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ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
DICKERSON PETROLEUM, INC.,	)	
	)	
Petitioner,	)	PCB 09-87
	)	PCB 10-5
vs.	)	(UST Appeal)
	)	(Consolidated)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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Pollution Control Board

Proceedings held on September 16, 2009, at 9:19 a.m., at the office of the Illinois Pollution Control Board, 1021 North Grand Avenue East, Springfield, Illinois, before Carol Webb, Hearing Officer.

Reported By: Karen Waugh, CSR, RPR  
CSR License No: 084-003688

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On behalf of the Respondent

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PROCEEDINGS

(September 16, 2009; 9:19 a.m.)

HEARING OFFICER WEBB: Good morning. My name is Carol Webb, and this is the hearing for dockets PCB 09-87 and PCB 10-5, Dickerson Petroleum versus IEPA. These dockets are consolidated for purposes of hearing, although the Board may issue separate decisions. It is September 16, 2009. We are beginning at approximately 9 a.m. For the record, although the petitioner is located in St. Clair County, there was no known public interest in this case and the parties agreed to hold the hearing in Springfield. There are no members of the public present.

At issue in these dockets is the Agency's determination that petitioner's incident fell outside the scope of the LUST program as pertains to petitioner's facility at 823 Upper Cahokia Road in Cahokia, St. Clair County. The decision deadline is January 7, 2010. The Pollution Control Board members will make the final decision. My purpose is to conduct the hearing in a neutral and orderly manner so that we have a clear record of the proceedings. I will also assess the credibility of any witnesses on the record at the end of the hearing. This hearing was noticed pursuant to the Act and the

1 Board's rules and will be conducted pursuant to  
2 Sections 101.600 through 101.632 of the Board's  
3 procedural rules. At this time I will ask the parties to  
4 please make their appearances on the record.

5 MR. DWYER: On behalf of the petitioner, my  
6 name is Edward Dwyer from the law firm of Hodge Dwyer &  
7 Driver.

8 HEARING OFFICER WEBB: Okay.

9 MS. RIOS: Monica Rios on behalf of the  
10 petitioner, Hodge Dwyer & Driver.

11 MR. RICHARDSON: For the respondent, Greg  
12 Richardson from the Illinois EPA.

13 HEARING OFFICER WEBB: Thank you very much.  
14 I understand that we have one preliminary matter to  
15 discuss on the record, and that is the parties' agreement  
16 that a few documents were accidentally left out of the  
17 record that was filed with the Pollution Control Board.  
18 Is that correct?

19 MR. DWYER: I think that's correct, Hearing  
20 Officer.

21 MR. RICHARDSON: Yes.

22 HEARING OFFICER WEBB: Okay. And I've been  
23 given a copy of that that I will file with the Board, and  
24 it has the page numbers beginning with the page that was

1 left off from the record that was filed with the Board.

2 Is there anything you'd like to add to that?

3 MR. DWYER: I don't have anything. Greg?

4 MR. RICHARDSON: No.

5 HEARING OFFICER WEBB: Okay. So this  
6 document is admitted as a supplement to the  
7 administrative record to correct what was filed with the  
8 Board. Are there any other preliminary matters you'd  
9 like to discuss on the record?

10 MR. DWYER: Yes. If the Hearing Officer  
11 please, just want to confirm with counsel for the  
12 respondent that I think we have an agreement on  
13 foundation for Petitioner's Exhibits 1 through 5 and 8.

14 HEARING OFFICER WEBB: Okay. Do you want to  
15 discuss those now or just wait until they come up in the  
16 course of the hearing?

17 MR. DWYER: I can do either one. Do you  
18 have a preference?

19 MR. RICHARDSON: It's whatever you prefer.

20 MR. DWYER: I mean, do you want me to  
21 describe what the exhibits are? Would that be useful for  
22 the record?

23 HEARING OFFICER WEBB: If you -- Well, why  
24 don't we go ahead and -- we can go ahead and admit the

1 ones that are -- to which the parties agree, if you'd  
2 like to describe those first, and we'll deal with the  
3 other ones --

4 MR. DWYER: That's fine. For the record --  
5 Thank you, Hearing Officer. Petitioner's Exhibit 1 is a  
6 copy of the curriculum vitae or resume for Mr. Thomas L.  
7 Herlacher of Herlacher Angleton & Associates. I think  
8 it's composed of three pages. Petitioner's Exhibit No. 2  
9 is a copy of an excerpt from 35 Illinois Administrative  
10 Code Part 734. Specifically, it is a copy of  
11 Subsection 734.505 downloaded from the LexisNexis  
12 database, and it is composed of two pages. Petitioner's  
13 Exhibit No. 3 is again an excerpt from 35 Illinois  
14 Administrative Code Part 734. Specifically, it is a copy  
15 of Subsection 734.210. It is titled "Early Action," and  
16 it consists of four pages.

17 Exhibit No. 4 is an excerpt from 41 Illinois  
18 Administrative Code, Part 170, which are regulations of  
19 the Office of the State Fire Marshal, and in particular,  
20 Petitioner's Exhibit 4 is a copy of Section 170.560 of 41  
21 Illinois Administrative Code with the subtitle "Reporting  
22 of Suspected Releases." Petitioner's Exhibit No. 5 is  
23 again a copy from -- well, a copy of an excerpt from 41  
24 Illinois Administrative Code, Part 170, which are



1 regulations of the Office of the State Fire Marshal. The  
2 specific exhibit excerpt is a copy of Section 170.580  
3 titled "Release Investigation Reporting, Site Assessment,  
4 Initial Response," and it is composed of two pages.  
5 Exhibits 2 through 5, again, just to be clear, were  
6 downloaded from the LexisNexis online database and we  
7 believe are accurate copies of those regulations as they  
8 read as of January 18, 2008, continuing to the present.  
9 The final stipulated exhibit is Exhibit No. 8, and that  
10 is a copy of the curriculum vitae of James Foley, an  
11 employee of Herlacher Angleton Associates.

12 HEARING OFFICER WEBB: Okay. As both  
13 parties agree to these exhibits, they are admitted into  
14 the record. That's 1 through 5 and No. 8. Do you want  
15 to discuss 6 and 7 now or wait until you --

16 MR. DWYER: I think we're probably all  
17 better served by when I present those in the course of  
18 the testimony so Mr. Richardson has a full opportunity --

19 HEARING OFFICER WEBB: Okay. We'll hold  
20 these for now. Are there any other preliminary matters  
21 to discuss on the record?

22 MR. DWYER: Your Honor, at this point in  
23 time the petitioners would make an oral motion to exclude  
24 witnesses from the hearing. We believe that's

1 appropriate. It ensures that no party is prejudiced by  
2 someone having an opportunity to view or prepare for  
3 testimony that the other party would not have a similar  
4 opportunity to undertake.

5 MR. RICHARDSON: I would also make a similar  
6 motion. However, I would state that Mr. Gaydosh is a  
7 witness that I plan on calling, really my only witness,  
8 so I would ask that he be allowed to remain here as the  
9 representative of the Illinois EPA besides myself.

10 HEARING OFFICER WEBB: Is he particular --  
11 in particular the witness that you --

12 MR. DWYER: Well, that would be obviously  
13 our concern, you know, that Mr. Gaydosh under those  
14 circumstances would have the benefit of hearing the  
15 testimony of petitioner's witnesses. Conversely,  
16 petitioner's witnesses would have to wait to hear the  
17 testimony of Mr. Gaydosh for any rebuttal.

18 HEARING OFFICER WEBB: Do you have -- Well,  
19 my --

20 MR. DWYER: I mean, maybe to clarify  
21 further, the petitioner's witnesses would not have the  
22 luxury of hearing Mr. Gaydosh's testimony until they've  
23 already testified. In contrast, Mr. Gaydosh, if he were  
24 to be called by the Agency, would have the benefit of

1 hearing all of what petitioner's witnesses will testify  
2 to and have the ability to in whatever way he so chooses  
3 prepare his testimony in response with that benefit.

4 HEARING OFFICER WEBB: My concern is, you  
5 know, oftentimes the Agency needs somebody with -- in the  
6 technical unit to perhaps answer some questions along the  
7 way regarding your witnesses. I mean, are you going to  
8 be able to handle cross examination of petitioner's  
9 witnesses without any technical assistance?

10 MR. RICHARDSON: Well, I had planned on  
11 being able to confer with Mr. Gaydosh on technical  
12 matters, and his supervisor's on vacation. I mean, I was  
13 just going to have Mr. Gaydosh here -- I mean, we  
14 had outside the hearing room said, well, is there  
15 somebody else, and I had really just planned on  
16 Mr. Gaydosh staying here. Not that I'm not surprised by  
17 Mr. Dwyer's motion, but I'm just saying that, yes, I was  
18 going to rely on him for assistance with questions or if  
19 he had -- you know, provide me questions on testimony as  
20 it proceeded.

21 HEARING OFFICER WEBB: I mean, we have on  
22 occasion excluded witnesses, but generally not to the  
23 point where we leave our legal counsel without any  
24 technical assistance for some of the more technical

1 testimony, so in this case -- I mean, that's not -- you  
2 know, normally for underground storage tank appeals we do  
3 have the -- at least someone from the technical unit from  
4 the Agency to assist the agency attorney, so in this  
5 particular instance I'm going to allow Mr. Gaydosh to  
6 remain.

7 MR. DWYER: All right.

8 HEARING OFFICER WEBB: You know, I think  
9 maybe in the future we can work it out where we can have  
10 somebody -- you know, if Mr. Richardson was aware in  
11 advance, he could have had somebody else just in case,  
12 you know, to give him information on some of the  
13 technical requirements, but that's my only concern with  
14 excluding Mr. Gaydosh.

15 MR. DWYER: Okay. And I just for the record  
16 want to make sure that Mr. Gaydosh's supervisor, who  
17 would presumably have similar knowledge, is unavailable.

18 MR. RICHARDSON: Yes. He's on vacation.

19 MR. DWYER: Okay.

20 MR. RICHARDSON: Yeah. I mean, I just  
21 learned that yesterday, so --

22 HEARING OFFICER WEBB: Are there any other  
23 preliminary matters to discuss on the record?

24 MR. RICHARDSON: Was my motion to exclude

1 granted or did you have an objection to that or --

2 MR. DWYER: Well, I think that that's sort  
3 of turnabout is fair play.

4 HEARING OFFICER WEBB: Well, yeah, I would  
5 say so --

6 MR. RICHARDSON: Oh, no, no.

7 HEARING OFFICER WEBB: -- unless there's any  
8 particular reason that you --

9 MR. RICHARDSON: No, I --

10 MR. DWYER: I mean, I -- I mean, my response  
11 would be --

12 HEARING OFFICER WEBB: Yeah.

13 MR. DWYER: -- you know, that's a motion  
14 that needs to apply to all parties, not one.

15 HEARING OFFICER WEBB: I agree.

16 MR. RICHARDSON: Yeah. No, that's fine.

17 HEARING OFFICER WEBB: Are there any other  
18 preliminary matters to discuss on the record?

19 MR. DWYER: I don't have any. Do you have  
20 any?

21 HEARING OFFICER WEBB: Okay.

22 MR. RICHARDSON: No.

23 HEARING OFFICER WEBB: Would the petitioner  
24 like to make any opening statement?

1 MR. DWYER: No. We'll waive opening  
2 statement, Your Honor.

3 HEARING OFFICER WEBB: Would the respondent  
4 like to make any opening statement?

5 MR. RICHARDSON: I would also waive opening  
6 statement.

7 HEARING OFFICER WEBB: Okay. Petitioner,  
8 you may call your first witness.

9 MR. DWYER: Okay. We would call to the  
10 stand Mr. Tom Herlacher.

11 HEARING OFFICER WEBB: Mr. Herlacher, would  
12 you come have a seat right up here, please, and would the  
13 court reporter please swear in the witness?

14 (Witness sworn.)

15 MR. DWYER: I apologize. Can we go off the  
16 record just for two minutes?

17 HEARING OFFICER WEBB: Yes.

18 (Off the record.)

19 HEARING OFFICER WEBB: We'll go back on the  
20 record, and you may begin questioning your witness.

21 THOMAS HERLACHER, produced, sworn and examined on  
22 behalf of the Petitioner, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. DWYER:

1 Q. Okay. Mr. Herlacher, just -- please state  
2 your full name for the record.

3 A. Thomas Leo Herlacher.

4 Q. Okay. Are you employed, Mr. Herlacher?

5 A. Yes, I am.

6 Q. And where are you employed?

7 A. With Herlacher Angleton Associates.

8 Q. How long have you been employed at  
9 Herlacher?

10 A. Since we started the company in January 1,  
11 1999.

12 Q. Okay. And how many employees does Herlacher  
13 Angleton Associates have?

14 A. Including the owners, we have 12 right now.

15 Q. Okay. And just for ease of our discussion  
16 here, I'm going to refer to Herlacher Angleton as  
17 Herlacher.

18 A. Sure.

19 Q. Will you understand what I'm talking about?

20 A. Yes.

21 Q. All right. And tell me -- just describe  
22 briefly for the Hearing Officer, what does Herlacher do?

23 A. Well, we have a general environmental  
24 consulting firm. We do phase I, phase II environmental

1 assessments, remediation projects, underground tank. We  
2 manage underground tank removal projects and interface  
3 between the property owner and the Illinois EPA for  
4 reporting purposes or regulatory matters.

5 **Q. Okay. I'm going to show you what's been**  
6 **marked and agreed to as Petitioner's Exhibit A, already**  
7 **admitted into evidence. Would you look at that and just**  
8 **tell me briefly what that document is?**

9 A. This is my resume.

10 **Q. All right. And just to cover some of that,**  
11 **Mr. Herlacher, would you just briefly summarize your**  
12 **educational background from high school?**

13 A. I have a bachelor's degree in mechanical  
14 engineering from Oklahoma University in December 1978, an  
15 MBA from University of Arkansas Little Rock in May  
16 of 1987.

17 **Q. Okay. And do you have any other**  
18 **certifications or licenses?**

19 A. I'm a professional engineer registered in  
20 several states.

21 **Q. Okay. And does that include Illinois?**

22 A. Yes, it does.

23 **Q. And can you tell me, as we sit here today**  
24 **and you review Petitioner's Exhibit 1, is that an**



1 accurate and up-to-date copy of your curriculum vitae?

2 A. Yes, it is.

3 Q. Now, let's talk a little bit more about the  
4 matter we're here about. Describe for me, Mr. Herlacher,  
5 your dealings with Illinois EPA. What kind of work do  
6 you do that involves them?

7 A. Well, underground tank remediations and  
8 reporting and --

9 Q. Okay. That's fine. What I'd like to ask  
10 you now, is there a specific part of the agency with whom  
11 you deal regarding those types of matters?

12 A. Well, it's Bureau of Land, leaking  
13 underground storage tank section.

14 Q. Okay. If you look at the -- open up the  
15 copy of the record that you have to the first page of the  
16 record, which is 001, are you familiar with a site called  
17 the Cahokia Quick Shop?

18 A. Yes, I am.

19 Q. Okay. And is that the site that's really  
20 the subject matter of the hearing today?

21 A. I believe it is, yes.

22 Q. And as we talk through your testimony, I'm  
23 going to refer to that location as the site, and just to  
24 confirm, that is a site located at -- I thought it was --

1 HEARING OFFICER WEBB: Is it 823 Upper  
2 Cahokia Road?

3 MR. DWYER: Oh, I have it in my notes. Yes,  
4 it's 823 -- that's correct, Hearing Officer. Thank you.

5 A. Yeah.

6 Q. (By Mr. Dwyer) That's the site that we're  
7 going to be talking about today, okay?

8 A. Right.

9 Q. All right. Just tell me briefly again, how  
10 did you become involved with the site?

11 A. Well, Dickerson Petroleum has been a client  
12 of mine for about 15 years, and there was some concern on  
13 their part about the possibility that there might be some  
14 contamination around the tanks.

15 Q. Okay. Well, tell me a little bit more.  
16 What is the site? What is there?

17 A. It's a convenience --

18 Q. Or let me strike that. Tell me what was  
19 there when you first got involved with the site.

20 A. Well, there was a couple of underground  
21 storage tanks and some pumps and canopies and a building  
22 where a convenience store was located.

23 Q. Okay. And tell me, when is -- to the best  
24 of your recollection, when did you first become aware of

1 **this site?**

2 A. Oh, I guess probably in December or January  
3 of 2008.

4 **Q. December of 2007?**

5 A. December of 2007, January of 2008, somewhere  
6 in that period of time.

7 **Q. Okay. And were you -- how -- I mean, how**  
8 **did you -- were you contacted about the site?**

9 A. Right, the property owners. I mean, the  
10 tank owners contacted me initially.

11 **Q. And just to clarify, is that Dickerson**  
12 **Petroleum?**

13 A. Dickerson Petroleum, yeah.

14 **Q. And again, for clarification, you said that**  
15 **they own the tanks.**

16 A. They own the tanks. They don't own the  
17 property.

18 **Q. They don't own the real estate.**

19 A. Right.

20 **Q. Okay. And so what did you do after you were**  
21 **contacted by them with respect to the site?**

22 A. Well, I drove by there just to take a look  
23 at it a couple days before I went out and collected a  
24 soil sample.

1           **Q.    And what was the purpose of this initial**  
2 **visit or drive-by?**

3           A.    Just to check the place out and see what was  
4 there and what was going to be involved for me to conduct  
5 a preliminary site assessment.

6           **Q.    And did you get any information from your**  
7 **client about the site?**

8           A.    Not really.  They told me the tanks were  
9 empty and the property had changed hands recently, and  
10 they didn't really know any more about what was going on  
11 with the new owner than that.

12          **Q.    Okay.  So you visited the site once.  Do you**  
13 **recall when your next visit was?**

14          A.    Yeah.  That was on January the 18th.

15          **Q.    2008?**

16          A.    2008, right.

17          **Q.    Okay.  And can you tell me, what did you do,**  
18 **if anything, at the site on that day?**

19          A.    Oh, I broke out some concrete or asphalt  
20 patch that was there between the fill openings and used a  
21 hand auger, went down about four feet altogether into the  
22 backfill between the fill openings and checked for the  
23 presence of gasoline contamination and discovered a  
24 significant amount of gasoline.

1           **Q.    We'll just kind of take that in sequence.**

2           A.    All right.

3           **Q.    When -- Just describe this process of**  
4 **augering or drilling through the concrete that you**  
5 **described.**

6           A.    Well, the concrete was -- actually, there  
7 was some asphalt patch there, so it was pretty easy to go  
8 through, and just fired up a portable generator and got  
9 one of those breaker things and busted a hole out about  
10 six inches in diameter, and the bucket on the auger's  
11 about two inches in diameter. Just rotated that down  
12 there and brought up about I guess two inches diameter,  
13 about a foot long, and brought up buckets of soil and  
14 dumped it out on the ground as I was going down through  
15 the hole, and so about every eight or ten inches, I had  
16 to take the bucket out and dump the soil out of it and  
17 then go down another eight or ten inches, take it out and  
18 dump the soil out.

19           **Q.    Okay. And what did you do after you'd**  
20 **completed this boring?**

21           A.    Well, I was obviously checking the soil for  
22 traces of contamination and -- as I was emptying the  
23 bucket out.

24           **Q.    And tell me, how were you checking? What**

1 **did you do to check?**

2 A. Well, you know, there was discoloration that  
3 was typically -- it happens when soil is contaminated  
4 with gasoline -- has a kind of a grayish-green color --  
5 beginning about two feet below the surface, and there was  
6 strong gasoline odors, and at about four feet I threw  
7 some of the sand into a plastic bag and Ziploc sealed it.

8 **Q. And let me just stop you. Why did you do**  
9 **that?**

10 A. That's so that -- I was going to use a PID  
11 to sniff the vapors that were coming off to get a VOC  
12 content measurement.

