

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
 2
 3 IN THE MATTER OF:) R04-22
 4 PROPOSED AMENDMENTS TO:) (UST Rulemaking)
 5 REGULATION OF PETROLEUM LEAKING)
 6 UNDERGROUND STORAGE TANKS (35)
 7 ILL. ADM. CODE 732))

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

14
 15 Proceedings held on July 27, 2005, at 10:00 a.m., at
 16 Southern Illinois University School of Law, Room 206,
 17 1150 Douglas Drive, Carbondale, Illinois, before Marie
 18 Tipsord, Chief Hearing Officer.

19 Volume I

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P R O C E E D I N G S

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(July 27, 2005; 10:00 a.m.)

4

HEARING OFFICER TIPSORD: Good morning. My

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name is Marie Tipsord, I've been appointed by the board

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to serve as a hearing officer in these combined

7

proceedings entitled in the matter of proposed amendment

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to regulations of petroleum leaking underground storage

9 tanks, 35-732 and 734. Docket numbers are R04-22 and 23.
10 To my right is Dr. Tanner Girard, presiding board member
11 assigned to the matter, and to his right is board member
12 Tom Johnson. On my left is Anand Rao, from our
13 technical staff and Erin Conley, with us today.

14 Before I go any further, Professor Patricia
15 McCoven, Environmental Law Clerk here at SIU, has asked
16 to be allowed to video tape these proceedings for future
17 use in her classroom. The board rules allow for video
18 taping if no witness objects and the taping is not
19 disruptive. If there's any objection to this proceeding
20 being video taped, if at any time anyone does become
21 uncomfortable with video taping, please let me know and
22 we'll ask it to be turned off at that time. Thank you
23 very much.

24 This is our fifth hearing in our eight day

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1 of hearing in this proceeding. The board received it's
2 first notice on February 17, 2005. Today's hearing is
3 set up to allow the Illinois Environmental Protection
4 Agency to respond to prefiled questions and to allow for
5 additional questions of the agency. We will then also
6 hear testimony from CW3M, United Science Industries, and
7 CSD Environmental Services.

8 Prefiled questions were filed by CW3M,
9 United Science Industries, and CSD Environmental
10 Services. I will mark each set of questions as

11 exhibit, and if there's no objection, then we will swear
12 in the agency witnesses, I will mark the prefiled
13 answers as an exhibit, and the next step will proceed
14 with follow up questions of the answers of the agency.
15 For purposes of transcript, we will proceed through the
16 prefiled answers and follow them in order. Please try
17 and have any additional questions ready, and let's try
18 to not go backward after we have moved forward on
19 questions.

20 As to the prefiled testimony, we will take
21 the testimony as read and I will mark that testimony as
22 an exhibit. Due to the amount of testimony, I am going
23 to ask that you forego summery of your testimony, and
24 let us proceed directly to questions. The order of

7

1 testimony will be CSD, CW3M, and we will conclude with
2 USI.

3 After entering the prefiled testimony as an
4 exhibit, I will allow for questions to be asked. Anyone
5 can ask a question, however I ask that you raise your
6 hand and wait for me to acknowledge you. After I have
7 acknowledge you, please state your full name, and who
8 you represent and then your question. Please be advised
9 that I only will only allow questions to be asked. If
10 you begin to testify, I will immediately have you sworn
11 in and I will then politely ask you to simply state the
12 question.

13 A few of you that have been here before, are

14 familiar with this process. If you want to testify,
15 we'll try to save time at the end of the day to allow
16 you to do so, but if you have not prefiled, it is
17 frankly unlikely that we are going to have time to
18 testify. There is a sign up sheet if you would like to
19 sign up, and have not prefiled. I will note that both
20 USI and Cindy Davis from CSD asked about amending their
21 testimony, or supplementing their testimony. We will
22 allow that as time allows, and we will talk some more
23 about Mr. Cook's testimony from USI when we get there, I
24 understand there's additional development there.

8

1 As I said before we went on the record, we
2 have this room until 9:00 and we are prepared to stay
3 until 9:00 tonight. The outside doors are locked at
4 6:00, so after that time, we're pretty much in the
5 building. We will not take a break for dinner, but we
6 will take a late lunch break.

7 During this hearing, I ask that you speak
8 one at a time. If you're speaking over each other, the
9 court reporter will not be able to get your question on
10 the record. Please note that any question asked by a
11 board member or staff are intended to help build a
12 complete record for the board's decision and not to
13 express any preconceived notion. I will also remind you
14 that as this is a rule making proceeding, testimony
15 which is relevant and not repetitive will be allowed.

16 At the side of the room there are sign up sheets. You
17 may also sign up for notice on line, you can also go on
18 line on our web page, WWW.IPCB.STATE.IL.US.

19 BOARD MEMBER GIRARD: Good morning. On
20 behalf of the board, I welcome everyone to our
21 Carbondale hearing on the proposal to amend the US
22 rules. The board recognizes and appreciates the
23 extraordinary amount of time and effort that has been
24 expended by participants in this rule making, as

9

1 evidenced by many of the submissions we've had in the
2 lengthy record we've been developing. In fact, in my
3 office, rule making now is developed into it's own file
4 drawer, and maybe be working on file drawer number two,
5 and we realize that people have put a lot of time and
6 effort and made a lot of sacrifices to develop this
7 record. We expect because of the good work, we'll have
8 a much better rule making by the end of the process, but
9 please be patient. We look forward to the testimony and
10 any questions today, let's get on with it. Thank you.

11 HEARING OFFICER TIPSORD: I also have a
12 handful, and I do mean that literally, there's seven
13 copies of the board's first notice opinion and order, if
14 anyone would like to have a copy, but given the amount
15 of paper in those, I didn't make a lot of them. Most of
16 you probably already had them.

17 With that, we're going to move on with the
18 administrative process of entering the prefiled

19 questions as exhibits. I will start with CW3M, because
20 they happen to be on time, and enter that as Exhibit No.
21 94 if there is no objection. Seeing none, it is Exhibit
22 94. For those of you unfamiliar with the process, we do
23 not start re-numbering exhibits, even though we've
24 already went to first notice, this for citation and

10

1 record, and also keeps it so that everybody knows where
2 we're at. So there's no exhibit No. 1 from hearing
3 number one, or exhibit number one from hearing number
4 five. So we just continually number them.

5 Next we'll do Dan King from United Science
6 Industries prefiled questions as Exhibit 95. And Jay
7 Cook's from USI as Exhibit 96. I'm also doing this right
8 away so if we need to refer back to them, everybody will
9 know what to refer back to. Finally Joe Truesdale and
10 Cindy Davis prefiled questions from CSD Environmental
11 Services will be Exhibit No. 97.

12 At this time, I would ask agency witnesses
13 be sworn in, and if you could introduce your witness to
14 me please.

15 MR. ROMINGER: Hi, my name is Kyle Rominger,
16 I'm an attorney for the Illinois EPA, and we have Doug
17 Clay, who is manager of the west section, and Gary King
18 who is manager of division of remediation management.

19 (Witness sworn.)

20 HEARING OFFICER TIPSORD: With that, we will

21 mark your prefiled answers as Exhibit 98. Hopefully
22 this will give us some peace in referring back and forth
23 if we need to.

24 With that, we will proceed with any follow

11

1 up questions, the agency prefiled answers, and I'm sure
2 there are some -- there was some prefiled testimony.
3 Starting on page two of the agency's prefiled answers,
4 which is Exhibit 98, those are answers to questions
5 asked by Dan King of USI. Are there any follow ups on
6 either one two or three? Seeing none, four five and
7 six? Seeing none, how about we just go where is the
8 first one. Does anybody got prefiled? Mr. Truesdale.
9 Again, identify yourself for the court reporter.

10 MR. TRUESDALE: My name is Joe Truesdale,
11 from CSD Environmental Services, I just have a follow up
12 on question five regarding abandonment slurry as was
13 indicated in my prefiled testimony. I just had a
14 question regarding how the abandonment slurry was
15 accounted for in the UST removal and abandonment clause,
16 and why there was no variation in cost between removal
17 verses abandonment in those costs, and what items in
18 tank removal would be equivalent then if those costs
19 were included.

20 MR. CLAY: It was included, I think what we
21 looked at was, you know, there's with the tank removal,
22 you're removing additional soil. There's other things
23 that need to be done, with the removal process probably

24 equipment you have to have, their abandonment slurry,

12

1 all of those things were not required, so the cost of
2 abandonment slurry were pretty close to removal cost, so
3 we just set one price for both.

4 MR. TRUESDALE: What were specific
5 differences in order for removal verses abandonment be
6 in relation to, for instance, our CSD prefiled testimony
7 listing tank removal abandonment removal items, scopes
8 of work included in the RS means environmental data
9 management, essentially I don't see where the equipment
10 or type of soil removal would vary from tank removal to
11 tank abandonment, so the only difference in cost would
12 be the abandonment slurry itself, a volume being
13 replaced, where is that volume included in the UST
14 removal cost option if both costs are in fact the same.

15 MR. CLAY: I don't have a specific cost
16 breakdown in front of me, but we can respond to that
17 comment.

18 HEARING OFFICER TIPSORD: Any other follow up
19 questions based on Dan King's questions? Okay, that
20 takes us to --

21 MR. SINK: Are you taking questions now?

22 HEARING OFFICER TIPSORD: Yes.

23 MR. SINK: I have a question on follow up
24 question to number 8, question number 8 Dan King. The

13

1 question was --

2 HEARING OFFICER TIPSORD: You need to
3 identify yourself please.

4 MR. SINK: Barry Sink, with United Science
5 Industries.

6 HEARING OFFICER TIPSORD: Thank you.

7 MR. SINK: That has to do with the allowance
8 of \$960 to professional services in preparation for the
9 consultant to prepare to abandon the tank to remove UST,
10 and yet in sub part H, there are -- that's a particular
11 line item, yet as far as a drilling event or corrective
12 action, the cost to prepare for those activities is not
13 specifically pointed out. I mean, the answer is that
14 they're all inclusive, and you know, we have a hard time
15 figuring out where they're include at, the answer is
16 they're just included. Is there some detail in that
17 breakdown of the, you know, what part of that is for
18 preparation?

19 MR. CLAY: How we arrived \$960 was in the
20 original testimony, I don't fully understand your
21 question, but the breakdown of that was in the original
22 testimony. How we arrived at \$960.

23 MR. SINK: It kind of goes back to the scope
24 of the work question of what's included in those maximum

14

1 payment amounts, and it's not immediately obvious that
2 the preparation is inclusive in there, in subpart H.

3 That's was the purpose of the question, and the answer
4 does not address, I guess, that this is how this was
5 included in the scope of work for those maximum payment
6 amounts for the preparation for the various tasks, I
7 suppose, associated with a drilling event and setting up
8 for corrective action activities.

9 MR. CLAY: I don't understand the question,
10 I mean, we're saying that it is included in the \$960.

11 MR. SINK: But it was not included in the
12 professional services associated with the preparation
13 for abandonment, so it was included -- was not included
14 in the preparation for abandonment removal of UST, but
15 it was included in the drilling event and divisional
16 technology. That's the answer, right?

17 MR. CLAY: What is the question?

18 MR. SINK: That subpart H allows for \$960
19 for professional services, associated in 734845-A-1 with
20 the preparation of abandonment or removal of UST.

21 MR. CLAY: Correct.

22 MR. SINK: So that was not included in, that
23 particular preparation was not included in the maximum
24 payment amounts, associated with UST removal, but it is

15

1 included in the other events, the drilling event and
2 conventional corrective action alternative technology.

3 MR. CLAY: What is included in that
4 professional services?

5 MR. SINK: Yes.

6 MR. CLAY: Well, professional services, for
7 example, a drilling event, if you were to say
8 investigation may be included in the stage one, stage
9 two, stage three professional services. It was for
10 excavation, it could be in preparation for that, and the
11 professional services could be an early action, soil
12 removal early action, could be under your corrective
13 action plan of soil removal under corrective action.
14 Professional services, we feel, is accounted for
15 throughout depending on what part of the mediation you
16 have to be in.

17 MR. SINK: So in this \$960 for professional
18 services, exactly what tasks did that -- those involve,
19 what was that scope of the work?

20 MR. CLAY: It's the tasks associated as you
21 see in your question, preparation for the abandonment
22 removal. And I think if you look at our original
23 testimony, you could further get an explanation as to
24 exactly what that is and how we arrived at that \$960.

16

1 HEARING OFFICER TIPSORD: Anything else?
2 Moving right along then.

3 MS. ROWE: I'm sorry, Carol Rowe, CW3M.
4 Just to follow up with Barry's question. I think where
5 he was trying to get to was when the agency developed
6 their number and their projections, and in this case,
7 preparation, there was I think in the earlier hearings

8 you had a set number of hours at set at a rate. In those
9 developments, did you guys ever put together a scope of
10 work report to say those five tasks or those ten tasks
11 that we can think of at this point we would consider in
12 that, you know, because a lot of answers to these
13 questions were is this included, and the answer was
14 well, it's all included. Well, at some point, what is
15 extraordinary? How do we define that out here, if the
16 answer is always what was included. Do you have a list
17 of tasks that you utilize to develop those original
18 numbers of hours at the rate.

19 MR. CLAY: I think we included in the
20 original testimony a list of tasks that were not
21 intended to be all inclusive. The scope of work is what
22 you need to do to meet regulations. You know that was
23 stated before in testimony, but we did give some
24 examples of the types of things that we identified were

17

1 going into a corrective action plan, and that list was
2 developed in consultation with the CECI Consulting
3 Engineers Counsel, which is now ACEC, but we did not
4 necessarily do that for all of the numbers. That list of
5 tasks was not intended to be all inclusive.

6 MS. DAVIS: Cindy Davis with CSD
7 Environmental. If the task list is all inclusive, how
8 do we know what tasks are included in the cost, and what
9 tasks aren't?

10 MR. CLAY: It's all the tasks that go into
11 preparing and planning a report, to meet regulations,
12 what you've been doing for 15 years.

13 MR. COOK: Jay Cook, United Science
14 Industries. I have several questions. One you
15 mentioned you worked with CECI to develop this list of
16 tasks. Is the list, first, do you have a specific
17 written list of tasks in support of the \$960 number
18 maximum payment amount for preparation?

19 MR. CLAY: I don't recall if that was part of
20 the testimony or not. If it was, if we have a specific
21 list, it would have been in our review testimony.

22 MR. COOK: To your recollection, I'm looking
23 for a yes or no answer, do you have a task list to your
24 recollection, have you developed one to your

18

1 recollection?

2 MR. CLAY: I don't recall.

3 MR. COOK: You don't recall, okay. Next
4 question is, you testified that CECI participated in the
5 preparation of the task, considering that we're not able
6 to recall whether we have a task list or not, are we
7 able to recall if CECI participated in the development
8 of a task list?

9 MR. CLAY: For the \$960?

10 MR. COOK: Yes.

11 MR. CLAY: I don't recall if CECI did that,
12 if that was one of the lists CECI provided.

13 MR. COOK: Did CECI in fact provide a task
14 list?

15 MR. CLAY: I don't recall for the \$960, they
16 did for other portions, and I believe it was like 45 day
17 report, corrective action plan, I know those two.

18 MR. COOK: Did you adopt their entire
19 recommendation of CECI entire recommendation as
20 presented to the agency?

21 MR. CLAY: I don't recall we used their
22 entire recommendation. What we did, was we used that as
23 a tool in looking at the number of hours that it would
24 take to perform, we're going to use the term task, the

19

1 task being preparation of site investigation plan,
2 preparation of corrective action plan, preparation of 45
3 day report. I know you're using the term task in much
4 more detail, but again, it's numbers that we came up
5 with, is to meet the regulation, so whatever you need to
6 do to meet the regulations in preparation of the
7 corrective action plan, that was meant to be included.
8 The list that CECI gave us was not necessarily all
9 inclusive, but we used that as a tool in developing our
10 cost numbers.

11 MR. COOK: This was one of the tools?

12 MR. CLAY: Yes.

13 MR. COOK: What were some of the other tools
14 that were used to develop that list?

15 MR. CLAY: Agency experience.

16 MR. COOK: Do you have a rate on that?

17 MR. CLAY: This is all in our previous
18 testimony, but everything that we used to develop those,
19 we looked at the cost of corrective action plans, with
20 agency experience, what had been billed and paid in the
21 past, but again, that's all in previous testimony.

22 MR. COOK: Can I ask, you just testified that
23 you looked at what had been billed and paid in the past,
24 did you look at what had been billed and paid in the

20

1 past relative to the tasks that were associated with the
2 \$960 maximum payment amount for preparation, activities
3 that Barry described earlier? Were you able to look
4 specifically at the tasks associated with those costs,
5 when you look back at your experience?

6 MR. CLAY: I don't recall. I mean, it's all
7 in our previous testimony on what we used to develop
8 those numbers.

9 MR. COOK: Well, I don't recall your previous
10 testimony, so I'd like an answer.

11 MR. CLAY: Well, I would go back and look at
12 the transcripts if you don't recall that.

13 HEARING OFFICER TIPSORD: Well, I think
14 that's a legitimate answer. We don't need to be going
15 back over ground that's been covered, and I understand
16 where you're coming from, I understand you want some
17 more specificity, but if his answer is that it was in

18 our previous testimony, then I think that's sufficient.

19 MR. COOK: Something that's not in previous
20 testimony that needs to be clarified for the record, at
21 any time, did the agency look at the total cost per
22 phase for professional services, total cost for early
23 action for professional services for early action in
24 order to do a reality check to make sure that the total

21

1 task cost, cost per task for professional services that
2 you developed pursuant to this proposed rule in fact was
3 even close to the amount that has been historically
4 reimbursed on the per phase basis?

5 MR. CLAY: Would you re-state that?

6 MR. COOK: Historically, you mentioned that
7 you looked at your experience in administering the fund,
8 just to clarify, when you looked at your experience in
9 administering the funds, did you look at the total
10 professional service cost that had been historically
11 reimbursed and approved in work plan on a per phase
12 basis, or just for professional services, professional
13 consulting service?

14 MR. CLAY: When you say per phase basis, what
15 are you talking about?

16 MR. COOK: One phase of a corrective action
17 project would be early action, second phase would be
18 site classification and investigation, and the third
19 phase would be corrective action, completely pursuant to

20 your regulations.

21 MR. CLAY: From developing the numbers that
22 are in the proposed regulations we looked at the
23 historical amount that we had reimbursed. For example,
24 45 day reports, investigation plans, and corrective

22

1 action plans, yes.

2 MR. COOK: So is it a proper characterization
3 then you looked at those costs on a task basis and not
4 on a phase basis?

5 MR. CLAY: No, I just said we looked at them
6 on a phase basis, we looked at what the costs
7 historically had been for a 45 day report.

8 MR. COOK: And a 45 day report is not a phase
9 of a project, it's a task.

10 MR. CLAY: Well, I guess that's semantics.

11 MR. COOK: It's not semantics. It's real
12 world.

13 HEARING OFFICER TIPSORD: Any additional
14 questions? Mr. Truesdale.

15 MR. TRUESDALE: I have one follow up to
16 Mr. Clay's response to Cindy Davis's question, and if I
17 recall correctly, he stated that the preparation of the
18 reports includes everything that we've been doing over
19 the last 15 years to comply with those regulations; is
20 that correct? In a sense.

21 MR. CLAY: The cost developed is intended to
22 include everything that is required to meet the

23 regulations.

24 MR. TRUESDALE: You stated that it's the same

23

1 thing that we've been doing for 15 years.

2 MR. CLAY: You have had some plans approved,
3 reports approved in the last 15 years.

4 MR. TRUESDALE: Right, exactly. So my
5 question is then in your past experience then, in the
6 last 15 years of reviewing those reports, what items are
7 required to meet the requirements of the regulations
8 that you're testifying to.

9 MR. CLAY: I don't understand exactly what
10 you're asking me.

11 MR. TRUESDALE: You state you said that, and
12 the court reporter may be able to read back exactly what
13 that response was, which would probably be more
14 appropriate. If I recall correctly, it's something to
15 the fact that Mr. Clay stated that the task that would
16 be required are the same things that we have been
17 submitting for 15 years to comply with the regulations,
18 so my question is, to Mr. Clay, in his experience of
19 reviewing submittals over the last 15 years, what items
20 are included with those submittals to meet requirements
21 of the regulations?

22 MR. CLAY: Off the top of my head, I don't
23 know that I can come up with that, but obviously you and
24 Cindy were both part of the CECI group that developed a

1 list of tasks that go into a 45 day report and
2 corrective action plan, and I assume that was a
3 brainstorming operation or exercise that you guys did
4 with all the consultants. So, I mean, we could go
5 through that and the agency, but I don't see what
6 purpose that would serve.

7 MR. TRUESDALE: And let me elaborate then and
8 ask this question. The question is, is it true that
9 CECI did do that brainstorming activity and provided
10 numbers for a selected number of tasks in the LUST
11 program, however the agency has presented vastly more
12 lump sum and unit prices, than the agency provided, the
13 agency conducted in any of this brainstorming or use
14 there experience to identify those tasks. For instance,
15 evaluation, what items were typically included in this
16 \$800, what in your experience have consultants submitted
17 over the 15 years to administering the program to meet
18 the requirements of applications as they relate to, for
19 example, tier two evaluation, which was not provided by
20 CECI.

21 MR. CLAY: In your example, in the
22 calculation, we also run those, so we used our
23 experience in that, as well as what we seen from
24 consultants in their submittals.

1 MR. TRUESDALE: I guess I'll follow up on

2 that one. That's one example of stage one, stage two,
3 and stage three site investigation, the agency
4 experience in reviewing or administering submittals in
5 stage one, stage two, and stage three site
6 investigation, what is that?

7 MR. CLAY: That's brand new, there is no
8 experience in that.

9 MR. TRUESDALE: So did the agency conduct
10 this brainstorming exercise to come up with a list of
11 tasks associated with those lump sum costs that were not
12 provided by CECI?

13 MR. CLAY: Well, the thought of stage one,
14 stage two, stage three is nothing new, it's just
15 breaking down into those stages, so we did look at site
16 investigation cost, and site classification costs, and
17 developing those.

18 MR. TRUESDALE: And then once again, it goes
19 back to the same thing, in your 15 years of experience
20 in administering the program, what items are associated
21 with that investigation?

22 MR. CLAY: We didn't necessarily break them
23 down into that. In those cases, in that case, we looked
24 at what had historically been billed and paid for those

26

1 tasks.

2 MR. TRUESDALE: So then how would the cost
3 allocate between stage one, stage two, and stage three,

4 if it was based upon a total?

5 MR. CLAY: We looked at the work that was
6 being asked to be performed.

7 MR. TRUESDALE: And that work that was asked
8 to be performed based upon your experience over the last
9 15 years, what work was being asked, what tasks were
10 included in the request for the work to be performed in
11 those stages?

12 MR. CLAY: It's what goes into site
13 investigation plan.

14 MR. TRUESDALE: That's what I'm asking you.
15 What, in your experience, what goes into the site
16 investigation?

17 MR. ROMINGER: I think we're well outside of
18 prefiled question agreement we started with.

19 HEARING OFFICER TIPSORD: It is getting a
20 little bit repetitive, let me see if I can ask it.
21 Mr. Clay, are you testifying that in establishing these
22 numbers by site one, site two, or stage one, stage two,
23 you simply took the numbers that had been provided to
24 you by consultants in the random selection and you

27

1 pulled out and saw that for stage one, stage two, and
2 stage three, this total, was this amount and stage one,
3 billed this amount, and during stage two, it was this
4 amount, and you used that?

5 MR. CLAY: Since we really didn't have stage
6 one, stage two, stage three, all though so we looked at

7 site investigation plans, and what goes into that, and
8 what had been billed and we developed those numbers
9 based upon that, based on past experience.

10 HEARING OFFICER TIPSORD: But bottom line is
11 the agency is not sitting around in brainstorming
12 sessions and saying these tasks are what it takes to do
13 stage one investigation?

14 MR. CLAY: No, no we didn't.

15 MR. TRUESDALE: One more, so what you're
16 saying then is would you be able to, based on your 15
17 years of administering the program, be able to develop a
18 list of the items that were submitted in those reports
19 to meet those minimal requirement of regulations?

20 MR. CLAY: We probably could, but I don't
21 know what purpose that would serve.

22 HEARING OFFICER TIPSORD: Identify yourself.

23 MS. HESSE: Carolyn Hesse, I'm with Barnes
24 and Thornburg, I represent CW3M.

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1 Mr. Clay, to follow up on a couple responses
2 you gave to answers to questions by Mr. Cook and
3 Mr. Truesdale, in your answers --

4 HEARING OFFICER TIPSORD: Before you go on,
5 did you have a follow up, Mr. Cook, that relates to
6 where we are?

7 MR. COOK: Yes, I do.

8 HEARING OFFICER TIPSORD: We'll come back to

9 you.

10 MS. HESSE: Okay.

11 MR. COOK: At the March 15, 2004 hearing held
12 in Chicago, Mr. Clay testified that the agency had never
13 developed standardized work breakdown structure. That
14 being the case, you just testified that you evaluated
15 cost to develop a 45 day report. In the absence of a
16 work breakdown structure, standard work breakdown
17 structure, my question is how did you develop those
18 costs for the 45 day report?

19 MR. CLAY: First of all, I don't think I've
20 ever used the term standard work breakdown structure.

21 MR. COOK: March 15, 2004, I can pull the
22 transcript if you'd like to see it.

23 MR. CLAY: As I said, I think I testified to
24 before, when you look at 45 day reports, that you must

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1 be submitted over a period of time, and what was billed
2 for those 45 day reports. Now, those 45 day reports
3 have been approved, they were prepared by multiple
4 consultants. We looked at the cost of those, and that's
5 how we determined what a reasonable rate was for a 45
6 day report. Now, we did not go into minute detail on
7 everything that goes into every single 45 day report,
8 and I would venture to say that every consulting firm is
9 not identical in everything that goes into a 45 day
10 report, but we looked at the lump sum for preparing a 45
11 day report, and what in the past had been billed for a

12 45 day report, and that's how we developed the number.

13 MR. COOK: You said what you had been billed
14 for a 45 day report, how many bills have you received
15 where the bill says we are billing for a 45 day report?

16 MR. CLAY: I don't know. I did not -- I did
17 not do the research for developing that number, but how
18 we developed that number is in our testimony.

19 MR. COOK: Okay.

20 BOARD MEMBER JOHNSON: It seems to me what I
21 would be concerned about is if I were an operator is in
22 an instance where the 855 unusual and extraordinary
23 expenses should kick in, I'm going to have to know what
24 went into your thinking and how you set that fee of

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1 \$960, so I think what they want to know is when you
2 describe what went into it as everything you have to do
3 in order to submit it, then that gives them no leeway
4 whatsoever to say well, we had to do more, and so there
5 is an unusual or extraordinary expense, and so you're
6 rhetorical every time, it was part of your preparation
7 for this and that's how we defined he how we came up
8 with the \$960. So I guess, can you envision an instance
9 where they would have to do an unusual or extraordinary
10 amount of work, and you would, the agency would approve
11 it, and throw it into that 855 category?

12 MR. CLAY: Yes, I can envision that. I
13 mean, are you talking about the \$960 for preparation of

14 removal of LUST?

