

THE ILLINOIS POLLUTION CONTROL BOARD

APRIL 22, 2010

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STATE OF ILLINOIS
Pollution Control Board

CANCER TREATMENT CENTERS OF)
AMERICA, INC.,)

Petitioner,)

vs)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)

Respondent.)

PCB 10-33
(UST Appeal)

REPORT OF PROCEEDINGS at the hearing of the
above-entitled cause, taken before Rebecca A.
Graziano, Certified Shorthand Reporter within and
for the County of Lake and State of Illinois, at the
Libertyville Village Hall, Libertyville, Illinois,
commencing at the hour of 9:00 a.m. on the 22nd day
of April, A.D., 2010.

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Appeared on behalf of the Petitioner,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
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P.O. Box 19276
Springfield, Illinois 62794
(271) 782-3335
BY: MR. GREGORY RICHARDSON

Appeared on behalf of the Respondent.

I N D E X

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1 MR. HALLORAN: Good morning, everyone.
2 My name is Bradley Halloran. I'm a hearing
3 officer with the Illinois Pollution Control
4 Board. I'm also assigned to this matter
5 entitled Cancer Treatment Centers of America
6 Inc., petitioner, versus the Illinois
7 Environmental Protection Agency, the
8 respondent.

9 Our docket number is PCB 10-33.
10 The hearing has been publicly noticed
11 pursuant to the board of regulations, and
12 will be conducted in accordance with
13 Section 101.600 of the Board's procedural
14 rules.

15 This matter involves an
16 underground storage tank appeal pursuant to
17 Section 105.400. I'll also note for the
18 record that I will not be making the ultimate
19 decision in this case. That decision is left
20 up to the five board members. I'm here to
21 ensure an orderly hearing, a clear
22 transcript, and just make sure the hearing
23 goes smoothly and rule on any evidentiary
24 hearings that may arise.

1 I also want to note there are no
2 members of the public in this room at this
3 time.

4 With that said, I'm going to have
5 counsel for petitioner and respondent
6 introduce themselves.

7 MR. COLLINS: For the petitioner,
8 Keith Collins. Actually, I use the first
9 initial to avoid explanations, S. Keith
10 Collins.

11 MR. HALLORAN: Thank you, sir.

12 MR. RICHARDSON: And for the
13 respondent, Illinois EPA, James G.
14 Richardson.

15 MR. HALLORAN: Thank you.
16 Mr. Collins, will you be doing an opening
17 this morning?

18 MR. COLLINS: No.

19 MR. HALLORAN: Okay. You're going to
20 waive that. Mr. Richardson?

21 MR. RICHARDSON: I have no opening
22 remarks.

23 MR. HALLORAN: Okay. At this time --
24 and this time is about 9:05 a.m.

1 Mr. Collins, would you care to call your
2 first witness, please?

3 MR. COLLINS: Yes. We call Alison
4 Rosenberg.

5 MR. HALLORAN: And Ms. Rosenberg, I
6 think we're going to have you sit up here.
7 And when you get up here, Rebecca will swear
8 you in.

9 (Witness sworn.)

10 MR. COLLINS: First I would like to
11 offer as an exhibit Ms. Rosenberg's resume.
12 And I apologize I don't have copies.

13 MR. HALLORAN: We can mark it as
14 petitioner's Exhibit Number 1.

15 (Document marked as Petitioner's
16 Exhibit No. 1 for
17 identification.)

18 MR. COLLINS: And if I may show it to
19 the witness.

20 (Document tendered.)

21 WHEREUPON:

22 ALISON ROSENBERG

23 called as a witness herein, having been first duly
24 sworn, deposeth and saith as follows:

1 DIRECT EXAMINATION

2 BY MR. COLLINS:

3 Q. Could you identify, first of all, the
4 spelling of your name before we get to this exhibit,
5 for the court reporter's benefit?

6 A. Oh, you would like me to spell my
7 name?

8 Q. Right.

9 A. It's Alison, A-l-i-s-o-n. Last name
10 is Rosenberg, R-o-s-e-n-b-e-r-g.

11 Q. And Alison, could you identify for us
12 what Exhibit 1 is that's in front of you?

13 A. This is my resume, which I have
14 previously given to Mr. Collins.

15 Q. And that basically summarizes your
16 background?

17 A. Correct.

18 Q. And in terms of environmental matters,
19 can you tell us what your basic background is?

20 A. I have a bachelor's degree in
21 environmental studies with a minor in earth science,
22 and I have been working in the environmental
23 consulting field for the past five years.

24 Q. And in that capacity, have you worked

1 with Benchmark?

2 A. Yes. I'm sorry, yes. I have worked
3 with Benchmark for the past five years performing
4 multiple environmental consultant duties.

5 Q. Would you say dozens of projects?

6 A. As far as projects like this, yes.
7 I've done at least 30 of them.

8 Q. All right. And are you familiar with
9 the site that is the subject of these proceedings?

10 A. Yes.

11 Q. And how did you first become familiar
12 with that?

13 A. I was brought onto the project when we
14 began the phase two investigation.

15 Q. And approximately when was that?

16 A. That was, I believe, August of '07.

17 Q. And that investigation was -- if you
18 would please just describe it in general terms.
19 What was the nature of the concern with the
20 investigation?

21 A. Based upon what the findings of the
22 phase one report were, it was required that we
23 investigate the possibility of underground storage
24 tanks on the property from a former gas station.

1 Q. And what information regarding tanks
2 on the property was available at the time of your
3 investigation?

4 A. The only information we had was
5 the -- I should say the former owner of the
6 property. He's the one who informed us it was a
7 former gas station, that there were tanks previously
8 present on the property. There were no official
9 documentation -- or documents that we could find in
10 regards to the underground storage tanks.

11 Q. But it was -- was it your
12 understanding that the underground tanks had been
13 removed?

14 A. Yes, it was.

15 Q. And that was based, in part, on
16 information through the ownership?

17 A. Correct.

18 Q. And with respect to public records,
19 did you have information regarding when they were
20 removed?

21 A. No, we did not. There was a data gap,
22 for some odd reason, as far as when they were
23 removed.

24 Q. And in terms of the nature of the work

1 that was done, can you briefly describe for us the
2 initial testing that was done at the property?

3 A. Yeah. The first -- I should say the
4 phase two, it was just going out -- we did a
5 magnetometer search to determine if tanks were still
6 present. The magnetometer search came up
7 inconclusive, but it did pull up -- you could see
8 the area where the tanks were previously located, so
9 we went out and punched in a few soil borings in the
10 general area of the underground storage tank, and
11 contamination was found.

12 Q. And what was done when contamination
13 was found?

14 A. Following that, we proposed to Cancer
15 Treatment Centers at that time to follow up with a
16 site investigation to determine or delineate the
17 extent of the contamination.

18 Q. And in terms of reporting that?

19 A. Reporting it?

20 Q. Notifying the --

21 A. Oh, yes.

22 Q. -- state authorities.

23 A. It was actually following the site
24 investigation, that was when we notified IEMA of the

1 presence of contamination.

2 Q. And subsequently, Cancer Treatment
3 Centers, did they decide to take an early action in
4 terms of the remediation?

5 A. They did respond. It took a little
6 bit of time for them -- for us to actually get out
7 there. But yes, it was -- that was what their
8 initial idea was, was to get out there and remediate
9 the property as soon as possible.

10 Q. And there were just some original time
11 scheduling things?

12 A. Right, just a matter of getting all
13 the ducks in a row to get the project going.

14 Q. And the weather wasn't the greatest at
15 that point in the year, was it?

16 A. Well, when we reported it to IEMA it
17 was January. So yeah, it was a little cold.

18 Q. Do you recall offhand if the ground
19 was frozen?

20 A. I'm sure it was. I remember there was
21 snow on the ground when we did the site
22 investigation.

23 Q. And during the course of this
24 remediation, did you find anything that you hadn't

1 been aware of of significance?

2 A. Yeah. We initially went out to
3 remediate the contaminated soil we found during the
4 site investigation. In that process of remediation,
5 we uncovered a 2,000 gallon diesel tank, an
6 underground storage tank.

7 Q. And was that located close to where
8 the original tanks had been removed?

9 A. No. No, it was not. It was, I would
10 say, approximately 100 feet to the east of where the
11 initial investigation took place, or remediation
12 took place.

13 Q. And that tank was discovered because
14 the contamination extended to that point?

15 A. Yes. Once we got out there and
16 started digging, we discovered that the
17 contamination went further than we originally
18 thought, and Cancer Treatment Centers gave us the
19 go-ahead to continue to remediate the property,
20 because she wanted a clean piece of property. And
21 in that process is when we uncovered the underground
22 storage tank.

23 Q. And so the soil contamination led you
24 to the tank?

1 A. Correct.

2 Q. And what happened when you discovered
3 the tank?

4 A. We immediately halted what we were
5 doing. We submitted for permits to the OSFM for
6 removal. Cancer Treatment Centers opted to register
7 the tank for reimbursement purposes, and then as
8 soon as we received the permits, we scheduled a tank
9 removal with the state fire marshall, Sue Dwyer, at
10 the time, and she met us out on site and we removed
11 the tank. I don't recall the exact date of the tank
12 removal, but it was after all the permits were all
13 received.