13 **Q. And why would you put it in a baggie?**

14 A. Because that's just a standard procedure  
15 that I think most consultants use whenever they're doing  
16 PID measurements in the field, because it tends to  
17 contain some of the vapors as they come off the soil  
18 sample, and when you poke a -- the probe of the  
19 instrument into the baggie, then it pulls some of that  
20 air out and measures the VOC content of the air that's  
21 inside the container.

22 **Q. Okay. Let me just -- Let's just go back,**  
23 **and I want you to explain, what is -- tell everybody**  
24 **here, what is a PID meter?**

1           A.    A photoionization detector.  It measures  
2 volatile organic content of vapors in air.

3           **Q.    Okay.  And what kind of measurement does it**  
4 **give you?**

5           A.    It gives you a measurement in parts per  
6 million by volume.

7           **Q.    Okay.  And what is that -- I mean, what is**  
8 **that measuring for the presence of?**

9           A.    Well, volatile organic compounds include a  
10 whole range of things that are contained in gasoline,  
11 including things like benzene, toluene.  I couldn't give  
12 you a list of all of the volatile organic compounds that  
13 are within the measurement range of the instrument  
14 because there's, you know, probably 15 or 20 of them.

15           **Q.    But are there some that you specifically**  
16 **measure for when you're doing this type of work?**

17           A.    Well, you don't specifically measure for an  
18 individual compound.  It's a combination of everything  
19 that's mixed in, which are compounds that are typical  
20 to -- typically contained in gasoline.

21           **Q.    So are -- just so I understand, are -- do**  
22 **volatile organic chemicals as a generic group include**  
23 **certain chemicals that would also be present in petroleum**  
24 **products?**

1 A. Right.

2 Q. Okay. So you said that you used this PID  
3 meter. You placed some soil in the bag and then you --  
4 what did you do with the PID meter?

5 A. Well, you seal the bag and then kind of  
6 tumble the soil sample around a little bit to stir it up  
7 and release the vapors and stuff, and then while the  
8 vapors are trapped inside the bag in the air space, then  
9 you take the probe of the PID and puncture the bag and it  
10 pulls some of that air and vapor sample out to give you a  
11 measurement reading in parts per million on the meter  
12 that says, okay, 100 parts per million, 500 parts per  
13 million, whatever.

14 Q. All right. And when you conducted this  
15 activity, was this on January 18, 2008?

16 A. Yes.

17 Q. Okay. And you say you measured this. Did  
18 the meter register anything?

19 A. Right. It --

20 MR. RICHARDSON: I'll -- I'd object to  
21 actual registrations at this point. They were not  
22 provided to the Agency prior to the March 9, 2009,  
23 decision letter, so I want to put an objection on the  
24 record as to that fact, the specific readings from the



1 meter.

2 MR. DWYER: Well, you know, my response,  
3 Your Honor, is that I think that that evidence is  
4 relevant and probative as to whether or not the meter  
5 measures anything. To the extent that it wasn't  
6 provided, unless and until there's some demonstration  
7 that it was required to be provided, I think it is  
8 relevant evidence. He's capable of testifying about it.  
9 It's his present sense observation of what occurred at  
10 that time. I think it's probative, relevant, and I think  
11 it's admissible.

12 HEARING OFFICER WEBB: I'll go ahead and  
13 allow it. Go ahead.

14 A. What was the question again?

15 Q. **(By Mr. Dwyer) The question was, when you**  
16 **conducted this measurement of the soils in the baggie**  
17 **with the PID meter, did the meter give you a reading?**

18 A. Yeah. It went into alarm at 1,000 parts per  
19 million, which means it makes a squealing noise to alert  
20 you that there's contamination over whatever alarm limit  
21 as it was set in the instrument.

22 Q. **Okay. So just -- I just want to make sure I**  
23 **understand. Does that mean that -- The meter audibly**  
24 **sounding at 1,000 parts per million, what does that mean?**

1           A.    That means that the atmosphere that's  
2 trapped inside the baggie that's going through the  
3 instrument has greater than 1,000 parts per million  
4 content of volatile organic compounds.

5           **Q.    Okay.  And I think you said earlier -- I**  
6 **want to make sure -- that in this process of looking at**  
7 **the soil, did you make any observation regarding the odor**  
8 **of the soil?**

9           A.    There was strong gasoline odor.

10          **Q.    So just to be clear, you observed visual**  
11 **contamination and you observed an odor or olfactory.**

12          A.    Right.

13          **Q.    And then you also measured the soils that**  
14 **you collected after placing them in a bag.**

15          A.    Right.

16          **Q.    And this PID meter measured 1,000 parts per**  
17 **million; is that correct?**

18          A.    Well, it was at least 1,000.

19          **Q.    So what -- tell me -- when you say at least**  
20 **1,000, explain to me why it's not 1,000 but at least**  
21 **1,000.**

22          A.    Because the meter's set to alarm at 1,000,  
23 so when it gets to 1,000 on the display, it goes into  
24 alarm and then makes a noise, a squealing noise, and

1 then --

2 Q. So would it be fair to say that there may  
3 have been a concentration greater than 1,000 --

4 A. Yes.

5 Q. -- parts per million in the bag of soil?

6 A. Right.

7 Q. But if -- the trigger for the machine to  
8 audibly react was set at 1,000.

9 A. Right.

10 Q. And the day -- had you calibrated this meter  
11 before using it?

12 A. Yes. It's calibrated on 100 part per  
13 million isobutylene and air, and --

14 Q. And is that appropriate and consistent with  
15 the instructions for using that kind of equipment?

16 A. It's the manufacture's instructions for the  
17 instrument.

18 Q. Okay. Just a rough estimate, Mr. Herlacher,  
19 how many sites similar to the site we're talking about  
20 today have you performed similar activities at?

21 A. Well, I got in this business in 1989, and  
22 I'm -- probably ten or twelve a year since then. I'd say  
23 150 or so. I never really kept a count.

24 Q. And is there a term for what you were doing

1 **that day? I mean --**

2 A. Just collecting the sample for evaluation.  
3 We call it a preliminary assessment.

4 **Q. Okay. And why -- you know, does that term**  
5 **come from regulations or is that an internal --**

6 A. I think that's a generally accepted term for  
7 environmental consultants.

8 **Q. Okay.**

9 A. I mean, it's not a name that I came up with.

10 **Q. After you conducted these activities you**  
11 **describe, did you develop any conclusion about the**  
12 **information you gathered?**

13 A. I was convinced that there had been a  
14 release of some sort from the tank and that there was  
15 contamination in the backfill.

16 **Q. Okay. And did you take any steps based upon**  
17 **that?**

18 A. I notified the tank owner of my findings.

19 **Q. Okay. And did you do anything further?**

20 A. Well, yeah. They said, okay, go ahead and  
21 contact the IEMA and report that there's been a release  
22 from the tank.

23 **Q. And did you do that?**

24 A. Yes, I did.

1 Q. Okay. And if we go back again to the record  
2 to page 001, would you look at that document and tell me  
3 what you understand that document to be?

4 A. That appears to be a report about the  
5 telephone contact I had with IEMA that day.

6 Q. Okay. And does that page 001 of the record  
7 in fact indicate that you made a release report to the  
8 Illinois Emergency Management Agency?

9 A. Yes, it does.

10 Q. And does it indicate that that was made on  
11 January 18, 2008?

12 A. Yes.

13 Q. Just briefly summarize for us all, what  
14 happens, from your experience, once a release is reported  
15 from an underground storage tank?

16 A. My understanding is IEMA forwards this to  
17 the Illinois EPA LUST section, and then about a week or  
18 so later we get a letter from somebody in management at  
19 the Illinois EPA that instructs us to proceed in  
20 accordance with some regulations for reporting and file  
21 20-day reports and 45-day reports and things like that.

22 Q. Okay. And did you do those things with  
23 respect to the site we're talking about today?

24 A. Yes, we did.

1 Q. Okay. And specifically, did you submit a  
2 20-day report on behalf of Dickerson Petroleum?

3 A. Yes, we did.

4 Q. And did you subsequently submit a 45-day  
5 report?

6 A. Yes, we did.

7 Q. Going to the record again, let me draw your  
8 attention to the documents beginning at page 004 of the  
9 record. If you look at page 004, would you tell me what  
10 you understand that page to be?

11 A. That's the cover page for the 45-day report  
12 that we submitted to the Agency.

13 Q. Okay. And then subsequent to that, did you  
14 submit another report to the Agency?

15 A. Well, we also submitted some requests for  
16 extension of early action period to accomplish some early  
17 action remediation activity.

18 Q. And did you submit a letter to the Agency  
19 requesting that extension?

20 A. Yes, we did.

21 Q. And did you receive a response from the  
22 Agency approving that extension?

23 A. Yes, we did.

24 Q. Okay. And did you subsequently submit a

1 45-day report addendum?

2 A. Yes, we did.

3 Q. Okay. And directing your attention to  
4 page 037 of the record, can you tell me, does that appear  
5 to be a copy of the 45-day report addendum you submitted?

6 A. Yes, sir.

7 Q. Now, the next document I'd ask you to look  
8 at in the record is at the record at page 110 and 111.  
9 Do you recognize that document or have you seen that  
10 document before?

11 A. Yes. This is a letter we received from the  
12 Agency.

13 Q. Okay. And then if you look to -- following  
14 that in the record to page 112 and 113, have you seen  
15 that letter before?

16 A. Yes.

17 Q. Okay. And just -- is that a letter from the  
18 Illinois EPA leaking underground storage tank program to  
19 Dickerson Petroleum?

20 A. Yes. It denies reimbursement for the  
21 incident in question.

22 Q. Okay. Now, going back to that first  
23 document, your 45-day report, and directing your  
24 attention to page 13 of the record, which is a page in

1 that report, does that report provide the Agency any  
2 information regarding your release investigation efforts  
3 on January 18?

4 A. Yes. Item D-3, lower half of the page,  
5 discusses our -- how we discovered that there was  
6 presence of gasoline contamination.

7 Q. Okay. And let me direct your attention to  
8 the record on the following page, page 014 of the record.  
9 Is there any additional information regarding your  
10 release investigation and/or confirmation on that page?

11 A. Yes, there is.

12 Q. And where is that located?

13 A. That's item E-5, soil boring logs, at the  
14 bottom of the page.

15 Q. Okay. And does that reference your  
16 observations on January 18, 2008?

17 A. Yes.

18 Q. And does it reference the fact that a PID  
19 meter was used?

20 A. Yes, it does.

21 Q. Now, if you would look at the top of  
22 page 015, and would you read that very first full  
23 sentence at the top?

24 A. "No samples from this boring were retained



1 for laboratory analysis."

2 Q. Okay. Now, tell me, Mr. Herlacher, is there  
3 a reason why no samples were retained for laboratory  
4 analysis?

5 A. Well, it had been my experience that there  
6 was no reason to have a laboratory analysis performed on  
7 a sample; that the PID measurement and the other  
8 observations were adequate to confirm the presence of a  
9 lot of petroleum.

10 Q. Okay. Now, again, directing your attention  
11 in the record to the 45-day report addendum, which I  
12 believe begins --

13 HEARING OFFICER WEBB: 37.

14 Q. -- at page 037, just to summarize, did that  
15 addendum also include language referencing the manner in  
16 which you investigated and confirmed the release at the  
17 site?

18 A. I'm pretty sure it does. It would be item  
19 D-3 and --

20 Q. And would it be on page 046?

21 A. Yes.

22 Q. And is it also mentioned again on pages 047  
23 and 048?

24 A. Yes, it is.

1           Q.    Okay.  In your experience, I think you've  
2 mentioned that you've worked on similar sites,  
3 approximately ten to twelve a year, for the last fifteen  
4 years?

5           A.    Right.

6           Q.    Okay.  Was it your normal practice to  
7 investigate and confirm a release in the fashion that's  
8 described -- you described in your testimony and as set  
9 forth in the 45-day report and the 45-day addendum?

10          A.    It's just -- The question was, was this our  
11 customary procedure for --

12          Q.    Yes.

13          A.    More or -- yes.

14          Q.    Okay.  As we sit here, up until -- let me  
15 rephrase it this way.  Up until you received this March 9  
16 letter that's in the record, had you ever been told that  
17 that was not an appropriate way to investigate and  
18 confirm a release?

19          A.    No.

20          Q.    Have you since been told by anyone at the  
21 Agency that that's not the appropriate methodology?

22          A.    Well, yeah, after some conversations after  
23 we got the March 9 letter.

24          Q.    Now, if you would, let's go back to the

1 letter in the record that's dated March 9, 2009, at  
2 pages 110 and 111.

3 A. Okay.

4 Q. Do you recall receiving that letter shortly  
5 after the date of the letter, March 9, 2009?

6 A. Yes.

7 Q. Did you read the letter at that time?

8 A. Yes, I did.

9 Q. Did you understand what the letter meant?

10 A. Well, I wasn't really -- I understood that  
11 they were rejecting our 45-day report. I just didn't  
12 understand why. There was no reason that I could tell  
13 that -- specifically why it was rejected.

14 Q. Okay. If you would, I'd like to direct your  
15 attention to Petitioner's Exhibit No. 2 that's been  
16 admitted into evidence. Do you know what that document  
17 is?

18 A. Yes. This is 734.505.

19 Q. And let me direct your attention in specific  
20 in Exhibit 2 to 734.505, Subsection -- or -- yeah,  
21 Subsection B, and in particular to the very last sentence  
22 of the first full paragraph. Would you read that for me?

23 A. "If the Agency rejects a plan, budget or  
24 report or requires modifications, the written

1 notification must contain the following information, as  
2 applicable."

3 **Q. And then would you just read for me b(1),**  
4 **(2) and (3)?**

5 A. 1, "An explanation of the specific type of  
6 information, if any, that the Agency needs to complete  
7 its review"; 2, "An explanation of the sections of the  
8 Act or regulations that may be violated if the plan,  
9 budget or report is approved"; and 3, "A statement of  
10 specific reasons why the stated sections of the Act or  
11 regulations may be violated if the plan, budget or report  
12 is approved."

13 **Q. Okay. Now, directing your attention back to**  
14 **the record, pages 110 and 111, can you tell me whether**  
15 **there's an explanation of the specific type of**  
16 **information that the Agency might need to complete its**  
17 **review?**

18 MR. RICHARDSON: I'm going to object. That  
19 really calls for a legal conclusion. We have the law.  
20 We have the letter. It's really up to the Board to  
21 decide if it was adequate, and I don't know that this  
22 witness can add to that process.

23 MR. DWYER: Well, I think he's entitled to  
24 testify to what he believed was in the letter was not in

1 the letter. That's his opinion. He's entitled to give  
2 that. It's his opinion of a document he read.

3 HEARING OFFICER WEBB: Okay. That's fine.  
4 Go ahead.

5 A. Okay. What was your question? I'm sorry,  
6 but I kind of --

7 Q. (By Mr. Dwyer) You're going to make me  
8 reread the question. Okay. When you looked at the March  
9 9, 2009, letter, did you see an explanation of the  
10 specific type of information, if any, that the Agency  
11 might need to complete its review?

12 A. No, there was no indication that I found in  
13 the letter, no, sir.

14 Q. Further, when you looked at the March 9,  
15 2009, letter upon receiving it, did you see an  
16 explanation of the sections of the Act or regulations  
17 that may be violated if the plan, budget or report that  
18 was submitted had been approved?

19 A. No.

20 Q. Okay. Well, let me ask you this: Does the  
21 letter -- I mean, doesn't the letter in the second  
22 paragraph reference that the incident was not subject to  
23 35 Illinois Administrative Code 734, 732 or 731?

24 A. Yeah, that's in the letter, but there's --

1 Q. Finally, does the letter -- aside from that  
2 second paragraph, does the letter contain any statement  
3 of specific reasons why the cited sections of the Act or  
4 regulations may be violated if the 45-day addendum and  
5 45-day report had been approved?

6 A. No.

7 Q. Okay. So when you received this letter, did  
8 you understand why the Agency had rejected the 45-day  
9 report?

10 A. No. I had no idea.

11 Q. Okay. Did you do anything after you  
12 received the letter regarding it?

13 A. Well, I called Jay Gaydosh on March the  
14 10th.

15 Q. Okay. Let me just stop you. I just -- I  
16 want to let the record reflect that Mr. Gaydosh is  
17 present at the hearing, and is he the individual that  
18 you -- you're talking about?

19 A. Well, he told me his name was Jay Gaydosh.

20 Q. All right. So do you recall approximately  
21 when you called Mr. Gaydosh?

22 A. I'd have to check my conversation notes, but  
23 I think it was, like, in the morning, maybe around ten  
24 o'clock, something like that.

1           **Q.    I mean, the day after you received the**  
2 **letter?**

3           A.    Well, we hadn't actually -- I hadn't  
4 actually seen the letter at that time.  He had left a  
5 message on Jim Foley's answering machine on March 9 to  
6 notify him that there was a letter on the way that  
7 indicated that the -- this was a non-LUST release, and so  
8 I tried to call him on March the 9th but I got -- he  
9 wasn't in, so instead of leaving him a message, I called  
10 him back on March the 10th.

11           **Q.    Okay.  And did you speak with him on March**  
12 **the 10th?**

13           A.    Yes, I did.

14           **Q.    And can you just summarize the conversation**  
15 **that you had?**

16           A.    Well, he explained to me that we didn't  
17 confirm the release in accordance with the agency  
18 regulations, and I asked him specifically what regulation  
19 that governed discovering a release and confirming a  
20 release.  He referred me to Part 210(h)(2), I believe,  
21 Part 734, and that -- and I mentioned to him that that  
22 was an early action procedure that required collecting  
23 samples around an abandoned in-place fuel storage tank,  
24 and I mentioned that we removed these tanks and so that

1 didn't really apply to our situation, and he also  
2 suggested that we took the sample from the backfill and  
3 it should have been collected from native soil, and said,  
4 you know, contamination of the backfill would not  
5 indicate that a release had occurred from the tank, and  
6 he said that he could check tanks anywhere in the state  
7 and find contamination in the backfill, so that wasn't  
8 really an indication that there'd been a release from the  
9 tank.

10 **Q. Okay. And drawing your attention back to**  
11 **the March 9, 2009, letter -- that's pages 110 and 111 --**  
12 **is there any reference in that letter to this 35 Illinois**  
13 **Administrative Code 734.210?**

14 A. No, there's not.

15 **Q. Is there any reference to the -- this**  
16 **requirement that confirmation of release samples be taken**  
17 **somewhere other than from backfill?**

18 A. No.

19 **Q. During that conversation after you received**  
20 **the letter, that -- I'm sorry -- the conversation with**  
21 **Mr. Gaydosh, is that the first time that you'd ever been**  
22 **told of this supposed requirement?**

23 A. Yes.

24 **Q. How did you end that conversation? Did you**



1 **ask him further questions? Did he ask for further**  
2 **information?**

3 A. I think after he explained to me the  
4 Agency's position on this, that pretty much answered my  
5 question and that was -- I don't recall that we had much  
6 of a conversation after that.

7 **Q. Did you speak with him again after that?**

8 A. Yeah, I did.

9 **Q. Do you recall approximately when?**

10 A. It was on March the 12th. By that time I'd  
11 relayed the information back to my client, and I was  
12 going to -- ordinarily these things have an appeal  
13 procedure specified someplace in the letter that says,  
14 you know, you got this many days to do this and this and  
15 this, and so I was going to put together a letter to  
16 notify some EPA attorney that we were going to appeal  
17 this decision, and -- but I couldn't find any appeal  
18 stuff in the letter, so I called Jay back and said, you  
19 know, where's the appeal stuff, and he said, well, you  
20 can appeal any decision we make and there should be  
21 something in there, but, okay, let me talk to my boss and  
22 find out what's going on, so that was on March the 12th,  
23 and I believe it was March the 13th before I heard back  
24 from him. Well --

1           **Q.    And you said you -- did he call you back on**  
2 **March 13?**

3           A.    Well, he called me back late in the day on  
4 March the 12th and said -- this was about five o'clock or  
5 so -- and he said that there was still some going over  
6 things, Hernando and Harry, his -- you know, his  
7 managers.