15 BOARD MEMBER JOHNSON: Or whatever, anything
16 you define as whatever you have to do to give this to
17 us. I can see where they would have a concern that that
18 would be your answer to every time they requested
19 additional money as an unusual or extraordinary expense.

20 MR. CLAY: I think what we see as unusual and
21 extraordinary circumstances are, you know, if you're
22 working bedrock, for example, and you've got a huge tank
23 field large number of tanks, you know, not your typical
24 two, three, four, five tanks, excavation, but you know

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1 large number of tanks, we're talking about previous
2 hearing with corrective action, if you're going along
3 doing dig and haul amounts, come across a couple of
4 tanks that no one knew was there, and you had to stop
5 operation and contact the fire marshall, those are types
6 of extraordinary experiences. What we were trying to
7 avoid was getting down to the minute detail, because of
8 variations in consulting firms and what goes into those
9 plans, getting into minute detail so that everything
10 that is not on that list, all of a sudden becomes
11 another nickel and dime item along the way.

12 BOARD MEMBER JOHNSON: Which is clearly why
13 they would want it in minute detail.

14 MR. CLAY: Exactly, and the other thing is
15 what we've seen in our current review of plans and
16 reports, as justification for, you know, cost, is well,

17 it just took me longer, it just took us longer to do
18 that plan and report, and I'm not sure that would meet
19 our definition of extraordinary circumstances. There
20 should be an explanation of why it took longer, why is
21 it out of the ordinary.

22 HEARING OFFICER TIPSORD: MR. TRUESDALE.

23 MR. TRUESDALE: In order for the agency to
24 make a determination as to whether or not something is

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1 out of the ordinary, wouldn't you first have to define
2 at least internally what is ordinary?

3 MR. CLAY: I think what we're asking is the
4 consultant to make that argument, why something is out
5 of the ordinary.

6 MR. TRUESDALE: As Member Johnson stated
7 though, how could we possibly make an argument that it's
8 out of the ordinary, when we have no idea what the
9 ordinary is?

10 MR. CLAY: That's something we need to review
11 on a case by case basis, I'm not sure how we -- I think
12 if we went to each of the consultants in this room, and
13 asked them to give an ordinary situation, or a specific
14 list or portion of it for remediation, we'd come up with
15 different. There would not be one that is identical.

16 MR. TRUESDALE: Well, if it's memorialized in
17 those regulations, doesn't that in fact then become the
18 ordinary? The benchmark?

19 MR. CLAY: What is memorialized?

20 MR. TRUESDALE: Any of those costs, the tasks
21 involved, what is required by the agency to meet those
22 regulations, when in fact the rules are implements, does
23 that not in fact memorialize what ordinary is? So in
24 order to memorialize that, shouldn't there be a

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1 description of what that ordinary is?

2 BOARD MEMBER JOHNSON: Ultimately, couldn't
3 you characterize it as ordinary and usual tasks that go
4 into preparation of this plan, and then you go back and
5 if the owners operators think that in fact this
6 particular instance, they had to perform work that is
7 outside the ordinary for usual, then by definition
8 you're going to kick yourself in that 855 section. I
9 mean, that's a suggestion or a thought. It says, the 855
10 language here says it's a site specific basis, that's
11 what you anticipated. Anticipated allowing application
12 for additional payment based upon unusual or
13 extraordinary expenses to be argued on a site specific
14 basis, and a case by case basis, when you come across
15 something for whatever the reason it's unusual and
16 extraordinary in your business that you have not run
17 across this on a regular basis over the last 15 years as
18 Doug said, then you have to memorialize in writing and
19 tell the agency why you consider it to be unusual or
20 extraordinary, and they make it a thumbs up or thumbs
21 down determination.

22 MR. CLAY: That's what we'll do.

23 MS. HESSE: This is a follow up on a question
24 I started asking before, which goes to a response you

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1 gave to a question asked by Mr. Cook and Mr. Truesdale
2 when they were asking you how you came up with the
3 numbers, the \$960 number and some of the other numbers
4 for consulting services. I think you said you looked at
5 the amount that was historically reimbursed, and in
6 another instance, you said the amount that was
7 historically billed and paid. When you calculate the
8 average cost for consulting service then, you did not
9 look for the total amounts of reimbursement that were
10 submitted, including those that might have been higher
11 than the amount the agency as determined were reasonable
12 previously.

13 MR. CLAY: We didn't necessarily look at
14 professional consulting services. We denied something,
15 and the denial was not challenged. I guess we didn't
16 necessarily consider that to be something we should
17 consider in the number that were proposed.

18 MS. HESSE: In looking at that, did you ever
19 consider the possibility that maybe some of the denials
20 are not challenged because the money that was at stake
21 would not be worth the cost to do the challenge?

22 MR. CLAY: We assume that the consultant, if
23 the owner operator on behalf of consultant felt that the

24 denial was unfair, it would be challenged.

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1 MS. HESSE: So what I'm trying to understand
2 is when you looked at the number for example, the agency
3 looked at the numbers, for example, to do a specific
4 consulting task, and calculate the average cost, then
5 you only looked at, for example, the lower two thirds of
6 the cost submitted to do the work, and from that you
7 calculated the average?

8 MR. CLAY: I didn't say we looked at the
9 lower two thirds.

10 MS. HESSE: Well, you said you didn't
11 consider all costs that were submitted.

12 MR. CLAY: You're assuming that the higher
13 ones were necessarily denied, that wasn't necessarily
14 the case. It may have been ineligible items that may
15 have been unreasonable for the task, but not necessarily
16 the highest. We looked at, you know, what was
17 reasonable for that task. It wasn't necessarily the
18 lower two thirds. I mean, it was approved for the task
19 in question.

20 MS. HESSE: Maybe it wasn't two-thirds, but I
21 believe historically the agency had used rate sheets?

22 MR. CLAY: That's correct.

23 MS. HESSE: To determine what reasonable
24 consultant services were in particular, and hourly rates

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1 on a rate sheet, and use those?

2 MR. CLAY: That's correct.

3 MS. HESSE: And historically, those numbers
4 were developed by taking averages, I believe; is that
5 correct?

6 MR. CLAY: Those numbers, I don't recall if
7 they were exactly averages or average plus standard
8 deviation, but that's all in testimony, how those were
9 developed.

10 MS. HESSE: But the point I'm trying to make
11 is when you develop those average costs, you did not
12 consider all costs that had been submitted for
13 reimbursement, just those that the agency paid, correct?

14 MR. CLAY: Again, it's back in testimony, and
15 some of numbers that were throughout the entire rules,
16 we looked at what was submitted, some of them we looked
17 at what were approved, I don't recall exactly in your
18 case, what you're talking about, if what you submitted
19 was approved.

20 MS. HESSE: But earlier today, you said it
21 was submitted and approved?

22 MR. CLAY: When I was talking about the task,
23 you're talking about all the numbers, all the numbers.

24 MS. HESSE: I'm talking about the specific

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1 consultant's tasks for example, the \$960 number.

2 MR. CLAY: The \$960 number we looked at was

3 based on our experience, what had been submitted and
4 approved in the past.

5 MS. HESSE: Thanks.

6 MR. GOODIEL: Russ Goodiel, Chase
7 Environmental Group. Going back to extraordinary costs.
8 Being that the agency takes basically back up from a
9 consultant for extraordinary costs, going back to
10 734-810 UST removal and abandonment cost, would the
11 extraordinary cost that the agency would consider be the
12 cost of slurry to abandon that underground tank, where
13 that slurry can typically be in 80 to 100 percent of the
14 cost of the agency allotting in that actual abandonment
15 cost.

16 MR. CLAY: As proposed the slurry included in
17 the cost currently in subpart H.

18 MR. GOODIEL: With invoicing cost from slurry
19 suppliers, when you're exceeding or meeting 80 percent
20 of that allotted cost, would that be an extraordinary
21 cost, with invoice from a slurry supplier? That doesn't
22 even take into account, you know, the backhoe time, the
23 excavation time, tank cleaning time, and those other
24 costs that would be incurred.

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1 MR. CLAY: We'd consider that argument.

2 MR. RUARK: Dan Ruark, R-U-A-R-K, Ecodigital
3 Development Group. Mr. Clay, the \$960, would it be fair
4 to say that represents the average of what has been
5 reimbursed?

6 MR. CLAY: I believe that's with the
7 testimony.

8 MR. RUARK: So by definition, the average is
9 in the middle 50 percent of packages that you had
10 reimbursed from the past, now actually fall into the
11 extraordinary and unusual circumstances category?

12 MR. CLAY: Yeah, I mean, the \$960 was what
13 the agency felt was a reasonable amount, and you know,
14 it averages, you know, taking everything and combining
15 with numbers, I think you're talking about the mean,
16 half above and half below.

17 MR. RUARK: If you have a larger sample --

18 HEARING OFFICER TIPSORD: Don't speak over
19 one another.

20 MR. CLAY: That doesn't make it
21 circumstances, just because it's above \$960.

22 MR. RUARK: Okay. So, if it's not
23 extraordinary circumstance, how would I get paid for it
24 without claiming extraordinary circumstances?

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1 MR. CLAY: You get paid \$960, unless you can
2 provide justification for cost above that.

3 MR. RUARK: Under extraordinary circumstance
4 provision.

5 MR. CLAY: Right, or you could bid that, you
6 could bid that out, the owner operator could bid that
7 out.

8 MR. RUARK: Could bid out to do professional
9 consulting services.

10 MR. CLAY: Exactly.

11 HEARING OFFICER TIPSORD: That actually
12 brings me to one of the questions I have about the
13 testimony. In response to question 33, you note the
14 agency did not vision the 734-860, unusual and
15 extraordinary provision would be utilized because the
16 cost exceeds a maximum payment amount. You then in
17 response to question 37, and annual adjustment of 5
18 percent talked about the fact that all the maximum
19 payments go up by more than that five percent, you can
20 bid out the process. My question really is, if
21 everything is going up by more than five percent,
22 wouldn't that actually be extraordinary circumstance.
23 If inflation suddenly shoots up at 8 percent, that would
24 be extraordinary circumstances; would it not?

40

1 MR. CLAY: If I guess if the inflation
2 affected consulting industries and their costs, that
3 could be considered an extraordinary circumstance.

4 MR. COOK: This is in regard competitive
5 bidding provisions, under 855, one of the things that
6 has to be demonstrated is that the bids must cover all
7 costs in the maximum payment amount that bid is to
8 replace. My question is, in the absence of a specific
9 list of tasks, associated with each maximum payment
10 amount, how is that demonstration that the cost that are

11 covered by the bids, cover all of the costs in the
12 maximum payment amount, the bid is designed to replace?

13 One of the provisions of section 734-855 for
14 competitive bidding to be affective, and I quote the
15 regs, each bid must cover all cost included in the
16 maximum payment amount that the bid is replacing. In the
17 absence of a specific list of tasks, that are related to
18 each maximum payment amount, how is that demonstration
19 that each bid cover all of the costs in the maximum
20 payment amount that bid is replacing, how is that
21 demonstration to be made?

22 MR. CLAY: Is this one of your prefiled
23 questions?

24 MR. COOK: No, okay.

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1 MR. CLAY: I would envision that the bid
2 would be for professional services, or release, subject
3 release. In accordance with the proposed rules, the
4 rules would be in affect at the time. For example,
5 there was a bid for a 45 day report, for a corrective
6 action plan, and for an investigation plan, I wouldn't
7 expect that the owner operator would bid out each of
8 those independently. I would think they would do a bid,
9 get a bid from the consultant for all the professional
10 services to the project.

11 MR. COOK: The question though is, how is the
12 owner operator or their consultant supposed to look into

13 their crystal ball when there's no scope of work defined
14 relative to those maximum payment amounts, and design a
15 bid specification that matches, as you just stated,
16 something that you have envisioned, the agency may have
17 envisioned, CW3M may have envisioned something else, USI
18 may envision some second thing, Rus may envision a third
19 thing, every consultant in the state in the absence of a
20 defined task list associated with those maximum payment
21 amounts, may envision something totally different, so
22 how is it that we are supposed to be able to determine
23 whether we're covering all the costs that the agency
24 envisions, when the agency has never communicated to us

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1 what they envisioned?

2 MR. CLAY: It's the cost required to meet
3 regulations.

4 MR. COOK: Let me ask another question, which
5 will provide a more specific example. Dan King's
6 question, number 19, he asked, has the EPA included
7 costs associated with performing water supply well
8 surveys, conducted under 734435-A in the maximum payment
9 amounts, and that survey actually conducted in
10 accordance with 435, but it's required pursuant to
11 315-A3. 315-A3 is site investigation activity. In the
12 agency's answer to that question, their suggestion was
13 that part of the costs to cover that are included in the
14 20 and 45 day reports. 20 and 45 day reports are
15 activities that are required to be conducted pursuant to

16 subpart B. Not even site investigations, a whole other
17 part of work. How is an engineers to certify a cost
18 associated with a bid obtained to perform that water
19 supply well survey, in an entirely different phase of
20 work than what the agency has intended the payment
21 amount to fall under, or that activity to fall under
22 with regard to payment amount, and wouldn't that
23 certification provided by an engineer be provided on an
24 illegal basis because that's not the agency's

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1 intentions? Although maybe it's not illegal, because
2 it's never stated that that's where the regular costs
3 was to be allocated.

4 So my question really is, is how are we to
5 make any kind of heads or tails of this regulation, and
6 how is it competitive bidding provisions are supposed to
7 apply in the absence of the scope of work?

8 MR. CLAY: The scope of work is what it takes
9 to meet regulations, I've answered that.

10 MR. COOK: It is what it takes to meet the
11 regulations, but requirement under site investigation
12 where the agency's division of cost are covered under
13 early action, if that is in fact were required to show
14 that the cost cover all the cost in the maximum payment
15 amount, the maximum payment amount for 20 and 45 day
16 reports is an early action activity, there's no
17 opportunity to demonstrate that those costs are being

18 covered under site investigation. It's impossible, yet
19 we would be expected to know how those allocations were
20 envisioned, but not communicated; is that correct?

21 MR. CLAY: I mean, I don't understand the
22 question. I mean, you're making a statement and
23 apparently you understand it, you're making this
24 characterization, so.

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1 MR. COOK: Let me put this another way. The
2 \$960 for preparation for tank abandonment, is it
3 reasonable that that cost is covered under the site
4 investigation phase?

5 MR. CLAY: No.

6 MR. COOK: Is it reasonable to say that the
7 cost to consult with the agency with regard to the
8 preparation for that abandonment is included in the
9 cost, in that \$960?

10 MR. CLAY: What consultation is required?

11 MR. COOK: They have to call and talk to the
12 agency or talk to the fire marshall about scheduling
13 tank removal, is value that cost included?

14 MR. CLAY: Yes, if they need to call OSFM as
15 part of that, that would be included.

16 MR. COOK: The cost to coordinate with JULIE;
17 is that included?

18 MR. CLAY: If that were required, yes.

19 MR. COOK: Are either of those two tasks that
20 you just described listed anywhere in regulation

21 relative to \$960?

22 MR. CLAY: I don't believe they're listed
23 specifically.

24 MR. COOK: So, how am I to know what is and

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1 what is not included for purposes of using competitive
2 bidding?

3 MR. CLAY: It's whatever it takes to meet the
4 regulations, and as a professional, I would hope you
5 would know what it takes to meet regulations.

6 MR. COOK: I would hope I would as well.
7 However, I'll save that for later, never mind.

8 HEARING OFFICER TIPSORD: MR. TRUESDALE.

9 MR. TRUESDALE: I have a quick yes or no.
10 With relation to competitive bidding, did you not state
11 in prior testimony today, Doug, that if you were to ask
12 the consultants in this room to list what they
13 considered to be items included in the scope of work for
14 a particular task, you would expect to get different
15 lists from each consultant?

16 MR. CLAY: Yes, I did.

17 MR. TRUESDALE: Okay.

18 MR. RUARK: Following up on that question,
19 if each consultant would look at this \$960 and picture
20 different things being performed for that, how am I, as
21 an owner operator, a lay person, going to evaluate that
22 to tell a consultant they ought to know what is in

23 regulations is one thing, but a lay person is not going
24 to know. Do you actually reasonably expect a layperson

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1 to be able to meaningfully and correctly evaluate
2 professional consulting services, when you admitted
3 yourself it may include several different scopes of
4 work?

5 MR. CLAY: I didn't say different scopes of
6 work, scope of work is what it takes to meet the
7 regulations. How you meet regulations may be different
8 consultant to consultant.

9 MR. RUARK: Let's follow up on that. If it's
10 different from consultant to consultant, how is a
11 layperson supposed to know which is a correct and most
12 complete bid to meet regulations, if it's not written
13 anywhere, what is supposed to be in the bid?

14 MR. CLAY: I would, I mean, what is bid is to
15 meet regulations, and if you get a bid from three
16 consultants, I would expect all three consultants to be
17 able to provide plans and reports to complete the job in
18 accordance with the regulations.

19 MR. ROWE: Carol Rouse, CW3M. This is more
20 of a statement, maybe this can kind of help put this to
21 bed a little.

22 HEARING OFFICER TIPSORD: Then we need to
23 swear you in, and please make it brief.

24 (Witness sworn).

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1 MS. ROWE: Back to the earlier hearing and
2 the CECI collective data, and I remember the task list,
3 there was a 45 day report, items, you know, one through
4 15 were included in there, and I think each one had an
5 estimated amount of time, two hours, half hour,
6 whatever. I believe the agency utilized that piece to
7 develop some of their lump sums, and I think the crutch
8 of what a lot of people are saying, is in those items at
9 the bottom, the group said those are variable from site
10 to site should be on a time and material basis, just got
11 completely left off. The others were pretty, I think,
12 people were in agreement, two hours, yeah, that's a good
13 number, unless there is something very weird. The things
14 that were variable from site to site just got thrown
15 out, so those are the one's we're going what do we do
16 with these. There are variables from site to site, and
17 things will be different, and without those in an
18 interscope of work or a way to address them, those
19 maximum payment amounts will likely not be enough.

20 MS. DAVIS: I have a question. Who prepared
21 the bid if you're going to prepare a bid for
22 professional services, who prepares the bid
23 specifications?c.

24 MR. CLAY: I would assume the owner operator

1 would.

2 MS. DAVIS: Do you believe the owner
3 operator is capable of preparing the bid specifications?

4 MR. CLAY: I believe that they would be
5 capable of doing that. However, I do not believe
6 that -- we did not envision professional services would
7 normally be bid, but that is certainly an option. We
8 didn't prohibit that, the rule doesn't prohibit that,
9 but that's certainly an option. I don't think we
10 envisioned that would be the norm, but for, you know, it
11 may never happen. We felt the rules as proposed now
12 first notice by the board are fair, and so and the
13 professional services portion is fair and reasonable and
14 that there wouldn't be a need for provision of
15 professional services, but if they chose to bid it,
16 that's just fine.

17 MS. DAVIS: If the owner operator does bid
18 out say a 45 day report, and hires a consultant to do a
19 45 day report, and decides to bid out the corrective
20 action plan, and hires consultant C, the agency does not
21 pay consultant C to review consultant A's work, correct?

22 MR. CLAY: That's correct.

23 MR. HUNDLEY: John Hundley, law office of
24 Terry Sharp, representing USI. Mr. Clay, if I understand

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1 it, in terms of inter-relationship between extraordinary
2 and ordinary, you basically answered the question that
3 the consultants should make the argument to you that
4 something was not in the ordinary, and we've discussed

5 the difficulties the consultants has in knowing what you
6 regard as ordinary, but if I understand it correctly,
7 you will look at whatever the consultant argues and
8 determine whether that was in their mind or not. Am I
9 correct that your decisions on those calls are then
10 appealable to the board?

11 MR. CLAY: That's correct.

12 MR. HUNDLEY: Tell me, what are you going to
13 tell the board was ordinary? How is the board to make
14 the decision whether something was or was not within
15 your scope at the appeal stage if you won't let us know
16 now what is ordinary?

17 MR. CLAY: As I stated, we're going to make
18 that determination on a case by case basis, based on the
19 argument that the consultant makes. If it goes to
20 appeal, then we would make our argument as to what our
21 rational was for making that decision before the board.

22 MR. HUNDLEY: So your answer is instead of
23 writing up out in rule form what these standards mean,
24 we'll litigate 101 cases and come to a common law as to

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1 what that means, is that your answer?

2 MR. CLAY: No, I stated my answer.

3 MR. HUNDLEY: And how it different than what
4 I said? I mean, maybe I'm wrong about 101, maybe it's
5 going to be 1000 cases that get appealed to the to
6 determine what is ordinary for the \$960, but that's a

7 process that you're urging the board to take?

8 MR. CLAY: No, I don't think when you break
9 down every portion of professional services in minute
10 detail for someone to be able to meet the regulations
11 and to bill for that.

12 MR. HUNDLEY: And my question was, when are
13 you going to tell board what is it in minute detail or
14 not so they can make decisions whether or not my appeal
15 is correct or not?

16 MR. CLAY: We'll make our argument to the
17 board as to why we make the decision we make.

18 MR. HUNDLEY: And when are you going to
19 disclose to the board what the proper standard for
20 ordinary is?

21 MR. CLAY: It's not a proper standard, it's
22 whether this was an extraordinary situation or whether
23 it wasn't, and what our rationale is in making that
24 decision.

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1 MR. HUNDLEY: You will agree that
2 extraordinary is something that's not ordinary?

3 MR. CLAY: Yes.

4 MR. HUNDLEY: So, by definition, in order to
5 know if it's extraordinary, one has to know whether it's
6 ordinary, and my question is, why would one want us to
7 make all of those appeals in order to develop a common
8 law as to what is in §960, when you could spell it out
9 at the onset?

10 MR. CLAY: I think there's a difference
11 between what's ordinary, and providing in minute detail
12 a list of tasks, and you're say ordinary being able to
13 provide a minute list of tasks, and I disagree with
14 that.

15 You can have an ordinary situation that is,
16 from one situation to another that is different, doesn't
17 mean they're not extraordinary, it can still be
18 ordinary, they can still fall within the framework, the
19 tasks we've listed, but it doesn't mean that necessarily
20 the list of tasks is going to be identical.

21 MR. HUNDLEY: And my question is how is the
22 board to know with that circumstance you just give,
23 whether it's in the \$960 or not? Are they supposed to
24 just trust you when the appeal comes up?

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1 MR. CLAY: The board evaluate the evaluation
2 of the agency, the argument of the agency and the
3 consultant and make a determination.

4 HEARING OFFICER TIPSORD: Question?

5 MS. CANTY: Yes, I do. Becky Canty, and I'm
6 with Eldorado School District. I'm here with my little
7 pink purse to tell you I'm a tank owner, or was. I'm
8 not your typical person you would think that would own a
9 tank, but there are a lot of school districts who did.
10 We put out for bids for many things, buses, and I can
11 tell you what I wanting a bus, I'm going to tell you one

12 thing. I have a file drawer, I was going to bring the
13 paperwork involved, we just had our job completed. I'd
14 like to you know how this process and what your bringing
15 is going to make my job easier, and how it's going to
16 reduce paperwork and how it's going to get the job done
17 so that I have a safe school playground for my kids. How
18 is this what you're proposing going to make my job
19 easier to get the dirt out?

20 MR. CLAY: The intent of the proposed rules
21 is to streamline the mediation process, and the
22 reimbursement process so that you can get your money
23 quicker, your reimbursement quicker, and the plan
24 reports to be hopefully reviewed in a timelier fashion,

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1 and the remediation can be completed on time.

2 MS. CANTY: So this will do that, so if we
3 run into exceptions like we did when we just dug out
4 line that it's now under the street, you know, I don't
5 want CSI to get stuck, or any company, to get stuck just
6 because they run into something a little more than what
7 they anticipated, so then where I am I going to be
8 involved in this again with, now we've got an exception,
9 now we have to come to this, and you think --

10 MR. CLAY: The exception does not go to the
11 board, the exception comes to the agency, and yes, I do
12 believe the rules will streamline that process and make
13 it a more straightforward, and quicker process.

14 MS. CANTY: So it's not going to take a full

15 file drawer, maybe just a half?

16 MR. CLAY: I hope.

17 MS. CANTY: Okay.

18 MR. G. KING: Let me add one thing. One of
19 the things, you weren't at the last hearing, one of the
20 things that obviously, you know, from a school district
21 standpoint, you do bid out various things, so
22 you're familiar with that process. One of the things
23 that we offer to do at the last hearing was to, as to
24 work with owners and operators to develop a bidding

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1 package document, so it would be easier for them to move
2 forward if they were going to bid out for services. I
3 mean, to the extent that this becomes adopted and that
4 becomes part of the rules, we certainly would want to
5 work with people in developing that.

6 MR. SCHWEIGERT: Dennis Schweigert, with the
7 Ecodigital Development Group. Mr. Clay, you stated
8 earlier today, you felt that these rate caps were meant
9 to be fair, you also stated you envisioned that for the
10 most part, professional services would not go to
11 bidding. One of the things, the questions I want to ask
12 are kind of in a series. First off, in setting the rate
13 cap, did you document the range of costs by which the
14 rate cap was established? Do you know the low end and
15 the high end?

16 MR. CLAY: I don't recall if that was in

17 testimony, the documentation we did for those numbers is
18 what we provided in testimony.

19 MR. SCHWEIGERT: The issue becomes then to me
20 in my next question is how can we determine fair,
21 because let's say it's \$960, and your range on average
22 was \$500 to \$2,000, and we don't know that range and you
23 set it at \$960, how can it be fair then that for the
24 consultant that comes out, and the work is actually

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1 going to cost \$2,000, they lose for the one that comes
2 out, they do it for \$500, they win. If you don't know
3 your range, and how broad that is, how can this possibly
4 be fair?

5 MR. CLAY: The numbers that we proposed, the
6 board has now proposed in their first notice, we believe
7 are fair and reasonable.

8 MR. SCHWEIGERT: That's just a statement. If
9 you do not have the definitive data to support that,
10 where we can see that that range of cost is fair, is it
11 your intent the some people will lose and some people
12 will win. Fair to me means the range is high enough,
13 that the people will come out on average and will make a
14 reasonable amount of money as a professional in the
15 field, and will not have to take this on an
16 extraordinary basis to bidding. You said before you did
17 not believe professional services should go to bidding,
18 on average, and I agree with that completely. How
19 without a range can you say this is fair?

20 MR. CLAY: I told you the documentation that
21 we support for \$960 is in testimony, I don't know, I
22 don't recall whether there is range provided or not.

23 MR. SCHWEIGERT: But how without a range, how
24 can we know that it's fair? How can you say that it's

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1 fair and will not be significant winners and losers
2 against that rate cap, and without the definition of
3 ordinary in that range, how can we say when it's
4 extraordinary, and why should we do competitive bidding
5 all the time?

6 MR. CLAY: I don't know that range has
7 anything to do with fairness, you can have a range from
8 \$500 to \$2,000 and if you look at 20 other sites, and 19
9 of them are below 1000, you still got the same range.
10 What does that have to do anything with fairness or
11 what's reasonable.