14 MR. COLLINS: I'm going to ask that,
15 for the record, Page 443 through 446, a copy
16 of which I am tendering to Mr. Richardson, be
17 marked for use as an exhibit. And I believe
18 that will be Exhibit 2.

19 MR. HALLORAN: That's correct.

20 (Document marked as Petitioner's
21 Exhibit No. 2 for
22 identification.)

23 (Document tendered.)

24

1 BY MR. COLLINS:

2 Q. I'd like to show you what's been
3 marked as Petitioner's Exhibit 2. Can you tell us
4 what this is?

5 A. This was the permit from the OSFM for
6 removal of the USC.

7 Q. Okay. And if you turn to Page 446,
8 the last page in this set of pages, do you recognize
9 the signature at the lower right?

10 A. Yeah. That's Sue Dwyer, the state
11 fire marshall that was on site.

12 Q. Okay. Now, you can determine from
13 the -- does this refresh your recollection,
14 rather --

15 A. Yes.

16 Q. -- of when the reporting of removal
17 occurred?

18 A. Yes.

19 Q. And when were those two events, first
20 the --

21 A. It was -- the tank was removed on
22 June 25th of 2008.

23 Q. And when was the tank discovered?

24 A. I believe it was a week prior. It

1 doesn't really say. It was a week or two prior to
2 that. I want to say June 11th, 2008.

3 Q. Okay. And on the occasion of the
4 25th, when the tank was removed, you said that Sue
5 Dwyer was present?

6 A. Correct.

7 Q. And she was there from the office of
8 the state fire marshall?

9 A. Correct.

10 Q. And who else was present at that time
11 that you recall?

12 A. Myself, Sarpelas Enterprises
13 (phonetic), who is the tank removal contractor, and
14 his employees.

15 Q. Okay. Did you have a conversation
16 with Ms. Dwyer at that time?

17 A. Yes.

18 Q. And can you relate to us what was said
19 with regard to the tank?

20 MR. RICHARDSON: I'm going to object
21 on a hearsay basis. We have her report here,
22 and it discusses, you know, what her -- what
23 Ms. Dwyer's observations were. So I just
24 want to make that objection.

1 MR. HALLORAN: Okay. Mr. Collins?

2 MR. COLLINS: In response, I would say
3 that, as Mr. Richardson said, it's not really
4 the conversation. It's more the summary of
5 Ms. Dwyer. And Ms. Dwyer is no longer with
6 the Agency, and is not someone we were able
7 to bring here today.

8 I think with regard to what this
9 summarizes, it's fair to allow the witness to
10 talk in her testimony about what the actual
11 conversation was, as opposed to the summary
12 report.

13 MR. HALLORAN: You know, Ms. Dwyer
14 really isn't a party, per se, but she is with
15 the OSFM, or at least she was. And also, I
16 think I'm going to overrule Mr. Richardson's
17 objection, based on Section 101.626, "The
18 officer may admit evidence that is material
19 relevant and will be relied upon by prudent
20 persons," and also Section 101.626 B,
21 "Admissibility of evidence depends on a good
22 faith argument. In the interpretation of
23 subsequent law, the hearing officer will
24 admit the evidence." I will allow the

1 question to be asked.

2 MR. COLLINS: Thank you, your Honor.

3 BY MR. COLLINS:

4 Q. What conversation occurred at the
5 occasion of the 25th when the tank was removed
6 between you and Ms. Dwyer?

7 A. I specifically asked her as we were
8 pulling out the tank if I needed to call in an
9 additional IEMA number, because leakage from the
10 tank was evident. There were holes in the bottom of
11 the tank, and at that time she said no, she'll just
12 notify the office that this tank will be added to
13 the original IEMA number. So no new number was
14 issued for the site.

15 Q. And in terms of the actual condition
16 of the tank, directing your attention to Page 446 of
17 Exhibit 2, in particular the last paragraph, do you
18 see where it begins, "The tank had multiple
19 corrosion holes?"

20 A. Yes.

21 Q. Could you read from that point to the
22 end?

23 A. The tank had multiple corrosion holes
24 throughout. Some were as large as my fist, while

1 others were the size of a half dollar or smaller.
2 The soil had an obvious petroleum odor of diesel
3 fuel and was petroleum stained with characteristic
4 gray to green color."

5 Q. And is that an accurate summary of the
6 state of the tank at the time of removal?

7 A. Yes.

8 Q. And was the tank the source of much of
9 the contamination?

10 A. Yes. It was very obvious that it had
11 been leaking for quite awhile.

12 Q. And was it possible to really
13 differentiate where that tank's contamination ended
14 and the other tanks began?

15 A. No. It all blended together.

16 MR. COLLINS: I'd like to have marked
17 next as Plaintiff's Exhibit 3 a series of
18 color photographs. The record is black and
19 white in terms of the photographs, and I have
20 had color copies made of the actual
21 photographs. These correspond to record
22 Pages 052 through 057.

23 (Document marked as Petitioner's
24 Exhibit No. 3 for

1 identification.)

2 MR. COLLINS: I'd like to show the
3 witness what's been marked as Petitioner's
4 Exhibit 3.

5 (Document tendered.)

6 BY MR. COLLINS:

7 Q. Can you identify those for us?

8 A. Yes. These are the photographs that I
9 had taken while we were out on site performing the
10 excavation.

11 Q. And first, starting with the upper of
12 the two photographs, on 052 of Exhibit 3, can you
13 tell us what the coloration within the excavation
14 pit indicates?

15 A. You can see on the bottom of the
16 picture, the soil color is a gray to green color.

17 Q. And what does that note?

18 A. That typically denotes that it is
19 petroleum contaminated soil.

20 Q. And as to -- on the next page, 053,
21 similar discoloration appears on those. Is that
22 right?

23 A. Correct.

24 Q. And does that denote the same thing?

1 A. Yes.

2 Q. And the remaining depictions of the
3 excavation on Page 54 --

4 A. Yeah.

5 Q. Go ahead.

6 A. I was just going to say 54 is actually
7 showing partial backfill area of the excavation.

8 Q. And on 55, still within Exhibit 3, you
9 see the tank. Is that right?

10 A. Correct.

11 Q. And 56 is close-ups --

12 A. Correct.

13 Q. -- of a portion of the tank?

14 A. Yeah. I was trying to show the holes
15 in the bottom of the tank. They're kind of hard to
16 tell that's what it is, but that's actually a
17 picture of the inside of the tank after they cut it
18 and cleaned it.

19 Q. And all these pictures were taken by
20 you on the date that you met at the site with
21 Ms. Dwyer --

22 A. Yes.

23 Q. -- and the tank was found?

24 A. Correct.

1 Q. What was the size of the tank?

2 A. I believe it was a 2,000 gallon.

3 Q. And what were its contents?

4 A. Diesel fuel.

5 Q. And did it still contain diesel fuel
6 immediately before its removal on that date?

7 A. Yes. There was some in there, and of
8 course it was also mixed with water, due to the
9 condition of the tank.

10 Q. So the remaining material in the tank
11 had to be removed before the tank was removed?

12 A. Correct.

13 Q. So in that sense, it was still leaking
14 until its removal?

15 A. Yes.

16 Q. And causing additional contamination?

17 A. Yes.

18 Q. Now, in terms of reporting the
19 discovery of the tank, you testified Ms. Dwyer said
20 you didn't need to obtain a new number. How was
21 that formally reflected, to your knowledge, other
22 than in the log at Page 446 of the record in
23 Exhibit 2?

24 A. To the best of my knowledge, she

1 handled that aspect of it by notifying whoever she
2 needed to notify at the fire marshall's office of
3 the additional tank located on the property.

4 Q. And it became associated with that
5 earlier incident number?

6 A. Correct.

7 Q. And after the remediation was
8 completed, did Cancer Treatment Centers have
9 occasion to request an NFR letter?

10 A. Yes. That was their intention, was to
11 obtain an NFR letter.

12 Q. And NFR means?

13 A. No further remediation.

14 Q. And was that NFR letter, in fact,
15 approved and issued?

16 A. Yes, it was.

17 Q. And it was recorded?

18 A. Correct.

19 Q. Timely?

20 A. Yes.

21 Q. What was the total cost of the
22 remediation of this site?

23 A. I don't recall exact numbers, but I
24 want to say it was around \$400,000.

1 MR. COLLINS: First I'm handing to
2 Mr. Richardson -- what I'm going to proffer
3 right now is I have an excerpt from the
4 record of Pages 401 through 407. I believe
5 that will be four.

6 MR. HALLORAN: That's correct.

7 (Document marked as Petitioner's
8 Exhibit No. 4 for
9 identification.)

10 (Document tendered.)

11 BY MR. COLLINS:

12 Q. Would it refresh your recollection if
13 I were to show you this Plaintiff's Exhibit Number 4
14 as to what the cost was for the remediation,
15 directing your attention to the second paragraph?