8           **Q.    Okay.   Just to clarify for the record, when**  
9 **you say Hernando, do you mean Hernando Albarracin?**

10          A.    Albarracin.

11          **Q.    And is he the director of the LUST program**  
12 **at IEPA?**

13          A.    Yes, he is.

14          **Q.    And then you said Harry.   Do you mean**  
15 **Mr. Harry Chappel?**

16          A.    Harry Chappel.   He's Jay's supervisor.

17          **Q.    And is he a regional subunit manager?**

18          A.    Right, uh-huh.   And anyway, there was kind  
19 of some discussions about why that information was left  
20 out of the letter, and he said, Hernando's going to check  
21 with the legal department and find out if there was some  
22 specific reason that they excluded that information, and  
23 then so that was -- he said he'd call me back as soon as  
24 he had an update from those guys.   All right.   Well, then

1 on March the 13th was the next time I talked to him, and  
2 he asked me, he said, has the site been approved by the  
3 fire marshal's office for reimbursement? I said yes, and  
4 he said he wanted a copy of that, and he wanted to know  
5 if I had a copy of the fire marshal's tank removal log,  
6 and I said, yes, I did, and he asked me to fax those to  
7 him.

8 **Q. And did you?**

9 A. Yes, I did.

10 **Q. Okay. And let me direct your attention to**  
11 **pages 088, 089, 090, 091 and 092 of the record.**

12 A. Okay.

13 **Q. Okay. Can you tell me, page 088 of the**  
14 **record, what is your understanding of that document?**

15 A. That's the cover sheet for the stuff that I  
16 faxed to Jay at his request from the fire marshal --

17 **Q. Is there a fax cover sheet?**

18 A. Yeah.

19 **Q. Okay. And can you tell me -- so page 1 is**  
20 **the cover. Would you tell me what the next page is?**

21 A. It's the first page of the fire marshal's  
22 eligibility, deductibility approval letter for the --

23 **Q. Okay. And so just to clarify, the fire**  
24 **marshal issued a letter to Dickerson saying that this**

1 release was eligible for reimbursement and that it had a  
2 deductible of \$10,000. Is that what it says?

3 A. Yes.

4 Q. Okay. And then that's a two-page letter; is  
5 that correct?

6 A. Yes.

7 Q. Then if we go to page 091, which is part of  
8 that fax, what is that document?

9 A. This is the log of underground storage tank  
10 removal that was completed by the fire marshal storage  
11 tank safety specialist who was on site at the time we  
12 removed the tanks.

13 Q. And do you remember the name of that  
14 individual?

15 A. His name was Kent Gelarden.

16 Q. Okay. And looking at that document, I note  
17 that it has a number of columns and rows for certain  
18 information to be filled in. Can you tell me what -- you  
19 know, what is the purpose of that form as you understand  
20 it?

21 A. It's a documentation of his I guess  
22 observations during the tank removal process that's filed  
23 with his office for historical reference, I suppose.

24 Q. Okay. And were these -- were the tanks at

1 **this location removed?**

2 A. Yes, they were.

3 **Q. Okay. Are there any requirements regarding**  
4 **removal of tanks?**

5 A. Yeah, quite a few safety-related issues.

6 The contractor doing the tank removal has to be certified  
7 by the state fire marshal, and then there's -- have to  
8 measure for explosive vapors inside the tank before it's  
9 removed, and the -- has to be lifted out of the thing and  
10 set down and has to be checked for explosive vapors again  
11 before the contractor cuts a hole in it.

12 **Q. Why is the fire marshal storage tank safety**  
13 **specialist present?**

14 A. Well, just like the name implies, storage  
15 tank safety specialist, to ensure that these safety  
16 procedures are followed to not endanger the public or  
17 have fires or explosions.

18 **Q. Okay. And looking at this form again, which**  
19 **is page 091, does the form provide places to check to**  
20 **identify the activity that's being undertaken?**

21 A. Yes, they do.

22 **Q. Okay. And what does it indicate was the**  
23 **activity at this site?**

24 A. Tanks were -- Two tanks were removed.

1 Q. Okay. And if -- let me direct your  
2 attention down. It's very difficult to see, but down in  
3 the lower portion of the document, there is a section  
4 that's very hard to read, but it's Section D. Can you  
5 see that section?

6 A. Yes.

7 Q. Okay. Does that contain five items that  
8 need to be checked off or, you know, determined?

9 A. Yes.

10 Q. Okay. Now, is the second item there -- it's  
11 listed I believe in Section D, Section 2, as  
12 contamination status?

13 A. Yes.

14 Q. Okay. And does it provide, then, a column  
15 where information can be provided for each of the tanks?

16 A. Yes.

17 Q. And at this site, just to confirm, there  
18 were two gasoline tanks that were removed --

19 A. Right.

20 Q. -- is that correct? And in Section D-2, for  
21 contamination status, is there information in there?

22 A. Yes, there is.

23 Q. And what does it say? It says NR. Do  
24 you -- What does that mean?

1           A.    According to the legend, it's no apparent  
2 release.

3           **Q.    Okay.  And so if I understand this**  
4 **correctly, the fire marshal's log indicates that there**  
5 **was no release at the site.**

6           A.    No apparent release.

7           **Q.    Okay.  And that's what the legend reads, no**  
8 **apparent release.**

9           A.    Yes.

10          **Q.    When was the first time that you saw this**  
11 **document, Mr. Herlacher?**

12          A.    On March the 13th.

13          **Q.    And how did you come to be in possession of**  
14 **a copy of it?**

15          A.    Well, there was -- I was concerned about the  
16 rejection of the 45-day report, so I e-mailed or  
17 contacted the woman at the state fire marshal's office  
18 who's the FOIA coordinator.

19          **Q.    And did you submit a FOIA, a Freedom of**  
20 **Information Act, request?**

21          A.    Right.  Yes.

22          **Q.    And did you request a copy of that document?**

23          A.    Yes, I did.

24          **Q.    Okay.  Did you receive it?**

1           A.    Yes.  They faxed it to me.  If you look at  
2 the header on the top -- or let's see.  No, down at the  
3 bottom, that says legal.  That's from the OSFM legal  
4 department.

5           **Q.    Okay.  But just to confirm, you received a**  
6 **copy of this document from the state fire marshal.**

7           A.    Yes.

8           **Q.    And then in turn, per Mr. Gaydosh's request,**  
9 **you faxed it to Mr. Gaydosh.**

10          A.    Right.

11          **Q.    Okay.  So prior to March 13, 2009, you were**  
12 **not aware and had not seen this log.**

13          A.    Right.

14          **Q.    And on the -- well, strike that.  So the**  
15 **last page of that faxed document -- it's page 092 of the**  
16 **record -- it appears to be a diagram.  Do you know who**  
17 **drew that?**

18          A.    Mr. Gelarden drew that on the back to -- I  
19 guess so that he could remember where the tanks were  
20 located.  This is a typical thing that these fire marshal  
21 guys do whenever they're out on the job site.

22          **Q.    Okay.  Are you okay, Mr. Herlacher?  Do you**  
23 **need a break?**

24          A.    No, I'm okay.  I'll let you know when I got



1 to get up.

2 Q. Okay. I'm going to show you another  
3 document -- well, let me stay with this. You -- So you  
4 provided these documents to Mr. Gaydosh by fax on March  
5 13, 2009. Did you have any further communications with  
6 Mr. Gaydosh?

7 A. Not that I --

8 Q. Regarding this site.

9 A. Yeah, not that I recall.

10 Q. Okay. Did -- After that date, did you have  
11 any communications with anyone else from the LUST  
12 program?

13 A. Yeah. Harry Chappel called me on March 31  
14 at the request of Mr. Ingersoll.

15 Q. Okay. And is -- do you understand  
16 Mr. Ingersoll to be the deputy chief counsel, legal  
17 counsel for the Agency?

18 A. He's somehow involved with legal stuff for  
19 the Illinois EPA. That's -- You know, I didn't know his  
20 exact title or anything.

21 Q. Okay. Let me suggest that that's his title,  
22 but it's not critical here. Please, let's go ahead  
23 and -- so you said you received a call from Mr. Chappel.  
24 Do you recall approximately when? I mean, sometimes

1 **after -- sometime after March 13, obviously.**

2 A. It was March 31. I went back and checked my  
3 conversation.

4 Q. Okay. And can you just again summarize, to  
5 the best you can, your recollection of the discussion you  
6 had with Mr. Chappel?

7 MR. RICHARDSON: I'd object to the relevance  
8 of this conversation.

9 MR. DWYER: Well, I -- we think it's  
10 relevant and probative with respect to the issues in the  
11 case; the -- one of the issues being that the 45-day  
12 report was rejected. We have appealed that rejection on  
13 two bases; that the letter notifying us of the rejection  
14 did not satisfy the regulatory requirements for  
15 notification, and further, we think the testimony's  
16 probative and relevant on whether or not there were  
17 reasons that the -- that drove the Agency's decision  
18 letter that were not in the letter but were later  
19 conveyed to the petitioner's consultant, and we think  
20 that's very relevant because that information appears, at  
21 least in our view, and that's why we're presenting it, to  
22 explore --

23 HEARING OFFICER WEBB: I -- I'll allow it.  
24 Just go ahead.

1           **Q.    (By Mr. Dwyer)    Just summarize, again -- and**  
2 **certainly, you know, the witness isn't -- is subject to**  
3 **cross examination -- please just summarize your**  
4 **recollection, as best you can, of the discussion you had**  
5 **with Mr. Chappel.**

6           A.    Okay.  He called me, he said at the request  
7 of Bill Ingersoll, to explain to me why they rejected  
8 this thing and why this procedure that we used to confirm  
9 the presence of release was inadequate, in his viewpoint,  
10 at least, and --

11           **Q.    And did he explain to you why he believed it**  
12 **was inadequate?**

13           A.    Yeah.  He said that it was agency policy  
14 that you had to have a laboratory analysis of the sample  
15 to -- that indicated that the contamination level in the  
16 sample was above tier 1 cleanup objectives.  I said,  
17 okay, Harry, where in Part 734 does it say this, and he  
18 said, it's not in Part 734, and I said, okay, well, where  
19 are you coming from with this, and he said, well, in 1991  
20 somebody changed some manual or something like that  
21 that -- I never did really understand the relevance of  
22 this 1991 manual, but I asked him several times, I said,  
23 where in Part 734 does it require that we have a  
24 laboratory analysis of a sample that exceeds tier 1 to

1 confirm the presence of a release, and he told me every  
2 time that it's not in there. So at that point we kind of  
3 reached a -- I guess you'd say an impasse or something.  
4 Obviously he was -- he had his mind made up that we were  
5 wrong and I -- and he couldn't explain to me to my  
6 satisfaction why we were wrong, so the conversation  
7 ended, and I suggested that we were probably going to  
8 appeal this to the Pollution Control Board.

9 Q. Okay. I'm going to ask you to look at a  
10 document. I'm not going to mark it as an exhibit, and  
11 I've shown it to respondent's counsel. Would you take a  
12 look at that and tell me if you understand what it is?

13 A. This is Part 734 of the 35 Illinois Admin  
14 Code.

15 Q. Okay. And just -- I want to be clear.  
16 Is -- Are those the regulations that you believe apply to  
17 the work that's been done at this site?

18 A. Yes.

19 Q. Okay. Now I'm going to direct your  
20 attention specifically to 35 Illinois Administrative Code  
21 734, Section 110. Now, specifically, can you tell me  
22 what the title of Section 110 -- if I can find it --

23 A. It's number 5. Okay. "Severability."

24 Q. No, 110. Oh, I'm sorry. I apologize. I

1 **misspoke. We're talking about 35 Illinois Administrative**  
2 **Code 734, Subsection 115.**

3 A. Yes.

4 **Q. And what is contained in there?**

5 A. Definitions of terms that are used in the --

6 **Q. All right. And I'm going to direct your**  
7 **attention to two specific terms in there. Well, let me**  
8 **ask you this: Do the definitions contain the terms**  
9 **"confirmed release" and "confirmation of a release"?**

10 A. Confirmation -- Yes, it does, both those  
11 terms.

12 **Q. Okay. And just tell me, how are those terms**  
13 **defined in Section 734.110?**

14 A. It says confirmation is done in accordance  
15 with the regulations promulgated by the Office of the  
16 Illinois State Fire Marshal at 41 Illinois Admin Code  
17 170.

18 **Q. Okay. And then the other definition?**

19 A. Means a release of petroleum that is  
20 confirmed in accordance with the regulations promulgated  
21 by the Office of the State Fire Marshal at 41 Illinois  
22 Admin Code 170.

23 **Q. Thank you. Now, I'm going to show you now a**  
24 **document that's been marked Petitioner's Exhibit 3. Do**

1     **you have a copy of that in front of you?**

2             A.    1, 2.  I don't have 3.

3             **Q.    Yeah, you do.**

4             A.    Oh, oh, here.

5             **Q.    Oh, never mind.  I'm -- I won't say I'm a**  
6 **dope on the record, but I just did.**

7             A.    Okay.  Sure.

8             **Q.    Can you tell me, do you have a copy of**  
9 **Petitioner's Exhibit 3 in front of you?**

10            A.    Yes, I do.

11            **Q.    And can you tell me what you understand that**  
12 **document to be?**

13            A.    These are the regulatory requirements for  
14 performing early action activities with -- for leaking  
15 underground storage tanks.

16            **Q.    Okay.  Now, if you would, look at 734.210,**  
17 **the first subpart, Subpart A, and will you just read the**  
18 **first portion of that sentence?**

19            A.    Upon confirmation of a release of petroleum  
20 from a UST in accordance with the regulations promulgated  
21 by the OSFM.

22            **Q.    Okay.  So what do you understand that to**  
23 **mean?**

24            A.    That I -- to confirm the presence of a

1 release, I need to conduct my activities in accordance  
2 with the requirements of 41 Illinois Admin Code Part 170.

3 **Q. Okay. And, now, directing your attention**  
4 **further down in Petitioner's Exhibit 3 to**  
5 **Section 7342.10 [sic], Subsection (a) (5), would you read**  
6 **the first sentence of Subsection 5?**

7 A. Measure for the presence of a release where  
8 contamination is most likely to be present at the UST  
9 site, unless the presence and source has been confirmed  
10 in accordance with regulations promulgated by the OSFM.

11 **Q. Okay. Now, directing your attention to the**  
12 **second page of Exhibit 3, some way down below Subsection**  
13 **G, is there a paragraph that's prefaced by caps, "Board**  
14 **Note"?**

15 A. Yes.

16 **Q. Okay. And would you read what that board**  
17 **note says?**

18 A. "Owners or operators seeking payment from  
19 the fund are to first notify IEMA of a suspected release  
20 and then confirm the release within 14 days to IEMA  
21 pursuant to regulations promulgated by the OSFM."

22 **Q. All right. Earlier, when I asked you to**  
23 **read that first sentence of Subsection 5, I believe I**  
24 **mistakenly referenced it as 734.210(a) (5). Just to**

1 correct the record, is the -- is in fact the language you  
2 read actually contained in 734.210(b) (5)?

3 A. Yes.

4 Q. I apologize. My mistake. Now, let me  
5 direct your attention now to Petitioner's Exhibits 4 and  
6 5. Dealing with Petitioner's Exhibit 4, is -- tell me  
7 what you understand that to be.

8 A. This is the state fire marshal's procedure  
9 for reporting suspected releases from USTs.

10 Q. Okay. And then if you would then switch to  
11 Petitioner's Exhibit 5, would you tell me what you  
12 understand that to be?

13 A. This is for investigating releases, initial  
14 response, conducting a site assessment for releases from  
15 USTs.

16 Q. Okay. And directing your attention in  
17 Exhibit 5 specifically down to 170.580, Subsection (c),  
18 what's the title of that subsection?

19 A. "Site Assessment."

20 Q. Okay. And then would you read how it, you  
21 know, further discusses site assessment?

22 A. Owners or operators shall measure for the  
23 presence of a release where contamination is most likely  
24 to be present at the UST site. In selecting sample



1 types, locations and measurement methods, owners or  
2 operators shall consider the nature of the stored  
3 substance, the initial alarm or cause for suspicion, the  
4 types of backfill, the depth of groundwater and other  
5 factors appropriate for identifying the presence and  
6 source of the release.

7 Q. Okay. Now, is it your understanding that  
8 those are the regulations that govern release  
9 investigation and confirmation --

10 A. Yes.

11 Q. -- for underground storage tanks?

12 A. Right.

13 Q. Okay. And is it your understanding that  
14 those are the regulations that are being referred to,  
15 going back to Petitioner's Exhibit 3, in 35 Illinois  
16 Administrative Code 734.210?

17 A. Yes.

18 Q. Now, directing your attention again to  
19 Exhibit 5, Subsection -- Section 170.580, Subsection (c),  
20 can you tell me, is there any language in there requiring  
21 that a release from an UST be confirmed with laboratory  
22 analytic results?

23 A. No.

24 Q. Okay. Does it specify any specific

1 measurement method that must be used?

2 A. No, it doesn't.

3 Q. Okay. Does it in fact say measurement

4 methods, plural?

5 A. Yes.

6 Q. And does it also recommend that an

7 owner/operator measure for the presence of a release

8 where it's most likely to be present?

9 A. Yes, it does.

10 Q. In your opinion, based upon the dozens of

11 LUST sites that you have worked on and performed

12 assessments for possible releases, in your opinion, what

13 is the most likely place where you would find

14 contamination?

15 A. Around the fill openings or the pump islands

16 or below the tanks.

17 Q. Okay.

18 A. In the backfill.

19 Q. Okay. In the backfill?

20 A. Right.

21 Q. And just explain for the Hearing Officer and

22 for the Board, what is the backfill area as opposed to

23 some other area?

24 A. Well, when the tanks are installed, you take

1 an excavation machine into wherever they're going to be  
2 placed and dig a hole big enough to hold the tanks and  
3 then put a layer of material about a foot or so thick on  
4 the bottom, set the tanks on there, level them up and  
5 then fill in around them with, you know, some sort of --  
6 well, in this case, these were backfilled with sand.  
7 Some tanks are backfilled with pea gravel, things like  
8 that, but it's just to fill up the gap between the  
9 excavation and the tank to prevent it from moving around.

10 **Q. Okay. And, now, let's go back to -- if I**  
11 **can find it -- Petitioner's Exhibit 3, which is a copy of**  
12 **35 Illinois Administrative Code 734.210, and if you would**  
13 **take a look at that, and then I'd just like to ask you a**  
14 **question about it.**

15 **A. Okay.**

16 **Q. Why don't you look at -- I think it's a**  
17 **four-page exhibit. Have you had a chance to look through**  
18 **that?**

19 **A. Uh-huh. Yes.**

20 **Q. Okay. Can you tell me, based upon your**  
21 **understanding of that regulation, does that regulation**  
22 **contain any requirements for release investigation and**  
23 **confirmation separate and apart from the fire marshal**  
24 **regulations that are referenced therein?**

1           A.    No.  Actually, this is an early action  
2 procedure that has nothing to do with our preliminary  
3 assessment.

4           Q.    And in fact, if you look at 734.210,  
5 Subsection A, doesn't it begin, upon confirmation of a  
6 release in accordance with the regulations of the fire  
7 marshal?

8           A.    Yes.

9           Q.    And do you know of regulations other than 41  
10 Illinois Administrative Code 560 and 580 that you're  
11 required to comply with?