12 MR. SCHWEIGERT: Because I, as a consultant,
13 coming out to a site, a site specifically and that site
14 I'm going to be paid for, you say I'm going to be paid
15 the \$960, and my only avenue out is extraordinary
16 circumstances, I as an individual, coming out there as a
17 consultant, have to live with that \$960. Is that range
18 is so broad that on any average site, I wouldn't win or
19 lose. It is a significant issue for me, sir.

20 HEARING OFFICER TIPSORD: I think, if I may,
21 we're getting into a position right now where you're

22 asking them to defend numbers that they defended at six
23 prior hearings, and I appreciate where you're trying to
24 come from with this, but I also think we don't want to

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1 go over old ground, and I recommend you take a look back
2 to see what they provided, they did provide statistical
3 analysis on a lot of those numbers, and then perhaps
4 present in comments your feelings on that. I don't
5 really thin it's fair, and I certainly didn't bring the
6 drawer full of documents that were provided in the six,
7 first six hearings on what and how they came up with
8 some of these numbers, so I'm going to ask that we try
9 not to go back over old ground, if you don't mind. I
10 think we don't have enough time today to do that. So,
11 did you have something else.

12 MR. SCHWEIGERT: I think we can go back to
13 those records, but I'm just asking the basic question
14 sir, how can you define fair without a range? On what
15 basis is fair defined?

16 HEARING OFFICER TIPSORD: And I think he's
17 asked and answered that at this point.

18 MR. COOK: I have a follow up question to
19 Mr. King's comment to Ms. Canty with regard to
20 assistance of the agency to develop for owners and
21 operators to put together some guidance to help them.
22 Can you elaborate on that? I don't recall that from the
23 August hearing. He mentioned that the agency had put
24 together some guidance to help owners and operators in

1 this bidding process.

2 MR. KING: Yes, that's what I said.

3 MR. COOK: What would you envision that would
4 consist of?

5 MR. KING: We haven't gotten to that point
6 yet because the rule hasn't been finalized.

7 MR. COOK: But what would you envision that
8 might consist of, you must have something in mind.

9 MR. KING: I'm sure we could deal with that,
10 I mean, whenever the board adopts the rules. We've gone
11 back and developed various form documents to make it
12 easier for people that were implementing the rules to
13 get those approvals in accordance with those rules, and
14 we would develop, I'm sure, a package of documents that
15 would be able to assist owners and operators, relative
16 to do bidding within this program.

17 MR. COOK: And that package of documents, can
18 you -- you must have some substance behind that comment
19 that you make here, can you elaborate on what that
20 package of documents might include?

21 MR. KING: The agency does a lot of
22 contracting for response action activities, and we do
23 contract out for professional services. And I mean, it's
24 not going to be the exact kind of thing, because ours

1 is -- we're contracting with multiple providers for
2 sites all over the state, so it's not the same exact
3 kind of thing, but we would use information that we've
4 developed, and certainly would want to have some
5 interplay with owners and operators, and particularly
6 owners and operators that have done bidding and those
7 kinds of things in the past, to see how to make the
8 guidance useful as we can.

9 MR. COOK: Within that guidance, what
10 specifically what might you envision would be included
11 within those documents you talked about?

12 MR. KING: I don't have any specific things
13 in mind right now.

14 MR. COOK: Okay. You mentioned that had that
15 agency contracts out professional services, do you have
16 experience with that.

17 MR. KING: From a senior management
18 standpoint?

19 MR. COOK: Yes.

20 MR. KING: I don't do the specific reviews.

21 MR. COOK: When the agency contracts out
22 services, would the agency put together a bid form?

23 MR. KING: Would we put together a bid form?

24 MR. COOK: Yes.

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1 MR. KING: On some sites, yeah.

2 MR. COOK: How might -- what might be
3 included in that bid form?

4 MR. KING: That's going to depend on the sit
5 involved.

6 MR. COOK: So in other words, you're
7 tailoring your specifications in the bid form to the
8 site?

9 MR. KING: Yeah, within an overall structure
10 of --

11 MR. COOK: You've answered my question. So
12 you've tailored that within this overall structure, and
13 specific to the site, would you characterize that as a
14 scope of work relative to that site?

15 MR. KING: Would you repeat the question,
16 please.

17 MR. COOK: Would you characterize this as a
18 scope of work that you prepare relative to this bid form
19 on this site, on a site that you're bidding for
20 competitive bid purposes?

21 MR. KING: No, I don't know what the specific
22 document is, how we set it up and how we phrase it. I
23 don't want to go into any more detail on that right now.

24 MR. COOK: Those documents that you're

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1 discussing, would you be able to share those and add
2 examples of those documents and add those to this
3 record?

4 MR. KING: No.

5 MR. COOK: Why?

6 MR. KING: Because it would be additional
7 thousands of pages that is related to our contracting
8 activities.

9 MR. COOK: Potentially, would there be within
10 those thousands of pages, would there potentially have
11 scope of work included in those documents?

12 MR. KING: They may.

13 MR. COOK: They may, and so if the agency
14 understands how to develop a scope of work with regard
15 to other programs, how come it can't develop a scope of
16 work relative to this program?

17 MR. KING: This program is structured
18 differently than how we do our work under response
19 action, or response action program, it's different
20 because there's a set of regulations that have to be met
21 for the leaking of underground storage petroleum, that's
22 been in existence for 15 years now, almost.

23 MR. COOK: I don't understand that answer
24 relative to the question. The question was if the

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1 agency -- the answer is, there's some differences, but
2 why would those difference, whatever they may be,
3 preclude the agency from being able to develop a scope
4 where under this program, it's just a basic business
5 principal.

6 MR. KING: I think this whole thing would be
7 different if we had a situation where we were doing the
8 contracting for all these clean ups. That's not this

9 program. We don't contract out to do less clean ups at
10 the state, okay. If we were doing that it would be a
11 different program. So it's a completely different
12 program, and you're asking for a comparison of apples
13 and oranges. All we did is we suggested that we would
14 help to try to develop guidance to help people bid out
15 under 734-855. That's was our intention.

16 MR. COOK: Just for the record, I'm not sure
17 that was an answer, but we'll stop there. We're chasing
18 our tails.

19 HEARING OFFICER TIPSORD: MR. TRUESDALE.

20 MR. TRUESDALE: I just have a general
21 question, I don't really know, in your response action,
22 do any of those include sites that have cleaning
23 underground storage tanks.

24 MR. KING: They may.

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1 HEARING OFFICER TIPSORD: Okay. Are there
2 any other follow ups to questions presented by Mr. King?
3 Miss Davis.

4 MS. DAVIS: I assume now we can go on, I have
5 a question about number 18.

6 HEARING OFFICER TIPSORD: That's wonderful.

7 BOARD MEMBER GIRARD: Before we do that, I
8 just want to clarify one thing. I'm not trying to beat
9 a dead horse here, but going back into what's ordinary
10 and extraordinary, and Mr. Clay, it seems like in your

11 testimony, you don't want to define ordinary in terms of
12 tasks, but it seems to me you have given some guidance
13 in the record here about ordinary in terms of the nature
14 of the site, and I mean, you've given us parameters in
15 numbers of tanks, you've given us parameters in geology,
16 are there other kinds of parameters that the agency
17 looks at to determine ordinary? For instance, end use of
18 the property or extent of the contaminant, whether or
19 not there are above ground structures, whether or not
20 there are off site contaminations, are those the kinds
21 of parameters you've looked at in determining whether
22 it's an ordinary site or extraordinary site?

23 MR. CLAY: Well, just to look at your
24 example. I don't think end use would necessarily be

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1 extraordinary, extent of contamination could be, and in
2 knowing that variable, I think in the current draft,
3 the, if I'm correct, the off site investigation. So
4 that's based on time and material. If you're proposing
5 it recognized, that could be highly variable, and
6 dependant upon the number of properties you have to get
7 access to, and that type of thing. That was changed to
8 time and materials. We would take, you know, any of
9 those situations into account, again it comes down to
10 extraordinary verses the ordinary, which is a site
11 specific situation, not task specific, but it's what
12 makes it extraordinary for that site, may be
13 extraordinary for one site, and ordinary for another

14 site. I mean, it's site specific, and we would want to
15 see that argument made by the consultant.

16 BOARD MEMBER JOHNSON: Since he brought it
17 up, just for clarification, and for the record, I
18 continually refer to 855, which was what we called the
19 prior to this first notice, and what I meant was the new
20 860.

21 MR. TIPSORD: Do you have a follow up with
22 that?

23 MR. WEINHOFF: Yeah, Jeff Weinhoff, CW3M.
24 Just a little bit of follow up. For right now, I believe

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1 the extraordinary circumstances made when you do the
2 billing. Would there be any way for an owner operator to
3 find out if his site has extraordinary circumstances
4 prior to conducting the work?

5 MR. CLAY: You can make an extraordinary
6 argument as part of the budget.

7 MR. WEINHOFF: In the early action phase is
8 there any way that an owner operator could know before
9 they turn the bills, that it's an extraordinary early
10 action?

11 MR. CLAY: Before they do the work?

12 MR. WEINHOFF: Right. Like you said, five
13 tanks, well they got twelve tanks in three different
14 fields or something, or they got tanks between each
15 other, is there any way they could get approval that it

16 would be -- that their situation would be considered
17 extraordinary prior to them conducting the work and
18 paying for it, since they're going to be asking for
19 reimbursement above those approved amounts?

20 MR. CLAY: I'm just trying to envision, I
21 wouldn't prohibit that, but how would you determine
22 what -- what your costs were based -- due to
23 extraordinary circumstances.

24 MR. WEINHOFF: This is unusual and this isn't

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1 something we usually see, this is going to cost more for
2 us to do this for you than what is in subpart H. So you
3 know, is there any way, or would you have to trust the
4 consultants that you know, something I believe is
5 extraordinary, but the agency sometimes they agree with
6 me, sometimes they don't. Is there any way for that
7 owner operator to know that, you know, ahead of time, or
8 do they -- should they just go, I don't know, I don't
9 know what they do, should they go get their three bids
10 because there's no way for them to know ahead of time
11 that the agency would consider that extraordinary?

12 MR. CLAY: I'm just trying to figure what
13 form that would be submitted to the agency in.

14 MR. WEINHOFF: That's what I'm trying to
15 figure out, is there a way to do that?

16 MR. CLAY: Certainly for anything after early
17 action, you're getting a plan approved a budget ahead of
18 time.

19 MR. WEINHOFF: I understand that.

20 MR. CLAY: For early action, I'm not sure if
21 you -- you could certainly ask the agency that question,
22 we would certainly respond, but I'm not sure if that's
23 an appealable decision, if that's the concern.

24 MR. WEINHOFF: But I would trust that if the

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1 agency told me on the record that they would consider
2 that extraordinary, they would follow through.

3 MR. CLAY: Right.

4 MS. DAVIS: I have a follow up question, and
5 I think I'm trying to figure out how to word this. In
6 case of a tank removal, okay, let's say we go out, we
7 have a normal tank site. I don't know what normal is,
8 let's say three tanks in a tank bed, we open it up. It
9 start raining, it rains for three days, okay. We've got
10 equipment on site that we're paying rental on on a daily
11 basis. I've got other expenses that are ongoing, so I
12 can't meet the price because of, let's say a rain delay.
13 I understand that this is not what you would consider an
14 extraordinary circumstance. Correct?

15 MR. CLAY: I don't know if we should be
16 paying for equipment that's not running, I think there
17 would be costs that were extraordinary because of a --
18 not just because of rain, because there was a large rain
19 event. I mean, I don't think you -- we would
20 necessarily pay for equipment that sat there because of

21 rain for seven days. You were paying rental on that, but
22 there could be costs, some costs that could be
23 considered extraordinary in that situation.

24 MS. DAVIS: But I thought in the regs, in

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1 your proposal so far, you said it was only if the site
2 has extraordinary conditions. This isn't necessarily the
3 site that had extraordinary conditions, this is an event
4 that occurred.

5 MR. CLAY: Well, I think that's a site, I
6 mean, the event affected the site and the ability to
7 conduct the work.

8 MR. DAVIS: And then on your comment about
9 the equipment that's not running, do you think I could
10 go back to the rental company and say I couldn't run it
11 for three days, could you knock three days off the
12 price?

13 MR. CLAY: I don't know, we don't, you know,
14 we haven't paid for years for trucks sitting, you know,
15 waiting to be billed on site. That's been denied from
16 actually it's in the regulations.

17 HEARING OFFICER TIPSORD: Mr. Goodiel.

18 MR. GOODIEL: Just a follow up. You say
19 that basically these regs are basically all encompassing
20 and everything for tasks are included in some of those
21 line up sum costs, but yet when we come up and present
22 circumstances, you say then the agency will look at that
23 based on justification. I guess my concern personally

24 is, you know, to me it's an extraordinary cost

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1 obviously, just like slurry cost, but yet in the regs,
2 it says that this is it and that's included, so I guess
3 where is the line that we know where it's at that, you
4 know, we can cross. I mean, if I pay \$2,000 in slurry
5 costs to abandon a 2,000 gallon tank, and you're only
6 going to pay me \$2,100 to do it, to me, that's
7 extraordinary, but yet you say slurry costs are
8 included, and therefor it's not extraordinary.

9 MR. CLAY: You're asking me to make broad
10 statements, general statements, I'm talking about
11 decisions that are going to be made on a site specific
12 basis.

13 MR. GOODIEL: So then is everything site
14 specific, or is everything supposed to fall in with
15 these specific tasks? I mean, there's always -- not
16 always, but there's extenuating circumstances on
17 different cases. Is it black or is it white or is it
18 gray, I mean, that's where my concern as a consultant
19 comes in in completing those projects.

20 BOARD MEMBER GIRARD: I just have a quick
21 question. Wouldn't something like slurry costs be
22 submitted in to the agency and then approved, that's not
23 early action, is it?

24 MR. CLAY: Yes, it is part of early action.

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1 BOARD MEMBER GIRARD: So a slurry, they have
2 to make on site decision about how much they pay for a
3 slurry, without input from the agency?

4 MR. CLAY: Yeah, it's something that is done
5 as part of tank closure, you know, leaving the tank in
6 place, using slurry, you know it was intended to be part
7 of the lump sum that's in there now, and I think that's
8 first that's come up that maybe that's outside of what
9 should have been in the lump sum, but you know, only
10 thing I can say is we can go back and look at it, but
11 I'll point out I think that's this is the first time
12 it's been brought up.

13 MR. GOODIEL: I brought up slurry cost
14 before, I mean, it's not been looked at. I don't know
15 if people who put this number together know the true
16 cost of slurry. It's not cheap. We have no control
17 over that, and the fire marshall requires use of a
18 slurry so that it fills the tank in, therefor, we're
19 left in a bind if our slurry costs are going to exceed
20 what you're going to pay, the rest of backhoe and labor
21 and everything else is going unpaid.

22 HEARING OFFICER TIPSORD: Is there a question
23 in there?

24 MR. GOODIEL: I guess not.

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1 HEARING OFFICER TIPSORD: You need to be
2 sworn in now.

3 (Witness sworn.)

4 MR. COOK: Doug, would you say that this
5 whole issue of ordinary and extraordinary combining the
6 scope of work is one of the major contention points in
7 this proceeding?

8 MR. CLAY: Based on your testimony and your
9 comments, yes.

10 MR. COOK: And how long do you think this
11 debate -- has this been one of the primary debates since
12 day one of the hearing since March 15, '04? Scope of
13 work?

14 MR. CLAY: Yes.

15 MR. COOK: And extraordinary circumstances?

16 MR. CLAY: Yes.

17 MR. COOK: How long do you think this debate
18 will rage on?

19 MR. CLAY: I don't know.

20 MR. COOK: This debate, I don't know either,
21 but this debate has been there since the beginning, this
22 debate is not yet really cost a tremendous amount of
23 money to owners and operators, because this rule hasn't
24 been promulgated. There's one way, would you agree or

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1 disagree, there's one way to resolve the debate?

2 MR. CLAY: I would disagree.

3 MR. COOK: You would disagree?

4 MR. CLAY: I'm sure there's many ways to

5 resolve this debate.

6 MR. COOK: All right. Can you elaborate on
7 the others?

8 MR. CLAY: No, I have no suggestions.

9 MR. COOK: I know one good way, we'll talk
10 about that later.

11 Do you think it's likely that many of these
12 issues will end up in court later?

13 MR. CLAY: I don't know, it's up to owners
14 and operators. If they, you know, chose to appeal those.
15 I think again, I think that the board proposal is
16 reasonable and fair as far as cost corrective action.

17 HEARING OFFICER TIPSORD: And is this not in
18 your previous testimony that maximum rate you propose,
19 you as the agency feel that 90 percent of reimbursements
20 will come in on that maximum payment?

21 MR. CLAY: That's correct.

22 MS. COOK: I do have a question about the 90
23 percent. Is that statistical 90 percent, is or that
24 sort of an estimation, good ole boy kind of 90 percent?

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1 MR. CLAY: That's just an estimation, there's
2 no statistical basis for that.

3 HEARING OFFICER TIPSORD: Is there any other
4 follow up on this extraordinary, ordinary?

5 MR. DOTY: I have one.

6 HEARING OFFICER TIPSORD: Okay, identify
7 yourself.

8 MR. DOTY: Duane Doty, United Science
9 Industries. Just kind of following along with how this
10 whole series of extenuating circumstances gets
11 demonstrated, reading between the lines, it sounds to me
12 like the agency kind of has the impression, maybe you
13 can elaborate, because I'm not testifying, it is a
14 question, is it the agencies impression that extenuating
15 circumstances usually present after the work is
16 performed? I know this is a question from CW3M, seemed
17 to maybe catch you a little bit off guard, can you
18 demonstrate extenuating circumstances before the work is
19 conducted?

20 MR. CLAY: You can definitely do it before
21 the work is conducted, I wouldn't say it caught me off
22 guard. I was trying to figure out how under early
23 action it can be submitted where the decision was then
24 something that they could appeal if they felt, you know,

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1 you inclined to do that. But whether it's part of the
2 plan or budget, or just a question of the agency, we
3 would certainly respond. It can be done before or after
4 the work has been performed.

5 MR. DOTY: So you can make your demonstration
6 with your plan and inclusive of your budget?

7 MR. CLAY: Certainly.

8 MR. DOTY: Before the work is done?

9 MR. CLAY: Yes.

10 MR. DOTY: So it's not the costs that are
11 extenuating, it is the task?

12 MR. CLAY: Correct, it's the task, but you
13 know, given site.

14 MR. DOTY: Okay. Thank you.

15 HEARING OFFICER TIPSORD: Mr. Cook raised his
16 hand first.

17 MR. COOK: I'm at a loss, if I can claim that
18 prior to claiming extraordinary circumstance prior to
19 the execution of the work, how does that track back to a
20 requirement to demonstrate that the cost results from
21 unusual or extraordinary circumstance, I have to
22 demonstrate the cost result from that. If those costs
23 haven't been incurred yet, how do I know whether what I
24 think what's going to be extraordinary circumstances, in

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1 fact exists, when we're talking about some surface
2 contamination? I mean, how do I guess that? How do I
3 guess that I've got extraordinary circumstances and I'm
4 dealing with subsurface?

5 MR. CLAY: I don't know if you're guessing.
6 In some instances, you wouldn't be able to do that until
7 after the fact, but if you can, you do know there's a --
8 for example, an example gave at a previous hearing, if
9 you're excavating downtown Chicago next to a sky
10 scraper, you know you're going to have to do some
11 additional storage and things, you know that up front.

12 MR. COOK: Sure.

13 MR. CLAY: Okay, so you could include that in
14 a budget and apply up front. I assume that you're going
15 to have cost estimates and all that, as part of that,
16 so, you can make that as an extraordinary circumstance,
17 and why excavation costs are going to be higher than are
18 in sub part H.

19 MR. COOK: Does the whole site have to be
20 characterized as extraordinary, or just circumstances
21 relative to a certain maximum payment amount have to be
22 demonstrated as extraordinary?

23 MR. CLAY: It doesn't have to be the whole
24 site, just the cost that you're making.

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1 MR. COOK: Could a single activity like tank
2 removal be the only activity on an entire project that
3 would be classified as extraordinary and a claim could
4 be made and approved, assuming there were the
5 extraordinary circumstances related to that tank
6 removal?

7 MR. CLAY: Correct.

8 MR. COOK: Well, I think that in the agency's
9 prefiled answers, I think in one of those answers, it
10 may lead one to believe, I don't recall which answer it
11 is, but one of the answers may lead one to believe that
12 the entire site has to be extraordinary, but just to
13 clarify, that's not the case, Doug?

14 MR. CLAY: That is not the case, if that was

15 the response, that was not the intent.

16 MR. COOK: Okay. Thank you.

17 HEARING OFFICER TIPSORD: Okay, anything
18 else on extraordinary? We're going to take a ten minute
19 break.

20 (Whereupon, a break was taken from 11:48 to
21 12:07).

22 HEARING OFFICER TIPSORD: Mr. Davis with a
23 follow up question for number 18, correct?

24 MS. DAVIS: Yeah, but I've decided this is

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1 taking so long, that's all right.

2 HEARING OFFICER TIPSORD: Is there any other
3 follow up to the prefiled answers to Mr. Dan King's
4 questions?

5 Okay, we'll move on to the prefiled question
6 of Mr. Jay Cook. Are there any follow ups to the
7 answers to his questions? Okay. CW3M, any follow up to
8 CW3M questions? Did you all have a meeting during the
9 break? All right. That leaves the CSD prefiled
10 questions, are there any follow ups to those?

11 MR. TRUESDALE: I have to. Just the one
12 question in to the agency stated they answered this
13 question. In hearing, for additional clarification,
14 provided the variability, I was referring to is actually
15 stated by Mr. Clay in testimony from the proceeding in
16 August, at page 24, lines one through ten, and it
17 specifies there have been comments about the scope of

18 work professional consultant services not being adequate
19 and complete in finding these. We agree that there are
20 some variables from site the site, but this variability
21 has been taken into account. The agency proposal and
22 our question was specifically -- was how has the agency
23 taken that variability into account in the proposal?

24 MR. CLAY: What question is that?

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1 MR. TRUESDALE: And your response was the
2 variability referred to in this question is unclear.
3 That's why we asked the question, you're the one that
4 said the variability?

5 HEARING OFFICER TIPSORD: Which question
6 again, Mr. Truesdale?

7 MR. TRUESDALE: It was N2.

8 HEARING OFFICER TIPSORD: That was the
9 prefiled answers on page 36?

10 MR. TRUESDALE: Correct.

11 MR. CLAY: The variability is when we looked
12 at developing the costs and comparing them to plans and
13 budgets and payments made in the past. Obviously
14 there's some variability in those budgets, and
15 reimbursement, and I guess that's where the variability
16 was taken into account.

17 MR. TRUESDALE: How was the variability taken
18 into account, was the question.

19 MR. CLAY: Comparing different budgets and

20 reimbursements from different cites.

21 MR. TRUESDALE: Compared to the average
22 numbers that you developed?

23 MR. CLAY: Correct.

24 MR. TRUESDALE: And then what was the range

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1 of that variability, how did that compare to those
2 averages?

3 MR. CLAY: I don't recall if that would be in
4 testimony, I don't recall if we provided a range or not.

5 MR. TRUESDALE: Yeah, there was no range
6 specified in testimony, that's why I asked the question.
7 So once again, what was the methodology used to address
8 that variability in your process? Was the averages were
9 calculated, you said there wasn't variability from site
10 to site, how was the variability accounted for in the
11 proposal?

12 MR. CLAY: Variability was accounted for in
13 the numbers we proposed. How we developed those numbers
14 accounted for variability from site to site. But again,
15 the numbers that are proposed we feel are reasonable for
16 the large majority of sites.

17 MR. TRUESDALE: Well, that doesn't answer the
18 question. Still how did it, I'll leave it at that. You
19 stated that that varies with the proposed budget
20 addressed variability, and my question was how did the
21 proposed numbers address that variability.

22 MR. CLAY: I don't know what response you're

23 looking for there. To the best of my ability I answered
24 the question.

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1 MR. TRUESDALE: You stated variability, it's
2 unclear, I just want to know what variability you
3 accounted for because you've stated in your testimony
4 that the variability was accounted for, what was that
5 variability that you accounted for, and how was it
6 accounted for?

7 MR. CLAY: I responded to the best of my
8 ability.

9 HEARING OFFICER TIPSORD: You have a follow
10 up.

11 MR. RIGDON: My name is Steve Rigdon, I'm a
12 professor of statistics at Southern Illinois University
13 in Edwardsville. In this data was -- do you know what
14 the mean was?

15 MR. CLAY: No, I don't.

16 MR. RIGDON: The median?

17 MR. CLAY: I don't know that off the top of
18 my head.

19 MR. RIGDON: Okay. Do you know what fraction
20 of those would have fallen above 960?

21 MR. CLAY: No, I don't.

22 HEARING OFFICER TIPSORD: Okay. Do you have a
23 follow up? Any other follow ups to the prefiled
24 answers? Going once, all right. Then we will move ahead

1 to the prefiled testimony of Cindy Davis, Joe Truesdale,
2 you want to go from right there or move up here?

3 MS. DAVIS: What are we supposed to do?

4 HEARING OFFICER TIPSORD: I'm going to have
5 you available for questions, so if you're comfortable
6 there, you can stay there.

7 (Witnesses Sworn.)

8 HEARING OFFICER TIPSORD: We will enter
9 their prefiled testimony, that's prefiled testimony of
10 Cindy S Davis and Joe Truesdale with CSD Environmental
11 Services as Exhibit No. 99. If there's no objection,
12 seeing none, it's entered as Exhibit No. 99.

13 Okay. Are there any questions? I actually
14 have one question that I'm going to ask this, and the
15 bottom line is that in your testimony and the testimony
16 of USI and the testimony of CW3M, there have been
17 several different language changes in the rules, and
18 explanations and discussions about them. My question to
19 the two of you is, have you reviewed the changes
20 suggested by USI and CW3M, and do you support those
21 changes? Do you take issue with any of those changes?
22 What is your position on those changes?

23 MR. TRUESDALE: I've reviewed them in whole,
24 I don't think I can comment on any specific change. I

1 think the premise presented, or most of the premises, if

2 not all of the premises presented, I agree with. The
3 position of threshold numbers verses maximum numbers, I
4 think was presented in both CW3Ms proposal and USIs
5 proposal. The exact dollar amounts, I can't comment on
6 comparatively between the two, I haven't evaluated that
7 in any detail, but the general premises submitted I
8 think I support.

9 HEARING OFFICER TIPSORD: Ms. Davis, do you
10 have anything to add?

11 MS. DAVIS: I think it's critical to look at
12 all three of us are saying, basically, and when I read
13 CW3M and USI, and put together ours, we're all saying
14 the same thing, just saying it differently. We're all
15 very concerned there is no scope of work or task list
16 associated with the price. We're concerned that the
17 price was established, and I'll just use for example,
18 stage one, yet there's no task list associated with
19 that. Since there are new, stage one, stage two, and
20 stage three are new requirements, we don't really know
21 what is required yet to complete stage one or stage two,
22 but yet somehow the agency knew enough to throw a price
23 on it. The bottom line is that the agency has nothing to
24 lose if the price is wrong, and the owner and operator

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1 has everything to lose. That's why we asked for
2 threshold. We'll meet them, I'm going to try, but if I
3 can't, don't make me go back to the owner operator and

4 say you're going to pay me for an appeal, or appeal
5 everything that we can't afford, the owner operators
6 can't afford to do.