16 A. Oh, yes. \$354,395.09.

17 Q. And can you tell us what this
18 Exhibit 4 is?

19 A. This is a letter from the Illinois EPA
20 stating that they reviewed our application for
21 payment from the underground storage tank fund, and
22 it is their response to our submittal for
23 reimbursement.

24 Q. And were you involved in the

1 preparation of the application for the
2 reimbursement?

3 A. Yes, I was.

4 Q. And what was your role in that?

5 A. Basically putting together the
6 application and compiling all the data and
7 submitting required documents to the EPA.

8 Q. And this is the letter, with a stamped
9 date on it of October 9, 2009?

10 A. Correct.

11 Q. And that is the denial by the Illinois
12 Environmental Protection Agency?

13 A. Correct.

14 Q. Did you, at any time prior to receipt
15 of this letter, receive any call or inquiry from the
16 Illinois Environmental Protection Agency?

17 A. No, I did not.

18 Q. In terms of the text of the letter,
19 was it your impression that -- well, what was your
20 impression as to whether or not additional material
21 could be submitted and considered?

22 A. It's been awhile since I read this
23 letter.

24 MR. RICHARDSON: Can we clarify

1 additional material? Can we clarify what
2 you're referring to there?

3 MR. COLLINS: Well, additional
4 information to be considered or reconsidered.

5 THE WITNESS: Possibly if we could
6 somehow separate the four-foot backfill
7 versus the remaining area. I don't know if
8 that would have helped, because that was one
9 of the things they were looking for.

10 Honestly, I don't know of anything
11 else that we really could have -- I mean,
12 nothing would have changed. The numbers were
13 what we submitted, as far as costs.

14 BY MR. COLLINS:

15 Q. And in terms of the separation, can
16 you explain what difficulty that would present, if
17 any?

18 A. Well, we couldn't separate it, because
19 the entire property was contaminated. So there was
20 really no way to just remediate the four-foot area
21 around the tank that we pulled out and then leave
22 the surrounding area, because contamination would
23 have still been on site, and therefore the site
24 would not have been remediated.

1 Q. And you would not have been able to
2 apply for or receive an NFR letter?

3 A. Correct.

4 Q. And, in fact, it was only through the
5 progressive removal across the site of soil
6 contamination that you discovered the tank in the
7 first place. Isn't that right?

8 A. Correct.

9 Q. So there was no way, was there, that
10 you could have reported this tank at the time of the
11 initial incident?

12 A. No, because we did not know it
13 existed.

14 Q. And you didn't have any information to
15 even suspect it was there, did you?

16 A. No, because it was nowhere in the
17 vicinity of where the suspect tanks were
18 located -- previously located.

19 Q. In terms of the specifics, if you
20 would turn to what is labeled at the top as
21 Attachment A of this exhibit?

22 A. Yes.

23 Q. Particularly with regard to
24 Paragraph 1, number one on Page 403, would you read

1 the second sentence of that?

2 A. "To be considered for reimbursement,
3 early action activities must be performed within
4 45 days after initial notification to the Illinois
5 Emergency Management Agency of a release, plus
6 14 days."

7 Q. And how long was it from the discovery
8 of the tank to its removal?

9 A. Approximately two weeks, a week and a
10 half.

11 Q. And it took about a week from the date
12 that the tank was discovered to arrange for the fire
13 marshall to be present for the removal?

14 A. Correct.

15 Q. So all together, this was
16 approximately three weeks, or 21 days?

17 A. Approximately, yes.

18 Q. So it was impossible for this to have
19 been done within 45 days of the initial report?

20 A. Yes.

21 Q. The incident report?

22 A. Yes.

23 Q. Because that was long prior?

24 A. Correct.

1 Q. And the same with respect to the
2 14 days. So that period of time, the 45 days for
3 initial notification and the 14-day period, expired
4 literally, if you keyed it to the initial report
5 date, long before the tank was even suspected to
6 exist?

7 A. Correct.

8 Q. And in terms of any release, the
9 active -- well, the tank was an ongoing source of
10 contamination?

11 A. Correct.

12 Q. Until removal?

13 A. Correct.

14 Q. It was continuing to release
15 contamination into the soil on the site right up
16 until that point?

17 A. Yes.

18 Q. Now, contrasting that with the
19 remediation of contamination that, at least in part,
20 came from tanks that had been removed years before,
21 that would be more of a static situation, as opposed
22 to an active release?

23 A. Correct.

24 Q. What was your view, if any, of what's

1 stated here in this Paragraph 1?

2 A. Well, basically I don't agree with
3 what their decision was. Had we known this is how
4 they were going to look at it, we would have, you
5 know, reported an additional incident number.

6 But hence, what I said before,
7 what Sue Dwyer had commented when I asked her that
8 question, "We didn't feel it to be necessary." So
9 therefore, it wasn't done. But if we did call in a
10 new incident number, it would have been taken care
11 of in the 45 days.

12 Q. And in fact --

13 A. It wouldn't have been an issue.

14 Q. If you look at the date from the
15 reporting to the completion of the remediation, all
16 of that took approximately three weeks?

17 A. Mm-hmm.

18 Q. And in your report that was submitted
19 as part of the application, did it address the issue
20 of why there was no separate incident report?

21 A. Yes.

22 Q. And how did it address that?

23 A. I stated in the report what Sue Dwyer,
24 the fire marshall, had told me on site as far as no

1 need to report an additional incident number.

2 Q. And so that is consistent with your
3 testimony today about the conversation as well as
4 with Sue Dwyer's report?

5 A. Yes.

6 Q. Are you aware of any provision that
7 requires a separate incident report?

8 A. No, I'm not.

9 Q. And, in fact, you were advised it was
10 not necessary by Ms. Dwyer?

11 A. Correct.

12 Q. You previously testified that it was
13 one area of contamination in most of the parcel. Is
14 that right?

15 A. Yes.

16 Q. And was it really possible to somehow
17 say this portion was the result of the actively
18 leaking tank, versus contamination that was
19 remaining from the tanks removed years before?

20 A. Not necessarily. Because typically
21 when a tank is leaking, the contamination is
22 strongest nearest the tank and progressively lessens
23 as it moves away from the tank. And as we were
24 digging, it was -- we were digging in the area -- it

1 all smelled the same, and the coloration was the
2 same. And as we moved, it was getting stronger and
3 stronger. So we were anticipating the possibility
4 of there being another source.

5 Q. So if you were to view this as
6 possibly a plume where you started where the old
7 tanks were, it would have been a point fairly far
8 migrated from the real concentration, which became
9 higher as you moved closer to the discovery of the
10 tank?

11 A. Correct.

12 Q. And all of the tank material
13 contamination, both the old and the new, was that
14 petroleum product?

15 A. Yes.

16 Q. In terms of -- again, looking at
17 Exhibit 4 and turning to Page 404 of the record
18 there, in Paragraph Number 2, it refers to fill
19 materials in excess of the amount set forth.

20 A. Yes.

21 Q. And do you know what that is directed
22 to?

23 A. I'm not sure what you're asking.

24 Q. Earlier in your testimony, you

1 referred to the four-foot. And what is your
2 understanding of the four-foot requirement or
3 limitation?

4 A. Basically, I have learned there is a
5 restriction on how much soil can be considered early
6 action, and they consider a four-foot area
7 surrounding the tank. That is all that falls into
8 the early action category. Anything beyond that is
9 not considered to be early action.

10 Q. And that's your understanding of the
11 way the Illinois Environmental Protection Agency
12 interprets that?

13 A. Yes.

14 Q. In terms of the actual contamination
15 surrounding the tank, was that fairly consistent,
16 whether you were at the three-foot or the four or
17 five or six-foot distance?

18 A. Oh, yeah. It extended way beyond four
19 feet.

20 Q. And as a practical matter, because of
21 the way this site remediation progressed, is it fair
22 to say that the removal was -- you know what, strike
23 it.

24 The initial decision, you

1 testified, was to proceed with early action?

2 A. Yes.

3 Q. And at the time that decision was
4 made, you were dealing with, you thought,
5 contaminated soil from tank removals that hadn't
6 been cleaned up?

7 A. Correct.

8 Q. The scope of the project, I think
9 you're saying, was really impossible to parse up, as
10 to what was from the tank discovered during the
11 process versus what was from the prior tanks?

12 A. Correct.

13 Q. Once you were involved in this process
14 of remediating the site, the removal of all of the
15 contamination, even that that was found at the tank
16 site of the tank that was removed, was really a
17 necessary process?

18 A. Yes, it was. Otherwise, it would not
19 be a clean piece of property.

20 Q. And the intent was to do early action
21 because of what?

22 A. To eliminate the contamination on the
23 site so that the Cancer Treatment Centers could
24 receive an NFR and develop the property.

1 Q. And what was the purpose for the
2 property?

3 A. I believe it was housing for families
4 of the patients from Cancer Treatment Centers.

5 MR. COLLINS: May I have just a
6 moment?

7 (Whereupon, a discussion was had
8 off the record.)