12          A.    No, I'm not.

13          Q.    Okay.  And has the Agency with respect to  
14 this site indicated there are any other regulations that  
15 govern release investigation or confirmation?

16          A.    No written regulations.

17          Q.    Well, and just to tie this up, on  
18 January 18, you have already testified that you went to  
19 the site and you drilled a soil boring out of the  
20 backfill and you examined that visually, by smell and  
21 with a PID meter.

22          A.    Yes.

23          Q.    Okay.  And is it your understanding based  
24 upon your review of the fire marshal regulations that

1 that -- what you did there was consistent with the  
2 requirements?

3 A. Yes.

4 Q. Okay. Do you know of any other requirements  
5 in the Agency's regulations or the fire marshal's for  
6 release investigation and confirmation?

7 A. No.

8 Q. And just to confirm, can you tell me, in  
9 your review of Petitioner's Exhibit 4 and 5, is there any  
10 language in there that says that a PID meter may not be  
11 used?

12 A. No, there's no indication of that.

13 Q. Okay. And is there any language in either  
14 of those sections of the 170 regulations that requires  
15 that samples be taken and analyzed by a lab to confirm  
16 the presence of a release?

17 A. No.

18 Q. Okay. Now, let me direct your attention  
19 back to the record, to the 45-day report addendum that  
20 was filed in this matter, which I can never seem to find.  
21 I think it begins, if I can get there --

22 MR. RICHARDSON: Page 38.

23 MR. DWYER: Thank you, Greg. Okay. It --  
24 Page 38 or page 37?

1 MR. RICHARDSON: Page 37 is the cover sheet.

2 Q. (By Mr. Dwyer) Now, in the 45-day report  
3 addendum that is in the record beginning at page 037,  
4 does that report contain any analytical data regarding  
5 the conditions of soils at the site?

6 A. Yes.

7 Q. Okay. And specifically, if we go to that  
8 report, and specifically page 051 of the record, can you  
9 tell me what is on that page?

10 A. That is a data table that has the results of  
11 the laboratory analysis reports.

12 Q. Okay. And just tell me what -- so what  
13 material was gathered to create this table?

14 A. Well, Jim collected samples from various --

15 Q. Okay. Let me back up. You need to identify  
16 who Jim is.

17 A. Jim Foley. He was -- He is our employee  
18 representative who was on site that was overseeing the  
19 removal of the tanks and the excavation of the soil  
20 contamination.

21 Q. Okay. So Mr. Foley was present on the date  
22 that the tanks were removed; is that right?

23 A. Yes.

24 Q. Okay. And so please continue with how you

1 **came to develop the information reflected in the table.**

2 A. Okay. Well, all these samples are collected  
3 in accordance with this 210 --

4 **Q. 734.210?**

5 A. -- 734.210, early action requirements for  
6 collection of soil samples after tank removal, and the  
7 first column on the left identifies the location of the  
8 sample and then the rest of the columns are individual  
9 contaminants of concern as specified by the Agency for  
10 gasoline storage tanks.

11 **Q. Okay. And what are those chemicals that are**  
12 **specified?**

13 A. Benzene, toluene, ethylbenzene, xylenes and  
14 MTBE.

15 **Q. Okay. And just so I understand, those are**  
16 **chemicals that you're required to sample for?**

17 A. For the analysis purposes for --

18 **Q. And why are you required to sample for**  
19 **those?**

20 A. Because according to the requirements of  
21 Part 210, this is in order to confirm whether we have  
22 remediated the contaminated soils to the point that we're  
23 below the tier 1 cleanup objectives.

24 **Q. So are those samples taken to demonstrate**

1 that either no more work is necessary at the site or  
2 further work is necessary?

3 A. Yes.

4 Q. Okay. And does 734.210 require that those  
5 samples be analyzed by a laboratory?

6 A. Yes.

7 Q. Okay. Now, getting back to page 051, did  
8 you take samples at the site?

9 A. Yes, we did.

10 Q. Okay. And did you send those samples to a  
11 laboratory for analysis?

12 A. Yes, we did.

13 Q. And does this table reflect the results of  
14 that laboratory analysis?

15 A. Yes, it does.

16 Q. And just tell me, does the table indicate  
17 that any of those chemicals, benzene, toluene,  
18 ethylbenzene or xylene, were present in samples taken  
19 from the site?

20 A. Yes.

21 Q. And does it indicate in fact that some of  
22 those chemicals were present at levels above what are  
23 called the detection limits?

24 A. Yes, they were.



1 Q. Okay. Now, just to go back and confirm  
2 this -- we discussed this earlier in your testimony -- in  
3 your opinion, are benzene, toluene, ethylbenzene and  
4 xylene volatile organic chemicals?

5 A. Yes, they are.

6 Q. And are they identified as such in the 734  
7 regulations?

8 A. I don't know if they identify them as VOCs,  
9 but they are contaminants of concern that have to be  
10 tested for whenever you're collecting samples to evaluate  
11 the presence of contamination in the soil.

12 Q. Well, now, you're a professional engineer,  
13 correct?

14 A. Yes.

15 Q. And you have, I think you described,  
16 approximately 20 years of experience working with  
17 underground storage tank sites?

18 A. Yes.

19 Q. Okay. In your professional opinion, based  
20 upon your, you know, experience and your education as an  
21 engineer and a professional engineer, do you consider  
22 benzene, toluene, ethylbenzene and xylene volatile  
23 organic chemicals?

24 A. Oh, yeah, they're definitely in that

1 category.

2 Q. So in your opinion, does this table document  
3 that in fact there were elements of these chemicals  
4 present in soils at this site?

5 A. Yes, in several of the samples.

6 Q. Okay. And do you have an opinion about how  
7 they came to be located there?

8 A. Well, they're not naturally occurring in the  
9 soil, so they had to be -- they had to come from some  
10 source, and there was underground tanks that held  
11 gasoline there in the immediate vicinity, so --

12 Q. And you visited this site on multiple  
13 occasions.

14 A. Yes.

15 Q. Okay. Did you identify any other sources  
16 of -- that might explain the presence of these chemicals  
17 other than the underground storage tanks?

18 A. No. There's none.

19 Q. Now, just to clarify for the record, going  
20 back to page 051 and the table and the information there,  
21 does that table indicate the presence of any of these  
22 chemicals listed at levels above what we've referred to  
23 here today as tier 1 remediation objectives?

24 A. No. They're all below those levels.

1 Q. Okay. And based upon that, did you submit  
2 your report and request that the Agency approve closure  
3 of this site?

4 A. Yes, we did.

5 Q. Okay. Earlier you testified that you had  
6 some discussions with Mr. Chappel and Mr. Gaydosh after  
7 you received the March 9, 2009, letter.

8 A. Yes.

9 Q. Okay. I'm going to show you what's been  
10 marked Petitioner's Exhibit 6. It's a group exhibit, and  
11 we'll talk about it in some -- well, I hope briefly.  
12 Looking at the first page of Petitioner's Exhibit 6, can  
13 you tell me what that document is?

14 A. This is an underground storage tank log for  
15 removal of piping at a convenience store facility in  
16 Cahokia, Illinois.

17 Q. Is that the same form as the one that is at  
18 page 091 of the record?

19 A. It's the same form, different location.

20 Q. Okay. And that's -- And so it's the same  
21 form, and I think you testified earlier that's the form  
22 that the fire marshal is required to fill out at each  
23 location where either a tank removal, a tank abandonment  
24 or a line leak replacement or upgrade or removal is

1 conducted.

2 A. Yes.

3 Q. Okay. Now, this Petitioner's Exhibit 6,  
4 first page, as you testified, deals with a different  
5 site, and where is this site located?

6 A. It's in Cahokia, Illinois, also, but it's  
7 several miles away from the Cahokia Quick Shop.

8 Q. Other than being in Cahokia, does it have  
9 any other relation to the site that we're talking about  
10 here today?

11 A. No, huh-uh.

12 Q. All right. And how did you come to be  
13 familiar with this site; that is, the site referenced in  
14 the first page of Petitioner's Exhibit 6?

15 A. A removal contractor received a permit from  
16 the state fire marshal to remove the lines, but one of  
17 the requirements on the permit was that a site assessment  
18 be conducted, and so the contractor called me to see if I  
19 could conduct the site assessment for them after they  
20 took the pipes out of the ground.

21 Q. Okay. So just so we understand here, in our  
22 case, this form was prepared for a tank removal, but in  
23 this Petitioner's Exhibit 6, this form was required for a  
24 replacement of tank lines?

1 A. Piping, yeah. Underground piping, yeah.

2 Q. The piping? Okay. Now, looking at the  
3 first page of Petitioner's Exhibit 6 and looking  
4 specifically at Section D, can you tell me, is there any  
5 indication about whether or not there was an apparent  
6 release at this site?

7 A. Appears not to have leaked according to the  
8 information here.

9 Q. Well, in fact, down in Section D,  
10 Subsection 2, under the columns for tanks one and two,  
11 does it indicate NR?

12 A. Yes.

13 Q. Okay. Now, did you perform any work at this  
14 site?

15 A. Yes. I collected soil samples to meet the  
16 requirements for the fire marshal's office to conduct a  
17 site assessment after the removal of the piping.

18 Q. Okay. And looking at the second page of  
19 Petitioner's Exhibit 6, tell me what that is.

20 A. That's the cover letter of the report that I  
21 submitted to the state fire marshal to document the site  
22 assessment that I performed.

23 Q. Okay. And then looking to the third page,  
24 can you tell me what that is?

1           A.    That's the report that I submitted to the  
2 Office of the Fire Marshal to document the site  
3 assessment and the samples I collected.

4           Q.    Okay.  And does that report indicate that  
5 the fire marshal required that samples be taken at the  
6 site as part of the line upgrade?

7           A.    Yes.

8           Q.    Okay.  And were you at the site when this  
9 work was done?

10          A.    Yes, I was.

11          Q.    Okay.  And was someone from the Office of  
12 the State Fire Marshal at the site on that day?

13          A.    Yes, Kent Gelarden.

14          Q.    Okay.  And is he the same individual that  
15 prepared the tank removal log for the subject site --

16          A.    Yes.

17          Q.    -- that we're here about today?  Okay.  And  
18 you -- beginning with page 3, that appears to be a report  
19 you prepared and submitted to the fire marshal; is that  
20 correct?

21          A.    Yes, it is.

22          Q.    And does that report contain any information  
23 about the conditions of the soils at this site?

24          A.    Yes.  I collected several samples for

1 laboratory analysis.

2 **Q. And were you directed to collect those by**  
3 **the fire marshal?**

4 A. Well, I talked to Bill Alderson. He's the  
5 southern regional administrator with --

6 **Q. Where is Mr. Alderson?**

7 A. He's the southern regional administrator  
8 with the office of -- the Illinois fire marshal's office,  
9 petroleum and chemical safety division.

10 **Q. Okay. And what was the purpose of talking**  
11 **with him about the site?**

12 A. To make sure that my report and my  
13 assessment would meet his requirements for the one that  
14 they required in accordance with the permit conditions.

15 **Q. And is that in your experience the normal**  
16 **course with a tank removal, that they would require this**  
17 **kind of report?**

18 A. No. This is the first time in my experience  
19 that I've seen that this -- the permit condition  
20 specifically required a site assessment.

21 **Q. Okay. Now, I'm going to direct your**  
22 **attention to page 10 of Petitioner's Exhibit 6.**

23 A. This is page 10?

24 **Q. Yep. Do you have page 10 in front of you?**

1 A. Yes. This is table I.

2 Q. Okay. And that table is somewhat similar to  
3 the table we talked about earlier that's in the record  
4 regarding the subject site we're here about; is that  
5 correct?

6 A. Yes.

7 Q. Okay. And tell me -- page 10 of  
8 Petitioner's Exhibit 6, tell me what that table -- what  
9 information it contains.

10 MR. RICHARDSON: I'd show an objection for  
11 the record on this material. I don't know the relevance  
12 of it to our case.

13 HEARING OFFICER WEBB: I don't know the  
14 relevance either, but I will allow you to make an offer  
15 of proof to the Board.

16 MR. DWYER: Okay. So just so I understand  
17 the Hearing Officer's ruling, do I need to make an offer  
18 right now?

19 HEARING OFFICER WEBB: Well, I --

20 MR. DWYER: I mean, I'm happy to do that.

21 HEARING OFFICER WEBB: I -- You haven't, you  
22 know --

23 MR. DWYER: I mean, I haven't offered the  
24 exhibit in.



1 HEARING OFFICER WEBB: You haven't --

2 MR. DWYER: I haven't offered the exhibit  
3 in.

4 HEARING OFFICER WEBB: That's true, you have  
5 not offered the exhibit in yet, so, I mean, I guess as  
6 the testimony -- you know, are you going to -- well, why  
7 don't you go ahead and offer it. If you're going to  
8 refer to it, if he's going to give a line of testimony on  
9 it, why don't we do it.

10 MR. DWYER: Well, that's fine. We offer  
11 Petitioner's Exhibit 6 into evidence.

12 HEARING OFFICER WEBB: Okay. I will accept  
13 it as an offer of proof.

14 MR. DWYER: Well, I'm sorry. And I should  
15 clarify. I'm offering it now. I'm -- I was on the  
16 understanding that you were going to deny that and then I  
17 would make my offer of proof as to why we think it should  
18 go in.

19 HEARING OFFICER WEBB: Yes, yes. You're  
20 right. Yes.

21 MR. DWYER: So I'm going to offer the  
22 exhibit into evidence now.

23 MR. RICHARDSON: I'll object for relevance.

24 MR. DWYER: Okay.

1 HEARING OFFICER WEBB: And I will sustain  
2 your objection and we may proceed.

3 MR. DWYER: Then, Hearing Officer, we'd like  
4 to make an offer of proof with respect to Petitioner's  
5 Exhibit 6.

6 HEARING OFFICER WEBB: Okay. Yes, go ahead.

7 MR. DWYER: We would submit that  
8 Petitioner's Exhibit 6 is relevant to the matter before  
9 the Board today for two reasons. The exhibit includes a  
10 document that is maintained in the ordinary course of  
11 business by the fire marshal, specifically page 1 of the  
12 exhibit, which is a log of underground storage tank  
13 removal. That log, like the log that is at page 091 of  
14 the record in this case, was, we would submit, prepared  
15 by the same storage tank safety specialist, Mr. Gelarden.  
16 That log in Petitioner's Exhibit 6, like the log in the  
17 record for our site, indicates no apparent release.  
18 Page 10 of Petitioner's Exhibit 6 contains a table that  
19 we believe clearly demonstrates that there was  
20 contamination at the site referenced in Petitioner's  
21 Exhibit 6 despite the fact that the fire marshal's log  
22 indicates no apparent release.

23 Further, we make an offer of proof that if  
24 Mr. Herlacher were allowed to testify, he would testify

1 that on the date of the work at the site, which just for  
2 the record I believe was November 28, 2006 -- that is  
3 with respect to the site in Petitioner's Exhibit 6 -- he  
4 had a conversation with Mr. Gelarden during which he  
5 asked Mr. Gelarden whether he should call in the release  
6 and Mr. Gelarden indicated that he'd already prepared his  
7 log, which is the first page of Petitioner's Exhibit 6,  
8 indicating no apparent release, and despite the  
9 information that the bag -- sample bag of soil from the  
10 area which Mr. Herlacher believed clearly demonstrated  
11 that a release had occurred, Mr. Gelarden replied that  
12 he'd already prepared his report and he wasn't going to  
13 go back and change it. That is our offer of proof with  
14 Petitioner's Exhibit 6.

15 HEARING OFFICER WEBB: Thank you.

16 Q. (By Mr. Dwyer) Okay. Now I'm going to ask  
17 you to take a look, Mr. Herlacher, at Petitioner's  
18 Exhibit 7. That is again a group exhibit composed of  
19 eight pages. Do you have that in front of you,  
20 Mr. Herlacher?

21 A. Yes, I do.

22 Q. Okay. Again, can you tell me the first page  
23 of Petitioner's Exhibit 7?

24 A. It's a copy of the log of underground

1 storage tank removal.

2 Q. Okay. And is that for a site other than the  
3 site we're here talking about today?

4 A. Yes.

5 Q. And in fact, is it -- does it relate to a  
6 site at 503 North Main Street in Red Bud, Illinois?

7 A. Yes.

8 Q. Okay. And again, directing your attention  
9 to Petitioner's Exhibit 7, the first page -- and again,  
10 we're looking at Subsection D -- does that report or that  
11 storage tank log indicate whether or not the fire marshal  
12 storage tank safety specialist believed that there was an  
13 apparent release at this location?

14 MR. RICHARDSON: I'm going to again object  
15 for relevance on this exhibit.

16 HEARING OFFICER WEBB: Sustained.

17 MR. DWYER: Okay. The offer of proof we'd  
18 make, Your Honor, on this is again similar to our offer  
19 on Petitioner's Exhibit 6; that here is another removal  
20 log where the fire marshal storage tank safety specialist  
21 indicated that there was no apparent release, and  
22 further, we would note that the pages 3, 4, 5, 6, 7 and 8  
23 of the exhibit are pages from the Illinois Environmental  
24 Protection Agency's leaking underground storage tank

1 database, which is a database that lists all of the  
2 reported release sites in the Agency's LUST program; that  
3 specifically, that site lists this location as having  
4 IEMA incident number 20081250; that at page 6 of the  
5 Petitioner's Exhibit 7 includes a description of  
6 correspondence between the owner/operator and the Agency  
7 indicating that early action has been performed,  
8 extensions of early action have been granted and a 45-day  
9 report addendum was received. On the last -- And this  
10 seventh page of the exhibit indicates that a site  
11 investigation plan has been submitted for that site and  
12 approved. Finally, the last page of Petitioner's  
13 Exhibit 6 shows that in fact this site has received  
14 reimbursement for corrective action costs despite the  
15 fact that the page 1 of the exhibit shows the fire  
16 marshal's log again indicating that there was no apparent  
17 release. We believe it's probative and relevant with  
18 respect to whether or not the fire marshal's log can be  
19 relied upon to conclusively determine whether or not  
20 there's a release at a site.

21 HEARING OFFICER WEBB: Okay.

22 MR. DWYER: That's our offer.

23 HEARING OFFICER WEBB: Thank you.

24 MR. DWYER: I'd ask for just five minutes.

1 I'm about done. I don't think I have much left. Maybe  
2 one question, maybe two. I'd just like to use the  
3 restroom.

4 HEARING OFFICER WEBB: Yeah. We'll take a  
5 five-minute recess.

6 (Brief recess taken.)

7 HEARING OFFICER WEBB: Okay. If everybody's  
8 ready, we will go back on the record, and, Mr. Herlacher,  
9 you are still under oath.

10 THE WITNESS: Yes.

11 HEARING OFFICER WEBB: Please continue your  
12 questions.

13 Q. (By Mr. Dwyer) Mr. Herlacher, I just want  
14 to finish I think maybe with one question. Given the  
15 testimony today, the discussion of the record, this is  
16 what I want to ask you: If the regulations as you  
17 understood them -- and when I say that, I mean Part 734  
18 of 35 Illinois Administrative Code and Part 170 of 41  
19 Illinois Administrative Code -- if those regulations  
20 require that you take a sample from a site and send it to  
21 a lab and have it laboratorially analyzed to confirm a  
22 release, would you have done so?

23 A. Sure. It's only, what 50, 60 dollars for a  
24 sample. It would be stupid not to do that.

1 Q. Okay. And again, just to confirm, until you  
2 received this letter and had the discussions you  
3 described with Mr. Gaydosh and Mr. Chappel, had you ever  
4 been under the impression or understood that you were  
5 required to take a sample, send it to a lab, have it  
6 analyzed to confirm a release?