7 MS. ROWE: Carol Rowe, CW3M. This is a
8 question maybe for the board and the agency. Since we
9 all individually developed language, would it be helpful
10 if we kind of put our heads together and came up with one
11 I mean, as far as, you know, the board now has different
12 versions in front of them to look at. I think Cindy
13 said it best, our premises are very much alike.

14 HEARING OFFICER TIPSORD: I don't know that,
15 and frankly, as I said, I'm going to ask these questions
16 of all of you, and actually if there's time today, I may
17 ask some of these questions or ask the agency to address
18 some of these questions as well in the final comments.
19 The bottom line is that we have a proposal that the
20 board went to first notice with, that the agency stated
21 in it's testimony today that it supports. We now have
22 some very specific changes that don't necessarily
23 contradict one another, but they are very different in
24 some ways, and so we need to know, we need to see some

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1 justification from everyone as to why the board should
2 take these amendments or what we should do with those
3 amendments and if there's a disagreement among all of
4 you, then we need to know that too. I mean, if you
5 disagree with a premise, or if CW3M has proposed a
6 number, and USI can't possibly live with, that certainly

7 the kind of information we need to see, and so that's
8 sort of why I'm asking these questions. The board has
9 to develop a record to support any decision we come to,
10 and one of the ways to develop that record, in my
11 opinion, is to ask all of you what you think of each
12 other's proposals. I mean, if you want to get together
13 and come up with one proposal, that's certainly up to
14 all of you, but my point in asking those questions is
15 trying to find out where there may be agreements, where
16 there may be disagreements, and that sort of thing.
17 Does that sort of answer your question?

18 MS. ROWE: Yeah, I think we would have
19 probably answered the same way, in a general since, I
20 don't think we have any issues, you know maybe the best
21 thing --

22 HEARING OFFICER TIPSORD: You know what? Can
23 we ask you that when we get to your prefiled testimony?

24 MS. ROWE: Sure.

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1 MR. COOK: If I could comment to that
2 question about --

3 HEARING OFFICER TIPSORD: When we get to your
4 prefiled testimony, after I have you sworn in
5 beforehand.

6 MR. COOK: That's fine.

7 BOARD MEMBER JOHNSON: That's what I was
8 going to ask. Just make sure you're going to have each

9 and everybody that wants to, do a final comment,
10 correct? And so in doing so, just make sure you read
11 your cohorts suggestions and comment on it as well. I
12 guess as long as we're with Cindy and Joe, you guys
13 ended up your prefiled testimony with pretty gloom and
14 dim scenario as to what would happen here in the state
15 of Illinois if we adopt this rule as proposed. You just
16 said, Cindy, that you're going to keep continuing to try
17 and work with UST sites as long as you can financially,
18 under those rules if they're adopted, petroleum rules if
19 they're adopted. I mean, comment on how you think this
20 is going to drive environmental consulting firms out of
21 business and stop mediation work in the state.

22 MR. TRUESDALE: One thing, one discussion
23 we've had back and forth already, we've reduced staff.
24 We have plans for the future, based on the outcome of

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1 these rules, to probably cut more staff. Our marketing
2 has shifted entirely from anything to do with LUST, into
3 the only projects I've worked on in the last month is
4 SRP, dry cleaning, RCRA projects, expert witness. Our
5 focus has shifted drastically, our staff size shifted
6 already, and will shift more drastically depending on
7 the outcome of the rule making. We don't plan on adding
8 any additional staff to focus on LUST work whatsoever.

9 A comment that I've heard from others around
10 me is that they have no interest in pursuing LUST work
11 based on the regulations that have been proposed. And

12 that's essentially how it affected our firm, and what we
13 expect we will have to do in the future. We're not
14 wholly LUST contractors, and as a matter of fact, our
15 practice, as Gary mentioned for response action, we work
16 in SRP, we work in RCRA, we work in dry cleaning, we do
17 expert testimony we do other work besides LUST. We are
18 90 percent LUST granted, but that was something that
19 came as a function of client satisfaction historically.
20 We were given additional LUST work and didn't have to
21 market that particular avenue of income. So that's how
22 we ended up in that place. We actually decreased our
23 RCRA, other things in the past, because of the volume of
24 LUST work that was brought to us, without our part in

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1 the effort whatsoever.

2 Now, that actually put us in a bad position
3 because we've lost some of the volumes of some of the
4 other environmental work that we've been involved in,
5 but our work as Gary mentioned with the response action,
6 our work in LUST does not vary from typical work in SRP
7 and typical work in RCRA investigation, corrective
8 action, all of this corrective action is still based on
9 the same scientific principals, there's no variation.

10 BOARD MEMBER JOHNSON: Have any of you, well
11 you two I guess, you're testifying, have you gone back
12 and looked at any of the previous jobs that you've done
13 and plugged in the figures that have been proposed here

14 to see how it's overall going to affect your bottom
15 line?

16 MS. DAVIS: Yes, it's -- the bottom line is
17 it's about 50 percent less. I have employees I have to
18 pay their work on projects. For every hour they work on
19 a project, we don't know if they're going to get paid,
20 and I understand the lump sum contract we're trying to
21 save costs, but some of the things are just plain
22 ridiculous. My project manager's been on the phone with
23 the EPA, and the LUST project manager says you're not
24 going to bill us for this, because we don't get paid for

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1 this. Well, you're being paid by the LUST foundation to
2 talk to me, you know, how can I, you know, they come to
3 me and they say we can't bill this, what am I supposed
4 to do with this half hour of time? What do I do with
5 that time? Do I go back to the owner operator, I try to
6 go back to the owner operator and they said get on out
7 of here, we're not paying any more costs. None. You
8 know, we pay our \$10,000 deductible, we're done. We're
9 not doing anything else, if it means letting my job sit
10 and I'll be in non compliance, that's what I'll do.
11 That's what they're telling us, they're not paying
12 another dime for us to do the work. Then to keep in
13 business, we do work for free? That's the problem. So
14 all I'm saying is I understand the lump sum pricing, why
15 you want to do it, but let's make sure it's fair. Let's
16 use a threshold and gather the data we need so we're not

17 out of business. That's all I'm asking. Don't put me
18 out of business because you're trying to save money,
19 because I'm not sure that really we're going to save any
20 in the long run, is if isn't anyone to do the work. If
21 I'm going under, I'm not the only put that's going to go
22 under.

23 MR. TRUESDALE: Or at the owner operators
24 end, we have clients that have stopped work at site

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1 classification and have no intention to advance in the
2 corrective action pursuit because of potential cost
3 shortcomings.

4 MS. DAVIS: I have to add one more thing
5 about NFR letter. They have not desire to ever get an
6 NFR letter, because one you get an NFR letter, you're
7 never coming back into the fund, so they say why would
8 we ever want it.

9 MR. TRUESDALE: We had one project that has
10 everything but corrective action completion report, we
11 can't get -- they will not give us authorization to
12 submit corrective action completion report, because we
13 can't tell them that to off site property we couldn't
14 gain access to may potentially in the future arise as a
15 problem.

16 HEARING OFFICER TIPSORD: Some of the
17 discussions we had about the maximum payment about in
18 prior hearing was that they would in fact become the

19 amount. Even people who aren't doing the work for that
20 maximum amount, would now submit that maximum amount, so
21 when you suggest on page three of your prefiled
22 testimony, that those maximums lump sums become a
23 threshold, wouldn't they, in affect, now become the
24 minimum?

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1 MS. DAVIS: No, I don't think so, because
2 what I'm seeing, if you offer the carrot to us, if you
3 do it for this price, that's in here, if you can do it
4 for this price or less, and we're going to submit time
5 and material to document what we -- we're going to
6 submit our actually cost, if it comes in less than that,
7 we're on a preapproval basis and we can move ahead with
8 our project. That is huge carrot to us. I would rather
9 have projects, I've got a drill crew I've got to send
10 out to work, but I have no work to do for them. I have
11 to pay them to sit there, so I'd rather have projects
12 that I can move along, instead of fighting on every
13 single project, on every single dollar. So in, I mean, I
14 think if we set them as thresholds, we submit our time
15 and material, and if it's below that threshold the
16 agency says already we know that's reasonable. Go, go.
17 And anything above, we keep the data as collected then
18 so that when we do try and review, we actually have real
19 data then to say here's what going on with stage two
20 site investigation, our price way low, the agency can
21 say that. They say that 90 percent are coming in over

22 what the threshold value is set at, it's obviously the
23 price is not correct to begin with.

24 MR. TRUESDALE: Or under the concept of

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1 threshold, I think that preserves that element of the
2 professional competition more than a maximum does,
3 because from our standpoint, it's a marketing tool.
4 Also if we can say we're under those thresholds 98
5 percent of the time, we can guarantee our client that we
6 are going to get 99.9 percent of their cost reimbursed
7 through the fund. That's a marketing tool for us.

8 I know in a review of some of the other
9 programs, they actually have in some additional
10 testimony here, going through some of the ones Mr.
11 Chappel submitted as supporting documentation, for other
12 states that have similar programs. One in particular,
13 Texas, had a program very similar and they introduced a
14 similar concept of threshold amount, but it was not the
15 intent. They had informed that real costs are submitted,
16 and if they're below, then it's automatically approved.
17 If it's above that, they have to have provide additional
18 justification for those costs, but they're not costs,
19 per se if you do a 45 day report, you bill for \$4,500,
20 it's broken down. You submit a 45 day report. It
21 includes the project manager at ten hours, or technician
22 at ten hours, site sketch map, a list of attachments
23 that are to be provided, resent contour ground map, and

24 the premise is similar to Illinois. I think in the

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1 agency's review of these, they failed to look into
2 details with those particular programs they do have,
3 costs items memorialized in regulation, but the way it's
4 implemented are drastically different than what the
5 agency is proposing here, and in every case of the six
6 states we looked at, there is on their web site, either
7 a work sheet that has a scope work associated with it
8 for billing, organizing report submittal, and guidance
9 documented for submittal of those reports.

10 MR. RAO: Which six states did you look at?

11 MR. TRUESDALE: Texas, Oklahoma, Arizona,
12 South Carolina, Indiana, and Colorado are the six states
13 that Mr. Chappel submitted in my prefiled testimony. We
14 summarized three of the six, just for time constraints,
15 Texas, South Carolina, and it looks like we lost one
16 printout. We had three, I only see two now, but we
17 reviewed all of them, but we couldn't summarize them in
18 the short timeframe.

19 MR. RAO: Have you had the chance to talk to
20 the consultants in those states to see how the programs
21 work?

22 MR. TRUESDALE: We actually did work on a
23 site that was in Oklahoma for a client in Missouri, and
24 all though we didn't pursue any work in Oklahoma, we

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1 just did a review of their program, and consulted with
2 that particular client regarding a purchase, and the
3 potential environmental reliability associated with
4 that, and I did review Oklahoma previously, and then I
5 re-reviewed it in the context of this rule. I hadn't
6 realized this was the same when we looked at this other
7 project. So, the bottom line, that one I was much more
8 familiar with, when I went through some of the other
9 ones, I saw similarities from state to state, and it is
10 in fact true, that all of them have some type of
11 reimbursement guidance, it's just the way that those
12 programs implement them. Most of them change order
13 provisions, most of them are not established as submit a
14 lump sum payment, a break down of reimbursable costs.
15 If you receive those, then you go to the next stage of
16 submitting justification, et cetera, et cetera. The
17 Texas program actually had online Excel spreadsheets
18 that spell out and track the real costs, it's broken
19 down into a standardized spreadsheet that all
20 consultants submit on, so all the data is uniform. It
21 includes specific item, the number of units, the cost,
22 and everything is broken down along the same framework
23 for each and every consultant submittal. So from a
24 review standpoint, they're able to look at these

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1 submittals and say well, there are 90 percent of those
2 consultants are X dollars in line A. So that would cover

3 90 percent of the cost, but that's the principal
4 difference in these programs, they all have a detailed
5 scope of work, or a detailed reimbursement submittal
6 that is not just a task, but subtask. Matter of fact,
7 that is one of the items that they list for one of those
8 programs, and it might be the one that we lost, said
9 list of tasks and subtasks. The main task, early
10 action, subtask 45 day report, 45 day report as subtask,
11 preparing ground contour map, main site sketch,
12 documenting, records search, et cetera et cetera et
13 cetera. And I can submit, and I have additional
14 testimony here, 15 copies that I can put on the side
15 that details our review, and apparently just a summery
16 of two of the states, because we apparently lost a page.

17 HEARING OFFICER TIPSORD: Additional
18 testimony than what you prefiled?

19 MR. TRUESDALE: I did not prefile it, it was
20 just additional work, that we did put it in testimony
21 format incase we needed to have it that way, I didn't
22 know how to have it.

23 HEARING OFFICER TIPSORD: Would you like to
24 submit it as an exhibit at this point?

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1 MR. TRUESDALE: Yes would yes that would be
2 fine.

3 HEARING OFFICER TIPSORD: That's fine. I'll
4 make that Exhibit No. 100. You've got a procedural
5 question?

6 MS. DAVIS: If I have some additional things
7 that need to be submitted for my testimony, I don't
8 believe I have any exhibits.

9 HEARING OFFICER TIPSORD: We can do them as
10 exhibits, and if we have time later and you want to
11 summarize them, we can do that.

12 BOARD MEMBER JOHNSON: I'm looking at my
13 notes from June of last year, and at that time, at least
14 my notes indicated, that you had testified that the
15 agency had been using their unpromulgated rule, the rate
16 sheet, they had been using, you said, I think, if my
17 notes are right, been using it for at least the last
18 three years. I think I asked you then if the rates that
19 were proposed in subpart H were significantly lower than
20 the ones that they used in their old rate sheet, and I
21 have no answer, and it's too long ago for me to
22 remember.

23 MS. DAVIS: I think what you were asking me
24 for were the rates that were proposed on their personnel

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1 sheet, were they consistent with what the rate sheet
2 was.

3 BOARD MEMBER JOHNSON: I think that's right.

4 MS. DAVIS: I think they're fairly
5 consistent. I don't have an issue with the personal
6 rates that are proposed. I have some issues with the
7 lump sum when there's no tasks identified, it's very

8 vague, that's where my issues are.

9 MR. TRUESDALE: It's hard for us to evaluate
10 on a specific task basis, because we don't know what
11 tasks on our work break down are to include in those
12 lump sums. We bill, we might have a draftsman that
13 bills two hours for preparation of a ground contour map,
14 but we know that all of those are coded in early action,
15 but we don't know how to allocate them to a specific
16 lump. So what the review we did, and the arbitrary
17 review of what our early action costs were, and then
18 taking what we know we did in those scopes and comparing
19 them to subpart H, and as we said, consistently we were
20 on that target about 50 percent of the time. The other
21 50 percent of the time weren't at or below that target.

22 BOARD MEMBER JOHNSON: Okay, then I
23 misunderstood your answer. I thought you said on
24 average, if you plug those numbers in on previous jobs,

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1 you were going to get about 50 percent of what you
2 billed.

3 MR. TRUESDALE: That's what I said, yes.
4 That's exactly correct. If we check our early action
5 for instance on one incident, we know that we were
6 reimbursed \$46,000 for early action. If we take a
7 specifications from that job, and apply them to subpart
8 H, we would get somewhere around \$20,000 reimbursement
9 for that particular incident, and like I said, 50
10 percent of the time, if we read four cases, two cases

11 would have been at or below the \$20,000, and two cases
12 would have been above the \$20,000 of subpart H premise,
13 assuming that same, you know, just applying the scope of
14 work from those projects.

15 MS. DAVIS: I guess, how do I --

16 HEARING OFFICER TIPSORD: We'll go ahead and
17 admit that as an exhibit as well.

18 MS. DAVIS: Should I talk about what they
19 are?

20 HEARING OFFICER TIPSORD: Well, explain what
21 they are.

22 MS. DAVIS: One is just, I know some of the
23 other consultants have sent a petition in that had been
24 signed by owners and operators, so that's one part of

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1 this, and then the other part, I just wanted to provide
2 some additional testimony regarding a task list
3 especially the ACECI or ad hoc group, since I was on it,
4 and then I had some additional testimony regarding
5 agency experience.

6 HEARING OFFICER TIPSORD: So there are
7 actually two documents here. So we'll mark amended
8 testimony as Exhibit 101, and the petition as Exhibit
9 102. If there's no objection. Seeing none, they'll be
10 marked.

11 MR. TRUESDALE: I think actually, to go along
12 with those work sheets, I might introduce this as an

13 exhibit also, which is -- these go along with our
14 proposal and prefiled testimony regarding phase
15 submittals of alternate technology corrective action
16 plans, and during our review of these six other states,
17 they have the same or similar programs, we also came
18 across at least two example of states that have a
19 submittal similar to what we were discussing. They have
20 a Texas has a remedial technology screening form that
21 they compared multiple technology in conceptual format
22 so that the technology and submitted tasks that gives
23 the proposal a more detailed design, and the limitations
24 and the scheduling for that design implementation. I

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1 think those are two exhibits we have here, and Arizona
2 also provides a corrective action plan content outline
3 that includes specifications of what is to be submitted
4 in that cap, and what appendices and attachments are
5 required, and it's detailed a little bit more in the
6 contents of the cap, which is a guidance document
7 specified on the form that shows their reimbursable
8 amounts, Texas calls it reimbursement guidelines, it's
9 specified in that testimony that I just filed,
10 reimbursable cost guidelines. So those are, I guess,
11 those are obviously just excerpts of those particular
12 programs, if you go to our website, we have multiple
13 interrelated forms for the middle and reimbursement and
14 applicable costs associated with each item. I just used
15 a couple of examples here. We summarized Texas, Texas

16 and South Carolina, and apparently we lost Arizona's
17 summary in a problem with printing last late night.

18 I think in response to your question, Marie,
19 about our thoughts on the other submittals, I think that
20 attachment A to our submittal outlines the Texas
21 petroleum storage tank operation, cost proposal format,
22 I think that in essence, is very similar in -- it's
23 basic form to allow the proposal of USI also. It's
24 slightly different, but the underlying premise is

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1 essentially the same.

2 HEARING OFFICER TIPSORD: All right. We will
3 mark as Exhibit 103 the Arizona Department of
4 Environmental Quality appendix J. If there's no
5 objection, seeing none, we'll mark that.

6 We'll mark contents of cap, always from
7 Arizona Department of Environmental Quality UST Program,
8 starting at 7.3, we'll mark as Exhibit 4. If there's no
9 objection. Seeing none, we'll mark that as Exhibit 4 --
10 140, I'm sorry, too many numbers.

11 And as Exhibit No. 105, technology screening
12 form, if there's no objection, seeing none that's
13 Exhibit No. 105.

14 MR. TRUESDALE: If we were to summarize
15 those other states also, I know that there's one that's
16 missing here, just because of computer problems, would
17 we submit those as public comment.

18 HEARING OFFICER TIPSORD: Yes, you could
19 submit those as public comment, and part of final
20 comments.

21 MR. TRUESDALE: Okay. Any other questions
22 for Ms. Davis and Mr. Truesdale? All right. Thank you
23 very much.

24 We'll move on to the prefiled testimony of

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1 CW3M. Ms. Hesse, would you like to introduce your
2 witnesses? Do you want to stay there, or move up here?

3 MS. HESSE: We'll stay here, if that's all
4 right.

5 HEARING OFFICER TIPSORD: Okay.

6 MS. HESSE: To my left is Vince Smith, to hi
7 left is Jeff Weinhoff, and to Jeff's left is Carol Rowe.
8 They are all with CW3M and have prefiled testimony. We
9 have prepared a summery to be read today, but it's
10 basically a reiteration of the comments that was in the
11 lengthy prefiled testimony that was filed.

12 HEARING OFFICER TIPSORD: Let's go ahead and
13 have your witnesses sworn in.

14 (Witnesses sworn.)

15 MS. HESSE: Given the time constraints, we
16 want to forgo the summery, if that's okay.

17 HEARING OFFICER TIPSORD: That's fine if
18 there's no objection, we'll mark you prefiled testimony
19 as Exhibit 106. Seeing none, your prefiled testimony
20 CW3M is Exhibit 106. Are there any questions for CW3M?

21 MR. WEINHOFF: If I could address, I think
22 Board Member Johnson's question to Cindy. We were
23 talking about the rate sheet and stuff. In our original
24 testimony, I know I did an analysis of the original rate

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1 sheet that we obtained in 2001, I'm pretty sure, I think
2 was the date or March compares the rates that were
3 proposed by the agency. And if I remember correctly,
4 from a rate that -- like there was a lot of rates on the
5 2001 that weren't in the 2005, but the items where there
6 were same rate I believe 20 percent had gone up, and 40
7 percent had stayed identical, and 40 percent had gone
8 down over that three year period. The numbers were all
9 in there too, I believe the numbers that went up, went
10 up very slightly, and the ones that went down, went down
11 more than slightly. So all those numbers and everything
12 was in my original testimony, spreadsheet detail all of
13 that. I just wanted to clarify that, thanks.

14 HEARING OFFICER TIPSORD: Would you like to
15 answer the question I asked earlier?

16 MS. ROWE: I was going to offer that we can
17 either provide individual comments on other proposals,
18 or we can try to cooperate our efforts, and where we're
19 all in agreement put that together, because I think that
20 in principal and theory, there's not any major
21 difference, just how we individually went about trying
22 to get there.

23 MS. HESSE: If I could just add one comment,
24 there would be some difficulty with the consultants

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1 trying to put together some proposed rates. Those go to
2 antitrust issues.

3 HEARING OFFICER TIPSORD: If I may, we've
4 heard that from the beginning.

5 MS. HESSE: I just want to --

6 HEARING OFFICER TIPSORD: If I may finish,
7 and I understand that, and I understand that there's the
8 antitrust thing and USI has made the comment in and
9 they've advised not to talk about rates. I do understand
10 that. I understand why you don't want to say those are
11 our rates, and all of that competitive issues, but the
12 board does need something the justify in the record what
13 we do. I mean, we can't just pull numbers out of a hat.
14 I just say that and I understand that I'm not asking you
15 to do anything that would violate antitrust laws, and
16 I'm not saying that you necessarily have to get together
17 and comment on that, or be specific, what we find in our
18 practice it is that doesn't happen. You can talk about
19 what you submitted to the agency, which is a matter of
20 public record. Those kinds of things, if I may offer
21 some suggestions.

22 Like I said, I just don't want us to be at
23 second notice, where we were at first notice, with
24 nothing but agency explanation of numbers and

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1 justification of numbers, and you know, I mean you have
2 given us a lot of information that we can look at, but
3 you know, I guess I'm just saying that we've heard
4 the -- we understand the antitrust thing, and we
5 appreciate that, but you can at least let us know
6 whether you think the threshold issue is a good idea.
7 Whether you think CW3M or USI proposals are a good idea.
8 Whether you think something of the agency agrees to look
9 at, did indicate what would look at some issues today.
10 Whether those are things that should be looked at. So
11 those are the kinds of things when I ask you to look at
12 each other's proposal, those are examples of what I'm
13 asking for. I'm not asking you to sit down and say
14 here's our rates, here's what we think of our rates.
15 We're all going to get to agree to only charge those
16 rates, that's not what I'm asking for.

17 MS. HESSE: Thanks for clarifying that. And
18 CW3M did propose some rates that they developed using
19 Illinois rates, other consultant's rates through IDOT
20 bidding procedures.

21 HEARING OFFICER TIPSORD: Right, there was
22 some very comprehensive information in here, and I
23 appreciate that.

24 But I do have a couple of questions. On page

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1 12 of your prefiled testimony, and this goes to NFR

2 letter, and the concept of once an NFR letter is issued,
3 you can't get back into the fund. Some of the examples
4 we give, particularly on page 15, talk about the appeal
5 process, and how we could be in the middle of an appeal,
6 we get an NFR letter, and then we come back and get
7 reimbursement. I guess my question is aren't all of
8 these situations, or all of those appeals, all
9 situations where Petitioner has a right to the decision
10 within 120 days by provisions of the statues, and the
11 Petitioner has the ability to say yes we can have more
12 time, or no, we can't have more time, so I guess I'm a
13 little confused as to how when the Petitioner controls
14 what the NFR letter asked for, and controlled the appeal
15 decision time, how those situations would arise?

16 MS. HESSE: Would you like to swear me in
17 too?

18 (Witness Sworn.)

19 MS. HESSE: To address to what extent the
20 Petitioner controls the appeal process, having filed on
21 behalf of my client, quite a few appeals on underground
22 storage tank cases, the board, it is true, does have 120
23 days time to make a decision. I have yet to receive an
24 administrative record from the agency within the 30 days

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1 that they're required to file it, after the petition has
2 been filed. In some cases, it has been close to a year
3 before I've gotten the administrative record. We've had
4 numerous discussions with the agency about it, the board

5 issues numerous orders to the agency to file record, but
6 they've still not filed it in the timely manner. Part of
7 it is whether the board is willing to request sanctions,
8 part of it is the agency's workload. In one particular
9 appeal, the attorney was not really able to find the
10 record to file, we don't know where it is, but the full
11 information to go with what the agency based their
12 decision on, just basically could not be found. So, the
13 appeal process to the board ended up being a long
14 cumbersome process. It's a burden for everybody. I
15 know it's a burden for the board, and it's a burden for
16 the Petitioners, and it's a burden for the agency, and I
17 think one of the goals with trying to get these rules
18 clarified is to cut down the number of appeals. So any
19 way, I just wanted to make that point.

20 MS. ROWE: I can add one example. A lot of
21 this depends on what our client needs or wants. They got
22 a buyer for the property and they need to move. If we
23 were to submit a closure report, maybe with a final
24 budget amendment, for the last thing that we're going to

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1 do, the NFR would get approved, and maybe a budget
2 denied. So in that case, you wouldn't know that you
3 were going to have have budget issues that would extend
4 beyond NFR. You could delay submitting your NFR until
5 you get all your budgets finalized, and that would be a
6 practice that you would have to change in light of this.

7 HEARING OFFICER TIPSORD: But in that
8 example, wouldn't that be the same decision? Wouldn't
9 you say we're going to approve your NFR, but disapprove
10 your budget. That would be the same decision.

11 MR. WEINHOFF: A lot of times, we get two
12 separate letters. The NFR in one, and if there are
13 other issues in the submittal, we usually get a separate
14 decision letter.

15 HEARING OFFICER TIPSORD: That's interesting,
16 I didn't know that.

17 MS. DAVIS: We actually have a situation
18 where we filed the NFR for our client, we received an
19 NFR, and we realized, well, when we went back to abandon
20 the well, we forgot to put in the cost for a corrective
21 action completion report, and to abandon the well, and
22 we thought it was after the NFR was filed. They sent a
23 letter back to us saying no, it was after the NFR so
24 therefor, there was no money left. And the owner sent

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1 me a letter two weeks ago saying I owe him \$8,000
2 because I closed his site, I got an NFR letter, I
3 closed his site, I owe him \$8,000.