9 MR. COLLINS: I don't have any more
10 questions on direct. Mr. Richardson?

11 MR. HALLORAN: All right. Thank you,
12 Mr. Richardson?

13 MR. COLLINS: Just for clarification,
14 the exhibits are admitted?

15 MR. HALLORAN: Any objection,
16 Mr. Richardson?

17 MR. RICHARDSON: I have no objection.

18 MR. HALLORAN: Petitioner's Exhibit 1
19 through 4, I believe, correct?

20 MR. COLLINS: Correct.

21 MR. HALLORAN: They are admitted with
22 no objection.

23 MR. RICHARDSON: There was one
24 question I had on four. Just to clarify, for

1 the record, Mr. Collins, there's an
2 underscore on Page 403, and there's a margin
3 note on Page 405, and obviously those weren't
4 with what the Agency had issued. So I assume
5 you're agreeing with that, correct?

6 MR. COLLINS: Oh, yes. I'm sorry.
7 Probably my oversight. Thank you.

8 MR. RICHARDSON: Well, it's just so
9 that --

10 MR. HALLORAN: You know, I would ask
11 the Board to disregard those notations --

12 MR. RICHARDSON: Yeah, that's all I
13 ask.

14 MR. HALLORAN: -- regarding Exhibit 4
15 and page what?

16 MR. RICHARDSON: 403 and on 405.

17 MR. HALLORAN: Okay. Thank you.

18 That's in the record. Thank you.

19 Mr. Richardson, your cross.

20 MR. RICHARDSON: Thank you.

21 MR. HALLORAN: Take your time.

22 C R O S S - E X A M I N A T I O N

23 BY MR. RICHARDSON:

24 Q. Ms. Rosenberg, I think we just said

1 something about what is there now. Do you know
2 exactly what kind of a structure is at this former
3 gas station site?

4 A. No, I do not.

5 Q. So you don't know if there was a need
6 when that -- whatever the subsequent use was, that
7 there was a need for excavation to occur anyway for
8 the development of the property?

9 A. No, I just know that was their
10 intention.

11 Q. To develop the property?

12 A. Correct.

13 Q. But you don't know exactly how that
14 portion was used?

15 A. No, I do not.

16 Q. Now, we received the petitioner's
17 request for an NFR and for reimbursement around
18 August 25th of 2008. Now, am I correct that prior
19 to that date, that you personally had never
20 contacted the Agency about what was transpiring at
21 the site as far as your work, anything like that,
22 prior to submittal of the package?

23 A. No.

24 Q. And am I also correct that prior to

1 the tank being removed, the petitioner already
2 removed 3,465 cubic yards of soil from the site?

3 A. I don't know as far as number-wise if
4 that was -- I think wasn't that the total number
5 removed?

6 Q. Well, I believe the total number was
7 3,795. I'd be glad to let you look at the record if
8 that helps you. I'm just trying to clarify that --

9 A. There was a significant amount of soil
10 removed prior to discovery of the tank.

11 Q. Okay. And am I also correct -- I
12 mean, you said that the petitioner's interest was
13 certainly to get an NFR for this site. But in that
14 endeavor, there is no guarantee that they would be
15 reimbursed for the cost of their remedial work at
16 the site. Is that your understanding of the system
17 in Illinois?

18 A. Yes.

19 MR. RICHARDSON: Those are all the
20 questions I have.

21 MR. HALLORAN: Thank you.

22 Mr. Collins, redirect?

23 MR. COLLINS: No redirect, your Honor.

24 MR. HALLORAN: Thank you.

1 Ms. Rosenberg, you may step down. Thank you
2 so much. We can go off the record for a
3 second.

4 (Whereupon, a discussion was had
5 off the record.)

6 MR. HALLORAN: We're back on the
7 record, and I neglected to mention that today
8 is April 22nd, 2010, and it's Earth Day. So
9 my apologies.

10 In any event, Mr. Collins, it is
11 still your case in chief. You may proceed.

12 MR. COLLINS: We will call Mr. Bauer
13 as an adverse witness.

14 MR. HALLORAN: Raise your left hand
15 and Rebecca will swear you in.

16 (Witness sworn.)

17 WHEREUPON:

18 BRIAN BAUER
19 called as a witness herein, having been first duly
20 sworn, deposeth and saith as follows:

21 D I R E C T E X A M I N A T I O N

22 BY MR. COLLINS:

23 Q. Mr. Bauer, what is your position?

24 A. I'm a project manager.

1 Q. With the Illinois Environmental
2 Protection Agency?

3 A. Correct.

4 MR. HALLORAN: I'm sorry. Could you
5 spell your name, please, for the record?

6 THE WITNESS: B-r-i-a-n B-a-u-e-r.

7 THE COURT: Thank you.

8 BY MR. COLLINS:

9 Q. And what is the scope of your
10 responsibilities in that capacity?

11 A. Presently I am the -- it's pretty hard
12 to describe it. I'm actually the lead worker for
13 all the reimbursement claims that are submitted to
14 the Agency right now.

15 Q. All of the leaking underground storage
16 tank claims?

17 A. That's correct.

18 Q. So is it fair to say that the other
19 people who review such claims report to you in the
20 hierarchy? Or can you just describe where you fit
21 in to the process?

22 A. Well, it's changed since -- a little
23 bit since that letter was written. But yeah, I
24 assign all the claims that come in to the different

1 projects managers, answer questions, stuff like
2 that.

3 Q. Okay. And what is -- well, actually,
4 with reference to what's been marked as Exhibit 4,
5 which is before you, the second page, which is
6 record Page 402, indicates a signature by John
7 Cheryl (phonetic). What was Mr. Cheryl's role in
8 the process at that time?

9 A. He signed the letter.

10 Q. Okay. Who actually did the work for
11 the report and in the decision that was made?

12 A. Doug Tolin wrote the letter.

13 Q. Okay. And why would it be signed by
14 Mr. Cheryl, rather than Mr. Tolin, if Mr. Tolin
15 wrote it?

16 A. Because Mr. Tolin reported to
17 Mr. Cheryl.

18 Q. And both of those gentlemen, within
19 the same unit, are responsible for reimbursement
20 application decisions?

21 A. Yes.

22 Q. And were you in that same unit at the
23 same time?

24 A. They are in the LUST claims unit. I'm

1 actually officially in the -- in a different unit.

2 Q. Presently or at that time?

3 A. Presently, yes.

4 Q. And at that time, were you in that
5 group?

6 A. I haven't changed units, no.

7 Q. Okay. I'm a little unclear. If you
8 can clarify for me what is the unit that processes
9 these versus the unit that you're in? What is the
10 difference?

11 A. There's a technical side and a
12 reimbursement side. I was on the technical side
13 officially, but I'm doing all the reimbursement
14 work. You have to do more with less these days.

15 Q. And it's my understanding, and I want
16 to ask if it's correct, that you're here to testify
17 today on behalf of the Agency, because Mr. Cheryl
18 was not available. Is that right?

19 A. I don't know the answer to that.

20 Q. Okay. Nonetheless, you were asked to
21 come and testify as to this particular matter?

22 A. That's correct.

23 Q. Were you involved in the process of
24 this application?

1 A. Doug Tolin contacted me regarding
2 this.

3 Q. Okay. And in what regard were you
4 involved? Can you tell us what you did as far as
5 this is concerned?

6 A. I was -- acted as the technical
7 advisor to the LUST claims unit.

8 Q. Okay. And technical -- by that, you
9 mean from a scientific engineering perspective, or
10 some other perspective, or multiple perspectives?
11 If you can just flush that out a little for us.

12 A. Probably multiple perspectives.

13 Q. Okay. Would that have included the
14 engineering science side of things?

15 A. We looked at the technical
16 documentation during the review.

17 Q. Well, when you say "the technical
18 documentation," I want to understand better how
19 you're using that. Are you saying technical with
20 regard to the administrative code provisions in the
21 statutes, or are you talking from the standpoint of
22 type and degree of contamination, or both?

23 A. We looked at the report that was
24 submitted, the technical reports that were

1 submitted.

2 Q. And in terms of your technical
3 involvement, do they deal with interpretation of the
4 application of such regulated matters as timing?

5 A. Yes.

6 Q. Was that a significant part of your
7 role in the process?

8 A. I can't recall.

9 Q. With regard to whether or not 35
10 Illinois Administrative Code, Section 734.210, and
11 its subparts were germane possibly to this decision,
12 is that something that you discussed or were
13 involved in from a technical or other perspective?
14 And in particular, if it would help, I'm looking at
15 Page 403 of Exhibit 4, number one.

16 A. You said 734.210 G?

17 Q. Actually, I said 734.210 and its
18 subparts. It mentions G in that, but other subparts
19 are mentioned in other parts of the letter.

20 A. Yeah. Me and Doug would probably have
21 looked at that information.

22 Q. Okay. And do you recall what the
23 subject matter of the discussion was with --

24 A. That the work was conducted beyond the

1 45 plus 14-day time frame of the early action
2 period.

3 Q. And on what basis did you reach that
4 conclusion?

5 A. Based on the date that this incident
6 was originally reported to IEMA.

7 Q. Now, when you talk about the date that
8 the incident was reported, are you talking about the
9 initial report that there was contamination, or are
10 you talking about the second report that there was a
11 leaking underground storage tank still on the
12 property?