7 A. No, not required.

8 MR. DWYER: Thank you. I have no further  
9 questions.

10 HEARING OFFICER WEBB: Thank you.  
11 Mr. Richardson?

12 CROSS EXAMINATION

13 BY MR. RICHARDSON:

14 Q. Mr. Herlacher, what's your ownership  
15 interest in your consulting firm?

16 A. I'm a 50 percent owner.

17 Q. Is it a partnership or --

18 A. It's an LLC.

19 Q. Okay. And have you done work on other LUST  
20 sites for Dickerson Petroleum?

21 A. Yes.

22 Q. About how many others are you aware of?

23 A. I've been doing work for them since 1994.  
24 There's probably been between 15 and 20 altogether.

1           **Q.    And do you know what prompted them to task**  
2 **you to do the site investigation that you were out there**  
3 **doing on January 18 of 2008?**

4           A.    Well, they didn't specifically -- they  
5 contacted me initially to find out do I have -- is there  
6 presence of any contamination around the tanks. Now, I  
7 know the property changed hands a few months before, and  
8 since they didn't own the property, they had some kind of  
9 an agreement with the property owner to, you know,  
10 provide gasoline to the tanks and stuff like that.

11           **Q.    So --**

12           A.    I don't know if that was part of the reason  
13 or not, but they just said, hey, do you -- can we check  
14 for presence of contamination around the tanks.

15           **Q.    So a property sale had occurred prior to you**  
16 **going out there, and then apparently they still had the**  
17 **responsibility to deal with the tanks at the site.**

18           A.    Yeah, they were the tank owner. Somebody  
19 else was the property owner.

20           **Q.    Okay. And do you know how long -- I think**  
21 **in your direct testimony you said the tanks were empty.**  
22 **Do you know how long they had been not being used as a**  
23 **gas station site?**

24           A.    I really don't.



1 Q. And I think you said when you were breaking  
2 through the concrete or asphalt to do your boring -- did  
3 you say something about greenish soil or something?

4 A. Well, yeah. When I got -- By the time I  
5 got, oh, a couple feet below the surface, there was some  
6 discoloration of the soil.

7 Q. And how did you describe that again?

8 A. Kind of a greenish-gray color. It was a  
9 dark color.

10 Q. Okay.

11 A. Hard brown, maybe.

12 Q. And I believe there's been testimony, as  
13 well as what's in the record, there was visual and  
14 olfactory sensing of a petroleum release; is that  
15 correct?

16 A. Yes.

17 Q. Now, isn't it true in your experience that  
18 if you were at a gas station site and you were digging  
19 into the earth, the backfill, the natural soil around a  
20 tank, it would be, what, almost certain you're going to  
21 get the smell of gasoline or a visual view of maybe some  
22 darker soil or something?

23 A. Oh, I would say in my experience that's not  
24 100 percent guaranteed.

1 Q. But it would be quite often, would it not?

2 A. Well, if there's been a release from the  
3 tank, yes.

4 Q. And, I mean, what, overfills and spills,  
5 things like that?

6 A. Overfills, tank leaks, piping leaks.

7 Q. So it's a fairly common occurrence to have  
8 visions like that or smells like that.

9 A. If there's been a release from the tank,  
10 yes.

11 Q. And, now, with the -- when you use a PID  
12 monitor, now, that cannot tell you what specific  
13 contaminant or chemical is giving that reaction; is that  
14 correct?

15 A. Right. It's a range of volatile organic  
16 compounds.

17 Q. But you can't identify the specific compound  
18 that it's reacting to.

19 A. No.

20 Q. And you also cannot tell the level of the  
21 contamination in the soil based upon the reading from  
22 that monitor; is that right?

23 A. Well, you do get a measurement of the VOC  
24 content in the vapors released from the soil.

1           **Q.    Yes, but you can't tell the exact**  
2 **contamination level in the soil itself.**

3           A.    It's not a part -- It's not in parts per  
4 million by mass weight, no.

5           **Q.    And to get either a specific pollutant in**  
6 **the ground or the level of contamination of that**  
7 **pollutant, you would need to send a sample to a**  
8 **laboratory; is that right?**

9           A.    If you wanted to isolate on a specific  
10 contaminant, yes, that would require a laboratory  
11 analysis.

12           **Q.    Okay.  And is there any reason in either the**  
13 **45-day report or the 45-day report addendum you did not**  
14 **include the levels that the PID was reading when you did**  
15 **that hand auger on January 18?**

16           A.    Well, first of all, there was no requirement  
17 that I was aware of to do it, and second, there's -- it's  
18 not like we were going to be able to utilize that  
19 information to close the site, because to do site closure  
20 you have to have a laboratory analysis.  This was just a  
21 preliminary assessment.

22           **Q.    But in later communications with the Agency**  
23 **on the matter, I mean, that number has been given some**  
24 **importance; is that right?**

1 MR. DWYER: I'm just going to object for  
2 clarification purposes. Which number?

3 MR. RICHARDSON: The PID reading.

4 MR. DWYER: Just generically or the PID  
5 reading that he testified to?

6 Q. (By Mr. Richardson) Well, was it over  
7 1,000? Is that what you testified to?

8 A. Right.

9 Q. That reading.

10 MR. DWYER: No, that's fine.

11 Q. I mean, has that been given importance  
12 subsequent to January 18 of 2008?

13 A. I've been, you know, advised by some  
14 correspondence from the Agency that it wasn't provided,  
15 and I don't know how important that is. I mean, at least  
16 to me personally, it's not all that important.

17 Q. Okay. And, now, just from the way your  
18 direct testimony went, I take it that you were not  
19 present when these tanks were pulled, like, in mid May  
20 of 2008?

21 A. Actually, I was there for an hour or so.

22 Q. And were you there when Mr. Gelarden was  
23 there, when --

24 A. Yes.

1           **Q.    So did you -- were you really doing the**  
2 **observations or was Mr. Foley --**

3           A.    Mr. Foley.

4           **Q.    -- doing the observations?**

5           A.    Okay. Mr. Foley was there as our  
6 representative to oversee the tank removal and  
7 contaminated soil removal. Do I need to tell you why I  
8 was there? I mean, is that --

9           **Q.    No, no. I just didn't know if you were**  
10 **there or not.**

11          A.    Well, I mean, on an unrelated site that he  
12 was conducting an inspection, so for the -- my client  
13 requested I take him some paperwork for this other site,  
14 and I knew he was going to be there because we were doing  
15 the tank pull.

16          **Q.    But Mr. Foley was really the one that was**  
17 **your representative --**

18          A.    Right.

19          **Q.    -- for the tank pull. Okay.**

20          A.    Uh-huh.

21          **Q.    Now, Mr. Dwyer had you looking at a number**  
22 **of regulatory provisions, and you say you are familiar**  
23 **with them from your past experience. Is it your**  
24 **testimony that once you have done the investigation like**

1 you did and then you call in a release, is it your  
2 understanding that after that, reimbursement should be a  
3 foregone thing; you're automatically eligible for it?

4 A. No. You have to file the application form  
5 with the state fire marshal's office and get that  
6 reviewed and approved by a woman up there.

7 Q. And the -- what application form are you  
8 talking about?

9 A. Eligibility and deductibility form.

10 Q. Okay.

11 A. I don't know if that's in the record or not.

12 Q. Okay. So if you -- say you do what you did  
13 here and you call in a release and then you get your  
14 eligibility and deductible letter. Then everything  
15 else -- it's a release and you should be reimbursed for  
16 the cost of corrective action at that site.

17 A. Well, as long as you conduct your activities  
18 in accordance with the regulatory guidelines and that the  
19 LUST section enforces. In other words, they're not going  
20 to pay everything automatically. There's restrictions on  
21 certain things and requirements that you in some cases  
22 file plans and budgets and things like that. I mean,  
23 it's not like in 1989 when you could go out and do  
24 everything you wanted to and get reimbursed for it.

1           **Q. Right.**

2           A. It breaks the fund after a couple of months.

3           MR. RICHARDSON: I have no further  
4 questions.

5           MR. DWYER: Just want to redirect on a  
6 couple things.

7           HEARING OFFICER WEBB: Okay.

8                               REDIRECT EXAMINATION

9 BY MR. DWYER:

10           **Q. During your cross examination,**  
11 **Mr. Herlacher, you were asked about the reasons why you**  
12 **were contacted by Dickerson to go to the site, or I'll**  
13 **just say words to that effect. I just want to clarify a**  
14 **couple things. In your experience, Mr. Herlacher, are**  
15 **there any things that an owner/operator has to do before**  
16 **they can take a tank out of the ground?**

17           A. Well, yeah. They have to hire a certified  
18 contractor and --

19           **Q. And then what else?**

20           A. The contractor has to submit an application  
21 form to the state fire marshal to get a removal permit.

22           **Q. An application for what?**

23           A. To get a removal permit.

24           **Q. Okay. So they need a permit to remove a**

1 tank.

2 A. Right.

3 Q. Is that -- Is it your understanding that's a  
4 requirement of the law, that to remove a regulated tank  
5 in Illinois, you need a permit from the fire marshal?

6 A. Yes.

7 Q. Okay. So would it be fair to say that in  
8 Illinois, to remove a tank legally, you have to undertake  
9 certain plans before you take it out of the ground?

10 A. Yes.

11 Q. Okay. Now, Mr. Richardson asked you some  
12 questions about the -- I want to make sure I understood  
13 your responses about whether or not the PID meter reading  
14 was important. I wasn't sure whether you said it wasn't  
15 important or it was important, so I want to make sure.  
16 From your perspective, in terms of doing your release  
17 investigation and confirmation, do you believe the PID  
18 meter reading and the use of it is important?

19 A. Yeah. I think it was important for me to  
20 decide whether there's evidence of contamination or not.  
21 The way I understood his question was was the actual  
22 number, whatever it was, important to somebody, and --  
23 somebody at the Illinois EPA.

24 Q. Okay. Well, let me -- then let me ask you,



1 just to be clear, was the number of the PID meter  
2 reading -- that is, 1,000 or more -- was that important  
3 to you?

4 A. Oh, yeah, that --

5 Q. And tell me, why was that important?

6 A. Because based on my experience, any time PID  
7 readings for a gasoline-contaminated soil sample exceed a  
8 couple hundred parts per million, then a laboratory  
9 analysis of that sample would come back above the tier 1  
10 cleanup objectives. The lab results would be above.

11 Q. Okay. But you're -- you are extrapolating  
12 that there's a correlation there. You don't have hard  
13 evidence that 1,000 ppm equals above tier 1 for a given  
14 contaminant.

15 A. No. It's just my experience that, you know,  
16 above a certain level, then the lab results typically  
17 come back above the tier 1 cleanup objectives.

18 Q. Okay. And then last point is -- I just want  
19 to make sure that I'm clear -- once you call in a  
20 release, do you think it's a foregone conclusion that any  
21 work in response to that release is going to be eligible  
22 for reimbursement?

23 A. Well, if it's conducted in accordance with  
24 the agency guidelines.

1           Q.    So there are a number of steps, it would be  
2 fair to say, that an owner/operator and/or its consultant  
3 have to step through and satisfactorily complete before  
4 they'll be entitled or that release will be entitled to  
5 any reimbursement for corrective action?

6           A.    Right.

7           MR. DWYER:  I don't have anything further.

8           MR. RICHARDSON:  I have no further  
9 questions.

10          HEARING OFFICER WEBB:  Okay.  Thank you,  
11 Mr. Herlacher.  You may step down.

12                   (Off the record.)

13          HEARING OFFICER WEBB:  Okay.  Mr. Dwyer, you  
14 may call your next witness.

15          MR. DWYER:  Okay.  We would call Mr. Foley,  
16 and Miss Rios will handle the examination of Mr. Foley.

17          HEARING OFFICER WEBB:  Okay.  Great.

18          MR. DWYER:  Any objection to that, Greg?

19          MR. RICHARDSON:  Oh, no.

20          HEARING OFFICER WEBB:  Will the court  
21 reporter please swear in the witness?

22                   (Witness sworn.)

23          HEARING OFFICER WEBB:  Go ahead, Miss Rios.

24          JAMES G. FOLEY, produced, sworn and examined on

1 behalf of the Petitioner, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. RIOS:

4 Q. Could you please state your name for the  
5 record?

6 A. James G. Foley.

7 Q. And, Mr. Foley, are you currently employed?

8 A. Yes.

9 Q. Who are you employed by?

10 A. Herlacher Angleton Associates.

11 Q. And how long have you been employed by  
12 Herlacher Angleton?

13 A. Since late 2005.

14 Q. Okay. And what is your position at HAA?

15 A. Associate scientist.

16 Q. Primarily, what are your duties as an  
17 associate scientist?

18 A. Project management.

19 Q. And as a project manager, what kind of tasks  
20 do you complete?

21 A. It's a mix of fieldwork and paperwork;  
22 probably more paperwork than fieldwork typically.

23 Q. And how long have you been in the  
24 environmental consulting business?

1 A. Since 1989.

2 Q. And I'm going to show you Exhibit 8, which  
3 has already been admitted. Can you tell me what this is?

4 A. Resume, mine.

5 Q. And is it an accurate recitation of your  
6 background and experience?

7 A. Yes.

8 Q. Can you tell me a little bit about your  
9 education and any professional certifications you may  
10 hold?

11 A. I have a bachelor's degree in chemistry from  
12 the University of Missouri, a master level certified  
13 hazardous materials manager certification. I'm a  
14 certified indoor environmental consultant with the  
15 American Indoor Air Quality Association and a Missouri  
16 and EPA certified asbestos inspector, Missouri Department  
17 of Natural Resources Department of Geology and Land  
18 Survey well driller and pump installer certificate and  
19 OSHA 40-hour HAZWOPER certification.

20 Q. Okay. And during the course of your career  
21 working as an environmental consultant, how many  
22 underground storage tank sites have you worked on?

23 A. Between 50 and 100. I don't know the exact  
24 number.

1 Q. And of those sites, how many have involved  
2 UST removals?

3 A. I'd estimate 75 percent.

4 Q. And, Mr. Foley, during site assessments and  
5 UST removal activities, do you use a photoionization  
6 detector or PID meter?

7 A. Yes.

8 Q. And can you explain what a PID is?

9 A. It's an instrument used to measure volatile  
10 organic molecules in air.

11 Q. And based on your experience and training,  
12 do you consider a PID meter and the readings it provides  
13 to be a quantitative measurement?

14 A. Yes.

15 Q. And what kind of measurement does it give  
16 you?

17 A. Gives you concentrations of volatile organic  
18 compounds in parts per million per unit volume, ppmv.

19 Q. And can a PID be used to measure for BTEX  
20 and MTBE?

21 A. Yes.

22 Q. And are BTEX and MTBE VOCs?

23 A. Yes.

24 Q. Does a PID need calibration?

1 A. Yes.

2 **Q. And how frequently do you calibrate a PID?**

3 A. Typically before each day it's used in the  
4 field.

5 **Q. And are you familiar with the Cahokia Quick**  
6 **Shop site that's the subject of this hearing?**

7 A. Yes.

8 **Q. Okay. And at this site, were there specific**  
9 **VOCs that you were measuring for?**

10 A. Specific VOCs? No.

11 **Q. Okay. And did --**

12 A. With the PID?

13 **Q. Yes, with the PID.**

14 A. Well, the target, we were looking for  
15 gasoline-related compounds, I mean, because that was the  
16 nature of the substances contained in the underground  
17 tanks on site.

18 **Q. Okay. And based upon your observation of**  
19 **the site, other than the USTs, were there any other**  
20 **subsurface sources of petroleum contamination in the**  
21 **vicinity of the site?**

22 A. To my knowledge, there were no other  
23 underground tank installations or sources of gasoline  
24 within a half mile of the site, to my knowledge.

1           **Q.    Okay.  And in your experience, can you**  
2 **correlate a PID measurement to a level of contamination?**

3           A.    Relative, yes.  I mean, you can't -- there's  
4 no direct correlation with laboratory analytical values,  
5 but order magnitude, yes.

6           **Q.    Okay.  Does a PID measurement mean -- What**  
7 **does a PID measurement mean in terms of determining**  
8 **whether the soil that you're sampling is contaminated?**

9           A.    If you're getting readings above background,  
10 it usually indicates some degree of contamination.

11          **Q.    And can you tell me in your experience what**  
12 **type of measurements those are in terms of ppm?**

13          A.    Generally, if you've got readings in the  
14 hundreds, it usually -- usually samples that exhibit  
15 readings in the hundreds on the PID in the field,  
16 typically, if that sample is laboratory analyzed, it'll  
17 generally come back with detectable levels of those  
18 contaminants in the laboratory samples.

19          **Q.    Okay.  And in your experience, is it**  
20 **customary to rely on PID measurements to determine that**  
21 **there is evidence of a release at a site?**

22          A.    In conjunction with other observations, yes.

23          **Q.    And what type of other observations?**

24          A.    Petroleum odor, discoloration of the soil,

1 that's characteristic of petroleum contamination.

2 **Q. Okay. Have you relied on PID measurements**  
3 **in the past as an indication of a petroleum release?**

4 A. Yes.

5 **Q. And does a PID meter provide any type of**  
6 **readout or receipt of the measurements?**

7 A. No. Some of them have data logging  
8 capability, but no -- at least the instruments we have do  
9 not have a printout of any sort, no.

10 **Q. Okay. And how were you involved with this**  
11 **site? What were your responsibilities?**

12 A. I was designated as the project manager for  
13 the tank removal on this site.

14 **Q. Do you recall the dates that you were at the**  
15 **site?**

16 A. I believe my first time on site was on  
17 May 2, but that was to take photographs of the site prior  
18 to any of the work commencing.

19 **Q. So on May 2 there were no corrective action**  
20 **or tank removal activities going on.**

21 A. No.

22 **Q. Okay. And after your initial visit to take**  
23 **photos, when did you return to the site?**

24 A. May 12.



1 Q. Okay. And why were you there?

2 A. To observe the process of the tank removal.

3 Q. Okay. And specifically, on May 12, what  
4 type of activities were going on?

5 A. WSI is the contractor, the mechanical  
6 contractor we were working with on the project. They  
7 were there removing the pavement over the tanks and  
8 uncovering the tanks.

9 Q. And in the 45-day addendum, which is in the  
10 record, there are several photos. Did you take those  
11 photos?

12 A. Yes.

13 Q. And can I direct you to page 204 of the  
14 record? This is part of the record supplement from  
15 earlier. It's -- should be --

16 A. Okay.

17 Q. So on May 12, did you take any of the photos  
18 in the record at page 204 through I believe 213?

19 A. Let's see. The photos on page 205 were  
20 taken on the 12th.

21 Q. Okay. And can you tell me in photo 4, which  
22 is labeled P4, on page 205 of the record --

23 A. Yes.

24 Q. -- if there's any indication that you see

1 **that a release occurred?**

2 A. Yes. There's staining on the surface of the  
3 tank and in the backfill material immediately adjacent to  
4 the tank near -- oh, I guess it's about a third of the  
5 way down the tank near where the laborer is standing.

6 **Q. And based on your experience and training,**  
7 **what does this type of soil staining indicate?**

8 A. That there's been a release to the backfill  
9 material.

10 **Q. Okay. And when you were at the site that**  
11 **day, were there any other observations that you made?**

12 A. From the side of the excavation, you could  
13 smell gasoline fumes in the air.

14 **Q. And based on your training and your**  
15 **experience, what does that -- what does the presence of a**  
16 **petroleum odor indicate?**

17 A. Well, given the location I was smelling it  
18 and the direction of wind, it was coming from the  
19 excavation.

20 **Q. Okay. And were you at the site the next**  
21 **day, on May 13?**

22 A. Yes.

23 **Q. And can you tell me what kind of activities**  
24 **were going on that day?**

1           A.    On the 13th they were getting any residual  
2 product out of the tanks and blowing the tanks down.  
3 They were removing vapors, gasoline vapors from the  
4 tanks.