4 MR. TRUESDALE: And it's the owner operator's
5 responsibilities to seek reimbursement to, in that
6 particular case, they send us invoices and told us okay,
7 prepare our reimbursement request, but the communication
8 difficulty and the owner operators not specifically
9 knowing what is required and what isn't required, then

10 sometimes you have those cases where you have shortfalls
11 and breakdown in communication or so forth, and you
12 don't receive something from an owner operator or even
13 from a contractor, until we've gotten contractors
14 invoices that have gotten lost in a building process six
15 months down the road, we get an invoice and say what was
16 that, I never did get an invoice for that. Things like
17 that happen in the real world.

18 MS. ROWE: We don't want to lose motivation
19 to try to get those NFRs, I mean, that's important for
20 us as well. We want to get them closed and done, and
21 while it's rare, it's not an every day occurrence, but
22 there are situations that happen, like Joe just said,
23 that, you know, if there was a crack in the door to
24 allow for those exceptions, that will keep us from

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1 sitting and holding NFRs, where we could control it.
2 The technical process could be done and over with.

3 HEARING OFFICER TIPSORD: The other question
4 I had involves, it was on page 12 and it involved a
5 suggestion that the work rejected put before post
6 mediation use of property, and this may be product of my
7 very real ignorance about how this happens in the real
8 world, but it would seem to me that especially when you
9 get to your site investigation, you have to have pretty
10 good idea what you're going to do before you decide
11 whether you're going to -- how you're going to end up

12 with that. If you find you have a site that's going to
13 need institutional control or could have institutional
14 control, then certainly you can make it a parking lot,
15 that's not you're going to need to know that, and I'm
16 wondering why you think that there are going to be
17 situations where after you've done your site
18 investigation, suddenly you're going to change you mind
19 about what you're going to do with the property.

20 A lot of cases, they don't know. If it's a
21 mom and pop convenience store, they're trying to get
22 their clean up done, they're ready to retire, they want
23 to sell it. They have no idea what a buyer might do with
24 it, or how they might redevelop it, or are they going to

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1 tear the building down and have to dig footers and put a
2 new one up, or are they going to remodel the existing.
3 Those are the kinds of things they don't know, nor would
4 we. So there are times you have no idea. What long term
5 or future use of the property is going to be. If it's an
6 active station, they're going to continue operating it,
7 at least for the foreseeable future, then it will be a
8 commercial gas station. If they're closing and they're
9 closing the entire business, it's a guess.

10 MR. GOODIEL: If I may, just to add to that.
11 That in the past, three difference stations where we're
12 gone in to tank removals to closed stations, some of the
13 stations have gone from photograph agencies, matter of
14 fact, both -- two of them went to day care facilities,

15 and basically they are leasing them. I mean, I can
16 provide the exact addresses and names of the property if
17 need be, but that is a very real every day concern, and
18 you know, the owners after they've closed their
19 stations, all they want to do is lease their property or
20 sell it, and they don't care who or what's in there,
21 they just want the money generated from the leasing or
22 selling of that particular property.

23 HEARING OFFICER TIPSORD: I guess my question
24 though, to you to is, the projected post mediation, you

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1 have an idea what proposed mediation use is going to be
2 when you're doing your clean up?

3 MR. GOODIEL: No, if it's for sale, for
4 lease, for rent.

5 MS. ROWE: We were working on a closure a
6 while back, the project manager called and said I need
7 to know what the property is going to be used for. I
8 have no idea, he's trying to sell set it, I don't know.
9 It's in a great location, it could be anything. Well,
10 I've got to put something in the box, I don't know, and
11 he really needed an answer for him to complete the
12 process, and unknown wasn't a good answer, and I said if
13 I tell you something, I'm just making it up, because I
14 have no idea. It could be a restaurant, it could be
15 anything.

16 HEARING OFFICER TIPSORD: Okay.

17 MS. DAVIS: I think the most we could
18 probably give you is what it's currently zoned for. That
19 would be it. Then there's nothing that would preclude
20 the new renter or anybody else from re-zoning the
21 property.

22 MR. TRUESDALE: The designation between
23 residential, industrial, commercial, as it applies
24 TACO, that's something we might be more apt to be able

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1 to project, but as Rus mentioned here, commercial could
2 include a grocery store, photo development facility, a
3 day care, any number of things in those zoning
4 ordinances, that vary substantially accordance to TACO.
5 It could be a park.

6 HEARING OFFICER TIPSORD: Any other questions
7 for CW3M? All right. Thank you very much. That moves us
8 on to USI. And I see -- Ms. Canty?

9 MR. TRUESDALE: She left.

10 HEARING OFFICER TIPSORD: Is that being the
11 case, we can't really enter her testimony as testimony
12 since she won't be here to be sworn. If you like, we
13 can move it into public comment, so we can make it
14 available.

15 MR. COOK: I know that was filed because in
16 our filing, we believe she used one of our passwords or
17 something, electronic signature. She's with the school
18 district at Eldorado, she's a USI client, so I can't
19 really comment one way or the other if that should be

20 entered as public comment.

21 HEARING OFFICER TIPSORD: We'll make it
22 public comment, we'll do that. If she wants it to be
23 sworn testimony, and she's still available, we can do it
24 later today, and we can get it catch up with her after

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1 lunch, but otherwise, we'll just move it to public
2 comment.

3 That moves us to Mr. Cook, United Science
4 Industries, and I understand that you have, I'm not
5 sure, Mr. Hundley and I talked before the hearing, is
6 this an amendment to the prefiled, or is this a
7 wholesale substitution?

8 MR. COOK: It's amendments to what we
9 prefiled, what we brought to the hearing was the
10 documents that could be replaced wholesale, so there
11 could be a single reading of the document. There's one
12 section that's been changed significantly and primarily
13 the other changes are additions as attachments.

14 HEARING OFFICER TIPSORD: Okay. Can we go off
15 the record, for a second.

16 (Whereupon, a discussion was held off the
17 record.)

18 HEARING OFFICER TIPSORD: Let's have Mr. Cook
19 sworn in, and we'll enter his prefiled testimony, if
20 there no objection we'll enter Mr. Cook's prefiled
21 testimony as Exhibit No. 107.

22 (Witness Sworn.)

23 MR. HUNDLEY: May we tender then the
24 amendment?

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1 HEARING OFFICER TIPSORD: Okay, before we do
2 that, I do have a couple of questions about prefiled
3 testimony I need to clear up. You have -- one of the
4 things that you submitted was a copy of part 734, and
5 what we have other than the one appendix, we really
6 can't tell where the changes were made in 734, I mean
7 there's no strike out or underline, or anything like
8 that.

9 MR. COOK: I believe what happened was there
10 was some electronic distortion to have file as it was
11 transmitted. Dan, can you explain?

12 HEARING OFFICER TIPSORD: It's in the hard
13 copy I got from you, too. So the documents we have was
14 734, other than appendix --

15 MR. COOK: And those were the proposed
16 revisions.

17 HEARING OFFICER TIPSORD: And Appendix F,
18 that stuff is showing up. That's the standard task
19 list.

20 MR. COOK: The standard task list I have a
21 copy of.

22 HEARING OFFICER TIPSORD: Okay, that's
23 showing up, but I do want to let you know we need to see
24 something, you need to resubmit that basically, so we

1 can see where the changes are, and if that's part of
2 what you have today and the changes are showing up in
3 that hard copy, that will be fine.

4 MR. COOK: It is. And I can say that we
5 made a number of changes to that filing, that proposed
6 changes to subpart H, we made a number of changes to
7 that. That will be attached to this filing that we'll
8 make today.

9 HEARING OFFICER TIPSORD: Okay. All right.
10 That'll help. Also, at the end of the prefiled
11 testimony, you have Attachment 7 and Attachment 8, I
12 believe, I think there was Attachment 8, yes Attachment
13 8, and then there is a synopsis of the changes proposed
14 regulations, and the two memos which did not pick up was
15 the cover page indicating that there were attachments,
16 and what attachment number they were. So just for your
17 information, you might want to clear that up too. You
18 want to submit them as a separate exhibit, you want to
19 just say on the record here today that, you know, what
20 Attachment 9 is and what Attachment 10 is, et cetera et
21 cetera.

22 MR. COOK: We can do that, we'll need to do
23 that in a few minutes. I'll need to look through this.

24 HEARING OFFICER TIPSORD: Okay.

1 MR. COOK: I can say in the revised
2 attachment that we're going to make today, that should
3 be clarifying that.

4 HEARING OFFICER TIPSORD: The prefiled
5 testimony is Exhibit 107, and you can go ahead and do a
6 synopsis of your additional materials.

7 MR. COOK: I'm going to want to go through
8 this step by step, and also need to consult with
9 different individuals that participated in the
10 preparation of these materials, I'll go through section
11 by section.

12 HEARING OFFICER TIPSORD: Okay, before you do
13 that, you want to go ahead and have everybody sworn in.

14 MR. COOK: Sure.

15 HEARING OFFICER TIPSORD: We'll swear you in
16 and everybody else, and identify yourself as the people
17 who participated.

18 MR. HUNDLEY: My name is John Hundley.

19 MR. DOTY: Duane Doty.

20 MR. SINK: Barry Sink.

21 MR. RUARK: Dan Ruark.

22 MR. KING: Dan King.

23 MR. BUNTON: Ross Bunton.

24 MR. EVERSGERD: Cory Eversgerd.

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1 HEARING OFFICER TIPSORD: Back here.

2 MR. RIGDON: I'm Steve Rigdon.

3 HEARING OFFICER TIPSORD: You can swear them

4 all.

5 (Witnesses Sworn.)

6 HEARING OFFICER TIPSORD: Okay, go ahead.

7 MR. COOK: Okay, with regard to section 1,
8 there are a few changes in this section. Dennis
9 Schweigert will discuss what those changes were.

10 MR. SCHWEIGERT: There were some basic
11 wording changes and a few additional comments within the
12 testimony that do not substantially change the testimony
13 itself.

14 HEARING OFFICER TIPSORD: I would say let's
15 just talk about the substance of the changes. If
16 there's something that's just wording changes, you don't
17 think changes the substance --

18 MR. SCHWEIGERT: There is nothing within what
19 we've changed that substantially changes the basic data
20 presented. The one thing we have done, we have prepared
21 a video of various owners and operators to receive some
22 of their comments. As to their opinions of the LUST
23 program itself, and the significance to them and their
24 characteristics of a small owner operator group, and I

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1 would like to submit that video as part of the
2 testimony.

3 HEARING OFFICER TIPSORD: Approximately how
4 long is video?

5 MR. SCHWEIGERT: Approximately 16 minutes.

6 HEARING OFFICER TIPSORD: Let's go ahead and
7 watch the video then, and then break for lunch. If there
8 is no objection, we will admit these.

9 MR. ROMINGER: Since we cannot cross exam
10 them, can we have those statements entered as public
11 comment, as the prior testimony?

12 HEARING OFFICER TIPSORD: It's an exhibit,
13 so it's not sworn testimony, but so I don't think that's
14 really an issue since it's an exhibit, it's not -- it
15 will enter as exhibit, not as sworn testimony any way.
16 All right. Go ahead and show that then.

17 MR. SCHWEIGERT: And just to put some
18 perspective on this, we put this together and asked
19 these individuals to participate, I just want to make it
20 clear, the main reason we made this was to basically
21 share some of their experiences of the LUST industry,
22 and small owners and operators. Just want to be sure
23 this was their opinion, not a reflection on the industry
24 as a whole, basically their viewpoint. The introductory

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1 commentary was prepared by us.

2 (Whereupon, a video was shown.)

3 MR. COOK: We wanted the show that primary
4 for two reasons. One is those are very typical of the
5 kinds of customers and tank owners that we see day in
6 and day out. That makes a pretty representative mix of
7 the market.

8 Secondly, this proceeding should be about

9 benefits to those kinds of people, not about differences
10 and squabbles between owners and operators, consultants,
11 and the EPA, so that's why we made that video, it should
12 be about them.

13 HEARING OFFICER TIPSORD: Before we break
14 for lunch, it might be helpful if we go ahead and enter
15 your amended prefiled testimony as an exhibit to that,
16 so we can follow along with your amendment, so do you
17 have copies of that for us?

18 MR. COOK: Yes.

19 HEARING OFFICER TIPSORD: We're going to
20 admit this amended testimony of United Science
21 Industries as Exhibit No. 109. Okay. No objection. It's
22 admitted.

23 All right. Let's take one hour lunch break.

24 (Whereupon, a lunch break was taken.)

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1 HEARING OFFICER TIPSORD: Let's get back to
2 work. Hope everybody had a good lunch. All right.
3 We'll pick up where we left off.

4 MR. COOK: I believe we were on section two
5 of testimony that we filed today. Section two, there
6 were not any substantive changes in section two to what
7 was prefiled, so I would like to just move then to
8 section three.

9 HEARING OFFICER TIPSORD: Could you give us a
10 page number where you're looking at, please?

11 MR. COOK: Also, with regard to the
12 introduction section, it doesn't have section numbers in
13 it, I might add that since the prefiled, we've had over
14 800 owners and operators that have submitted written
15 request for us to represent their interest at this
16 hearing, and I believe those are attached. Those
17 requests are attached.

18 Section three then, which begins on page 30,
19 the highlight of the changes to that section primarily
20 deal with the removal from the text of the cost numbers
21 that were presented on per phase basis. Since we
22 prefiled, we have gone through the process of
23 normalizing data, and through the normalizing of data,
24 that's resulted in slightly different numbers, which are

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1 actually attached to this document, and the attached
2 numbers are found in attachment 15, page 327. We would
3 like to highlight the results of that survey and
4 statistical analysis later after we go through the
5 modifications that have been made.

6 Section four, there were no substantive
7 changes to that section.

8 HEARING OFFICER TIPSORD: Page number?

9 MR. COOK: Page number is 37. Section five,
10 on page 40, that particular section was replaced at the
11 wholesale level. Many of the concepts, most of the
12 concepts that were touched upon in the original are the
13 same concept that are presented here, just the arguments

14 are slightly different. We've identified what we
15 believe are conceptual and fundamental that make certain
16 aspects of the rule unworkable, and if I could highlight
17 those five flaws.

18 First, flaw one is the lack of standards and
19 definitions. Particularly are we regarding the with
20 section 734800, 734800 A, B, and C are highly confusing
21 in that A, it states that all costs have been grouped
22 into tasks. B, then 734800 B then leads one to believe
23 that statement that was made in A may not necessarily be
24 the case, and then C directs the reader to take a look

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1 at subpart F to try to make some determination, whether
2 a cost is eligible or not.

3 In the proposed solution that we'd like to
4 offer as part of our revised section 6, provides the
5 methods for clarifying what we think is confusing
6 language in section 724800. So that's the first flaw in
7 the lack of standards and definitions.

8 Second flaw on page 46 is what we refer to
9 as an inappropriate use of ACECI estimated personnel
10 hours for professional services from reading the board's
11 pending order, and from reading Mr. Chappel's testimony,
12 it's obvious that the ACECI estimate was relied upon
13 fairly heavily in the development of the maximum payment
14 amounts for professional services in section 845. The
15 ACECI proposal was submitted pursuant to a specific

16 scope of work. That scope of work was changed
17 substantially and promotes sub part H from what was
18 provided by ACECI and our opinion, is that it voided the
19 validity of those professional service hours. In
20 addition to that, because there were certain aspects of
21 those proposals that have never been implemented before,
22 anyone's estimate would be purely a guesstimate as to
23 the number of hours that are necessary to accomplish
24 certain tasks and activities. So for those two reasons,

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1 we feel that use of ACECI estimated personnel hours is
2 inappropriate and fundamentally flawed.

3 The next flaw that we discussed is on page
4 53. I will not elaborate on this since it's been
5 elaborated on before, so to define a scope of work
6 fundamentally flawed that's been, I think that's been
7 spoken to plenty already. We agree that's been
8 fundamentally flawed. These rules need to provide a
9 scope of work for each activity against which some
10 maximum payment amount would be applied.

11 Page 59, flaw four, one step conversion of
12 professional service task to the maximum lump sum
13 payment amounts. Our USI experience in working with the
14 LUST program, I believe the record in this proceeding,
15 and also USI's evaluation of the 69 project sites,
16 reveal that the agency never utilized a standardized
17 task list for reporting costs. The affect of that is
18 that resulted in costs being reported on a task basis on

19 task level. Those costs are meaningless, because if you
20 consolidate the work from one consultant to the next,
21 those are not consistent or standardized. So it's a
22 belief to properly make an apples to apples comparison
23 as to a particular cost. One consulting firm may call a
24 cost cap preparation, as an example, another consulting

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1 firm may lump cap preparation and PE certification into
2 a single task. A third consultant may take and lump cap
3 preparation, project management, IEPA correspondence and
4 various other activities into a single task. The result
5 of this is that costs are not able to be adequately or
6 statistically validated at the task level, to concur
7 with the agency's records. So that experience in this
8 area is very limited in being able to evaluate costs at
9 the task level.

10 However at the phase level, for a number of
11 years, since mid 1990s, phase level reporting of
12 professional services has been done, and when I say
13 phase, it's at the early action phase, site
14 investigation, and site classification phase, and the
15 corrective action phase, all require professionals to
16 report their time and at that level, the aggravated cost
17 per phase for professional services can be evaluated.
18 We have evaluated that in the analysis that we did, in
19 the study that we did pursuant to our section three.
20 We'd like to present more information on that later

21 today.

22 Then, the fifth fundamental flaw is the use
23 of averages as maximums. All though, we think that we
24 now may understand the motive behind the agency's use of

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1 the average to maximum type approach, that motive may be
2 that if the average is not used, theoretically cost
3 would increase if they publish the maximum and the
4 industry immediately began to adjust the rates to the
5 published level. That being said, the publications of
6 the averages is inherently problematic problem,
7 publication of the maximum is inherently a problematic
8 problem. We believe that a threshold value should be
9 published, but a maximum, if it's used, one, should be
10 non-published, and two, it should be used as a criteria
11 to evaluate maximums with that number, and should be not
12 published. The threshold number should be published.
13 The judgements could be made both against threshold
14 values, and maximums, that keeps the industry from the
15 temptation of raising prices to the published maximum
16 level, and if you like, we could elaborate more on that.

17 Section 6 then has been replaced on a
18 wholesale basis, and there are, I say wholesale basis,
19 there are a few similar areas to what we proposed for
20 section six. Reviews are proposed solutions in light of
21 those five conceptually flawed areas, it also takes into
22 account the previous testimony in this proceeding. Takes
23 into account the statistical study that we performed,

24 and tried to develop a solution that we believe would be

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1 workable for all, and could be implemented in the short
2 term.

3 So, that's a summery of the changes in a
4 section by section basis. If it's appropriate, we'd like
5 to present statistics from the sample that we did of the
6 agency files.

7 HEARING OFFICER TIPSORD: Before we go to
8 that, attachment twenty, which begins on page 409, the
9 734 provision.

10 MR. COOK: Yes.

11 HEARING OFFICER TIPSORD: You say show the
12 changes. Again, I'm just leafing through and I don't
13 see they're not readily obvious, I guess, is the best
14 way to say it. It doesn't appear to be shown by
15 straight out underline.

16 MR. COOK: Okay.

17 MR. G. KING: There's some very subtle
18 changes in the wording, you really have to read through
19 word line by line, because there's just been changes
20 there that, you know.

21 HEARING OFFICER TIPSORD: We're going to need
22 the changes you're suggesting in an straight out
23 underline format, striking out any lines you're taking
24 out, and underlying any language you want to add in.

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1 MR. COOK: We can do that, the concepts
2 have -- from fundamentally the inclusion of all costs in
3 consolidation of all costs in the tasks, we believe that
4 that's better served by referring to all costs as
5 products or services, and having a product or service
6 listed in an approved schedule, and so there will be a
7 number or changes, the red line will be substantive.

8 HEARING OFFICER TIPSORD: And like I said --

9 MR. COOK: We can do that.

10 HEARING OFFICER TIPSORD: Under
11 administrative procedures, you show changes to an
12 existing rule by using strike out and underline, so if
13 you could use strike out and underline, there are two
14 reasons for this. One is it will make it very easy for
15 us to see those changes, secondly, it will make sure we
16 don't miss the changes that you are suggesting.

17 MR. COOK: We can do that.

18 HEARING OFFICER TIPSORD: And given the
19 volume that we have here in 734, have been fortunately
20 pointed out there are errors in the 734 as published
21 because I didn't get into the table of contents, we need
22 to be in the table of contents, among other things. So
23 you know, to best serve you, if we could get that, that
24 would be very helpful.

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1 MR. COOK: And we'll make the changes, and
2 we'll mention that the changes that were made were made

3 to section 734110 and 734800. 734110 we added
4 definitions. 734800 we changed substantially.

5 MR. G. KING: There's more changes to that
6 section, I assume he means the entire sub part? You're
7 just saying --

8 MR. COOK: Subpart H, yes, thank you.

9 MR. ROMINGER: I just want to make sure we
10 get a copy in enough time to have adequate time to
11 review that before final comments, some sort of deadline
12 or something.

13 HEARING OFFICER TIPSORD: Well, I would say
14 that I was going to give them until later, but along the
15 same lines, we may have questions, we the board may have
16 of you today yet based on your testimony, but given the
17 volume of additional testimony you've added, I'm going
18 to preserve the right to do a hearing officer order
19 which may direct you to answer additional questions once
20 we've had an opportunity to look at this, if we have
21 additional questions.

22 MR. COOK: That's fine.

23 HEARING OFFICER TIPSORD: We can go on.

24 MR. COOK: We're ready to go ahead then with

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1 the statistics.

2 BOARD MEMBER JOHNSON: Maybe I'm reading it
3 wrong, but the index here, the headings don't match up
4 with the same number. For instance, 734865 index says

5 unusual and extraordinary circumstances, later --

6 HEARING OFFICER TIPSORD: Yes, that's my
7 error. I'll take responsibility for that.

8 MR. COOK: I'm sure you'll find some in
9 there, we put this together pretty quickly, so.

10 With regard to section three, if you would
11 refer to attachment, I believe it's attachment 15.

12 HEARING OFFICER TIPSORD: Could we have page
13 numbers, if possible?

14 MR. COOK: Yes, it starts on page 328.

15 HEARING OFFICER TIPSORD: Yes, thank you for
16 the page number, that will help.

17 MR. COOK: First of all, attachment 11 on
18 page 295, actually starts on page 296, this was
19 prefiled, but this provides a filtering criteria for the
20 records set that sample, this is how we arrived the
21 records set, and how we selected the incident numbers
22 that were evaluated, and are there any questions about
23 this?

24 HEARING OFFICER TIPSORD: Don't see any at

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1 this time.

2 MR. COOK: That's how the records were
3 selected. If you'll turn back to page 328, there is the
4 data that resulted from the survey. We took and went
5 through the titles that had been reported on the
6 personnel hours listed, and took the titles that
7 appeared to be consistent with the following categories,

8 those being professional engineer, professional
9 geologist, and project manager, engineer, geologist,
10 scientist, account technician, draft person, technician
11 administrative. We took those titles from the
12 reimbursement applications that were made, and
13 identified with those labor classification from sub part
14 H, each of those individual postings were for each
15 posting, the similar later classification. We then went
16 through the data, compiled the data, and as an example,
17 in the instance of professional engineer, we found that
18 that title, or a similar title, was used in 43 of the 69
19 incidents that we sampled. We performed an analysis of
20 the average cost, per unit rate, or the average price
21 per hour, and we found that that was 100 dollars and 18
22 cents. We applied the standard deviation of \$17.40 and
23 then established a lower and upper limit for those
24 numbers of \$74.10 and \$126.76. You can then see how

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1 each of those labor classifications from professional
2 engineers to administrative, how each of those, what
3 those statistics were relative to each.

4 We then went through and analyzed and
5 averaged hourly rate. We did this for purposes of
6 comparing back 80 dollars that the agency used, which
7 was testified to by Mr. Chappel to determine if that --
8 how accurate that \$80 figure was, and we established a
9 confidence, and lower and upper range for that number.

10 That range ranged from \$54.23 to \$89.40. We then went
11 through and evaluated the hours per phase and came up
12 with the information in that lower table of the three
13 tables there on page 328. We found that the average
14 number of hours, this is just for professional services
15 for the early action phase, was 85.58, for the site
16 classification phase it's 139.53, and for the corrective
17 action phase it was 259.3. We went through the same
18 process of establishing the upper and lower limits in
19 those areas, you can see those where early action
20 agreement from 7.6 to 218.89 hours.

21 The process that we went through to develop
22 the upper and lower confidence limits, I'll let Dr.
23 Rigdon testify to that.

24 MR. RIGDON: Okay. What those numbers mean

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1 in those last two columns of those tables is this. This
2 is called a tolerance variable. What it means is we are
3 95 percent confident that that interval covers 80
4 percent of the population. So we're not talking about
5 means here, we're not saying a mean between those two
6 numbers, we're saying with high confidence 80 percent of
7 the population value is between those numbers, because
8 there is variability here. Quite a bit of variability,
9 actually.

10 MR. COOK: From the standpoint of where
11 those incidents were located, because we believe that
12 geography has some bearing on the cost, which is

13 representative in the samples, we see on page 331, we
14 have plotted incident locations of the 69 sites that
15 were included in the sample. You can see that they range
16 from remote southern Illinois, looks like Union County,
17 all the way up to the Cook County area. We then took
18 those numbers historical numbers, and we developed a
19 cost estimate to compare subpart H the rates proposed in
20 subparts H, and what we prepared an estimate an
21 estimated reimbursement for the site owners that would
22 have a specific scope of work under subpart H, and we
23 compared what that reimbursement -- how that might look
24 if it was compared to the historical reimbursement, and

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1 that information along with some additional information,
2 is provided in Attachment 19, that is page number 398.
3 If you look at page 398, you'll see the hours on the
4 phase by phase basis, I'm sorry, page 399. You'll see
5 the hours, average hours per phase, plus the standard
6 deviation and total hours. That is 95 percent
7 confidence level to cover 80 percent of data. You'll
8 see early action hours of 218.9. So we took the data,
9 80 percent data, 95 percent confidence level, upper
10 limit of 8940 and we multiplied that by the number of
11 hours per phase. That generates an estimated charge for
12 professional services per phase.

13 We also note from reviewing that cost
14 submissions that we evaluated that for the professional

15 service cost, included within the 69 sites that we
16 evaluated, that 94 percent of those professional service
17 charges were charges reimbursed by the agency. So the
18 right, you see we had for early action cost or charge,
19 to the typical charge to owner operator of \$19,500, and
20 typical reimbursement of about \$18,432, and you can see
21 similar numbers there for site investigation,
22 investigation and corrective action.

23 If you then look at page 404, and you
24 compare the estimated reimbursement to an owner operator

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1 for early action professional service activities, you'll
2 see that the estimated reimbursement is about \$9,500.
3 That tracks pretty closely with the 50 percent
4 reduction, that Joe Truesdale testified to this morning.
5 If you follow through each of those phases, you'll see
6 similar reductions. If you look at page 407, you'll see
7 a summery. A typical project might move from early
8 action, all the way through corrective action. You'll
9 see a reduction applying to subpart H numbers from 69
10 percent that we sampled, from a reduction of
11 reimbursement of about \$63,000 on a typical project that
12 might fall within that range.

13 To the right then, the far most right column
14 on page 407, is the percent reduction LUST fund benefits
15 that are represented by sub part H, and that is applied
16 only to professional consulting services.