13 A. I'm only aware of one report to IEMA,
14 and that was the original report.

15 Q. Now, why is that?

16 A. I never saw a second IEMA report.

17 Q. How much of the record materials did
18 you see then?

19 A. I saw the whole thing.

20 Q. The whole file. Okay. If I could
21 refer you to Exhibit 2 in front of you, and in
22 particular to Page 446.

23 Now, in terms of the file, this
24 would be part of the file, since it was filed as

1 part of the administrative record, would it not?

2 A. Yes.

3 Q. And would you take a moment to review
4 what it states on that page? And let me know when
5 you're ready to proceed.

6 (Witness peruses document.)

7 THE WITNESS: Okay.

8 BY MR. COLLINS:

9 Q. Was this a page that you recall seeing
10 at the time you were involved in the discussions?

11 A. I'm sure we did see it, yes.

12 Q. And this is from the office of the
13 state fire marshall. Is that correct?

14 A. Correct.

15 Q. And this actually addresses the issue
16 of the discovery of the tank, does it not?

17 A. Yes.

18 Q. And the date of the removal?

19 A. Yes.

20 Q. So obviously the state fire marshall
21 did not know about this tank, based on what they've
22 said here, at the time of the initial incident
23 report. Is that true, based on the record?

24 A. Based on what it says.

1 Q. And, in fact, it refers to the state
2 fire marshall saying there was no need to have a
3 separate report number. Is that true? To be
4 literal, it says, "The same IEMA number will be used
5 for this tank." Is that correct?

6 A. That's correct.

7 Q. So in your discussion with Mr. Tolin
8 regarding this, notwithstanding this, you used the
9 date of the initial incident report for purposes of
10 denying reimbursement because of the 45-day and
11 19-day periods. Is that right?

12 A. Forty-five plus 14, yes.

13 Q. Yes. And on what basis did you use
14 that date, as opposed to the date of the discovery
15 and reporting of the tank?

16 A. That was the date -- it was called
17 into IEMA.

18 Q. What was the date?

19 A. The date of the -- that's the date we
20 used, the IEMA date. That's the --

21 Q. Which IEMA date?

22 A. There's only one IEMA. They never
23 called IEMA a second time.

24 Q. Then why was --

1 A. That's the fire marshall. IEMA is a
2 separate agency.

3 Q. And how do you know they never called
4 IEMA?

5 A. Maybe they did, but we didn't get a
6 report on it.

7 Q. And you've been involved in hundreds
8 of these claims. Is that right?

9 A. That's correct.

10 Q. And what is your understanding as to
11 what is required to establish a recording date for
12 purposes of a situation where you have a second
13 incident at a single site?

14 A. Can you say that again?

15 Q. Let me try and rephrase that. Which
16 statutory or administrative provision do you rely on
17 in calculating the applicable date for this tank
18 removal in the application of the 45-day and 14-day
19 time periods?

20 A. I'm still confused as to the question.

21 Q. All right. If we go back to the
22 letter, the letter says that it fell outside the
23 time period that was applicable, basically. And
24 that is a theme throughout the letter with regard to

1 the denial, right?

2 A. It's one of the denial points, yes.

3 Q. And it sites 325 Illinois
4 Administrative Code 734.210 and some of the
5 subparts. Is that right?

6 A. Yes.

7 Q. And what do they actually say in that
8 provision about initial notification?

9 A. It says you have 45 days, plus 14, to
10 perform all the action activities within the initial
11 notification to IEMA.

12 Q. Have you run across situations in
13 other cases that were brought on appeal from denials
14 where the state fire marshall represented it advised
15 those at the property that there was no need to
16 obtain a new IEMA number?

17 A. On appeal?

18 Q. Yes.

19 A. I don't recall any.

20 Q. Did you have any involvement with the
21 recent Dickerson or Week applications?

22 A. I'm familiar with the Dickerson. I
23 don't know what the Week one is.

24 Q. And is it your recollection there was

1 no such information given by the fire marshall
2 representative in that one?

3 A. I didn't -- I'm not that familiar with
4 it.

5 Q. Is it fair to say you don't know if
6 that's common practice or not?

7 A. What's common practice?

8 Q. For the fire marshall to say there's
9 no need for an additional IEMA report.

10 A. I do not know what their practices
11 are.

12 Q. Now, as to the other grounds stated in
13 the letter, Exhibit 4, for denial, would you explain
14 your interpretation of the requirements concerning
15 the so-called four-foot rule?

16 A. As part of early action, you're
17 allowed to remove four feet of backfill material
18 from around the tank during early action activities.

19 Q. Now, what is the meaning of backfill
20 under the statutory and administrative provisions?

21 A. I'm not sure if it's defined, but we
22 mean it to believe non-native soil.

23 Q. Okay. Do you know offhand if fill
24 material is defined in this context?

1 A. I'd have to check.

2 Q. As far as the four-foot fill or
3 backfill removal under early action, that is
4 basically what is physically necessary in the
5 Agency's view, to lift the tank out and remove it
6 from the ground. Is that a fair statement?

7 A. I would say no.

8 Q. What is the basis then for that?

9 A. The basis for the four-foot material?

10 Q. Yes, for that.

11 A. It's part of the statute.

12 Q. But logically, do you have any idea
13 how that number was arrived at?

14 A. I would assume it would be the most
15 contaminated area that they would want to remove
16 during early action.

17 Q. Now, that limitation is stated in the
18 context of a limitation that specifically addresses
19 the fill, is that correct, fill or backfill? It
20 says only four feet of fill or backfill.

21 A. Yes. That's four feet of fill, I
22 believe, yeah.

23 Q. Is there anywhere that it states a
24 limitation you're aware of on remediation that is

1 associated with that tank? Is there an expressed
2 statement that you're aware of to that effect?

3 A. You're only allowed to remove four
4 feet of backfill during early action, and that's it.

5 Q. Is there anywhere it states that you
6 weren't allowed to remediate the site as a part of
7 early action, or is it simply a limitation on how
8 much so-called fill or backfill can be removed under
9 early remediation?

10 A. It's a limitation of the amount that
11 you can do during early action. You cannot
12 remediate the site during early action.

13 Q. And could you tell us exactly where
14 that is expressed in terms of the early action?

15 A. Where in the regulations?

16 Q. Mm-hmm.

17 A. I don't have the regulations in front
18 of me.

19 Q. Would it be in the provisions that are
20 cited in the letter? Would that, perhaps, refresh
21 your recollection? Or actually in the attachment to
22 the letter, that's also part of the exhibit.

23 (Witness peruses document.)

24 THE WITNESS: I think it's a little

1 bit more complicated than to say
2 that -- point to one thing that says you
3 can't dig up your whole entire site.

4 BY MR. COLLINS:

5 Q. Well, there's an expressed limitation
6 for what we'll call, if I may, backfill removal,
7 that that's limited to the four feet. Is that
8 correct?

9 (Witness peruses document.)

10 THE WITNESS: It does say four feet of
11 fill material.

12 BY MR. COLLINS:

13 Q. And are you referring to 734.220, the
14 administrative code?

15 A. I was referring to the letter, Item 2,
16 Page 404.

17 MR. COLLINS: I'd like to mark, just
18 for convenience -- I believe this will be
19 Exhibit 5 -- a copy of the administrative
20 code, 734.220.

21 MR. HALLORAN: Administrative code
22 734.220 will be marked as Petitioner's
23 Exhibit Number 5.

24

1 (Document marked as Petitioner's
2 Exhibit No. 5 for
3 identification.)

4 BY MR. COLLINS:

5 Q. Showing you now what's been marked as
6 Exhibit 5, is this the section that's referred to in
7 the denial letter and the subparts of that section?

8 MR. COLLINS: And by the way, just for
9 clarity in the record, these were printed off
10 the state's website, and the coding indicates
11 the dates yesterday and the day before. So I
12 believe that should be current.

13 MR. HALLORAN: Thank you. The record
14 will so reflect. Thank you.

15 (Witness peruses document.)

16 BY MR. COLLINS:

17 Q. Are these the basic provisions
18 governing early action costs?

19 A. They are some of them.

20 Q. Okay. And what would the others be?

21 A. The entire rule. The entire set of
22 rules in the act.

23 Q. And when you review those in your
24 department or departments that are involved in the

1 review of the reimbursement claims, do you do those
2 review and analysis with regard to the provisions of
3 the act and the administrative code?

4 A. Yes.

5 Q. And is there any interpretive aspect
6 of that review beyond the letter of what the
7 provisions provide?

8 A. There could be.

9 Q. With regard to interpretation of the
10 applicable date for consideration of the
11 reimbursement time frames, the 45 and the 14 days,
12 is there any interpretation of what the operative
13 date may be?

14 A. I think it's pretty clear, initial
15 notification to IEMA.

16 Q. Regarding that particular incident?

17 A. That's correct.

18 Q. Not just with regard to that site? In
19 other words, if you have one incident on a site, and
20 then unexpectedly later discover another situation
21 on a later date, how would that be considered when
22 that is reported?