5           **Q.    Okay.  And can I direct you to page 206 of**  
6 **the record?  Were any of these photos, either photo 5 or**  
7 **photo 6, taken on that day?**

8           A.    The photo 5 was taken on that day.

9           **Q.    And can you tell me if -- in this photo 5 on**  
10 **page 206 if there is any indication or evidence of a**  
11 **release?**

12          A.    As noted in the other photograph, you can  
13 see staining on both tanks in the vicinity of the manway.  
14 There's a manway about a third to halfway down the tank  
15 where there's staining on both -- emanating from that  
16 manway going down both sides of the tank into the  
17 backfill.

18          **Q.    And based on your experience, what does this**  
19 **type of soil staining indicate?**

20          A.    That there was a release of gasoline  
21 contaminants into the soil.

22          **Q.    Earlier you mentioned that when you were at**  
23 **the site on May 12 you could smell petroleum odors.  Was**  
24 **that odor still present when you were there on May 13?**

1 A. During the excavation process, yes.

2 Q. When you were at the site that day, did you  
3 use a PID meter?

4 A. Yes.

5 Q. And why were you using that?

6 A. Just to see the -- whether the soil was hot  
7 or not.

8 Q. And do you recall what the PID measurements  
9 were?

10 A. I took a variety of samples to examine, and  
11 I was getting readings anywhere from the low hundreds up  
12 to and above 1,000.

13 Q. And what does a PID measurement in the low  
14 hundreds to above 1,000 indicate in terms of whether the  
15 soil there is contaminated?

16 A. It's usually indicative of a significant  
17 release.

18 Q. And then based on your visual observations  
19 of the soil staining, the presence of a petroleum odor  
20 and these PID measurements and your experience, was there  
21 evidence of a release there at that site?

22 A. Yes.

23 Q. On May 14 were you also at the site?

24 A. Yes.

1 Q. And what activities were going on that day?

2 A. In the morning the tanks were removed, on  
3 the 14th.

4 Q. Okay. And during a UST removal, what are  
5 your responsibilities at the site?

6 A. To document the process via photographs and  
7 collect samples in accordance with Part 734.

8 Q. And did you take photos that day?

9 A. Yes.

10 Q. Can you turn to page 208 of the record?  
11 This is the record supplement again. Was photo 9 taken  
12 that day?

13 A. Yes.

14 Q. And can you show me in photo 9 if there is  
15 any evidence of a release?

16 A. In that photograph, on the sort of center  
17 section you can see dark staining in the sand beneath  
18 where the tank had been removed. The dark staining sort  
19 of extends from the left -- I mean -- I'm sorry -- the  
20 right center of the photo toward the center of the photo  
21 and also from the upper left center of the photo downward  
22 toward the center of the photo.

23 MR. RICHARDSON: Excuse me. Just for  
24 clarification --

1 MS. RIOS: Sure.

2 MR. RICHARDSON: -- what photo number --  
3 These photos are numbered, right? What photo are we  
4 referring to?

5 MS. RIOS: Photo 9 on page 208. It's the  
6 top one.

7 MR. RICHARDSON: Okay.

8 **Q. (By Ms. Rios) And based on your experience,**  
9 **what does the soil staining in photo 9 indicate?**

10 A. When petroleum-related compounds get in the  
11 soil, they generally cause it to change color from a  
12 brown to a greenish-gray.

13 **Q. As you testified earlier, on previous days**  
14 **when you were there, there was a petroleum odor. Was**  
15 **that still present during the excavation of the USTs?**

16 A. Yes.

17 **Q. Did you use a PID meter on May 14 during the**  
18 **UST removal activities?**

19 A. Yes.

20 **Q. Do you remember what those measurements**  
21 **were?**

22 A. They ranged from background to in excess of  
23 1,000.

24 **Q. And what do those types of PID measurements**

1 **indicate, then, in terms of contamination?**

2 A. If -- Well, if you're getting any readings  
3 above background, it indicates some degree of volatile  
4 organic compounds in the soil. When those readings get  
5 up into the hundreds, it's typically indicative of  
6 significant contamination.

7 **Q. Okay. So based on the PID measurements and**  
8 **your visual observations as well as the petroleum odors,**  
9 **was there evidence of a release at this site?**

10 A. Yes.

11 **Q. Were you at the site on May 15, the day**  
12 **after the UST removal?**

13 A. Yes.

14 **Q. And what type of activities were going on**  
15 **that day?**

16 A. Excavation and hauling of contaminated  
17 backfill material.

18 **Q. And during those activities, did you use a**  
19 **PID meter?**

20 A. Yes.

21 **Q. Why?**

22 A. Just to see what the levels of contaminants  
23 were in the material that was being removed.

24 **Q. Okay. And do you remember what the PID**

1 **measurements were for those samples?**

2 A. It varied from one sample to the next, but  
3 it was typically -- we were seeing levels between 200 and  
4 1,000.

5 Q. Okay. And what material were you measuring  
6 with the PID that day?

7 A. I'm sorry?

8 Q. What material were you measuring with the  
9 PID? You said that there was backfill going on,  
10 excavating. Were you measuring --

11 A. Yes.

12 Q. -- the soil that was being excavated?

13 A. Yes.

14 Q. Okay. Did you take any photos that day?

15 A. Yes.

16 Q. And in the record on page 211, photo 15 --  
17 it's the photo on the top -- was that one of the photos  
18 that was taken?

19 A. Yes.

20 Q. Can you show me in this photo if there's any  
21 indication of a release?

22 A. You can see the trackhoe operator was raking  
23 the contaminated backfill material over into a -- one  
24 corner of the excavation to facilitate loading. He had



1 done that by moving around the excavation to different  
2 locations and throwing the dirt over into one corner,  
3 because that was really the only place we could load the  
4 trucks, was on that one side, without obstructing  
5 traffic, so you can see in that photo there's a pile in  
6 the corner of the excavation below the excavator where he  
7 had pulled this material, and that material you can see  
8 is -- exhibits discoloration characteristic of petroleum  
9 contamination.

10 **Q. And was the petroleum odor still present**  
11 **that day?**

12 A. Yes.

13 **Q. When was the excavation completed?**

14 A. On that -- On the 15th.

15 **Q. Okay. Let's go back to May 14 during the**  
16 **UST removal. Was there anyone from the Office of the**  
17 **State Fire Marshal on site that day?**

18 A. Yes.

19 **Q. Do you remember who that was?**

20 A. It was Kent Gelarden.

21 **Q. Did you have the opportunity to observe**  
22 **Mr. Gelarden's activities?**

23 A. Yes.

24 **Q. And what did you observe?**

1           A.    I think he showed up around nine o'clock,  
2   and they were -- the tanks had been blown down and we  
3   were at the point where they're ready to be removed, and  
4   so Mr. Gelarden walked out onto the tanks with his LEL  
5   meter to check the tanks for explosive vapors so that he  
6   could determine whether it was safe to remove the tanks  
7   at that point or not.

8           **Q.    And what is an LEL meter?**

9           A.    It's a device used to -- it measures oxygen  
10   and it also measures the presence of flammable compounds,  
11   and it can tell you -- that's a certain -- for a given  
12   flammable compound, there's certain range below which and  
13   above which there's insufficient -- there's an  
14   insufficient mixture for it to be flammable or explosive,  
15   but within that explosive range it can easily, you know,  
16   catch fire and explode, so he was trying to make sure  
17   that we were below the lower limit of that range.

18          **Q.    Okay.   And does an LEL meter measure VOCs?**

19          A.    Not directly.  I mean, VOCs -- many VOCs are  
20   flammable, but it doesn't -- it just determines the  
21   presence of a flammable compound.  Many VOCs which fall  
22   into that category, but it doesn't specifically measure  
23   them.

24          **Q.    And can an LEL meter be used to determine**

1 **whether there was a release of petroleum?**

2 A. No, because it was used to measure the  
3 atmosphere inside the tanks.

4 **Q. And during the explosivity testing, where**  
5 **was Mr. Gelarden standing in relation to the**  
6 **contamination you discussed earlier?**

7 A. Almost right on top of it.

8 **Q. After the explosivity testing, did**  
9 **Mr. Gelarden conduct any other activities?**

10 A. None that I'm aware of.

11 **Q. Did he collect a soil sample?**

12 A. No.

13 **Q. Do you recall whether Mr. Gelarden was on**  
14 **site during the UST removal?**

15 A. Yes, he was.

16 **Q. Okay. Did you have any discussions with**  
17 **Mr. Gelarden?**

18 A. Just very brief. He said he had a form for  
19 me that he wanted to give me before he left.

20 **Q. And do you remember what those forms were?**

21 A. One was a copy of the amended permit to  
22 remove the tanks and the other was a blank tank removal  
23 certification form.

24 **Q. So he did not provide you a copy of his OSEFM**

1 **log of removal report.**

2 A. No.

3 **Q. Okay. You mentioned earlier that one of**  
4 **your responsibilities at the site was collecting soil**  
5 **samples.**

6 A. Yes.

7 **Q. So during the removal, did you collect soil**  
8 **samples?**

9 A. After the tanks were removed, I collected  
10 samples in accordance with 734.210(h), I believe it is.

11 **Q. How were those samples collected?**

12 A. The safety regulations prohibit us from  
13 getting into the excavation to collect samples, so I  
14 directed the trackhoe operator to get a bucketful of soil  
15 from specified locations around the excavation. He would  
16 bring the bucket up to the surface near the side of the  
17 excavation. I would remove a portion of that bucket with  
18 a trowel and place it in Ziploc bags.

19 **Q. And did you use a PID meter --**

20 A. Yes.

21 **Q. -- with those samples?**

22 A. Yes.

23 **Q. And was it calibrated?**

24 A. Yes.

1           **Q. Do you recall what the measurements were**  
2 **from the PID?**

3           A. On those samples, the readings were pretty  
4 low.

5           **Q. And what does that indicate?**

6           A. That we were -- That the contaminated  
7 materials were being removed -- well, we were getting to  
8 the point in the excavation where the more contaminated  
9 materials had been removed or getting down to the point  
10 where we're reaching clean conditions.

11           **Q. Okay. Did you have any role in compiling**  
12 **the 45-day report or the 45-day report addendum that's in**  
13 **the record?**

14           A. Yes. I prepared both of them.

15           **Q. Have you compiled these types of reports in**  
16 **the past?**

17           A. Yes.

18           **Q. Do you typically include the PID**  
19 **measurements in the 45-day reports or 45-day report**  
20 **addendums?**

21           A. No.

22           **Q. Did you include the PID measurements from**  
23 **the Cahokia site in the 45-day reports or addendums?**

24           A. No.

1           **Q.   And why don't -- why were those not**  
2 **included?**

3           A.   They're not required and they're not  
4 acceptable by the department for reaching any  
5 conclusions, at least for the purpose of closure.  The --  
6 You know, I was mainly using it as a tool to determine  
7 where we were in terms of getting to the point of  
8 conditions that appeared to be, quote, unquote, clean.

9           **Q.   And are you aware of any rule that requires**  
10 **PID measurements be included in reports submitted to the**  
11 **Illinois EPA?**

12          A.   There is no requirement as such that I'm  
13 aware of.

14                   MS. RIOS:  I have no further questions.

15                   HEARING OFFICER WEBB:  Thank you.

16 Mr. Richardson?

17                                   CROSS EXAMINATION

18 BY MR. RICHARDSON:

19           **Q.   Mr. Foley, so you were there at the tank**  
20 **pull.  Did that go over a period of three to four days?**  
21 **Is that correct?**

22          A.   Basically Monday through Friday from start  
23 to finish.

24          **Q.   Okay.  And if you could reference -- I guess**

1 it's photograph number 4, what day was that on; do you  
2 recall?

3 A. That was on the 12th, Monday the 12th.

4 Q. Okay. And what day was Mr. Gelarden there?

5 A. Wednesday the 14th.

6 Q. Okay. And when you were wrapping things up  
7 with him, I mean, you never discussed, like, well, we got  
8 a release here, don't we, or there's evidence of  
9 contamination? Did you have any discussions to that  
10 effect?

11 A. Not that I recall.

12 Q. Okay. And is that typical, that you don't  
13 go into those details with the OSFM representative?

14 A. You know, it's -- some of the conversations  
15 we have are not necessarily on topic. I mean, it's just  
16 chitchat. It's -- You know, sometimes comments will be  
17 made about, you know, this one's really nasty or this  
18 one's not so bad or whatever, but I don't recall any  
19 conversations to that effect.

20 Q. Okay. And, now, can you estimate about how  
21 many PID readings you took during that week of the tank  
22 pull or those four days of the tank pull?

23 A. In total? Probably in the neighborhood of  
24 30, 30 to 40.

1           **Q.    And do you keep any type of log of those or**  
2 **something?**

3           A.    I do not.  I usually -- When I collect the  
4 samples, I put them in a Ziploc bag and I typically write  
5 the numbers on the bags and stack them in the back of my  
6 truck, and then I can look at them at the end of the day,  
7 and if there's no reason to retain any of them, I chuck  
8 them in the excavation so they can be hauled off with the  
9 material on the next day.

10           **Q.    And what's the point of, like, bagging the**  
11 **soil and then putting it in your truck till the end of**  
12 **the day?**

13           A.    In case I want to look back at the numbers  
14 and see how they've changed during the course of the  
15 excavation.

16           **Q.    So it's not really anything of a personal**  
17 **safety issue or something that you need to know before**  
18 **you can do the next hour's worth of work.  You're just**  
19 **sort of monitoring -- generally monitoring the soil where**  
20 **you're at and then putting it back to see where things**  
21 **are at at the end of the day.**

22           A.    Yeah, it's not a safety issue.  It's just to  
23 sort of track the progress of the excavation to see  
24 what -- the relative degree of contamination of the



1 material that's being removed.

2 Q. And, now, in photograph 4 there where that  
3 gentleman is standing, that's near -- is that near the  
4 fill hole of the tank, that manway, or am I incorrect?

5 A. There is -- It's a manway. I'm not sure  
6 whether that was a fill port or connection for a suction  
7 line. I'm not really sure.

8 Q. Okay.

9 A. I didn't see -- well, I don't know.

10 Q. And when Mr. Gelarden was there -- was he  
11 actually there when you pulled the tanks out of the  
12 ground?

13 A. Yes.

14 Q. And I'm just looking at page 6 -- I guess  
15 this is tank one -- and page 7, tank two.

16 A. You mean photo 7?

17 Q. Excuse me. Photo 6 and photo 7. I don't  
18 really see any holes or other damage to the main bodies  
19 of those tanks. Is that a fair statement?

20 A. I didn't observe any perforations in either  
21 tank.

22 Q. Okay. And I don't see any material leaking  
23 out of them.

24 A. No, I did not observe that.

1 MR. DWYER: Excuse me. Just to clarify,  
2 finish that. Leaking out of --

3 MR. RICHARDSON: The tanks.

4 MR. DWYER: Okay.

5 MR. RICHARDSON: Either tank one or tank  
6 two.

7 Q. (By Mr. Richardson) And the tanks were  
8 basically empty when they were pulled, were they not? I  
9 mean, not -- I'm not talking about the preparation before  
10 the pull that has to be gone through to pull them, but I  
11 mean basically prior to that, the tanks were pretty much  
12 empty and not been in use for a while, correct?

13 A. Say again.

14 Q. Basically, when the -- when you arrived at  
15 the site to remove the tanks, the tanks were pretty much  
16 free of any product because they hadn't been used --

17 A. I believe they got all the product out of  
18 the tanks they could get using a stinger and a vacuum,  
19 you know, a vacuum pump.

20 Q. But, now, that was the personnel that were  
21 pulling the tanks, correct?

22 A. That was WSI, yeah.

23 Q. Do you know how much they pulled out?

24 A. I think they ended up with two or three

1 drums of gasoline.

2 **Q. Fifty-five-gallon drums?**

3 A. Yeah.

4 **Q. And these are each, what, 10,000-gallon**  
5 **tanks?**

6 A. Yes.

7 **Q. And in photograph 15, can you sort of direct**  
8 **where you're seeing visual evidence of contamination in**  
9 **that photo, like, either by points on the clock or**  
10 **something?**

11 A. The -- You can see some discoloration along  
12 the walls of the excavation, but the area where it was  
13 the highest, over on the -- I guess at your three o'clock  
14 position, the right-hand side near the center vertically,  
15 that's where the pile of material that was being loaded  
16 was staged. Like I say, we were under some physical  
17 restrictions at the site, so the trackhoe operator,  
18 rather than sit in one space and dig and load, he moved  
19 all the material over into that one corner to facilitate  
20 loading the trucks without blocking the local streets.

21 **Q. And do you recall how much material was**  
22 **excavated and transported to the landfill?**

23 A. I believe it was close to 500 tons. I don't  
24 know the exact number.

1           **Q.    Okay.  And no soil samples were taken of**  
2 **that material; is that right?**

3           A.    Of the material that was removed?

4           **Q.    The material that was removed for disposal.**

5           A.    No, there were no -- well, there were  
6 samples collected and checked with the PID of that  
7 material, but not -- no samples of that material was sent  
8 to the laboratory.

9           **Q.    Yes.  You're -- I should have been more**  
10 **specific on that.  And why weren't any samples collected**  
11 **and sent to a lab for analysis?**

12          A.    There's no requirement to do so.

13          **Q.    No requirement where?**

14          A.    In the regulations.

15          **Q.    Since your company and your client received**  
16 **the Illinois EPA's March 9, 2009, letter and also**  
17 **Mr. Gelarden's report that -- where he indicated that**  
18 **there was no apparent release, I mean, it would be**  
19 **your --**

20                   MR. DWYER:  I'm just going to object.  For  
21 clarification, of which report?  Which report are you  
22 talking about?  The underground storage tank log?

23                   MR. RICHARDSON:  Mr. Gelarden's field report  
24 or -- from I guess --

1 MR. DWYER: Well, can we sort of maybe talk  
2 in terms of the record?

3 MR. RICHARDSON: Sure.

4 MR. DWYER: Are we talking about -- I just  
5 want to make sure --

6 MR. RICHARDSON: No.

7 MR. DWYER: -- we know what we're talking  
8 about.

9 MR. RICHARDSON: No.

10 MR. DWYER: I mean, are we referring to here  
11 page 091 of the record?

12 MR. RICHARDSON: Yes, and I guess 092 is his  
13 drawing.

14 MR. DWYER: And his drawing, yeah. Okay. I  
15 just want to make sure I understood.

16 MR. RICHARDSON: No.

17 MR. DWYER: I don't know if you need to  
18 rephrase that form. I just wanted to make sure I  
19 understood what report we were speaking about.

20 **Q. (By Mr. Richardson) Do you have that in**  
21 **front of you, Mr. Foley?**

22 A. Yes.

23 **Q. Since your firm received that report and**  
24 **received the Illinois EPA's March 9, 2009, decision, I**

1 mean, am I correct that your firm disagrees with  
2 Mr. Gelarden's findings? I guess that's Section D. It's  
3 hardly readable, but --

4 A. Yeah.

5 Q. -- where it talks about appears to have  
6 leaked, etc.?

7 A. I'd say that Mr. Gelarden was mistaken.

8 Q. Okay. And has your firm made any complaint  
9 to the state fire marshal's office about this?

10 A. I don't know.

11 MR. RICHARDSON: Okay. I have no further  
12 questions.

13 HEARING OFFICER WEBB: Miss Rios?

14 REDIRECT EXAMINATION

15 BY MS. RIOS:

16 Q. I'll ask a follow-up. Did the landfill  
17 require a green sheet profile to accept the soil from the  
18 excavation?