17 What does this mean to the industry? Well,

18 that question was asked earlier, and the agency also
19 testified last year that there was around 375
20 consultants in Illinois that do this type of work. Go
21 back to page 401 of that same attachment, you'll see
22 2004 environmental and financial consulting group survey
23 from environmental CEOs. Each year in October, the
24 environmental financial consulting group, which is

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1 widely recognized analysts, financial analysts that
2 evaluates the cost trends, profitability, market
3 analysis for environmental engineering and consulting
4 firms. They are based in New York City. They hold a
5 conference each year. These are the results of their
6 2004 survey. 2004 they had 178 CEOs, CFOs, or other
7 senior executives from these environmental consulting
8 and engineering firms that participate in their
9 conference and their survey. Those firms represented in
10 2003, they represented about 36 billion dollars a year
11 in annual revenue.

12 If you go to the next page, page 402 you'll
13 see that when EFCG surveyed the profitability of those
14 firms from year 1999 to year 2003, that the average
15 profitability from that range of years was 9.4 percent
16 net income, figured on IEPA. That's earnings before
17 interest, bonuses, and taxes. That means that at the
18 bottom of page 402, that if for every dollar worth of
19 revenue that each one of these firms generate, they

20 generate 9.4 cents in profit. Applying those numbers on
21 page 403, to the historical level of claims against the
22 less LUST fund for professional consulting services,
23 you'll see that if you take early action, and you have
24 total charge from the consultant to owner operator of

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1 \$19,569.66, and you apply a cost, a total cost of \$90 --
2 or 90.6 percent to that. That going to yield a total
3 cost of \$17,730.11, comparing that to the reimbursements
4 proposed under subpart H, you'll see that a cost to the
5 consultant will be far greater than the reimbursement to
6 the owner operator. So, what this means to the owner
7 operator, in particular is, they're going to be faced
8 with a decision. And that is how do they deal with
9 compliance issues.

10 The consulting industry is not going to
11 absorb those costs, can't observe those costs to carry
12 on it's mission. So those costs will need to be passed
13 on to the owner operator. Additionally, I'd like to
14 submit I don't believe this is in the filing, but I
15 would like to submit some additional information from
16 environmental consulting groups 2004 survey, and in this
17 survey, it did two analysis. One is, I'll bring these
18 copies up to the board, I just got one copy, but what
19 they do is they analyze, they ask these CEOs of those
20 environmental companies to analyze the sector analysis
21 and project market growth for a particular market
22 sector. What you'll see is, since 2000 these CEOs did

23 not see the UST market segment as a growth segment. In
24 fact, it's the only segment there that shows no market

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1 growth.

2 Additionally, what pocket fold analysis the
3 UST market segment ranging as the worst market segment
4 in the country, that was for the second year running.
5 The reason I make this point is that there seems to be
6 an implication if there are 375 consultants in this
7 business in Illinois, that there's going to be a rush to
8 do this work if subpart H is proposed, that there's
9 plenty of people to do the work. I think this
10 information clearly demonstrates that one, the
11 department will be forced to lose money, two, this is
12 already not an attractive segment.

13 So, I completely disagree with the agency
14 that there will be firms that will be interested in
15 doing work in Illinois if subpart H is passed. In fact,
16 I think Joe Truesdale's testimony this morning speaks
17 volumes, they're already looking in other areas.

18 HEARING OFFICER TIPSORD: If there's no
19 objection, we'll enter the hot and cold analysis as
20 Exhibit 110, and sector analysis and growth rate as
21 Exhibit 111. Seeing no objection, they are so admitted.

22 BOARD MEMBER JOHNSON: Joe, did you say that
23 cost will have to be passed on to the owner operator,
24 when you contract with them now, and do you contract

1 with them where they're going to have to come up with
2 whatever your costs are that are not reimbursed by the
3 fund?

4 MR. COOK: To answer that, there's actually
5 two categories of costs that are not reimbursed.
6 There's costs that are outside the scope of corrective
7 action, and that we know are outside the scope of
8 corrective action. As example, the costs that are
9 listed in section, I believe subpart F, section 630, it
10 calls out ineligible costs. There are those costs, and
11 if those costs, we know that those costs are going to be
12 incurred.

13 BOARD MEMBER JOHNSON: You know them up
14 front.

15 MR. COOK: We know those up front. That's a
16 separate contract, we contract those separately. It's a
17 separate scope of work, it's not LUST related. Those
18 costs would never even show up in our project files for
19 LUST projects, so that's one category of cost.

20 The second category of cost is costs
21 associated then with the corrective action. A LUST
22 site, and our contract document states that will be
23 guaranteed, that the work that we perform will be
24 reimbursable. Our contract documents also go on to

1 state that if we believe funds are not available on a

2 sufficient basis, from the LUST program, or are not
3 available on a timely basis, we are able to suspend
4 performance of work, renegotiate contract, so we have
5 been able over the years to provide services to these
6 small owners and operators at a very high level of
7 reimbursement. The agency might like to suggest that
8 there's something wrong with that, the fact of the is
9 matter we comply with the budget requirements, obtain
10 pre approvals, and perform only the work they require.
11 And if we make a mistake, and once that budget work plan
12 is approved, and let's say, for example, we make a
13 mistake, we take too many samples. But other than that,
14 the costs are covered by the client.

15 BOARD MEMBER JOHNSON: Is that common, I
16 mean, that's industry standard, most of you all do that?

17 MR. COOK: I will say that in the valuations
18 that we've done, most of the work that you see, most of
19 the submissions I can come up with the statistics if
20 you'd like to see it, most of the submissions to the
21 agency work plan budgets since 2003 have been from
22 consulting firms that offer that service. The majority
23 of the submissions are that way. To answer the
24 question, most of the firms that are performing work are

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1 able to do so. And the other thing I want to point out
2 as well, is that the owners and operators are always
3 required to pay the applicable deductible.

4 In response, Member Girard, to other
5 consultants, CSD has historically offered similar term
6 contracts to some clients or customers. It varies. As
7 of the beginning of this year, we no longer offer that
8 type of contract to any client. We still honor existing
9 contracts that are under that format, but we eliminated
10 that because of perspective shortcoming in the
11 reimbursement process, outlined in subpart H.

12 MS. DAVIS: I'm going to add, some of our
13 clients are pay as we go, pay in 60 days or 90 days or
14 so. Even though it's not in their contract, they're
15 supposed to pay our invoice, and if the agency cuts it,
16 they're knocking on our door. They want the money back.
17 So I mean, they basically say it's our responsibility to
18 deal with what the LUST fund pays.

19 BOARD MEMBER JOHNSON: Thank you.

20 MR. COOK: I'd like to add one other thing
21 is that these owners and operators are not what I call
22 bankable. Many of these are unable to get a loan
23 because of their financial situation. So, what
24 we've done in response to the -- some of the conceptual

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1 flaws in light of the statistics that we have, is to
2 develop a proposed solution to this that covers those
3 five flaws. And I think that Marie asked the question
4 earlier, what points did the consultants agree on, what
5 portions of the proposals are similar. I think that
6 most of us agree on almost all of those five flaws that

7 we outlined. The use of ACECI numbers, one step
8 conversion to time and materials basis, and the absence
9 of any statistically valid information, lack of a scope
10 of work, all of those five flaws in section five we
11 agree on those. What we have not done is gone to the
12 point where we have a consolidated proposal that, for
13 modifications, to subpart H. We have some proposed
14 solutions to that and the sub part H proposal that would
15 be submitted today.

16 MR. DOTY: In section five, this section will
17 provide an overview of regulations United Science
18 Industries has designed to address the flaws the agency
19 proposed previously discussed in five, section five, the
20 draft regulations that we've talked about in attachment
21 twenty that you've asked me to red line for, I realize
22 that. These regulations have been created with the
23 stated goals of the rule making in mind, which are
24 streamlining preparation, review of budgets and payment

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1 application, approving consistency in review action and
2 creation of cost containment program based on real
3 market statistics in Illinois. We understand and are
4 trying to accomplish the same goal as the agency is
5 concerned with as we perceived them.

6 We'll also discuss in this section how
7 technology came to be applied to the administration of
8 the program to administer all parties concerned.

9 Response to the flaw number one, lack of
10 standards, shown in section five of regulations as
11 proposed by IEPA are confusing, contradictory, and in
12 some cases, don't provide adequate definition to
13 frequently used but potentially ambiguous words and
14 phrases.

15 Our solution would be to offer the
16 definition of standardization that we proposed in his
17 draft regulations to solve this first by clearly
18 defining all the key terms that must be used to regulate
19 and clean up and financial assurance program. Secondly,
20 the ambiguous nature of the field work descriptions
21 provided in the proposed rules is solved by the
22 provision of detailed descriptions in our draft
23 regulations. So it's just a matter of consistency in
24 offering some definition. I think we discussed earlier

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1 that I forget what section it was where all costs were
2 included, but it's on an all inclusive list, go to
3 subpart F, kind of trying to get rid of the vicious
4 circle there as far as tax verse cost verse whatever.

5 Flaw two, inappropriate use of ACECI
6 estimated personnel hours, and flaw three, failure to
7 define a scope of work. We feel we've shown the
8 adoption by IEPA of ACECI estimates of hours without
9 regard to the corresponding scope of work and or the
10 task is a flaw, and into coherent means of establishing
11 the appropriate level of effort required for

12 professional consulting services.

13 We further demonstrated that an indefinable
14 scope of work by definition cannot have a defined price.

15 Maximum payment amounts set at this time,
16 using the available historical data, or lack thereof,
17 can not be supported. And again, it's basically just
18 basics. If the level of effort is different, it's not a
19 one size fits all. And if you want to get some payment,
20 if you want to learn the averages, and you want to learn
21 what does cover 90 percent, the tank owners would have
22 to offer to perform their task or have a consultant
23 perform the task on their behalf, you need to grab the
24 statistical data, and learn exactly what that is, and

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1 you'll set an appropriate mark if you'll do that.
2 Implementation of a cost containment rule that governs
3 time and materials billings for professional consulting
4 services. This is our solution, our approach recognizes
5 that time and materials billing is the market standard
6 for such work, but establishes controls to regulate
7 costs. The issue of scopes of work is addressed by the
8 creation of a standardized task schedule which
9 explicitly references the regulations themselves to
10 define the appropriate scopes of work. As you go
11 through or when we provide red line version of our sub
12 part H, in an effort to try to come up with a scope of
13 work, because it has obviously been a struggle to do so

14 throughout the hearing process, we've used -- actually
15 used the regulations. And in our standardized task or
16 standardized task list, it will reference a regulation
17 and that regulations says this is required. And that's
18 734210 and 210 says -- has sub-paragraph A, B, and C.
19 See how that kind of flows from major task to this task,
20 to subtask, which I think some of the other consultants
21 had mentioned, and I think if you'll take time to gather
22 the costs relative to performing those tasks, that
23 you've already got structures to do it you can
24 appropriately set some benchmarks at the task level.

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1 MR. COOK: If I could comment to that.
2 Cindy, if you want to jump in, fee free, or Carol, when
3 pike meant one of the difficulties we talk about with
4 developing a standard task is that each of us approach
5 projects differently. The means and methods and the
6 approach that we take is different. The task list has to
7 deal with means and methods of accomplishment of the
8 work. That can be debatable. What's not debatable is
9 the standard that's already set in the regulations, so
10 that's why we adopted those regs. It an easily
11 adoptable already widely known standard concept is a
12 professional just charges their time, to the applicable
13 reg that they're working to comply with, so that
14 standard is already there, nothing more than is already
15 in existence has to be done here than the adoption of
16 those regulations as standard task structure.

17 MR. DOTY: Flaw number four, one step
18 conversion of professional services tasks to lump sum
19 pricing. USI has shown that the pricing of professional
20 service tasks on a lump sum basis, due to flaws two and
21 three above, is not practical. The fact is that the
22 agency never tracked the cost on any standardized basis
23 that could conceivably be used to set some maximum
24 payment amounts. Furthermore, competitive bidding, as

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1 contemplated in the new rules, will not serve as a
2 dependable or statistically defensible means of
3 establishing maximum payment amounts for professional
4 consulting services.

5 Offering a solution, the standardized list
6 of tasks, as described in the previous paragraph, allows
7 the collection of meaningful data that can be utilized
8 to support the conversion of professional consulting
9 services tasks from a time and materials basis, to a
10 lump sum billing method. This approach prevents the
11 financial catastrophe that the arbitrary and unstoppable
12 one-step conversion will cause.

13 Flaw five, use of average unit rates as
14 maximum payment amounts. Statistical data presented in
15 section three conclusively show that the IEPA's proposed
16 rates are set too low to be used as maximum payment
17 amounts.

18 Our draft regulations adopt the proposed

19 rate as the level of pricing at which proposed unit
20 pricing will be presumed acceptable, and will not be
21 subject to further review or reduction. However, the
22 agency may chose to set those rates at some level other
23 than the averages currently proposed, for cash flow,
24 work level, or other reasons. In any event, it is the

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1 expedited unit rates that will be published and known to
2 the general public. I think, and some of you can correct
3 me if I'm wrong, but that kind of goes hand in hand and
4 use expedited and threshold, using it the same way here.

5 This will encourage their use and
6 effectively drive down the costs of doing LUST work,
7 because consultants will desire the quick and painless
8 pricing approvals the use of such rates will provide.
9 However, USI recognizes that in many cases, the rates
10 are too low to allow the performance of the needed work.
11 Therefor, our draft regulations provide for a second
12 level of pricing which will be higher than the expedited
13 unit rates and will in fact be the maximum unit rates.
14 These rates still remain unpublished and known only to
15 the agency, and or the proposed advisory committee, and
16 I'm sure that we can work that out later, just not
17 published is the point.

18 Proposed unit pricing, which exceeds the
19 expedited unit prices, but falls below the maximum unit
20 rates, shall require justification for their use by the
21 consultant and their approval for use will be subject to

22 the discretion of the Agency reviewer, or the Agency
23 project manager.

24 The maximum unit rates will be set for each

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1 pay item by a statistically sound means, and finally we
2 recognize that in some cases, extraordinary condition
3 may cause unit pricing for needed work to exceed even
4 the maximum unit rates. In such cases, the extraordinary
5 nature of the situation must be documented to the
6 satisfaction of the reviewer in order for the use of
7 such rates to take place.

8 So it's almost a three tier approach, and
9 expedited is almost like a fast track budget approval.
10 We've been discussing averages, averages plus whatever
11 deviation. Not every site is going to be the same.
12 There are a lot of sites that are less than the average
13 site approved, where the expedited rate is a sufficient
14 rate. You're going to rush those through if you want an
15 expedited review. If it's an above average site, you've
16 got the room to play between expedited rate and a
17 maximum rate, and if you have extenuating circumstances,
18 you can still present that. So it's almost similar to a
19 three tiered approach.

20 HEARING OFFICER TIPSORD: I just have to ask
21 about maximum payment rate as you've talked about it.

22 MR. DOTY: Sure.

23 HEARING OFFICER TIPSORD: One of the things

24 we heard over and over and over again was railing

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1 against the agency having a rate sheet. I'm not sure I
2 see the difference between the agency developing a rate
3 sheet that they didn't tell anybody about, and
4 developing a maximum rate that they don't tell anybody
5 about.

6 MR. COOK: I'd like to speak to that. If
7 you turn to page 534, that's what, I can't recall which
8 attachment that was, I pulled it out of my book, but
9 it's 534. In this is a graph of the perceived expedited
10 unit price relationships, and if you see there the
11 center of that curve, you'll see the average which is a
12 nonpublished figure. That can be a calculated figure,
13 even though it's non published, it's still calculated.
14 On the far right then, you see if you look up at the top
15 maximum unit rate, it's non-published as well, and to
16 answer your question more directly, these figures can be
17 incorporated into a rule as part of the process and
18 ongoing process for long term and statistically
19 defensible cost containment. Those rates would change
20 over time and fluctuate the market conditions so that
21 there would really never really truly be a publication
22 of a list, per se, there could be, but that list could
23 change weekly. It could change monthly, it could change
24 quarterly and it's all purely based and driven on market

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1 conditions.

2 So the average and the maximum are both
3 going to shift up and down as the program experiences
4 market realities to take place in the market. The
5 expedited rate figure then, you see in the middle of
6 that, the expedited unit rate would be published, that
7 could be set, and here, we see it being published
8 somewhere between average and the maximum, but where
9 that rate is actually set can be adjusted by the agency
10 over time as specified by internal values such that it
11 created a competitive element in the market, because
12 firms are continually working to approve expedited
13 rates. It means the plans are approved more timely, it
14 means that their cash flow is presumedly better, so a
15 lot of incentives to achieve expedited rates, but the
16 standard of review is not extraordinary. You don't have
17 to be just extraordinary to speed the expedited, you
18 just have to justify that the time was necessary to
19 comply with the regulations, and to show that you don't
20 exceed the statically valid maximum. And we see that as
21 being a huge difference between published maximum,
22 having a published threshold, keep the average and keep
23 the maximum, keep that behind closed doors. Make it so
24 that it's auditable by some authority, but don't

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1 necessarily publish that.

2 MR. TRUESDALE: I think, if I understand what

3 Jay's saying, so not necessarily this is something that
4 would know not be able to be published because it would
5 change as submittals come into the agency and it's
6 submitted as a real cost. That would actually allow the
7 agency at the triennial review or something like that,
8 to evaluate those real market rates, relative to the
9 expedited amount. I hadn't really thought about it the
10 way Jake presented, but the question you raised before
11 about consultant billing at a maximum rate as the
12 minimum, or whatever, by establishing this expedited
13 unit rate as a particular portion on this normal
14 distribution, statistically you make that impossible to
15 occur basically. So at best, what would happen is you
16 would get all of your sites coming closer to that
17 average value and limit that outliers, and get
18 essentially limit closer to what that expedited review
19 cost is statistically.

20 So that would solve the agency's problem of
21 extraordinary billing, and get closer to a number that
22 is representative of a larger regulation site, in all
23 actuality.

24 MR. COOK: And if the rate, if the expedited

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1 rate happens to be too low, there's still the ability,
2 without having to go through the rigorous process and
3 confrontational process of establishing the
4 extraordinary to show that the costs were reasonable and
5 justified.

6 HEARING OFFICER TIPSORD: I guess I'm
7 confused because I'm not sure how this unpublished
8 maximum rate that you're suggesting really differs from
9 what actually happens today. The agency decides on a
10 case by case basis, based on the experience they have
11 seen all of these consultants across the state filing
12 things, determine something as reasonable. I guess I'm,
13 maybe it's just the post lunch coma sitting in, but I'm
14 not sure that I understand, particularly with the
15 unpublished rate, and let me just say, unpublished rates
16 of any kind are a real big massive red herring, not only
17 to me, and the board over all. I just don't see that's
18 any different than what the agency does currently when
19 it looks at every submission and says this is
20 reasonable, and I'm not understanding, I guess, exactly
21 what you're trying to achieve here.

22 MR. TRUESDALE: The reason this all became
23 clear to me just now is because I jumped ahead and read
24 through his next section. I think that might be a

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1 problem once he goes into this next section here, the
2 automated budgeting and reimbursement approach. That's
3 where the light bulb went off in my head.

4 MR. RAO: Is this whole thing on a
5 statistical data basis?

6 MR. TRUESDALE: No, it would be -- the way I
7 read it, something that would be adopted now, the

8 expedite unit rate is any value they select, it can be
9 published at any time, it can be published right now,
10 and the way that this is set up, it allows the agency to
11 have -- solve those problems that we've been talking
12 about, that we can't compare our cost to scopes of work
13 because we don't know what they are, because there are
14 required submission on standardized levels from all the
15 consulting community, and then you know whenever a
16 review was run of that data, it would calculate a
17 maximum average, and then that would allow the agency
18 the opportunity then at that point to review what was
19 run to compare those maximum and averages to what the
20 actual expedited published rate is, to determine if that
21 expedited rate needs to go up or down, relative to real
22 world market numbers that are being submitted by
23 consultants.

24 MS. DAVIS: I'm not a statistician here, but

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1 I'm kind of with, I'm trying to figure out the
2 difference. Am I correct in that the difference between
3 the maximum unit rate non-published and the rate sheet
4 that the agency used in the past, is that a procedure of
5 how you define the maximum unit rates are outlined in
6 this proposal, is that what you're saying?

7 MR. DOTY: Yeah, the methodology.

8 MS. DAVIS: Right.

9 MR. COOK: The methodology in this proposal
10 is not specifically stipulated in the concept of a

11 maximum unit rate, talked about it being a non-published
12 number, that doesn't necessarily mean that it has to be
13 a non-published letter. The key issue is that there are
14 a range of costs that are not categorically denied just
15 because they don't hit the number. If there's an hour
16 of service is what we pointed out is needed, because
17 that's what the site conditions warrant. That's what the
18 regulation requires, that hour of work worked is
19 something that the owner or operator will want to be
20 reimbursed for. They will want to be reimbursed for that
21 hours worth of service that's required, and the current
22 proposal, using just the maximums, would not allow that
23 in a number of instances because the standard that has
24 to be met is an extraordinary standard. So this

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1 provides a standard that doesn't require an
2 extraordinary circumstance to justify the cost, and that
3 is actually a question that I have for the agency, is
4 we -- I don't know that there is on the record anywhere,
5 but moving to the subpart H proposal, the \$5,120 is an
6 example for preparation of corrective action plan. Is
7 that a lump sum bill, or will the consultants continue
8 to be requested to bill on a time and materials basis if
9 the \$5,120 is not to exceed the price for reimbursement
10 purposes.

11 MR. CLAY: If it's anticipated to be a lump
12 sum bill, I mean, but if you showed an invoice from USI

13 for a corrective action plan for \$5,120, we would
14 anticipate paying that. Now, if you showed an invoice
15 for \$4,000, we're not going to pay \$5,120.

16 MR. COOK: Are we still required to bill,
17 Doug, on a time and materials basis?

18 MR. CLAY: No, we would expect to see -- I
19 would think we would see a one page invoice from you
20 that says preparation, corrective action plan for
21 \$5,120, we would review that, and I'm assuming that
22 corrective action plan had been submitted, and we would
23 pay it.

24 MR. COOK: And in this instance where

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1 averages are maximums, maximums become minimums too,
2 because if they're not, then how do you ever make up on
3 the site where the level of effort the five times what's
4 necessary, or what paid for, how do you ever make that
5 up? You have to charge that much to have any hope
6 whatsoever of coming close to breaking even, and that's
7 inherently problematic.

8 BOARD MEMBER JOHNSON: Contrary to statute,
9 too, I guess the agency would have to say that they are
10 going to consider any billing statements submitted for
11 \$5,120, that's the figure, as inherently reasonable,
12 because that's what the statute requires, only allows
13 you to pay reasonable cost.

14 MR. CLAY: Reasonable costs incurred.

15 BOARD MEMBER JOHNSON: That's a question from

16 the very first hearing. I asked how are you going
17 handle that if, in fact, that reasonable cost is less
18 than the maximum allowable, I'm not sure I understand
19 what you're saying.

20 MR. CLAY: If it's less than, then you know
21 we wouldn't anticipate that.

22 MR. COOK: Duane just brought up a excellent
23 point, that is that the tank owner's reimbursement, if
24 they own one site, which the vast majority of tank

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1 owners remain within the responsible party basically in
2 the state of Illinois, have one to two incidents, so if
3 there site, on the plot data points, their site happens
4 to fall out here, outside of the realm of the undefined
5 ordinary, they are in trouble.

6 MR. DOTY: To really look a little bit
7 further, you're only going to reimburse maximum costs
8 incurred. Putting yourself in the shoes of the tank
9 owner, you either got two or three sites, you either get
10 fully reimbursed or you don't. You can't get 80 percent
11 reimbursed on one job, and 20 percent reimbursed on
12 another. It won't come out in the wash for the tank
13 owner.

14 MR. G. KING: I do have sort of an
15 observation question. At times, it seems like what is
16 being proposed here is that much different than what the
17 agency is proposing, we're just using different terms

18 and setting different points on the normal distribution.
19 The agency's proposal is basically saying, you know,
20 we're going to take the average, which I think is sort
21 of taking as a median, we got 50 percent of cases
22 falling below that point of normal distribution, that
23 will be your expedited unit rate. They call it maximum,
24 but it's the expedited. If you come in with costs under

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1 that point, it's going to fly through the system. If
2 it's something above that, then we have to go to our
3 other sections on usual circumstances or, you know, come
4 in and justify. Some of the values that you are coming
5 in with, I mean, I understand all the problems with how
6 the numbers were arrived at and scope of work, but it
7 seems like a lot of consultant groups would like to move
8 that point beyond the median and put it out there
9 somewhere where it might cover at least 80 percent of
10 the situations. So it seems to me that if we could just
11 get beyond the semantics, that we're sort of getting to
12 the same point here, and that is where do you set that
13 point in which you get expedited review. And there are
14 problems if you set it too high, everything moves to
15 that high point, and you haven't saved any money. The
16 agency proposal set at a median, so that 50 percent of
17 them apply, and the other one, you know, obviously have
18 different circumstances, and are going to have to be
19 reviewed on a site by site basis. Now is that a fair
20 characterization of where we are at this point in time?

21 MR. COOK: I think generally, with a few
22 exceptions, and one is that seems that this definition
23 of extraordinary and the standard that has to be met for
24 additional costs above the maximum to be reimbursed to

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1 the owner operator, it seems that is a very stringent
2 standard, that concept is not one where if a
3 professional works a hour, works a legitimate service
4 that's justified, the agency would agree maybe that that
5 time was necessary, or would agree that the time was
6 necessary. That under the current subpart H proposal,
7 it wouldn't make any difference at the time if it was
8 necessary or not. If that exceeds the maximum, and the
9 circumstances are not an extraordinary one, and the
10 costs are denied. So, this concept of justification of
11 hours, I guess fundamentally that's the question I'll
12 really glad to see where we got this interaction taking
13 place today, because it's been hard to assess whether
14 the board's position that it's reasonable for an owner
15 operator to be reimbursed for an hour of work of
16 professional services that are warranted, justified,
17 required as necessary under the regulations, a non
18 eligible cost. And if that's the board position that
19 those are the costs that need to be reimbursed, then I
20 think subpart H has got some shortcomings that need to
21 be addressed, so that there needs to be a standard that
22 allows justification of cost above this expedited or

23 maximum amount, without having to meet the definition of
24 extraordinary, and extraordinary standards. I see that

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1 as a significant issue. But generally, the concepts
2 yes, I think we're very close conceptually with that
3 major exception.

4 HEARING OFFICER TIPSORD: With the exception
5 of professional services, there's also a issue of
6 bidding, and I understand that you have a problem with
7 professional services and bidding issue, but there's
8 also the concept of bidding that you just don't have to
9 show extraordinary circumstances to get outside of the
10 maximum, you can also bid the process.