23 A. If it was reported to IEMA and they
24 got a second number, it would be based upon that

1 particular date if they submitted a claim for that
2 incident.

3 Q. So irrespective of whether or not it
4 was reported to the fire marshall and probably
5 handled with the fire marshall for a removal, you
6 would deny the claim if there was only one IEMA
7 reporting, as opposed to a fire marshall reporting
8 of both. Is that correct?

9 A. We would deny the claim if it were for
10 costs that were incurred outside the early action
11 time frame, regardless of what they were, except
12 for -- I think there's a few limitations, like the
13 cost to prepare reimbursement, or something like
14 that.

15 Q. So in effect, the initial IEMA date,
16 you're saying, consistent with what you did here, is
17 the only date that you looked at with respect to any
18 incident for purposes of early action and
19 reimbursement?

20 A. Yes.

21 Q. Now, with respect to timing, is that
22 the only timing basis on which the claim for
23 reimbursement in this instance was denied?

24 A. I don't understand what other timing

1 issue there would be.

2 Q. Well, I just wanted to make sure that
3 is the timing issue that was one of the stated
4 grounds in the letter. There were no other timing
5 issues, were there?

6 A. Not -- I don't know. Not that I'm
7 aware of.

8 Q. I'm sorry?

9 A. Not that I'm aware of.

10 Q. Okay. Thank you.

11 A. I'm not sure.

12 Q. Now, referring you to the denial
13 letter again in the attachment, Page 404 of the
14 record, another stated basis is because -- and this
15 is in the category of Paragraph 2, but at the end of
16 the second paragraph, drawing your attention to
17 that, the last sentence, it says, "In addition, such
18 costs are not approved pursuant to Section 57.7,
19 sub C, sub 3 of the act, because they are not site
20 investigation or corrective action costs."

21 Could you explain what you mean by
22 saying they are not corrective action?

23 A. There's three stages of remediation:
24 Early action, site investigation, and corrective

1 action.

2 Q. How would you, for purposes of this
3 project, separate those three categories that you
4 just stated?

5 A. Well, if it was site investigation or
6 corrective action, it would have to come in for
7 prior approval. Early action doesn't have prior
8 approval, so the package was submitted all as early
9 action.

10 Q. And you're saying it also doesn't
11 constitute the other categories?

12 A. That's correct.

13 Q. And continuing onto the next section
14 on Page 405, it refers to in Paragraph 4 handling
15 charges?

16 A. Yes.

17 Q. And the gist of the position is that
18 those were not in strict compliance with what the
19 rule provides?

20 A. That's correct.

21 Q. And again, you rely on the 45 and
22 14-day provisions as well. Is that right?

23 A. I think that's tossed in there as an
24 extra, yes.

1 Q. I think your resume said you'd been
2 involved in something like 700 of these matters. Or
3 that's my recollection. I don't have it in front of
4 me. But hundreds would be fair to say?

5 A. Yes.

6 Q. What's your understanding of the
7 purpose of the reimbursement provision?

8 A. We reimburse eligible costs.

9 Q. And is there an underlying purpose to
10 encourage environmental cleanup and remediation?

11 A. I would assume there would be some
12 purpose like that.

13 Q. There's probably a purpose in effect?

14 A. Yes.

15 Q. How many claims are approved, versus
16 denied under the program in, let's say, the last
17 year?

18 A. I don't have the statistics on that,
19 but I would say more are approved than denied.

20 Q. And do letters tend to be partial
21 versus complete approvals?

22 A. I don't know.

23 Q. Is there a trend in terms of approval
24 versus denied?

1 A. What kind of trend?

2 Q. Well, is the percentage of denials
3 increasing compared with the percentage of full
4 approvals?

5 A. I don't know. It's just a guess. I
6 don't have any data like that.

7 Q. Okay. I understand you don't have
8 data. What would your guess be?

9 MR. RICHARDSON: I'm going to object
10 to a guess and the relevance of approvals
11 versus denials.

12 MR. HALLORAN: Yeah. You know, I'm
13 going to -- Mr. Collins, I'm going to sustain
14 the objection.

15 MR. COLLINS: Okay.

16 BY MR. COLLINS:

17 Q. Is there any theme or inclination to
18 protect the fund by strict interpretation or perhaps
19 analysis and interpretation beyond the letter of the
20 applicable fund reimbursement provisions within your
21 agency?

22 MR. RICHARDSON: I'll object. There's
23 no foundation, and I don't know the relevance
24 of that.

1 MR. HALLORAN: Mr. Collins?

2 MR. COLLINS: Well, I think he does
3 have quite a bit of experience within the
4 program.

5 MR. HALLORAN: I'm not sure I
6 understood the question. You can rephrase
7 it, and we'll see if Mr. Richardson will
8 object again.

9 MR. COLLINS: Okay.

10 MR. HALLORAN: Thank you.

11 MR. COLLINS: Thank you.

12 BY MR. COLLINS:

13 Q. Is there any tendency or inclination
14 in the Agency's review and consideration of
15 reimbursement claims to try to minimize or curtail
16 the amounts being reimbursed for reasons of budgets
17 or otherwise?

18 A. No, I don't believe so.

19 MR. COLLINS: That's all.

20 MR. HALLORAN: Thank you, Mr. Collins.

21 Mr. Richardson, your witness.

22 MR. RICHARDSON: Thank you.

23 MR. HALLORAN: Thank you.

24

1 C R O S S - E X A M I N A T I O N

2 BY MR. RICHARDSON:

3 Q. Mr. Bauer, I'm going to try to clarify
4 a couple of things here, starting early on you were
5 asked about Mr. Cheryl signing letters, but really
6 other people working on it.

7 I don't know if you know the
8 answer to this question, but the Agency, with permit
9 reviewers, the actual reviewer seldom signs the
10 permit. It's usually the permit chief. Is that
11 correct? Or you may not know.

12 A. I don't know about permits.

13 Q. Okay. But, I mean, that was -- it's
14 been done like that for a while, right, the unit
15 head would sign rather than the individual reviewer?

16 A. It happens in the tech section too.

17 Q. And that's a unit manager, right, that
18 signs for the project managers?

19 A. Correct.

20 Q. And just to clarify, as a project
21 manager, you would be in the less technical section,
22 where as an accountant or a claims person would be
23 in the claims section. Is that right?

24 A. That's correct.

1 Q. And you pretty much have been a
2 project manager for most years leading up to the
3 last year. Is that right?

4 A. Yes.

5 Q. And in that role, you actually do
6 technical reviews of proposed corrective action
7 plans, completion reports, whether a remedial
8 approach will deal with a remediation level. Is
9 that fair to say?

10 A. Yes.

11 Q. And I believe you said that Mr. Tolin
12 consulted with you on this particular application
13 before that letter was issued. You recalled that,
14 didn't you?

15 A. Yes, I recall that.

16 Q. And now you're like the lead worker
17 overseeing all the claims that are going through the
18 Agency?

19 A. That's correct.

20 Q. Is it fair to say that in the LUST
21 process, you have IEMA with their role, the fire
22 marshall's office with their role, and then the
23 Illinois EPA with its role?

24 A. That's correct.

1 Q. And IEMA is basically assigned to take
2 in reports or releases and issue incident numbers?

3 A. Yes.

4 Q. The fire marshall, they actually
5 oversee -- they permit tank pulls and then oversee
6 the removal of the tanks?

7 A. Yes.

8 Q. And then lastly, if you want an NFR
9 letter, if you want reimbursement, you come to the
10 Agency?

11 A. Correct.

12 Q. And everybody, sort of, does their
13 thing in the process?

14 A. Yes.

15 Q. And one agency -- does one
16 agency -- what one does control what another does,
17 unless it's provided in the statute?

18 A. No.

19 Q. And in this particular case, there is
20 only one incident number. Is that right?

21 A. That's correct.

22 Q. And does IEMA normally tell the Agency
23 of the incident numbers related to underground
24 storage tanks?

1 A. Yes, we get all the -- they're
2 funneled through to the Agency through, I believe,
3 the emergency response unit. Then they're funneled
4 up to us.

5 Q. And at the time of the tank pull,
6 there was no new incident created, new release
7 reported, new incident number created. Is that
8 right?

9 A. That's correct.

10 Q. And so that's why you're triggering
11 early action off of the January '08 incident number?

12 A. That's correct, yeah.

13 Q. And just to clarify, again, we talked
14 about there are parts of the process the Agency is
15 over. One is consisting of early action. Would you
16 say the second would be investigation, and then
17 corrective action? Are those one in the same, or do
18 you consider those two separate things?

19 A. We consider them separate. You do
20 your investigation after your early action to define
21 the extent, and then you submit a corrective action
22 plan and do your corrective action.

23 Q. Now, the petitioner here had found,
24 for whatever reason, that they could not perform

1 early action activities within the 45 plus 14-day
2 requirement. Are there steps they could have taken
3 to extend that period?