19 A. Yeah, there was a profile that had to be  
20 submitted in advance, but I think it was a -- if I'm not  
21 mistaken, it's a standing -- didn't require for this type  
22 of -- for what we refer to as virgin  
23 gasoline-contaminated soil, laboratory analysis isn't  
24 required except for I believe a paint filter test and a

1 flash point, I believe.

2 Q. Okay. So there's no requirement  
3 specifically to send a soil sample to the lab for  
4 purposes of sending this to the landfill.

5 A. No.

6 Q. Okay.

7 A. Can --

8 Q. Mr. Foley, are you aware of any right or  
9 process to challenge an OSFM removal log?

10 A. I don't know about that.

11 MS. RIOS: Okay. I don't have anything  
12 else.

13 HEARING OFFICER WEBB: Mr. Richardson?

14 MR. RICHARDSON: I have no more questions.

15 HEARING OFFICER WEBB: Okay. Thank you,  
16 Mr. Foley. You may step down. Does the petitioner have  
17 anything further to present?

18 MR. DWYER: We have no further witnesses at  
19 this time.

20 HEARING OFFICER WEBB: Okay. Well, let's go  
21 off the record for a moment.

22 (Off the record.)

23 HEARING OFFICER WEBB: We will go back on  
24 the record, then. The petitioner has completed with its

1 case at this time. I will ask the EPA to call its first  
2 witness.

3 MR. RICHARDSON: We would call Jay Gaydosh  
4 to the stand.

5 HEARING OFFICER WEBB: Okay. Mr. Gaydosh,  
6 the court reporter will swear you in, please.

7 (Witness sworn.)

8 JAY GAYDOSH, produced, sworn and examined on  
9 behalf of the Respondent, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. RICHARDSON:

12 Q. Would you please state your name?

13 A. Jay F. Gaydosh.

14 Q. And what's your current occupation?

15 A. I'm an environmental protection specialist 3  
16 with the Illinois EPA's Bureau of Land, leaking  
17 underground storage tank section.

18 Q. And how long have you been so employed?

19 A. Sixteen years, four months.

20 Q. And could you please just tell us briefly  
21 what college degrees you've obtained, the institutions  
22 therefrom and the dates?

23 A. I graduated with an associate of arts degree  
24 in general studies from Lincoln College in 1985 and in



1 1989 graduated with a BS in agriculture from Southern  
2 Illinois University Carbondale.

3 **Q. Now, you're a project manager for the LUST**  
4 **section; is that correct?**

5 A. Yes.

6 **Q. And could you briefly describe what duties**  
7 **you have in that role?**

8 A. Just -- The primary function is for me to  
9 review the files and the reports of leaking underground  
10 storage tank incidents that are submitted either by the  
11 owners or by their consultants for their application and  
12 satisfaction to the requirements of the regulations  
13 promulgated by the Board.

14 **Q. Okay. Now, were you assigned to the**  
15 **Dickerson Petroleum site located 823 Upper Cahokia Road**  
16 **in Cahokia, Illinois?**

17 A. Yes.

18 **Q. And am I correct that basically your first**  
19 **contact with the paperwork for that site occurred during**  
20 **a file review on March 4, 2009?**

21 A. That's correct.

22 **Q. And what was the purpose of your doing that**  
23 **file review on that date?**

24 A. I have a queue that I go off of that tells

1 me what reports are due for review, and it was -- that  
2 was the next in line for review of the 45-day report  
3 addendum. Because that was my first interaction with  
4 this incident, my first response would be to go back and  
5 check the file and make sure that there isn't anything  
6 previous to that report that would require review, so  
7 we -- in reviewing that, I found that the 45-day report  
8 had been submitted earlier, had been selected for  
9 non-review until such time as other information had been  
10 submitted, and at that point I went back and reviewed the  
11 45-day report.

12 **Q. Because basically, the 45-day report**  
13 **addendum was the further information that had been**  
14 **foreseen with the -- that later review letter; is that**  
15 **correct?**

16 A. Correct.

17 **Q. And when you were reviewing the 45-day**  
18 **report and the 45-day report addendum, what particular**  
19 **points or items were you looking for?**

20 A. I'm looking -- Basically, our program is  
21 qualitatively and quantitatively organized. We have to  
22 follow the progression from the beginning of the site  
23 through to the end to show that work has been done, that  
24 it's actually cleaned up or released, and that when we're

1 finally done, we can show through analytical results that  
2 the contaminant that's left or has been removed has  
3 satisfied the requirements of the regulations.

4 **Q. And could you please just tell us what items**  
5 **and identify the report they were in that you paid**  
6 **attention to to that end?**

7 A. The first thing that we covered was the  
8 requirements that are listed in the 45-day report.  
9 There's a progression as you follow through the report  
10 from Section A through to the signature page that you  
11 look to make sure that everything's been properly  
12 endorsed, the addresses, the locations are all correct,  
13 that the requirements of the report itself have been  
14 provided. The 45-day report quickly caught my eye in  
15 that the only evidence that was submitted or proposed  
16 that showed that there was any kind of a release was  
17 strictly visual, olfactory and PID readings, but there  
18 were no readings. It was just stated we used a PID. So  
19 my job then was to look through the rest of the report,  
20 look for tables, look for maps, look for certifications  
21 from laboratories, look for anything that would tell me  
22 that I'm dealing with a contamination release. At that  
23 point in time there wasn't any.

24 My next step was to go into the addendum and look

1 at what was there to see if something had been left out  
2 or something had been discovered at a later date that  
3 would support the confirmation of a release. The  
4 addendum basically has one table, and it says that we  
5 took wall samples, floor samples, I think there was some  
6 trench samples from where the piping was, and it  
7 contained the closure samples, basically saying, look,  
8 we've met the requirements for no further remediation and  
9 we -- and the report says, we want an NFR letter, but  
10 there wasn't anything in there that ever said they had  
11 contamination above the requirements of the regulations  
12 that would indicate that a cleanup was required.

13 That was -- At that point in time I took my notes  
14 and the report and went in to my supervisor, Harry  
15 Chappel, and discussed that with him, and we came to the  
16 conclusion that without any kind of proof whatsoever that  
17 there was actual contamination above the cleanup  
18 objectives that we really didn't have anything here.  
19 There was no justification for a release, and that's when  
20 the March 9 letter was written and issued.

21 **Q. And what did that letter basically say?**

22 A. The letter said that based on the  
23 information contained in the initial 45-day report, we  
24 could not justify a release, and therefore it was not

1 subject to the LUST regulations. There was an additional  
2 paragraph that said because there was no confirmation of  
3 a release that we could verify, that we really didn't  
4 have the jurisdiction to continue further with reviewing  
5 the incident, so we didn't submit a letter in response to  
6 the request for no further action.

7 **Q. Now, there has been reference to the wall,**  
8 **floor and piping samples. I think they appear on**  
9 **page 51. I think you reference those also. Now, those**  
10 **did not exceed the applicable objectives, correct?**

11 A. They exceeded detection limits, but they did  
12 not exceed the contaminant levels that would require  
13 corrective action.

14 **Q. And --**

15 A. Had they done the tank pull first and taking  
16 those samples, there would have been -- it wouldn't have  
17 been -- the fire marshal wouldn't even have required it  
18 to be released, I don't believe.

19 **Q. Now, just to clarify, though, what --**  
20 **page 51, what those samples show is that this is what's**  
21 **still left out there and it's not above the cleanup**  
22 **objectives.**

23 A. Correct.

24 **Q. Now, there's also been discussion concerning**

1 **the eligibility and determination letter?**

2 A. Correct.

3 **Q. And am I right that you received that after**  
4 **the issuance of the March 9, 2009, letter?**

5 A. That's true. Mr. Herlacher called me to  
6 inquire about the non-LUST determination letter and he  
7 had made reference to we're eligible, and I -- we didn't  
8 have that in file, we didn't have it in our possession,  
9 so I asked him if he had received it, and I believe he  
10 had not received it too much earlier than that, so I  
11 said, could you send me that, and at the same time I  
12 asked if he by chance had the field inspector's log of  
13 removal, and he did, and I requested that be faxed to me  
14 as well.

15 **Q. Now, for purposes of the transcript, the**  
16 **eligibility and determination letter appears on page 89**  
17 **and 90. I mean, you're familiar with that letter,**  
18 **correct?**

19 A. Yes.

20 **Q. And just as an overview from your experience**  
21 **as an agency project manager, what, if any, significance**  
22 **to the types of review you do does that letter have?**

23 A. That letter has only one purpose for us, and  
24 that's to show that when they're doing corrective action

1 and they submit the budgets and the billing packages to  
2 us, that we can confirm that the fire marshal has  
3 determined that they're eligible to access the leaking  
4 underground storage tank fund. As far as -- There is  
5 nothing technical in that report that would tell me one  
6 way or another that there's any contamination present.

7 **Q. And also from your experience -- in this**  
8 **case there's been testimony of visual detection of**  
9 **petroleum release, olfactory detection, as well as these**  
10 **PID readings. In your experience from the LUST sites**  
11 **that you deal with, what's the value of those three types**  
12 **of information?**

13 A. For the entire time I've been with the  
14 leaking underground storage tank section, visual,  
15 olfactory and PID readings have strictly been screening  
16 devices, and that normally has been a trigger to say, we  
17 need to take some samples, because there is no one that I  
18 found whose nose or eyes is calibrated to tell you how  
19 much contamination is present. I have been at one site  
20 where the soil was a lovely shade of bluish-green and  
21 that was what they were pushing, they wanted  
22 contamination, but when they took samples, it wasn't  
23 contaminated. They were in a section that was full of  
24 blue and green clay. We work strictly off of do the

1 laboratory analyses tell us that we're proceeding through  
2 the process of corrective action to the point where when  
3 we're done, have we either reached those TACO tier 1  
4 objectives or have they recalculated using the TACO  
5 equations to get site-specific objectives and have they  
6 complied with those. So it's a -- qualitative and  
7 quantitatively driven, and to date I haven't received  
8 anything on this site that would meet those criteria to  
9 say we've got a release.

10 MR. RICHARDSON: I have no further questions  
11 of this witness.

12 HEARING OFFICER WEBB: Okay. Thank you.  
13 Mr. Dwyer or Miss Rios?

14 MR. DWYER: Thank you. Thanks.

15 CROSS EXAMINATION

16 BY MR. DWYER:

17 Q. Mr. Gaydosh, you know, I'll try to be  
18 efficient with our time here. Maybe we can, you know,  
19 cut pretty quickly to the issues here. If I understood  
20 your testimony -- and please correct me -- you reviewed  
21 the 45-day report and determined that the evidence in  
22 that report of a release -- which was -- and tell me if  
23 I'm wrong -- the hand-augered boring on January 18,  
24 the -- Mr. Herlacher's visual observation of the soils he



1 took out, his olfactory observation and the use of the  
2 PID meter -- that was the evidence that you had in the  
3 45-day report. Is that a fair statement?

4 A. Correct.

5 Q. Okay. And just so I understand, after  
6 reviewing the report, your determination was that that  
7 was not sufficient evidence to document or demonstrate  
8 confirmation of a release.

9 A. Correct.

10 Q. Okay. Now, let me ask you a further  
11 question. Based upon your experience with the program  
12 and with the Part 734 regulations, is -- in your opinion,  
13 is there a difference between confirming a release and  
14 closing out a site?

15 A. Oh, most definitely.

16 Q. Okay. Tell me the best you can what you  
17 consider the difference between the process of confirming  
18 a release and the process or information you need to  
19 close out a site.

20 A. Based on the information that we've  
21 received, not only through the regulations through  
22 working with this for 16 years but also through periodic  
23 section meetings that we've had that have included  
24 members of the Office of the State Fire Marshal, we

1 understand a release can be confirmed one of two ways.  
2 If you're on site and an Office of the State Fire Marshal  
3 says, there's evidence here that I have observed that  
4 require you to call this in and report a release, that's  
5 a done deal, but if that is not present or if the fire  
6 marshal says there isn't a release, then we normally look  
7 for laboratory analysis to confirm the presence of  
8 contaminants above tier 1 objectives.

9 Q. Okay. And let's talk about this site in  
10 particular. At the time that you reviewed the 45-day  
11 report in the record, did you have the OSEFM's log of  
12 removal?

13 A. No.

14 Q. Okay. So just so we're clear, that's not  
15 information you relied upon to make your decision that's  
16 reflected in the March 9 letter.

17 A. That's correct.

18 Q. Okay. Now, the second method you referenced  
19 that -- is apparently based upon the policies at the  
20 Agency and the OSEFM about confirming a release, and I  
21 just want to make sure I'm clear. Your understanding is  
22 that the second method, if it's not going to be via the  
23 storage tank safety specialist's log, would be to take a  
24 sample and have it analyzed by a lab.

1           A.    I would say that's what I look for, and I  
2 would say that's what part of the regulations state.

3           Q.    Okay.  And that's really what I want to get  
4 to, because I -- you know, maybe we just end up  
5 disagreeing, but I want to show you again what I will  
6 represent to you is a copy of Part 734, and in particular  
7 it's Section 115, and I just would ask you to look at the  
8 definitions in there for "confirmation of a release" and  
9 "confirmed release."

10          A.    Okay.

11          Q.    Would you agree with me that those  
12 regulations say that in order to confirm a release under  
13 Part 734, someone has to comply with the regulations of  
14 the fire marshal?

15          A.    Yes.

16          Q.    Okay.  And so those regulations deal with  
17 confirming a release, not closing out a site.

18          A.    Correct.

19          Q.    Okay.  And we have no dispute that in order  
20 to close out a site under the LUST program, an  
21 owner/operator has to submit laboratory-analyzed data  
22 that demonstrates they either meet one or more of the  
23 closure levels that are required by the Agency, and you  
24 couldn't give them a closure or an approval or no further

1 remediation without any analytical data.

2 A. Correct.

3 Q. Okay. But with respect to confirming a  
4 release, would you agree that's sort of a step before you  
5 ever get to closure?

6 A. That is correct.

7 Q. Okay. And, you know, as our discussion  
8 indicates, 734.115 contains definitions that specifically  
9 say confirmation of a release or a confirmed release is  
10 done by using the fire marshal's regulations.

11 A. That's correct.

12 Q. And I think you were here earlier for the  
13 testimony, so I'm going to ask you to bear with me, and  
14 let's go back to petitioner's earlier exhibits, which are  
15 Petitioner's Exhibits 4 and Petitioner's Exhibits --  
16 Exhibit 5, and here's just what I want to understand.  
17 Can you show me or tell me where -- well, let me ask you  
18 this question: Would you agree that those regulations  
19 pertain to release confirmation at LUST sites; for  
20 example, the site we're talking about today? And please  
21 take your time to look at those.

22 A. Thank you. Okay. Well, I can start by  
23 saying in 170.560, "Reporting of Suspected Releases,"  
24 they give examples such as the presence of free product

1 or vapors in soils, basements, sewers, utility lines or  
2 nearby surface water. That's pretty arbitrary. I  
3 don't -- I'm not sure where to go with that one.

4 Q. Okay. Well, let me just ask you this  
5 question with respect --

6 A. In the second one -- go ahead, please.

7 Q. Okay. Let me just ask you with respect to  
8 Petitioner's Exhibit 4, in that section of the fire  
9 marshal's regulations, does it anywhere in there say  
10 laboratory analysis is required to confirm a suspected  
11 release?

12 A. Not in this particular document.

13 Q. Okay. Now, let's talk about Petitioner's  
14 Exhibit 5, which is again a section of the fire marshal's  
15 regulations, 170.580, and I just -- I want to make sure  
16 you get a chance to look at that.

17 A. Okay.

18 Q. Okay. Now, in looking at that document, can  
19 you tell me, Mr. Gaydosh, does -- do you see anywhere in  
20 there -- and just for the record, that subsection is  
21 titled "Release Investigation Reporting, Site Assessment  
22 and Initial Response." Does that appear accurate?

23 A. Yes.

24 Q. With respect to Petitioner's Exhibit 5, can

1 **you tell me, anywhere in there does it say that**  
2 **laboratory analysis is required to confirm a release**  
3 **under that regulation?**

4 A. Potentially.

5 **Q. Okay. Can you tell me when you say**  
6 **potentially where it says laboratory analysis is**  
7 **required?**

8 A. Under (c) it says, "Site assessment. Owners  
9 or operators shall measure for the presence of a release  
10 where contamination is most likely to be present." A  
11 measurement requires some type of a qualitative or  
12 quantitative statement or finding that would indicate  
13 that they measured something.

14 **Q. Okay. And then that next --**

15 A. "In selecting sample types, locations and  
16 measurement methods, the owner shall consider the nature  
17 of the stored substance." Now if you go down to item 1,  
18 it says, if the test results for the excavation zone or  
19 the UST site indicate that a release has occurred, owners  
20 shall begin initial response.

21 **Q. Okay.**

22 A. So here basically it says they have to  
23 measure for something and they have to tell you how to  
24 measure it and the test results. In the 45-day report,

1 they said they used a PID.

2 **Q. Okay.**

3 A. However, as required in the regulations,  
4 they didn't bother to tell me what the PID readings were.

5 **Q. Okay. And that's fine. Can you tell me**  
6 **where it requires that they provide the PID meter**  
7 **readings?**

8 A. I don't believe you have that there.

9 **Q. Okay. Can you -- Well, can you tell me**  
10 **where --**

11 A. Can I have the regulations, please? It is  
12 important to understand that all of 734 needs to be  
13 complied with, and this is something that as we searched  
14 through and found this, we go to Section 734, Subpart D,  
15 "Miscellaneous Provisions." Section 400 -- 734.400 in  
16 general states, "This Subpart D applies to all activities  
17 conducted under this part and all plans, budgets, reports  
18 and other documents submitted under this report" -- or  
19 "under this part." It indicates what the indicator  
20 contaminants for gasoline are. It states that if you  
21 conduct soil borings, in 734.425, that soil boring logs  
22 must be kept. Those were never submitted.

23 **Q. Okay. And just so I'm clear here, you**  
24 **would -- then it's your opinion that that language is**

1 **included in this definition of confirmation of release.**

2 A. This is included in my review of anything  
3 that comes to me under Subpart -- or Section 734.

4 **Q. Okay.**

5 A. And basically, when they're talking about  
6 measuring and test results, I have to go back and look at  
7 other regulations that I use to determine what a  
8 measurement is and what a test result is. In  
9 Section 734.425, "Soil Borings," under item (c), number  
10 4, it says petroleum hydrocarbon vapor readings are to be  
11 included as part of your soil borings, so if you used a  
12 PID, you should have included the numbers.

13 **Q. So let me just ask you hypothetically, if**  
14 **the 45-day report and/or the 45-day addendum had included**  
15 **the actual PID meter reading, would that have been**  
16 **satisfactory?**

17 A. Most likely I would have said, I want you to  
18 go in and take a boring and give me more data.

19 **Q. Okay. So the PID meter plus the actual**  
20 **reading would not be deemed sufficient.**

21 A. The PID reading, as we've always considered,  
22 is a field screening device, and that's it.

23 **Q. Okay. But, well, then is it your opinion**  
24 **that the PID meter is not a measurement method as that**



1 **term is used in Part 170.580 of the fire marshal**  
2 **regulations?**

3 A. It may very well be accepted, but without --  
4 if I want to know how many feet a board is and I take a  
5 measurement but I don't write it down, then I don't know  
6 how many feet the board is. If I take a measurement with  
7 a PID and I don't submit to the reviewer who's going to  
8 be approving my report what those readings are, then I  
9 don't have that to use as a piece of data, and I still  
10 don't have that to be used as a data. It wasn't  
11 submitted. It wasn't given to me by the time I wrote the  
12 letter.

13 **Q. Okay.**

14 A. I haven't gotten any field reports. I  
15 haven't gotten any notes. I haven't gotten anything  
16 anywhere to tell me that there was ever contamination  
17 here on this site above TACO tier 1 objectives that would  
18 indicate that there was a release sufficient to be  
19 reported.