11 MR. COOK: That's a very good point. We
12 haven't really testified a lot to the bidding aspect,
13 and I believe the bidding, particularly in the absence
14 of scope of work, particularly is workable, number one.
15 Number two, it adds a whole level of complexity and cost
16 to this program that I believe has been dramatically
17 underestimated to this point. We went through. I
18 believe it was just UST removal portion, Dan, where you
19 guys did that exercise, we went through a very small
20 portion of the regulations and looked at the different
21 maximum payment amounts that could be put out for
22 competitive bidding, if necessary, and that one portion
23 of the regs, was it early action, there were eleven
24 different potential sets of need bid specifications that

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1 may need to be prepared. Three bids, eleven different
2 cases, 33 sets of bid specifications. The cost of this
3 program will increase exponentially. You're hearing that
4 from someone who is in the consulting industry. We
5 would make a dollar worth of revenue for every hour we
6 spent putting those bid specifications together. I
7 could sit back and not say this, but I fundamentally do
8 not think that competitive bidding, if it can be
9 avoided, is a good approach for this industry, for a
10 variety of different reasons. There are a lot of
11 unknowns associated with subsurface contamination that
12 are going to drive costs up in the absence of scope of
13 work, companies are going to highball their prices,
14 because everything is unknown. So you have to cover all
15 the risks in your bid.

16 John will tell you he had real concerns from
17 the anti-trust standpoint, he's got concerns from the
18 number of other standpoints, I'll let him speak to you
19 later. I think the competitive bidding is not the best
20 solution, the best solution is for the rate to be set at
21 the right level, and for it to be set at the right
22 level, because if a rate is set at the right level, we
23 can forgo the competitive bidding process, saving the
24 fund, tank owners, everyone involved money. Will it run

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1 consulting firms revenues up? No, it won't. No it

2 won't because the consulting firms will make the revenue
3 presumably from the preparation of bid specs and all
4 that, but that's not a good solution for cost
5 containment, and it doesn't help this program.

6 MR. TRUESDALE: Actually I have a question
7 for Jay. I don't think that -- it wouldn't necessarily
8 be true in your presentation here that these maximums
9 average unit rates wouldn't be published information,
10 that just wouldn't be memorialized in a rule that
11 requires this level of effort that we've all been
12 exposed to in order to adjust, when certain
13 circumstances require that.

14 MR. COOK: What I envision the agency and
15 board to do is to set some rules that provides
16 parameters within the formulas that are used for these
17 calculations, and then over time, the averages change,
18 the maximums change, but it's those formulas that are
19 memorialized so that we don't have to go through this
20 rate adjustment confrontation process. Again, it's all
21 there. Some things that people are agreeable to from
22 the onset. In terms of whether it's published or
23 nonpublished, there's probably a whole variety of legal
24 issues and other things that would dictate whether it's

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1 published or non-published, but from my perspective,
2 it's not as important whether it's been published or
3 non-published, as it is to put the process in place that
4 will allow a long term cost containment system to be

5 established.

6 MR. TRUESDALE: In follow up to that
7 question, would, I mean when I look at this normal
8 distribution, the maximum unit rate, I'm looking at how
9 you got it defined here as extraordinary unit rate,
10 justified unit rate, would there be anything wrong with
11 establishing an extraordinary unit rate, between that
12 threshold value and maximum unit rate, and anything
13 above that maximum unit rate is an unusual cost, based
14 on statistically available information you would be
15 collecting?

16 MR. COOK: I don't think it's, just going
17 back to Board Member Girard's comments. I think it's
18 just a matter of semantics, what we want to call the
19 concepts are there.

20 MR. TRUESDALE: This provides a mechanism
21 that allows collection implementation of the rules now,
22 and then provides a framework for and evaluates those
23 rates, and not giving us one cut and dry, but actually
24 give us this gray area, what would be considered

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1 extraordinary and unreasonable.

2 MS. HESSE: I just wanted to make a comment
3 in response to Member Girard's comment, where he was
4 saying, if we would approve as the maximum rate, what is
5 the mean. What happens then above that, and that goes
6 to the answer that Mr. Clay gave earlier that unless

7 it's an extraordinary circumstance where you list a
8 number of situations, unusual tanks numbers, I'm not
9 sure why they keep referencing excavation in downtown
10 Chicago, but they do, that the agency would deny those
11 costs, I think that the costs above the average cost,
12 and I think the information that USI has presented, has
13 shown that there is a lot of variability, when people
14 submit costs on a time and material basis. Just look at
15 the standard deviation of the averages. Some of those
16 numbers are pretty big, to that setting a median and a
17 maximum cost after that extraordinary circumstances, is
18 really was he was saying.

19 MR. G. KING: Of course we're had not very
20 much time to look at this at all, but if I'm
21 understanding this as I was looking at page 407, and is
22 that's I'm looking at the column that says historical
23 professional consulting services payment based on 80
24 percent coverage. As I understand it, you've totaled

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1 that up, means for a typical LUST site, you now are
2 being paid \$104,000 in professional services. When an
3 average LUST site now, total cost is around that much.

4 MR. COOK: I want to clarify that, because
5 that's not the way those numbers are used in the context
6 of the proposed rule. Context of the proposed rule got
7 scope of work defined for all of the activities that
8 consultants perform pursuant to 734835, and subpart H,
9 and what's said in that section is the agency can use

10 statistical information as guidance to help guide them
11 as to what's reasonable for a particular phase of work.
12 As a practical matter, every hour has to be justified
13 and necessary in order comply. So every hour, still
14 immediate to be justified and necessary, and so many
15 things that in life, that's how I deal with them. The
16 gentleman sitting on either side of me here are being
17 paid by the hour. They will send me a bill for all of
18 their hours worked, probably get it some time next week.
19 And I will sit and review the bill, and were they here,
20 and what services were they providing, and was that
21 reasonable. And the answer will be, if they provide me
22 the right number of hours will be yes, it was necessary.
23 I asked them be there. So they were there, that's all
24 we're asking, that's really all we're asking, these

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1 rules if it's necessary for a professional to work an
2 hour, pay that professional for an hour, and have the
3 owner operator reimbursed for that hour, so that this
4 owner operator consultant relationship can be a
5 relationship of trust, like the gentlemen in the video
6 said earlier, it's important that it is, because we're
7 working for them to help them to comply. That's all
8 we're really asking for, is to make sure this is done
9 appropriately so that those sites can be cleaned up.

10 HEARING OFFICER TIPSORD: Before we go on, I
11 think we're going to take a break.

12 (Whereupon, a break was taken.)

13 HEARING OFFICER TIPSORD: Let's go back on
14 the record then.

15 MR. WEINHOFF: Jeff Weinhoff, CW3M. I just
16 want to go back to the point on page 407, I think that
17 the main thing that we've been saying all along. I
18 think that's what we're getting at is, you know, all
19 along they allow these things to be calculated on means
20 or median or whatever, that's according to 407, \$40,000
21 and what the agency says I guess we've been covering 90
22 percent of the cost. Well, what Jay's numbers did, he
23 evaluated calculated what dollar figure would cover 90
24 percent of the costs, that's what the 80 percent

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1 coverage is, the bottom ten and the top ten. If you're
2 paying everything below -- or below that number, that's
3 paying 90 percent of costs, that's \$104,000 for
4 professional services. So that shows how much of a
5 difference there is between the average, which was
6 \$40,000 and the 90 percent coverage, which is the
7 \$104,000 and it shows how the average cost they have are
8 not going to be 90 percent of what has been previously
9 been paid.

10 MR. COOK: Dr. Rigdon has got some comments.

11 MR. RIGDON: Could I clarify that a little
12 bit? I think you're pretty much correct here in looking
13 at that. These are 80 percent tolerance levels, which
14 means they cover the middle, 80 percent of all the

15 costs, ten percent are below the lower, and ten percent
16 are above the upper. So this upper number that is there,
17 that's sort of the upper 90 percentile, which is on the
18 high end, but that's not that atypical, I think there
19 were about 30 people in the room before we took the
20 break, and if you think we're all owners of one of those
21 things, and three of us would be above that, and it's in
22 the high end for sure, but it's not that unusual.

23 MS. ROWE: I just have a follow up to Board
24 Member Girard's comments, I think it's kind of on target

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1 is where we set the bar is most critical, and I think
2 what Jay's trying to do is say between the bar and the
3 extraordinary area, there's a gray area of what could
4 normally been a reimbursable or eligible cost, so I
5 think what we need to do figure out how to set the bar
6 at the level that deals with all the reimbursable,
7 eligible costs. And I think fundamental to this whole
8 concept is we're yet to define what is reasonable. Is it
9 100 percent cost over deductible reasonable? If every
10 single little unit price was reasonable, is 100 percent
11 reasonable, is 50 percent reasonable, is 80 percent
12 reasonable. I think that question has to be answered to
13 figure out where we really need to set the bar.

14 HEARING OFFICER TIPSORD: You said you had a
15 couple of questions?

16 MS. ROWE: I think Jeff kind of hit on that.

17 We're going to excuse ourselves.

18 MR. RIGDON: Could I clarify that maybe? I
19 think the key here is that these costs are going to be
20 on like a continuum, so it's not -- could I actually go
21 to the chalk board?

22 HEARING OFFICER TIPSORD: The problem with
23 the chalk board is we can't put that in the record.

24 MR. RIGDON: I can copy it down and give it

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1 to you. The costs are going to be on a continuum, so
2 it's not like they're either all in the middle, or
3 they're really exceptional big ones. Maybe it's not a
4 normal distribution, maybe it's a little bit asymmetric,
5 but it may look like this, and so, if you is set the
6 threshold there, then anybody down here is in good
7 shape, and if you think of those guys in the far upper
8 tail, as being extraordinary, well then they're in good
9 shape too. But, what about somebody that's about right
10 there, is that extraordinary, or would this person sort
11 of lose a little bit. Or what about somebody that's out
12 there. Are they extraordinary? Of course, you could move
13 this arrow back and forth, what do you call
14 extraordinary, and so there you're getting the benefits
15 to the low end and the very high end of the expenses of
16 those guys in the middle.

17 HEARING OFFICER TIPSORD: Jeff, if you could
18 copy that down for us, and we'll put it in as an
19 exhibit. We'll put that in as Exhibit 112.

20 MR. RIGDON: Should I annotate at this time,
21 or would you like me to go up to the board and annotate
22 this with some words?

23 HEARING OFFICER TIPSORD: It's up to you.

24 MR. COOK: If I could elaborate just a little

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1 bit, I'd like to give just sort of visual aid as sort of
2 an example of this continuum that he's talking about,
3 and what that has implication as it relates to subpart
4 H. We brought with us two files that we pulled from our
5 records, corrective actions that were completed. We
6 called this appropriately, big file, little file. And
7 these are both just the documents that were necessary as
8 part of the corrective action process, the EPA required
9 documents, and I've got some statistics on those. This
10 is all documents necessary for corrective action, all
11 documents necessary for corrective action through
12 completion, and to illustrate the point, both of those
13 projects fall within the appropriate range in terms of
14 cost. The range in cost, if you take the 61 and a half
15 hours for corrective action as the lower limit, I'm on
16 page 328, times the \$89.40 average for professionals, at
17 the 80 percent upper confidence limit, you come up with
18 a lower dollar limit of 5473, and an upper dollar limit
19 of 4962.

20 Well, in the first of those project files,
21 some interesting statistics about that, is 1,350 pages

22 of information was needed to be submitted in order to
23 comply. 100 percent of the cost, professional service
24 cost, associated with that package were reimbursed, and

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1 that total reimbursement was \$36,960.75.

2 On the second site, this is the small file,
3 this totals 213 pages. That cost \$14,928.25 in terms of
4 professional consulting services, and it was also 100
5 percent reimbursed. If you look at, I believe it was
6 attachment twenty, I may not be correct in that, if you
7 look at the total cost for each of the phases, you'll
8 see those figures in terms of reimbursement, one of
9 these is obviously not going to fit. But it was deemed
10 reasonable and necessary and required, the big file, and
11 I think that the small file may fit within the total
12 estimated, you have the total estimated cost for
13 corrective action for subpart H. I don't have it handy.

14 BOARD MEMBER JOHNSON: What were the figures
15 again?

16 MR. COOK: The figures on the two, the small
17 file there, \$14,928.25 in professional services that
18 were reimbursed at 100 percent level, there is a total
19 of 213 pages in that stack for the small file. The
20 large pile there's 1,350 pages, and it's cost was
21 \$36,960.75. So this notion that corrective action plan
22 is a corrective action plan, is a corrective action
23 plan, as long as it's a conventional corrective action
24 plan, it's not reality and it's not consistent with

1 historical reimbursement practice. The estimated
2 reimbursement for an owner operator per sub part H with
3 corrective action phase for professional services, just
4 barely covers the \$14,928 for the small file.

5 HEARING OFFICER TIPSORD: You'll have to
6 speak up, I can't hear.

7 MR. COOK: We were trying to determine
8 exactly how many yards of soil were transported and
9 disposed. The discrepancy is the yardage on one side was
10 a lot larger than the yardage on the other side, but
11 they're both conventional technology. So our point is,
12 even though this larger project owner of this larger
13 project file site today deemed to be necessary and
14 reasonable to comply, if this rule passes that site
15 would receive reimbursement for less than half of it's
16 professional service costs. Which again, that tracts
17 back pretty closely to the statistics that Joe Truesdale
18 mentioned earlier, 50 percent reductions.

19 And it matches our data pretty closely.

20 HEARING OFFICER TIPSORD: I think you
21 sufficiently described those, I don't think I need to
22 enter them into exhibits for the visual aide.

23 MR. COOK: Correct.

24 MR. CLAY: Would you identify those by

1 incident number?

2 MR. COOK: Sure. Incident number 2000669, and
3 it's Jasper County, Willow Hill, Jasper County Community
4 School District Number 1.

5 MR. CLAY: Can you give me that number again,
6 that was only seven digits?

7 MR. COOK: I'm sorry, theres a lot of zeros.
8 2000669. The next project is incident number 20001077,
9 Jackson County, 315 North Illinois Avenue, Carbondale,
10 Illinois, just down the street here.

11 MR. CLAY: Were both of those done by the
12 same project manager on your end?

13 MR. COOK: I don't know, apparently not.

14 MR. DOTY: It may not be on the same project
15 manager on their end either, I don't know.

16 MR. CLAY: I'm looking at the level of work
17 your project manager put in, could be maybe different
18 project managers.

19 MR. COOK: I don't know how that's relevant,
20 they're both reimbursed, they're both approved, budgets
21 have been approved, work plans have been approved.

22 MS. JOHNSON: Jay, you said under as
23 proposed subpart H, that the large pile or file, would
24 have been reimbursed, you calculated, at \$14,000 or

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1 there abouts?

2 MR. COOK: The estimate was, I believe it's
3 15 -- the estimate for corrective action, this is from

4 page 406, would be \$15,350. That's just an average
5 estimate for a typical phase of work. That does not
6 necessarily tract specifically back to that file, but
7 that's our ballpark estimation of what a typical
8 corrective action reimbursement will look like under sub
9 part H.

10 BOARD MEMBER JOHNSON: Presumably you would
11 contend, any way, the fact that there were elements of
12 that job that were unusual or extraordinary, or do you
13 think you have no grounds to do that?

14 MR. COOK: Guys, are we aware of any
15 situations that would be atypical in those projects?
16 We're not aware of anything that would qualify as either
17 of those, as atypically or extraordinary type projects,
18 at least pursuant to what we know the extraordinary
19 standard to be.

20 BOARD MEMBER GIRARD: Now, you did say that
21 there was more materials hauled off site, so if there's
22 more material, that makes up more of the additional
23 cost, wouldn't that qualify as an unusual or
24 extraordinary circumstance, based on that.

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1 MR. COOK: My understanding is no, that it's
2 a conventional technology corrective action plan, and
3 conventional technology corrective action completion
4 report, irrespective of the number of yards hauled off,
5 under this current proposal, those are treated

6 financially exactly the same. So that stack on the
7 right is the small file, the cost for reimbursement
8 relative to the site, for the preparation of corrective
9 action plan would be, I believe it's \$5,120 to prepare
10 that corrective action plan.

11 Similarly, the stack on the left under sub
12 part H, there would be \$5,120 in reimbursement to
13 develop the corrective action plan, because they're both
14 conventional technology.

15 HEARING OFFICER TIPSORD: For the record,
16 when you're speaking about the one on the right, you're
17 speaking about your right?

18 MR. COOK: That's correct.

19 HEARING OFFICER TIPSORD: Which is the small
20 pile, and the left is the large pile.

21 MR. COOK: That's correct.

22 BOARD MEMBER JOHNSON: Well, look at the
23 paperwork you're going to save.

24 HEARING OFFICER TIPSORD: Just to be clear,

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1 you're talking about billing for professional services,
2 you're not talking about the cost of removal of the
3 extra soil, it's just the professional service for doing
4 the paperwork?

5 MR. COOK: That's professional services only,
6 and let me clarify one other thing. There was
7 additional -- those two examples only provide the cost
8 of labor only. So that as an example, does not include

9 instrumentation such the vehicle used that might be
10 necessary to take technician from our office to the job
11 sit, and to back.

12 BOARD MEMBER GIRARD: Well, since I'm not
13 going to sit here and go through the documents right
14 now, tell us why one site requires 1300 pages of the
15 plan, and the other site requires 213.

16 MR. COOK: That question would better be
17 asked of the agency, because they dictate the level of
18 reporting that's required. And their project manager can
19 dictate that level of reporting, that varies
20 significantly.

21 I'd like to also add into the record our
22 chart that shows the variability and review amongst
23 units, I'll ask those gentlemen for that. The answer is
24 it varies widely.

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1 BOARD MEMBER JOHNSON: So I can get an idea
2 as to what professional services are, as a percentage of
3 the total job, you have to figure what each of those two
4 incidents, what the total reimbursement requests for
5 those two jobs.

6 MR. COOK: For those particular projects, I
7 don't have that figure, these guys might have that
8 figure. No, we don't.

9 BOARD MEMBER GIRARD: I'd like to submit this
10 to the board, this shows we do have the tables in the

11 record of the studies you've done, I don't recall which
12 exhibits or appendices they were, does anybody remember
13 that number? No? I mean, we have tables in here.

14 MR. TIPSORD: This is by reviewer that
15 you're talking about.

16 MR. COOK: Yeah, this shows percentage
17 modified, this is just a denial only, you can see it
18 ranges from less than ten percent denial, to more than
19 50 percent denial rates, and if rates run all across the
20 board, it appears to be a trend that some consistency
21 per unit, and you can see, as an example, the unit E,
22 which is shown here in red, typically those reviewers
23 tend to deny a lot more than the other units. I believe
24 this gentleman --

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1 HEARING OFFICER TIPSORD: You did have some
2 of this in your original prefiled testimony?

3 MR. COOK: Yes, I think it was present in a
4 little different format.

5 HEARING OFFICER TIPSORD: Did you want to
6 submit both of them today? If there's no objections, we
7 will admit this as Exhibit 113. And we'll do a whole
8 series of charts as 113.

9 MR. G. KING: Mr. Cook, how much of this big
10 file is manifest?

11 MR. COOK: How much of the big file?

12 MR. G. KING: Yeah, how much is manifest.

13 MR. COOK: On a percentage basis, the same

14 percentage, relatively speaking, as in the little file,
15 I can't tell you a number.

16 MR. CLAY: I think it's the lower band, more
17 than half.

18 MR. COOK: So these costs were approved in
19 the plan.

20 MR. G. KING: You're showing us professional
21 services.

22 MR. COOK: We're talking about cost, Gary,
23 not manifest. We're talking about cost, this is not
24 about manifest. There is a cost containment ruling.

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1 MR. G. KING: You're showing us a big stack
2 of manifest.

3 MR. COOK: I can show a big stack of money, I
4 can show a big stack of dirt, I can show a big stack of
5 a lot of things, but the point is that the dollars are
6 not the same, that's my point. This is simply to
7 illustrate that, that the dollars are different,
8 dramatically different.

9 Now, relatively speaking, the cost for the
10 pile on the larger pile are not twice the cost for the
11 smaller pile, but they are higher. Because of the level
12 of effort required was higher.

13 MR. D. KING: Dan King, with United Science
14 Industries. If I might add also, even the larger number
15 of manifest in the larger file still required somebody

16 to go through each and every one, check weight, check
17 manifest numbers, to make sure the proper amount was
18 billed. So there's still an extra amount of work
19 associated to manifest, as compared to the smaller one.

20 MR. COOK: This is not an isolated incident,
21 this is not isolated, this is across the board.

22 MR. DOTY: More manifest just better
23 describes it as the difference between the two. Took
24 more to manage, takes more to manage a bigger job, more

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1 level of effort, level of effort.

2 MR. D. KING: You demand that be submitted,
3 do you review each and every manifest?

4 MR. CLAY: We don't necessarily go through
5 and add up everything think.

6 MR. D. KING: Well if you did, it would take
7 you very, very long time to add up that stack, compared
8 to that stack, which is what we have to do.

9 HEARING OFFICER TIPSORD: Since there's some
10 question about what's actually in these, would you be
11 more comfortable if we entered them in as an exhibit so
12 we could look at them more closely. Is there any
13 objection to entering this as an exhibit?

14 MR. COOK: No objection at all.

15 HEARING OFFICER TIPSORD: We'll admit those
16 as Exhibit 114, the small stack, and Exhibit 115 the
17 large stack.

18 MR. COOK: I don't believe we brought an

19 extra copy of those. The only point we're trying to
20 illustrate is that the number of hours is substantially
21 greater, that's all. The unit rates there are published,
22 and I think it's Appendix B, personal rates, those are
23 not, you can see from the statistics, those are not way
24 off, it's the number of hours where those sub part H

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1 proposal is way off base.

2 MR. ROMINGER: I just want to make sure that
3 we got copies of exactly what will be in the exhibit?

4 HEARING OFFICER TIPSORD: Yes.

5 MR. COOK: Before I say that we don't object.
6 Do we have a separate copy of that at our office?
7 Exactly that? Exactly that. We have an exact copy of
8 that.

9 HEARING OFFICER TIPSORD: Exhibit 114 is the
10 big file, the one I just put on there. I'll leave them
11 there for now to continue the illustration. Any
12 questions on the file at this time? Let's go ahead.

13 MR. COOK: Going back to the expedited unit
14 pricing relationships. The key is that we'd like to make
15 sure that as many sites as possible are covered by, one,
16 the continuum or covered by a rate, but the cost should
17 also be justified, needs to be necessary, and so the
18 question about how is this different than what the
19 agency does today, it's different in a respect that it
20 would set a figure that much like the rate sheet is a

21 figure that they could use for reasonable reviews. It's
22 been my understanding that one of the things they desire
23 throughout this process is some internal guidance for
24 that purpose.

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1 HEARING OFFICER TIPSORD: Just to clarify,
2 we're looking at Attachment 21.

3 MR. COOK: Yes, page 534. There was also a
4 question earlier about whether this required a data
5 base, it would be ideal if a data base was available for
6 this purpose, and if the data base was available, much
7 of this whole process could be automated, but I think as
8 we've demonstrated with our statistical analysis, the
9 project file it not an absolute requirement that a data
10 base be available. One of the key provisions here is
11 can scope of work be defined still, and then some level
12 of definition be given to what's considered to be
13 ordinary. Those are two still very critical concepts,
14 and that the task be well defined. If the cost model or
15 billing method that needs to be moved over the unit
16 price or lump sum billing method then, in order for
17 those billing methods and those tasks, costs per tasks,
18 be meaningful tasks that need to be standardized, and
19 that's why it's part of our proposal. We propose
20 standardized task list. I think with that I'd like
21 share with you some of the more detailed aspects of what
22 we included in that proposed rule that we developed,
23 some of key concepts.

1 417, as one reference point, and page 495 as the start
2 of the other reference point. Page 417 provides some of
3 the definitions that we perceived could be included in
4 the proposed rule of this nature. I'd like to walk
5 through each of those, and I think by the time I walk
6 through those definitions, and discuss them a little
7 bit, it will provide a fairly accurate representation of
8 the concepts behind this proposed rule. It's much less
9 important to us that the actual form of what
10 we've presented here be adopted, then it is the concept,
11 we're most interested in the concept.

12 First, I'm going to go down to the bottom of
13 page 417, last definition provided on that page, is
14 standard products and services, and so rather than using
15 all cost language, the environmental compliance is
16 achieved by environmental professionals providing
17 services and products. So we felt it was appropriate to
18 call those products and services, standardized
19 environmental services and products may be necessary on
20 a task by task basis, in order to comply with the
21 planned provisions of this part. The standard products
22 and services are listed in Appendix E of the
23 regulations, products or services not listed in Appendix
24 E may be approved on a site specific basis per unit.

1 The provision 734800, so it recognizes that can not be
2 an all inclusive list, in Appendix E, and this provides
3 a method to provide services when required and
4 necessary, and when approved by the agency.

5 The objective method outlines the basis for
6 price products or service. I'm sorry, the definitions
7 run together. There is a unit of measure for each
8 provided service, and that unit of measure is the matter
9 that is utilized to establish the basis for pricing. In
10 other words, gallon, hours, cubic yard. That way
11 statistically speaking we're sure that all the costs are
12 reported using the same unit of measure.

13 And the standardized task then, if you move
14 over to the next page, on page 418, our proposal
15 includes a standardized task list. The task and
16 individual work activity may require to be complete in
17 order to comply with the provisions of this part. I
18 think I mentioned earlier all we did was adopt the
19 various provisions of part 734, to serve as a
20 standardized task list, and the concept would be that
21 the consultants would charge their time to accomplish
22 these tasks. So if they were working on a task under 210
23 A or B, if they were working on a task that needed work
24 activity were needed to comply with 734 part 210 A, they

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1 would code their time to the task 734210 A, and that
2 would allow the agency or the board to determine what

3 the cost, statewide cost, to comply with that activity
4 were, relative to professional services.

5 Then, we have the next concept which is
6 expedited unit rate, so if you move, I'm on page 417
7 again, and expedited unit rate is the rate per price per
8 unit of measure of a product or service published in
9 Appendix B of this part. For purposes of administering
10 the maximum payments from the fund, the agency shall
11 present a unit price for product or service less than or
12 equal to the price that's reasonable. So as an example,
13 the rates for professional services that were listed in
14 the appendix, in subpart H, those were the rates that
15 could be used as expedited unit rates by the hour.

16 Then the next concept toward the bottom of
17 the page, page 417, reasonable quantity, this is really
18 where the big discrepancy is between the consultants and
19 the agency, with regard to the maximum payment amount
20 for professional services. Is the quantity of hours
21 that are needed to complete certain tasks. The
22 reasonable quantity would be the number of units of
23 measure for a standard product or service that are
24 considered to be reasonable in relation to performance

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1 of a particular task, further provisions of 734805B. So
2 all we're doing is suggesting that if you work an hour,
3 that the hourly rate to be charged, is equal to or less
4 than the unit rate, expedited unit rate for that

5 particular labor classification as an example. That
6 hourly rate would not be challenged necessarily. Then
7 as long as the quantity of hours were justifiable, the
8 expedited unit rate times the reasonable quantity, would
9 deal with extended cost. That extended cost would be
10 presumed reasonable for payment, purposes of payment for
11 the fund.

12 If a situation arose where, like these
13 files, where the cost in one instance may be higher than
14 some threshold value, yet, the cost per unit rate was
15 higher than the threshold value, we have a justified
16 unit rate, and that's on page 417 as well. And it's a
17 price per unit of measure for product or services that's
18 greater than the expedited unit rate, but less than the
19 maximum. So these are situations where the time was
20 warranted, the regulations required it, required the
21 work, but the price and the costs were able to be
22 justified, and therefore they were acceptable, as opposed
23 to an absolute maximum, which would just shut the door
24 unless it was an extraordinary procedure to be met.