4 A. Yeah. There is a provision that they
5 can ask for an extension from the Agency. They have
6 to submit it in writing within that 45 plus 14 days,
7 I believe.

8 Q. And you're not aware -- excuse me. I
9 didn't mean to interrupt you.

10 A. Yeah, that was it. They have to
11 submit it in that time frame to the Agency, and we
12 would issue a letter back granting or denying that
13 early action extension period.

14 Q. And there was no request to extend the
15 early action period here. Is that correct?

16 A. No.

17 Q. And from your perspective -- I'll be
18 introducing your resume when I get you on the
19 stand -- but from your experience with the program,
20 what's your perspective of what early
21 action -- what's supposed to be accomplished during
22 that finite time period?

23 A. The main factor is to limit additional
24 release to the environment.

1 Q. So deal with the worst aspects,
2 whatever is causing the release, deal with that. Is
3 that correct?

4 A. Correct, yeah. Remove product from
5 the tank. Free product, remove that, that type of
6 thing.

7 Q. And the immediate backfill area, or
8 fill area?

9 A. If the tank is removed, they are
10 allowed to move the backfill.

11 Q. That's the four-foot?

12 A. The four-foot rule, yes.

13 Q. And are you familiar with the
14 historical background of the four-foot rule or what
15 was going on at that time in connection with that?

16 A. To some extent, yes.

17 Q. And what was going on that perhaps
18 prompted or played a role in that rule being
19 enacted?

20 A. It was to limit people from going out
21 there and digging up their entire site.

22 Q. Okay. And when you say "digging up
23 the entire site," digging it up without any Agency
24 oversight?

1 A. Correct.

2 Q. Because there are requirements in the
3 loss program that the activities you do have to be
4 pointed at the corrective action and to accomplish
5 just what the act says you must?

6 A. Right.

7 Q. Let's say in this case the petitioner
8 didn't ask for an extension of early action. Then
9 what would have been the next phase that they should
10 have undertaken to keep -- stay within the confines
11 of the LUST program?

12 A. They could have come in and done a
13 site investigation, submitted that to the Agency,
14 and then submitted a corrective action plan and
15 budget for costs to the Agency and we would approve
16 that.

17 Q. So we're not saying you're just stuck
18 with taking out four feet, it's just that's the
19 limit to early action. You can do more, you just
20 need Agency oversight to do it?

21 A. Correct.

22 Q. And that's by submitting
23 investigation, approval, and then whatever other
24 approvals or submittals are needed as required by

1 the statute?

2 A. Correct.

3 Q. And at the end of the day, if you
4 don't satisfy all the requirements of the LUST
5 program, you run the risk of not getting reimbursed
6 for your cost. Is that right?

7 A. That's correct.

8 Q. And in this case, when Sue Dwyer was
9 out there at the time of the tank pull, if a new
10 release have been reported, would that have caused
11 pitfalls with work performed prior to that date for
12 the petitioner?

13 A. I believe so, yes.

14 Q. And in -- what do you think -- if a
15 second release had been reported, what do you think
16 would have impacted work done prior to that date?

17 A. If they submitted a claim for
18 reimbursement with the 2,000 gallon tank associated
19 with a new incident number, all the costs incurred
20 prior to that would be prior to IEMA costs and would
21 not be eligible for reimbursement.

22 Q. And that's also in the regulations.
23 Is that right?

24 A. Yes.

1 Q. That's a prohibition?

2 A. Correct, yeah.

3 Q. And it would have been reported the
4 day of the tank pull what effect would that have had
5 on the cost of the tank pull?

6 A. It would have been considered a
7 planned tank pull and not been reimbursable.

8 Q. And it would have been considered a
9 planned tank pull because they got a permit to pull
10 the tank prior to the date of the actual pull?

11 A. Correct, prior to IEMA.

12 Q. Prior to IEMA?

13 A. Prior to IEMA, yes.

14 Q. So in this case, the petitioner, is it
15 fair to say they would have been better suited to
16 either extend early action or have gone into
17 investigation, rather than relying upon what was
18 going on with the incident numbers and the releases
19 they were reporting or not reporting?

20 A. Their best bet would have been to go
21 into site investigation and do corrective action,
22 because they went beyond the limits of the early
23 action all together.

24 Q. And, I mean, without the facts, we're

1 just speculating on that, but there might have been
2 acts the petitioner could have done to avoid where
3 we're at today?

4 A. Correct, yes.

5 Q. And I think you said -- there's no bar
6 against getting an NFR after just completing early
7 action, is there?

8 A. No.

9 Q. It does occasionally happen if you
10 demonstrate -- you've dealt with all the
11 contamination issues at the site?

12 A. Oh, yeah. Sometimes the contamination
13 is limited to the backfill. They pull the tank,
14 collect the samples, and they're done.

15 Q. I was just clarifying an earlier
16 statement.

17 MR. RICHARDSON: Those are all the
18 questions I have.

19 MR. HALLORAN: Thank you,
20 Mr. Richardson. Mr. Collins?

21 R E D I R E C T E X A M I N A T I O N
22 BY MR. COLLINS:

23 Q. With regard to this particular site,
24 you heard the testimony of Ms. Rosenberg earlier

1 today?

2 A. Mm-hmm.

3 Q. If there had been no tank discovered
4 during the process with regard to this site, in
5 other words, if as the documentation indicated, the
6 tanks had all been removed years prior, there would
7 not have been a reason to submit a budget, because
8 there would not have been reimbursement. Is that
9 right?

10 A. True. They probably would not be in
11 the program and not be eligible for reimbursement at
12 all.

13 Q. And similarly, if one had no
14 expectation that there was still a leaking tank on
15 the property, to do a staged site investigation
16 would have incurred additional costs and delayed the
17 ultimate cleanup of the property, would it not?

18 A. It could have.

19 Q. So based on the situation as it was
20 when they began the remediation, it was probably
21 cheaper and a more expeditious way to proceed than
22 going through steps that they had no anticipation
23 might make a difference in terms of reimbursibility,
24 since they didn't know there was a tank. Is that

1 correct?

2 A. I'm not sure what I'm saying "correct"
3 to.

4 Q. Okay. It was practical, was it not,
5 since they didn't know there was a tank, to not go
6 through the extra steps that, had they known there
7 was a tank, they might have considered?

8 A. It might have been practical to the
9 owner/operator standpoint, I guess.

10 Q. And the same would be true in terms of
11 asking for an extension; not knowing there was a
12 tank, there would be no reason to ask for an
13 extension?

14 A. If they weren't thinking they were in
15 the program, then they wouldn't ask for an
16 extension.

17 Q. And if they didn't have a tank, then
18 they wouldn't be in the program for reimbursement?

19 A. Correct.

20 Q. So really, the circumstances here were
21 that the tank was not discovered until near the end
22 of the process, as opposed to at the beginning of
23 the process of the remediation?

24 A. They did some remediation after they

1 discovered the tank, I believe, too.

2 Q. Right. And it really was a process.
3 It wasn't an isolated removal of the tank with no
4 surrounding contamination. It was a contaminated
5 site, the extent of which was very extensive, was it
6 not?

7 A. I would -- I don't know how extensive
8 it was. I guess it --

9 Q. Well, in terms of removing
10 contaminated soil --

11 A. They removed a lot of soil.

12 Q. In terms of the NFR letter that was
13 issued, is that indicative of the fact that what was
14 done was done properly?

15 A. Probably in the sense of
16 reimbursement.

17 Q. Probably in the sense of remediating
18 the site?

19 A. I would say that it was reviewed to
20 see if there was any contamination that remained in
21 place, and from what I saw there was not any soil
22 contamination based on the soil samples. So it was
23 issued with no further remediation letter.

24 Q. And in terms of the process, as

1 opposed to the application for LUST reimbursement,
2 you reviewed the reports as a part of the review of
3 the claim. There wasn't any issue with how the
4 process was done, aside from the claim and the
5 timing, was there?

6 A. I don't -- I guess I'm confused,
7 because the process would be -- I'm considering it
8 would be, like, if it was submitted in -- we would
9 examine that and comment on that if there was a
10 corrective action plan. That would be the process,
11 so I'm kind of confused.

12 Q. Right, but that wouldn't have been
13 done if you didn't know there was a tank?

14 A. Right, there wouldn't be no --

15 Q. Okay. If you turned this whole
16 project around and you started off with the tank,
17 you would have wound up with the same ultimate
18 likely removal of contamination?

19 A. I don't believe so.

20 Q. No?

21 A. No.

22 Q. Well, if the tank had been discovered
23 at the beginning -- let's say the incident report
24 initially given to IEMA was, "We have a leaking

1 underground storage tank," are you saying that the
2 extent of the cleanup would have been different?

3 A. I believe it possibly could have been,
4 yes.

5 Q. In what sense?

6 A. There was a couple different factors.
7 If you go under a corrective action plan, you're
8 required to do a tier two remediation objective and
9 calculate that tier two number to use certain
10 portions of TACO. None of that was utilized.

11 I reviewed the investigation that
12 was done. I think that if that investigation was
13 submitted as a corrective action plan with a
14 corrective action plan, there would have been a lot
15 less amount of soil approved.