20 **Q. Okay. And that's important, because I want**  
21 **to make sure I understand this. Your interpretation of**  
22 **the regulations is that for a release to be confirmed,**  
23 **there has to be laboratory analytical data. Is that a**  
24 **fair statement?**

1           A.    No.  If there's a fire marshal present that  
2 says it's a release and he reports it, then there's not.

3           **Q.    So if the fire marshal's log says there was**  
4 **a release, then that ends your inquiry.**

5           A.    Correct.

6           **Q.    Okay.  And if the fire marshal's log says no**  
7 **release, then does an owner/operator of that site need to**  
8 **submit laboratory analysis to document a confirmed**  
9 **release?**

10          A.    I think they need to submit something.

11          **Q.    Well, but I'm asking you, do they need to**  
12 **submit laboratory analysis?**

13          A.    That's probably more for my management to  
14 decide that.  What I'm saying is nothing has ever been  
15 submitted that supports anything.

16          **Q.    But I -- we'll just ask for your opinion.**

17          A.    I'm going by my guidance up until now.  
18 Unwritten, some of it just instructed, is the idea that  
19 there has to be some kind of proof of a release.  I can  
20 go to the corner gas station while somebody is filling  
21 gas and smell gas.

22          **Q.    Okay.  But it's -- But we're down to here**  
23 **really -- and that's what I want to isolate on -- your**  
24 **opinion based upon your review of the regulations and**

1 your experience is that the PID meter readings are not a  
2 sufficient measurement method to confirm a release. I'm  
3 just asking you if that's your opinion.

4 A. What I will say for this particular site and  
5 for this particular incident, I don't have PID readings,  
6 so it doesn't matter. It's irrelevant.

7 Q. Okay.

8 A. They never submitted any PID readings.

9 Q. Okay. But I want to make sure I understand.  
10 Is it your opinion that those would be required?

11 A. Not necessarily.

12 Q. Okay. Then --

13 A. My opinion is I'm going with only what I  
14 have as information, and there's nothing been submitted  
15 that supports a release.

16 Q. That's what I want to understand, is what is  
17 the information that you believe is necessary under the  
18 regulations to document or confirm a release? And I  
19 understand either the fire marshal -- the first one is  
20 the fire marshal's log says there's a release, but if  
21 that -- if the fire marshal's log says no apparent  
22 release, then what information, in your opinion and  
23 experience, must an owner/operator submit to confirm a  
24 release?

1           A.    I'm looking --

2                   MR. RICHARDSON:  I'm going to object.  I  
3 think it's been asked and answered.

4                   MR. DWYER:  Well, I'm not sure it's been  
5 clarified yet.

6                   HEARING OFFICER WEBB:  Well, I don't know  
7 that it's been answered.  It's been asked a few times.

8                   MR. RICHARDSON:  We covered a lot of ground.

9           A.    All I can tell you is that I took the 45-day  
10 report, I took the 45-day report addendum, and I looked  
11 at both of those.  I searched through that addendum to  
12 see is there anything that will support my understanding  
13 of the 45-day report, will change my mind, and I -- in  
14 talking to Mr. Herlacher on the phone, I understood that  
15 if I took the reports that he received from the Office of  
16 the State Fire Marshal and they contradicted what I  
17 found, then I would submit a reversal of that decision.  
18 The only problem is I have two reports.  One is a -- the  
19 letter of -- ED&D letter, which basically is just an  
20 office person's reviewing a file versus a person who was  
21 in the field who said he doesn't think there was a  
22 release, and I used that and that didn't support my  
23 decision, so I really don't have anything -- if they had  
24 come in and said that the -- more than one PID reading,

1 one PID reading, I don't know. If they had some readings  
2 that showed something, they might have, but nothing has  
3 been ever submitted.

4 Q. (By Mr. Dwyer) Okay. And again, I just  
5 want to confirm, is it your opinion that laboratory  
6 analysis is required to confirm a release from a LUST?

7 A. It's my opinion that a measurement of  
8 something is required.

9 Q. Okay. A measurement of something, and  
10 just -- let's just take that a step further. They  
11 submitted a report that said PID measurements were taken.  
12 I -- Let's just stop there. I want to make sure. In  
13 your opinion, is that adequate or inadequate to confirm a  
14 release?

15 A. That's inadequate.

16 Q. Okay. And what information beyond the  
17 statement that PID readings were taken would be necessary  
18 for you to accept that as a confirmed release?

19 A. Well, first of all, just some PID readings.

20 Q. Okay.

21 A. Anything. Something.

22 Q. Okay. So I just want to make sure that we  
23 understand two things; one, that the regulations --  
24 again, I'm asking you with respect to 170.560 and

1 170.580. Do they anywhere explicitly state laboratory  
2 analysis is required to confirm a release?

3 A. Not in what you have here.

4 Q. Okay. Are you aware of other regulations  
5 that may apply?

6 A. Not from fire marshal regulations.

7 Q. Okay. But the regulations we've talked  
8 about, 170.560 and 170.580, do talk about under the "Site  
9 Assessment" section requiring a measurement method, and  
10 just so I understand your testimony, simply submitting  
11 evidence that a PID meter was used to measure vapors  
12 wasn't sufficient on this site because you didn't have  
13 readings from them.

14 A. Right.

15 Q. Okay. The other two things I just want to  
16 cover, Mr. Gaydosh, is you referenced earlier in your  
17 testimony some provisions from Part 734, and the thing I  
18 want to ask you about is, directing your attention to the  
19 March 9 letter, which I think is -- I ought to know this  
20 by heart -- page 110 and 111 of the record, in that  
21 letter, did you reference the owner/operator's failure to  
22 comply with those regulations?

23 A. I just used the standard language that was  
24 in the letter.

1 Q. Okay. And again, just to confirm, that  
2 letter doesn't contain any reference to a failure to  
3 comply with 734.210.

4 A. Correct.

5 Q. And it doesn't reference failure to comply  
6 with fire marshal regulations at 170.560 or 580.

7 A. We don't reference those. That would come  
8 from the fire marshal.

9 Q. But you would agree that in Part 734--

10 A. They are not here.

11 Q. You would agree in the Part 734 regulations,  
12 the definitions specifically require that a release be  
13 confirmed by complying with the fire marshal regulations.

14 A. Correct.

15 Q. Okay. But those are not referenced in the  
16 March 9 letter. Is --

17 A. That's correct.

18 Q. Is there any particular reason why the  
19 letter didn't provide more explanation about why this was  
20 being rejected and treated a non-LUST incident?

21 A. Not particularly.

22 Q. Okay. But you would -- would you agree that  
23 subsequent to issuing the letter, you had discussions  
24 with the consultant for the owner/operator about reasons

1 **why the report was rejected?**

2 A. Rephrase that, please.

3 **Q. Okay. Would you agree that subsequent to**  
4 **the letter being issued on March 9, 2009, you had**  
5 **conversations with the consultant for the owner/operator?**

6 A. After I issued the letter, I did have  
7 consultant --

8 **Q. And in those discussions, did you identify**  
9 **specific provisions of the regulations that you didn't**  
10 **believe were complied with?**

11 A. I spoke with him and spoke with my manager,  
12 and we -- I don't know offhand if I gave him a specific  
13 quotation or not.

14 **Q. Okay. So you -- as we sit here, you don't**  
15 **recall whether or not you referenced 734.210 of the**  
16 **regulations during the --**

17 A. I'm sure we did reference 734.210, and that  
18 also refers to the concept of measurement.

19 MR. DWYER: Okay. I think that -- Could I  
20 just have two minutes?

21 HEARING OFFICER WEBB: Sure.

22 (Off the record.)

23 **Q. (By Mr. Dwyer) Other than -- Now, you**  
24 **mentioned a couple places -- and I apologize -- I hate to**



1 have her read it back -- but a couple of miscellaneous  
2 provisions that you referenced as being applicable here?

3 A. Subpart D.

4 Q. All of Subpart D?

5 A. Basically, there's five or six references  
6 that talk about what type of information is required that  
7 pertains to entire Section 734.

8 Q. Let me ask you this, because I confess that  
9 I don't know that portion verbatim, but that section,  
10 Subpart D, that you're referring to, does that section  
11 specify anywhere in it that to confirm a release,  
12 laboratory analysis is required?

13 A. It doesn't address that.

14 Q. Okay.

15 A. It's -- It talks about what types of  
16 analysis you use and, if you use a specific type of  
17 analysis, what kind of information is required.

18 Q. Okay. I just want to cover two more things  
19 with you. If we look at the record, Mr. Gaydosh, and in  
20 particular the addendum, the 45-day report addendum --

21 A. Page?

22 Q. You know what? As soon as I find it, I'll  
23 tell you. Page 51. Now, you talked some about this with  
24 Mr. Richardson. I just want to make sure I understand.

1 Do you agree that this table appears to reflect a  
2 laboratory analysis of soil samples taken at the site?

3 A. Yes.

4 Q. Okay. And would you agree that at least one  
5 or more of the analytic results indicates the presence of  
6 what we've talked about as the indicator contaminants in  
7 soils at the site that were above the detection limit?

8 A. Above detection limits, yes.

9 Q. Okay. And is that not adequate information  
10 to demonstrate that a release appeared there, in your  
11 opinion?

12 A. No.

13 Q. Okay. Tell me why, if you would.

14 A. If we're looking for -- specifically for  
15 contaminants -- because there's a lot of sites that have  
16 contamination that's left. We're looking at not  
17 detection limits. Detection limits tell us what the  
18 equipment uses to be able to recognize that particular  
19 contaminant. What we're looking at is the tiered  
20 approach to corrective action objectives, tier 1, either  
21 residential or commercial -- industrial/commercial list.  
22 There's nothing on here -- If an investigation was done  
23 and they did borings all around the excavation and  
24 anywhere they could possibly find and they gave me these

1 examples and said, do we have a release, the answer would  
2 be no, because there was nothing above TACO tier 1  
3 numbers.

4 **Q. Okay. So then can -- is it reasonable to**  
5 **assume that your interpretation of the regulations is**  
6 **unless there were contaminants, the indicator**  
7 **contaminants, one or more of them, present at a site**  
8 **above the tier 1 levels, there's not a release?**

9 A. We're dealing with a table that's requesting  
10 closure, and that's what this shows, but there's nothing  
11 that shows me we got --

12 **Q. Right.**

13 A. There -- I mean, I'm trying to give whatever  
14 benefit of the doubt I can, I have. No one took any  
15 samples of the excavated soils to show there was  
16 contaminated soil. No one took any samples when they  
17 first confirmed it. No one took any samples anywhere  
18 except for closure, and they got a clean site. As a  
19 reviewer, I have to look at this and say, what am I  
20 comparing this table to? I have to have something prior  
21 to say that they actually got something done. Did they  
22 just dig up two tanks and a lot of soil and do really  
23 nothing for cleanup? I don't have anything to compare it  
24 with.

1           **Q.    Okay.  But I want to make sure I understand**  
2 **here, though.  Then this requirement for a comparison, is**  
3 **that in the regulations?**

4           A.    It's common sense.  If we're submitting a  
5 report requesting closure and you have closure samples, I  
6 have to be able to compare something prior to that to say  
7 did we actually accomplish anything.

8           **Q.    Okay.  And the evidence -- well, the -- just**  
9 **so we're clear here, this information in this table on**  
10 **page 51 --**

11          A.    All I can say is it didn't help either way.

12          **Q.    And it didn't help because it didn't show**  
13 **concentrations above the tier 1 levels.**

14          A.    At this point, yes.

15          **Q.    Okay.  Now, if it had shown -- let's just**  
16 **say if this table on page 051 of the 45-day report**  
17 **addendum had shown any of the contaminants above the tier**  
18 **1 levels, in your opinion, what would that mean?**

19          A.    There's several things.  If -- And it all  
20 depends on how they would have approached it.  If they  
21 submitted this table for closure stating that they were  
22 using pavement as an institutional control, an engineered  
23 barrier, and that -- and it closed off that pathway of  
24 exposure, then it could very well have closed it.  If it

1 had contamination that they were saying, okay, we've  
2 still got a little bit left and we've got further to go,  
3 at least I could have used the table and said, ah-ha, I  
4 have contamination, but just coming in and using it to  
5 confirm a release, I can't use non-contamination above  
6 TACO objectives to confirm a release, so basically, all I  
7 did was use the addendum to try to provide some  
8 information that would allow me to confirm the release  
9 based on my side of the review.

10 **Q. But that suggests -- and this is my**  
11 **concern -- that suggests that in order to confirm a**  
12 **release, they would had to have provided you laboratory**  
13 **analytic results that showed levels, at least one sample,**  
14 **above the tier 1 levels to confirm a release.**

15 A. As far as the Pollution Control Board's  
16 concerned, they can make that decision. As far as my  
17 supervisors, they could pitch that decision. As far as  
18 common sense to me, it would make sense for me to review  
19 a site that supposedly is contaminated to at least see  
20 somewhere where it's actually been demonstrated to be  
21 contaminated, and that's all I can take. I'm not a  
22 policy maker. I'm not a decision maker. I wrote a  
23 letter based on the idea that I have no evidence to  
24 support there's contamination above TACO tier 1.

1 Q. So and that's really what I want to get --  
2 okay. And that's -- this is the important part. There  
3 are two steps there. You said that you didn't have  
4 evidence sufficient to determine a release occurred, and  
5 then you said you didn't have evidence sufficient to  
6 determine that there was a release above tier 1, and what  
7 I want to make sure I understand here is, is it your --  
8 and I'm just trying to understand your interpretation and  
9 application of the regulations, and if I understand it  
10 correctly, it is that you would need evidence that there  
11 was an indicator contaminant at the site above tier 1 to  
12 document that there had been a confirmed release.

13 A. It is my opinion that you can't clean up a  
14 site that isn't dirty.

15 Q. Okay. And then we get into definitions.

16 A. Okay.

17 Q. Is your definition of dirty that it has to  
18 have contamination at least above tier 1?

19 A. That would make sense to me.

20 Q. Is that your interpretation?

21 A. That would make sense to me.

22 Q. Well --

23 A. I'm not interpreting -- okay.

24 Q. Let me ask you, is it your opinion that it

1 needs to have contamination above tier 1, in your eyes,  
2 to be a site with a confirmed release?

3 A. Fine. I will say yes.

4 Q. Okay. And this data in table I on page 51  
5 does not have evidence of an exceedance of a tier 1  
6 standard.

7 A. Correct.

8 Q. Okay. I mean, how do you understand that an  
9 owner/operator would close out a site after excavating  
10 soils? What is that whole process? Did -- A site is  
11 contaminated. What happens then?

12 MR. RICHARDSON: I'm going to object. I  
13 mean, I think we've covered what's relevant here. Now we  
14 seem to be getting into more hypotheses and that, but I  
15 don't know what the relevance is.

16 HEARING OFFICER WEBB: Well, I --

17 MR. DWYER: He's got 15 --

18 HEARING OFFICER WEBB: -- don't know until  
19 he asks, I guess.

20 MR. DWYER: He's got 15 years in the  
21 program. I think he's perfectly capable of talking about  
22 how the progress goes.

23 MR. RICHARDSON: Well, I agree, but I don't  
24 know, are we talking about generic? I mean, I just don't

1 know.

2 **Q. (By Mr. Dwyer) Why does an owner/operator**  
3 **excavate soils at a site?**

4 A. All I can -- There's a lot of reasons for  
5 excavating soils. There's a lot of reasons for taking  
6 out tanks. They're not all -- not necessarily connected  
7 to the leaking underground storage tank program.

8 **Q. Well, if you have contamination above the**  
9 **tier 1 levels in soils and you can't use an institutional**  
10 **control, what do you do with those soils?**

11 A. You dig them up and you make sure that  
12 they're disposed of properly.

13 **Q. And would you agree that in order to close**  
14 **out the site by doing source removal, soil removal, you**  
15 **would have to provide analytic results to the Agency that**  
16 **show that you're meeting in this case the tier 1**  
17 **standards?**

18 A. There's two parts there. If they're  
19 removing clean overburden, we don't pay for that removed  
20 if it isn't sampled and it isn't shown to be  
21 contaminated.

22 **Q. Okay.**

23 A. If you're taking out the soil from below the  
24 top of the tanks to the bottom of the tanks or wherever



1 you go and it is contaminated, we ask that they show  
2 proof that it's contaminated so that we pay for the  
3 removal, because we're not going to pay to remove clean  
4 soil.

5 **Q. Okay. I'll try to make this simple. In**  
6 **your experience, is -- when soil is contaminated, is it**  
7 **likely to be less contaminated further away from the tank**  
8 **or the line?**

9 A. That's a site specific, depending upon  
10 hydraulics, geology. There's a lot of different things.

11 MR. DWYER: Okay. I don't think we have  
12 anything further.

13 HEARING OFFICER WEBB: Mr. Richardson?

14 MR. RICHARDSON: I have no further  
15 questions.

16 HEARING OFFICER WEBB: Okay. Thank you,  
17 Mr. Gaydosh.

18 MR. DWYER: Thank you, Mr. Gaydosh.

19 THE WITNESS: You're welcome.

20 HEARING OFFICER WEBB: Let's go off the  
21 record for a minute here.

22 (Discussion held off the record.)

23 HEARING OFFICER WEBB: We'll go back on the  
24 record. Mr. Richardson, did you have anything further to

1 present to the Board?

2 MR. RICHARDSON: No. The respondent rests.

3 HEARING OFFICER WEBB: Okay. The transcript  
4 is due by September 28 and will be posted on the Board's  
5 web site. The public comment deadline is October 12.  
6 Any public comment must be filed in accordance with  
7 Section 101.628 of the Board's procedural rules. The  
8 petitioner's brief is due by October 26 and respondent's  
9 brief is due by November 23. The mailbox rule will not  
10 apply, and if the parties file electronically, the briefs  
11 must be filed by 4:30 p.m. on the due date. If there's  
12 any problem with electronic filing, I authorize the  
13 briefs to be filed by fax. Would the petitioner like to  
14 make any closing arguments?

15 MR. DWYER: No, Your Honor.

16 HEARING OFFICER WEBB: Mr. Richardson, would  
17 you like to make any closing arguments?

18 MR. RICHARDSON: No.

19 HEARING OFFICER WEBB: Okay. I'll again  
20 note for the record that there are no members of the  
21 public present to give any comment. I will further add  
22 that I find all of the witnesses testifying today to be  
23 credible. At this time I will conclude the proceedings.  
24 We stand adjourned, and I thank you all for your

1 participation.

2 MR. DWYER: Thank you.

3 MR. RICHARDSON: Thank you.

4 (Hearing adjourned.)

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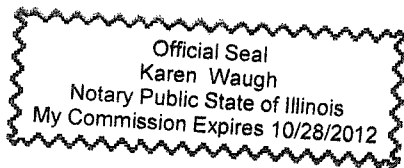
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1 STATE OF ILLINOIS )  
 ) SS  
2 COUNTY OF BOND )  
3

4 I, KAREN WAUGH, a Notary Public and Certified  
5 Shorthand Reporter in and for the County of Bond, State  
6 of Illinois, DO HEREBY CERTIFY that I was present at the  
7 office of the Illinois Pollution Control Board,  
8 Springfield, Illinois, on September 16, 2009, and did  
9 record the aforesaid Hearing; that same was taken down in  
10 shorthand by me and afterwards transcribed, and that the  
11 above and foregoing is a true and correct transcript of  
12 said Hearing.

13 IN WITNESS WHEREOF I have hereunto set my hand  
14 and affixed my Notarial Seal this 25th day of September,  
15 2009.



*Karen Waugh*

19 Notary Public--CSR

20 #084-003688

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23  
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