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1 Then, the maximum unit rate in this
2 instance, and only for conceptual purposes, we said that
3 the maximum could be the average, plus two standard
4 deviations, but how the maximums are actually set is
5 just a mathematical figure, whether it's two standard
6 deviations, or some other scientific or mathematical
7 method, is the main thing that's defensible method.

8 So, in applying those concepts then, in the
9 event that a rate, expedited unit rate is inappropriate,
10 this proposal, similarly to sub part H provides for
11 several different methods of establishing alternatives
12 to the expedited amounts, and if you look on page 501,
13 at the bottom of that page, section 734855, section
14 entitled competitive bidding, this is very similar to
15 competitive bidding provision provided in the current
16 proposal. This competitive bidding method could be
17 utilized in situations where there is already a well
18 defined scope of work. As an example, I think you saw
19 probably from our prefiled testimony, we really don't
20 have any objections to most of the maximum unit prices
21 that are provided in section 734810, through 734840. The
22 reason for that is most of the units of measure there
23 were used to measure that unit pricing, and the scopes
24 of work are fairly well defined such that they would

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1 facilitate the competitive bidding process. That's not
2 the case for professional services, so for professional
3 services primarily, we added on the very next page, page
4 502, section 734860, which we refer to as cost
5 justification, and try to state this simply, and not
6 read through the entire passage. Essentially, what this
7 paragraph provides is owners operators can demonstrate
8 that the costs were necessary and justified to comply
9 with the rule, they would be eligible for that level of

10 cost reimbursement as long as it's justified. We had
11 envisioned that this cost justification would work
12 primarily in relation to those professional services,
13 and the reason for this proposal, is so a defined scope
14 of work does not have to be developed for every single
15 professional consulting service. We tend to agree with
16 the board, to do so is almost an impossibility, because
17 the variability and scope of work is huge. So we
18 provide this as a means of saying that if the
19 professional works an hour, here's a method for
20 determining whether that level of time they spent, and
21 the level of cost that was incurred, is reasonable.

22 And then the next section was on the
23 following page, section 503. Section 734862 unusual or
24 extraordinary circumstance, and in this instance, we

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1 believe it would be appropriate by virtue of insertion
2 of the cost justification provision, it would be
3 appropriate to essentially maintain a similar standard
4 of extraordinary that's published in the current
5 proposal, because this could truly be then only those
6 extraordinary situations. That were allowed to be
7 adjusted pursuant to that.

8 Then another significant provision which
9 could be easily expanded upon, is on page 521, for
10 purposes of illustration, we have attempted to define
11 with more specificity the scope of services that are
12 necessarily relative to each of those products and

13 services that are listed in the fee schedule found in, I
14 believe it's Appendix E, and the reason for this is to
15 help assure the competitive bidding process, when
16 utilized, is providing an apples to apples comparison to
17 expedited amounts published in the regulations. That
18 way there's a standard that's established so that the
19 competitive bidding really means something. I said that
20 we'd provide these for purposes of illustration, these
21 are not all inclusive, I think that there's probably
22 some more work that needs to be done. We provided them
23 as providing a conceptual basis for more than a
24 substance.

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1 Additionally, I'd like to call out on page
2 532, that working right in tandem with the concept of
3 expedited unit rate and maximum unit rate, is the
4 concept of what quantity of hours is a reasonable number
5 of hours for a professional to spend on the per task or
6 per phase basis. We've broken this out on page 532,
7 we've shown the number of hours, I believe rounded to
8 the nearest ten, per the statistical analysis that we
9 did. So this would help guide the agency in what number
10 of hours is reasonable. Each hour would still have to be
11 justified and shown to be necessary, and required to
12 comply with the rules, but this helps guide
13 reasonableness.

14 Variations of this would work as well. As

15 data is built over time, I say variations, variables of
16 this using some other reasonable figure to provide
17 guidance would be appropriate to have at the phase level
18 at this junction of the LUST program. Later cost data,
19 accurate cost data are accumulated on a task by task
20 basis. This list could be expanded to include those
21 specific tasks, and you could set reasonable hour of
22 thresholds on a task by task basis.

23 So, again, we mostly provided this for
24 conceptual purposes, with that notion of eventually

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1 converting this cost containment model to one that can
2 provide greater levels of specificity of the appropriate
3 level of cost on a task by task basis. It could be
4 appropriate to implement data base system. And all
5 though the agency has testified that they don't believe
6 that that's necessary or would be too time consuming, we
7 want to be able to provide the board with, at least
8 conceptually, a complete solution. After the August
9 hearing, 2004, we set out to develop an automated budget
10 reimbursement system that we developed it's a functional
11 model, and I'm going to ask Dan Ruark to present some of
12 the concepts behind that. Thank you.

13 MR. RUARK: First, may I ask would it be
14 possible to use Microsoft power point to illustrate and
15 demonstrate some of the points I want to make?

16 HEARING OFFICER TIPSORD: If it reflects what
17 you have in the attachment, and there's nothing in the

18 power point that's not already in the attachment.

19 MR. RUARK: That's correct. That's correct.
20 It's very difficult to make reference to one slide out
21 of the attachment, where I can go immediately to slides
22 in the presentation.

23 HEARING OFFICER TIPSORD: If we have the
24 capability.

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1 MR. RUARK: As Jay said --

2 HEARING OFFICER TIPSORD: Excuse me, let me
3 just point out that this is Attachment 22 to Exhibit
4 109, and it is a power point presentation.

5 (Whereupon, a break was taken.)

6 HEARING OFFICER TIPSORD: Back on the record.

7 MR. RUARK: I'm Dan Ruark, I'm Vice President
8 of IMS for Ecodigital Development Group. As just a
9 point of reference, I'm not really a technical, tech
10 geek kind of guy. I'm a geologist, I've been working in
11 the LUST program for 16 years.

12 As Jay mentioned, whenever we found out that
13 there was concerns on the part of the agency about the
14 adoption of electronic data base, we started beginning
15 to actually think about how can we address those
16 problems, and those concerns, but still achieve the goal
17 of electronic data base, which I think it's clear from
18 the proceedings, where if we have a statistically
19 reliable database to give some information in dispute, a

20 lot of this, I guess negotiation and speculation could
21 be put to rest. We can actually run meaningful reports
22 from actual data.

23 What we decided to do was to develop an
24 application that is data base that uses an electronic

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1 data base. The key, one of the keys features about this
2 software is that it uses a web interface for the
3 consultant or owner operator to submit their budgets,
4 and their reversal packages. We went with a web
5 browser interface to address one of the main concerns
6 that we thought we heard, which was difficulty of
7 getting the data into the system. If we replace for
8 these budgets and reversal applications, if we
9 replace the budget forms with electronic forms that can
10 be completed with a web browser, by anyone that has
11 internet access, which is almost universal now. The web
12 data will be automatically be validated and formatted by
13 the software itself. When data arrives at the agency,
14 electronically, it will be ready for immediate review.
15 This will be in an electronic format, which means it
16 will automatically populate the data base. So almost
17 immediately, the agency would begin building a database
18 of thousands of data points, from across the state.

19 One of the other key concerns that we had in
20 design of this software, that it would be very easy to
21 use. So we identified numerous ways to speed up the
22 entry of data. One is that when a consultant builds a

23 budget, a budget form automatically loads with all the
24 attachments that are typically used with the phase of

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1 work, early action for example. And then all the
2 consultants need to do is assign individual labor
3 classification, equipment classifications and so forth,
4 so that those tasks that have no cost associated with
5 them, simply don't go to the agency for review. There's
6 also the ability if there's unusual or extenuating
7 circumstances on the site, that the consultant can add a
8 custom task. Of course, a custom task of that nature
9 would have to be justified. One of the things we
10 included for justification and requirement that
11 documentation be provided through a field in the web
12 browser, and or with attachments.

13 If other third party documentation that can
14 be scanned and sent in, along with a spreadsheet, or
15 Word documents and so forth, can be sent in along with
16 reimbursement application. In conjunction with our
17 proposed regulations with expedited levels of pricing,
18 this review process for the agency would be greatly
19 speeded up, because only those items that would be
20 subject to agency review. In other words, those items
21 that exceed the expedited pricing level would need to be
22 reviewed by a human. The software itself can make a
23 determination that this price is less than this
24 expedited rate, and is therefor acceptable.

2 This is something that is documented in the Attachment
3 No. 22. I do have a few screen shots that I want to
4 show you, just for information purposes, and if you're
5 interested, we can take questions.

6 As I just explained, ABRA is database
7 application, web base data base. Even the reviewers at
8 the agency use a web interface, so that anywhere that
9 the reviewer works, as long as they have a web browser,
10 they can do useful work. Fundamentals are those that
11 we've explained in the regulations, standardized tasks,
12 standardized resources. In other words, fee schedule
13 items like professional labor hours.

14 All the review screens are standardized and
15 simplified for easy use, and one of the key points about
16 this is the statistical review status cash flow report
17 that can be done from this. The system can actually
18 generate just the kind of statistical data that is so
19 much in need at proceedings such as this. It can also
20 generate cash flow reporting, one of the primary
21 responsibilities of the agency is to manage the cash
22 flow of the LUST fund. Using the software, you can
23 generate reports that can actually tell you what cash
24 circumference are for all the budgeted scopes of work

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1 that are being approved, the agency can then project
2 ahead what their cash needs are. That might actually
3 prove useful if there are suggestions that funds are

4 being transferred out of the LUST fund, to the general
5 fund. If we can show that those are encumbered, then
6 that is a hint against catastrophic taking of funds from
7 the LUST fund.

8 It's very simple. You log into the web, and
9 I'm not going to get into details on all of this, but I
10 would be happy to do that in another venue. You
11 indicated that you wanted to do a budget proposal, and
12 you click on the left menu item there, you pick the
13 incident which is filtered to that consultant so they
14 don't need to go through a list of 10,000 incidents. You
15 pick the phase, it automatically loads with all the
16 tasks that are typically used for the phase. You can add
17 other tasks or custom tasks if you so wish, but to speed
18 up the entry process, it automatically loads with them.

19 Then you simply, well, these are some help
20 screens, I'm not going to go into that. Then you simply
21 began adding resources, in this case, a professional
22 engineer. Urinary unit price and the quantity of units,
23 which is hours in this case, and you go through this
24 process and fill out the budget online.

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1 Professional certification is done online
2 using a password protected web screen. The certified
3 professional logs in, use a budget renewal format. Can
4 enter comments if something needs to be revised,
5 otherwise, they can certify it, and then an electronic
6 signature, which is used as the latest in security

7 management, such as you might use it for buying things
8 off of Amazon, would be employed to apply electronic
9 signatures and certification.

10 The owner logs in and does the same thing.
11 So I'll speed through these forms. At this point, with
12 it doubly certified by the owner of the certified
13 professional, the consultants can submit it. We, for
14 workflow purposes, we have signed it with account review
15 in mind. The EPA account reviewer logs in, they're
16 automatically presented with a list of all budget
17 submittals and payment applications that are pending.
18 They can sort those by the dates they've been waiting
19 for review, and can select these. These lists are also
20 filtered to just that particular county reviewer. They
21 review everything. This is the point in which the
22 software employs the validated against expedited unit
23 rates, and maximum payment unit rate in cases where the
24 expedited unit rate is excessive, or I should say, the

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1 proposed unit rate exceeds the expedited unit rate, then
2 the reviewer can review that documentation and determine
3 whether or not that price is reasonable. However, in no
4 case can they lower it below the expedited rate. That's
5 already understood to be unacceptable to unit rates.
6 They confirm the budget, it next goes to the technical
7 reviewer. The technical reviewer does not get it in
8 their cue until the counter view is done. The counter

9 reviewer selects the budget.

10 Now, they view the quantity of the tasks,
11 because those are the issues that are related to
12 technical advocacy. What is being proposed, and in what
13 quantity. They have to take whatever quantity they wish
14 to approve. If they want to -- if they decide a
15 professional engineer is not called for, they zero out
16 the hours. If the entire task is not called for, simply
17 zero out everything associated with that task, just
18 disprove that tax.

19 Now, they confirm the budget. Immediately an
20 e-mail is sent to the owner operators and consultants.
21 Inside that e-mail attachment with an approval letter,
22 same process applies as I mentioned before, additional
23 budget supplemental, and payment application. Cash flow
24 report. Cash encumbrances, review status if you want to

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1 know where all, for any reviewer, where they're at on
2 their reviewing. Their view of budget submittals,
3 payments applications, resource pricing, mean, median,
4 mode, and other statistical reporting. You can compare
5 proposed verses approved. Cumulative budget approval,
6 budget balances. What we see ABRA doing is speeding the
7 consultant budget payment application submittal process.
8 It greatly accelerates the agency's reviews, it
9 expedites communications almost instantaneous
10 communication budget approval, or a payment application
11 approval, standardized data so the meaningful

12 statistical analysis can be performed, and delivers
13 valuable program management to the agency.

14 Now, we've developed this, and we believe in
15 it strongly. Even if the agency does not like the
16 concept of ABRA, even if the agency does not adopt, or I
17 should say the board does not see merit in the
18 regulations that we proposed today, we greatly encourage
19 some type of database, so that some type of statistical
20 meaningful data can be generated in the future. And the
21 ability to deliver such data, is critical to the bond of
22 trust and cooperation that must exist between the owner
23 operators, and the Illinois EPA. Thank you.

24 MR. COOK: I've got some closing comments,

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1 and then we would be happy to entertain questions.

2 MR. CLAY: Who has the patent?

3 MR. D. KING: Ecodigital Development Group.

4 MR. COOK: Today we've been critical of the
5 agency, and I just want to be clear that we don't do
6 that merely for purposes of criticism, we do that
7 because we want the best possible solution in this case,
8 and we want to make sure that this rule is adopted in
9 the fashion that serves everyone comparatively and
10 objectively and transparently. That's been our mission
11 in this particular rule making all along, what PIPE
12 stated, and we still believe in it strong. That's --
13 we're critical to point out the serious flaws in the

14 rule. The flaws that are unworkable and intolerable, and
15 I Dan, I think, has addressed those. We've talked about
16 those, and we hope that we've presented a good solution.

17 I want personally to thank the board for
18 coming here to Southern Illinois. It's been helpful for
19 us to be able to provide this level of information which
20 we felt was appropriate to get on the record. I want to
21 apologize for the lack of redlining in the proposed
22 rule, we'll work on that and get that to you.

23 And finally, I just want to say that you can
24 see we've done a tremendous amount of work, and

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1 certainly we do have pride in our work, but we don't
2 have so much pride that we're not willing to change any
3 of this proposal that we've put forth in light of a
4 better rule.

5 We are here, generally, because we want this
6 rule to be good. We do not object to cost containment.
7 We have millions of dollars on the line every day in
8 investments that we've made relative to this program.
9 Probably, more than anyone in the state, our
10 organization has a literal vested interest in the
11 program, more than anyone else. We want cost
12 containment. We want to know that the fund doesn't go
13 broke in a year. We just want to make sure that this is
14 done right. We're willing to do whatever it takes,
15 including the giving of ourselves and our time, to make
16 sure that that happens. We will work with the agency,

17 we'll work with the other consultants, but I want the
18 board to know that we are dedicated to this industry,
19 dedicated to the program, we're willing to work to a
20 solution, and whatever that takes, as long as that
21 solution is reasonable.

22 With that, I close and thank you.

23 HEARING OFFICER TIPSORD: Mr. King, you had a
24 question and comment?

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1 MR. G. KING: Yeah, we raised, first I want
2 to raise a comment and a question for you, and then I'll
3 raise some other questions.

4 I've been appearing at and testifying at
5 work proceedings now for almost 20 years, and the board
6 has made a number of procedural improvements to it's
7 rule making procedure over the years, and one of the
8 things that the board did many years ago was adopt a
9 notion of prefiling of testimony. So that when either
10 the agency or a non-agency participate showed up at the
11 hearing, they already seen what was the technical detail
12 of what was being presented. I think in this case, CW3M
13 and CSD met the spirit of that. They brought some
14 additional documents, but they were supplemented. USI
15 did not. They came in and laid a 600 page document on
16 us, which Jay Cook admitted and stated that there were
17 wholesale changes in it. We have a regulatory proposal
18 we've never seen before with all sorts of things in it,

19 so, they really didn't comply with the spirit of the
20 board procedures on that. We could have objected as
21 opposed to the introduction of this, we want to see this
22 proceeding to move along and the board get information.

23 The hearing officer indicated the board was
24 going to issue an order with written questions possibly?

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1 HEARING OFFICER TIPSORD: Possibly.

2 MR. G. KING: We would also like the
3 opportunity to forward to you questions that we think
4 should be submitted to USI with regard to materials
5 they've submitted today.

6 HEARING OFFICER TIPSORD: I think that's a
7 legitimate request, and what I would like to do, as
8 we'll set up a time specific that gives you the
9 opportunity to look at them and ask for any questions,
10 we'll do it just like we did with you guys. We'll set a
11 date for prefiled questions to be submitted to you, and
12 a date for answers, and hopefully be able to do it
13 through comment and questions, written questions and
14 answers at that point. I think you've made a legitimate
15 point, Mr. King. I appreciate your willingness to
16 accept this testimony today and let us proceed and take
17 this option, and I think that you will agree that that's
18 good.

19 MR. COOK: We'll answer those questions.

20 MR. G. KING: To this last presentation, I
21 was going through the proposed draft USI put together,

22 and I didn't see anything that mandated either the
23 agency or any of consultant to use that data base
24 system, am I missing something here?

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1 MR. COOK: In the proposal of subpart H
2 regulation that we included here in today's --

3 MR. G. KING: Yes.

4 MR. COOK: In today's draft, we did not
5 insert into this proposal any requirement for a data
6 base. For a number of different reasons. One, that's the
7 database we developed, and so to the extent that use of
8 that database is objectionable, that's fine. We did not
9 include that database in this proposed rule.

10 MR. G. KING: Now, this was talking about
11 cost containment, I want the board just to point out
12 what this proposal, as best as I can read, it is saying.
13 If you look at page 532, and Mr. Cook talked about this
14 a little bit, this is a page that had a reasonable
15 professional consulting hours table, and it has 220
16 hours for early action, 460 for site investigation, 560
17 for corrective, 560 for corrective action. If I add
18 that correctly, that's 1240 hours of professional
19 service. Now, if you look at the paragraph above that,
20 it says, all those hours shall be aggravated if the
21 agency shall presume that any quantity of total hours
22 that's equal to or less, than those listed below, that
23 will be reasonable. So, anybody can come in and say

24 1240 hours for total project --

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1 MR. COOK: Gary, you didn't read the rest of
2 the sentence. It also says provided that each hour is
3 documented as being performed and what the work activity
4 is justified, and it could go on, should go on to say
5 that it's required pursuant to the regulations. That
6 work activity was required to comply.

7 MR. G. KING: Well, I still think my point is
8 accurate, that anybody could come in and get 1240 hours.

9 MR. COOK: No.

10 MR. G. KING: Okay. That's what it -- that's
11 my reading of it, if I were looking at it as far as
12 administering the rule.

13 MR. COOK: I can say that is not the intent,
14 and the intent is to provide that only as a barometer of
15 reasonableness, that every hour has to be justified, and
16 necessary.

17 MR. G. KING: How do question those hours as
18 being justified?

19 MR. COOK: How do you do that?

20 MR. G. KING: How would we do that?

21 MR. COOK: I'm not going to speak to that,
22 that's an agency decision.

23 MR. G. KING: Well, let me finish the point I
24 was trying to make. If you take the 1240 hours, and you

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1 multiply that by just taking the project manager's rate,
2 and you assume it's a project manager hours on all of
3 those hours, which is nothing to prohibit that from
4 being the case, you're talking about professional
5 services then of \$127,000 on a site, which is now going
6 to be, you know, this 1240 is going to be kind of a
7 presumptive number, and that \$127,000, compared it to
8 the 80 percent coverage that was talked about on page
9 407, and you're \$23,000 above that. So I mean, if we're
10 talking about cost containment and a proposal being put
11 together, that is beyond -- even the total of 90 percent
12 we were talking about before, I don't see that USI
13 proposed cost containment?

14 MR. COOK: I would also like to clarify that
15 I testified just a few minutes ago to this table. I
16 also clarified that those numbers are 220, 460, and 570.
17 The numbers within that table were not absolutes. The
18 560, the concept is important. So if we use those
19 numbers as absolutes, it is not representative of the
20 testimony that I just made.

21 MR. G. KING: So are you saying that's not
22 part of your testimony, those numbers are not part of
23 your testimony, not part of your exhibit here, are you
24 withdrawing those numbers?

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1 MR. COOK: No, I'm not withdrawing those
2 numbers, I just testified that it was a concept that we

3 are testifying to.

4 MR. G. KING: So what are we supposed to
5 understand about those numbers, are you suggesting those
6 numbers would be in a rule, are you suggesting those
7 numbers could go into a rule?

8 MR. COOK: What I'm suggesting in the current
9 subpart H, the agency has -- let me make an analogy.
10 There, I guess as a premise in mathematics, you show
11 your work, each step of the equation needs to be shown,
12 so the logical progression can take place. One can
13 follow to see if the problem was resolved properly.

14 In this particular instance, there should be
15 a logical progression of whether an hour of work is
16 necessary or not relative to the accomplishment of a
17 specific activity, and that's what this table
18 represents, is that cost in subpart H, we've made this
19 leap of faith that we're going to convert cost from an
20 only statistically valid range of cost is at the phase
21 level, and the agency is taking that cost and trying to
22 convert it to a task basis, without any basis. If you
23 add the per task costs together that the agency's
24 proposed, those are 50 percent lower than what you would

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1 see normally or within a normal range on a LUST site.

2 So, the whole concept here is that you have
3 to establish, not just reasonable rates, as you did in
4 Appendix E of subpart part H, you published an hourly
5 rate. Now, that was the reasonable thing to do, now

6 whether those rates are exactly accurate, or within the
7 appropriate range, I'm not talking about that right now,
8 it's a reasonable thing to put a rate together, a
9 reasonable rate, but in parcel to that is also a number
10 of hours, and that's where the subpart H proposal fails
11 miserably.

12 So going back to the analogy of showing your
13 math, there's no accounting for the number of hours
14 relative to those tasks. Not only that, there's no
15 accounting for the tasks, there's no scope of work. If
16 those were able to be published, and you were willing to
17 do that, which that has not happened in this proceeding,
18 at least then we could all talk off of some baseline.
19 That's been the problem with this proceeding all along
20 is that baseline has never been established, so it's
21 difficult, if not impossible, to speak intelligently
22 about those subpart H numbers on a task by task basis.
23 The only level we've talked about is the phase level.

24 MR. G. KING: I think I was pointing out this

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1 language here, because to me, a comment I made is what
2 it says to me, and I think that if the board needs -- if
3 the board is going to be considering using any of these
4 items, they really have to look at those very closely,
5 because none of this has gone through any kind of review
6 and what the administrative consequences are, and how
7 the language is actually.

8 BOARD MEMBER JOHNSON: I think the way I read
9 is this proposal is a two step task. You're not
10 saying -- you say there's going to be a continuum of
11 both number of hours expended per task, and hourly rate
12 per individual, and that you just want to set a baseline
13 that at that point or lower, then it goes to an
14 expedited process, both for an hourly rate, and for the
15 number of hours. Not using any number. 80 dollars an
16 hour is what they had proposed currently, it might be
17 60, or it might be 100, and the same thing. What you're
18 telling us is the 220 hours is just a figure that you've
19 started as -- thrown in there as a beginning point in a
20 way for discussion.

21 MR. COOK: It's a statistically significant
22 number that we pulled from the study, but I don't see
23 that it's an absolute number that had to be converted
24 to. I know the agency wanted to convert the cost

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1 containment model from the phase level to the task
2 level. I think that's appropriate to do that. It
3 provides a greater level of accountability at the task
4 level, however, eventually I think it's appropriate to
5 do that. I think it's completely inappropriate to do
6 today, on day one of this rule, given the broad naming
7 conventions and the arbitrary grouping of work
8 activities that have been reported to the agency for the
9 past 15 years, and the lack of any standard for the last
10 15 years of a task level. I think it's completely

11 inappropriate to allow this cost model, cost containment
12 model to be operated relative to professional services
13 on a task by task basis today. Using absolute numbers, I
14 think that tasks can be set forth, costs can be tracked
15 per task, and can apply maximums on a per task basis, an
16 inappropriate thing to do and a huge mistake. That's my
17 two cents on that issue.

18 HEARING OFFICER TIPSORD: Any further
19 questions?

20 (Whereupon, a discussion was held off the
21 record.)

22 HEARING OFFICER TIPSORD: All right, let's go
23 back on the record then and formerly set dates for
24 questions to USI on August 12, 2005 mailbox rule does

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1 not apply, answers August 26, 2005, mailbox rule does
2 not apply, and all final comments on September 23,
3 mailbox rule does not apply. I will also follow this up
4 with a written hearing officer report, setting out all
5 those dates.

6 I really want to thank everyone today. I
7 first of all want to compliment you all on your
8 professional behavior. I know this has been a very
9 frustrating time in many ways, for all of you, and I
10 have the utmost respect for all of you.

11 And Mr. Clay, I really have to say your
12 ability to maintain your professional demeanor

13 throughout this is a compliment to the agency, and thank
14 you, and that's true of all of you. I can't say that
15 enough. There have been times when frustration has
16 started to boil over, and we've all been able to laugh
17 and step back and get back to being professional, and
18 that really is a compliment to all of you, and I
19 appreciate that a great deal, thank you, it makes this
20 rule making much easier.

21 And the level of detail and information that
22 all of you have provided to us in the record is just
23 phenomenal, and I look forward to digging into it
24 deeper, and I look forward to all of your final

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1 comments. Board Member Girard?

2 BOARD MEMBER GIRARD: Well, thank you, Marie,
3 I think you said everything. We certainly do appreciate
4 all the time and effort the people are putting into
5 this, we have a much better record now to make the rule,
6 and the rule that comes out should be a much better rule
7 than it looks like it would have been a year ago. So we
8 thank you very much, and we will continue to work on it.

9 HEARING OFFICER TIPSORD: I also want to, on
10 the record, thank SIU Law School, they have been an
11 excellent host to us today, and it was a pleasure to be
12 here, and I thank all of you again, and I think we're
13 adjourned.

14 (Whereupon, the hearing was adjourned at
15 5:56 p.m.)

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1 STATE OF ILLINOIS)

2 COUNTY OF MARION)

3

4 I, ANGELA R. KELLY, a Notary Public and
5 Certified Shorthand Reporter in and for the County of
6 Marion, State of Illinois, DO HEREBY CERTIFY, that I was
7 present at the Illinois Pollution Control Board hearing,
8 Carbondale, Illinois, on July 27, 2005, and did record
9 the aforesaid Hearing, that same was taken down in
10 shorthand by me, and afterwards transcribed, and that
11 the above and foregoing is a true and correct transcript
12 of said Hearing.

13 IN WITNESS WHEREOF I have hereunto set my
14 hand and affixed my Notarial Seal this 8th day of
15 August, 2005.

16

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Notary Public--CSR

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#084004498

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