16 Q. So you're saying that the
17 reimbursement approval would have some limitations?

18 A. That's correct.

19 Q. But in terms of the actual cleanup,
20 are you saying that there would have been less soil
21 removed, or just that there would have been
22 limitations on reimbursement?

23 A. There would have been a lot of
24 limitations on the reimbursement. There also would

1 have been limitations on probably the amount of soil
2 that was removed as part of the corrective action
3 plan that would have been approved for
4 reimbursement. You can always excavate more soil
5 than we'll pay for.

6 Q. Now, I understand the distinction
7 between what you'll pay for and what is excavated.
8 But in terms of actual clean up, that is not
9 something where you want to deter the scope of
10 cleanup. In fact, you want to get it to at least
11 the TACO standard, right?

12 A. We would want you to utilize TACO,
13 yes.

14 Q. And, in fact, wasn't this cleaned up
15 to satisfy the TACO, and doesn't the NFR letter, in
16 effect, confirm that it was within those parameters?

17 A. I don't believe there was any -- I
18 think all the soil samples were below remediation
19 objectives, the tier one level.

20 MR. COLLINS: I don't have anything
21 further.

22 MR. HALLORAN: Thank you, Mr. Collins.
23 Mr. Richardson?

24 MR. RICHARDSON: I just have a couple

1 more questions.

2 R E C R O S S E X A M I N A T I O N

3 BY MR. RICHARDSON:

4 Q. Mr. Bauer, there were approximately
5 3,465 cubic yards of soil removed prior to or at the
6 time of the discovery of the second tank. Is that
7 right?

8 A. Correct.

9 Q. We'll say prior to.

10 A. Prior to.

11 Q. Because it's not really clear in the
12 record when that tank was discovered.

13 And the petitioner saw a
14 reimbursement for all the work, at least that
15 excavation work that was done before that second
16 tank was encountered. Is that correct?

17 A. That's correct.

18 Q. And just because the petitioner's
19 actions may have been practical from a business
20 sense, that in no way has any impact on whether or
21 not they're reimbursable from the funds. Is that
22 right?

23 A. That's correct.

24 Q. And the Agency has other programs that

1 the petitioner could have obtained an NFR letter
2 from besides the LUST program. Is that right?

3 A. That's right.

4 Q. And is one the remediation program?

5 A. Yes, it is.

6 MR. RICHARDSON: I have no further
7 questions.

8 MR. HALLORAN: Thank you,
9 Mr. Richardson. Mr. Collins?

10 MR. COLLINS: Could I have just a
11 moment?

12 MR. HALLORAN: Yes, you may.

13 (Whereupon, a discussion was had
14 off the record.)

15 R E D I R E C T E X A M I N A T I O N

16 BY MR. COLLINS:

17 Q. I just want to clarify something from
18 the testimony. And maybe I misunderstood, but when
19 you talked about the test results for the soil that
20 was removed, are you saying that it was removed up
21 to the tier one standard, or are you saying most of
22 the soil removed wasn't that contaminated?

23 A. I said that the samples from the
24 limits of the excavation were below the tier one

1 remediation objectives that were collected to
2 demonstrate closure. That's what I was referring
3 to.

4 Q. Which merely means that it satisfies
5 the closure requirements, because you've gone to the
6 point where the degree of contamination is within
7 acceptable limits?

8 A. Yes.

9 Q. Okay. And that wasn't intended to
10 imply that they were removing soil which wasn't
11 contaminated?

12 A. That statement, no, was not.

13 MR. HALLORAN: Mr. Richardson?

14 R E C R O S S E X A M I N A T I O N

15 BY MR. RICHARDSON:

16 Q. And the samples we're talking about,
17 are those the confirmatory samples, the floor and
18 wall samples that are mentioned in the act, for
19 saying that an excavation is clean?

20 A. Yes.

21 MR. RICHARDSON: That's it.

22 MR. HALLORAN: Anything further,

23 Mr. Collins?

24 MR. COLLINS: No.

1 MR. HALLORAN: Thank you, Mr. Bauer.
2 You may step down. We'll go off the record
3 for a second.

4 (Whereupon, a discussion was had
5 off the record.)

6 MR. HALLORAN: We're back on the
7 record after a short break. Mr. Collins has
8 indicated that he rested his case in chief.
9 We now turn it over to the Agency and
10 Mr. Richardson.

11 MR. RICHARDSON: I would call Brian
12 Bauer to the stand.

13 MR. HALLORAN: Thank you, Mr. Bauer.
14 Just remember you're still under oath.

15 THE WITNESS: Okay.

16 MR. HALLORAN: Thanks.

17 MR. RICHARDSON: If I could have this
18 marked as respondent's Exhibit Number one.

19 (Document marked as Respondent's
20 Exhibit No. 1 for
21 identification.)

22 WHEREUPON:

23 BRIAN BAUER

24 called as a witness herein, having been first duly

1 sworn, deposed and saith as follows:

2 DIRECT EXAMINATION

3 BY MR. RICHARDSON:

4 Q. Brian, I think you've already stated
5 and spelled your name for the record.

6 I've put your resume -- I made it
7 an exhibit. Basically, just a little bit of
8 background picked from that; how long have you
9 worked at the Illinois EPA?

10 A. Just over 18 years.

11 Q. And has all that time been spent with
12 the LUST program?

13 A. Yes, it has.

14 Q. And I think we've already brought this
15 out that you're currently the lead worker for the
16 reimbursement claim section?

17 A. That's correct.

18 Q. And you've also had experience as a
19 project manager?

20 A. Yes.

21 Q. And I think your resume indicates that
22 you've reviewed, as a project manager, over 700
23 sites?

24 A. Yes.

1 Q. And then reimbursement applications,
2 over 800?

3 A. Yeah.

4 Q. And have you also been involved in any
5 rulemaking activities?

6 A. Yeah. I was involved in the last
7 rulemaking with the 732/734 regarding reimbursement,
8 Subpart H.

9 Q. Okay. And you're familiar with the
10 October 9th, 2009, decision letter concerning the
11 sites as a subject of the incident appeal?

12 A. Yes.

13 Q. Do you have a copy up there?

14 A. Yes, I do.

15 Q. I was going to introduce my own copy,
16 but we already have Petitioner's Exhibit Number 4,
17 so I'll just refer to that for clarity's sake.

18 Now, I want to direct your
19 attention to the specific accounting deductions. I
20 want you to look at the one at the top of the page,
21 deduction number one.

22 First of all, to clarify, am I
23 correct that this whole amount, which is later
24 broken down in other paragraphs, but the entire

1 amount, the basic reason for the Agency rejecting
2 reimbursement or denying reimbursement of those
3 costs was because it fell outside of the early
4 action period?

5 A. Yes.

6 Q. Okay. So that's the basic reason for
7 denial of the \$354,395.09?

8 A. Yes.

9 Q. Now, in the middle of Page 403 of the
10 administrative record in Exhibit 4, it's a more
11 detailed breakdown of the above adjustment, and
12 there's a figure there of \$28,357.42. And could you
13 please describe what the genesis -- or what's the
14 purpose of that particular calculation and the
15 breakdowns that are demonstrated there?

16 A. It was a breakdown to exhibit that if
17 the costs -- what the Agency thought were
18 potentially -- how do I say it? If they had done it
19 within the time frame, if the costs were done in the
20 time frame, that \$28,357.42 would potentially be
21 eligible as early action costs.

22 Q. The time frame being the early action
23 period?

24 A. That's correct, yes.

1 Q. And you're basically saying that these
2 appear to be costs in the submittal that were
3 related to the pulling of that tank?

4 A. Right. They were the -- yeah, to
5 remove the 2,000 gallon tank, and I think the
6 four-foot material. And then consulting time and
7 materials also was tied into that.

8 Q. And now, hypothetically speaking,
9 we're assuming here, had this been done in the early
10 action period, that these costs appear to be
11 appropriate related to the tank pull. Assuming
12 those things, would the Agency have still issued a
13 direction to the controller to make a payment to the
14 petitioner of \$28,357.42?

15 A. No, they wouldn't.

16 Q. And why is that?

17 A. This site had a \$100,000 deductible.
18 So any costs in excess of the \$100,000 could only be
19 paid, and they wouldn't have met their deductible.

20 Q. So until the eligible costs had
21 reached over \$100,000, no directions or control
22 would have been made. Is that correct?

23 A. That's correct.

24 Q. And that's basically the purpose of

1 that calculation, to cut that out of the original
2 amount of the upper number one there?

3 A. Yes.

4 Q. I want to go to Item Number 2. And
5 once again, the primary reason for the cut was
6 outside of early action. But what other reason is
7 Item Number 2 presented for there?

8 A. That was for the removal and treatment
9 and disposal of contaminated -- of soil beyond the
10 outside dimensions of the four-foot backfill
11 material of the underground storage tank during
12 early action.

13 Q. So removal of the too much soil
14 beyond -- for the early action period, which is
15 where this site, sort of, fell into?

16 A. Correct. Yeah, it was all considered
17 early action because there was no plans or budgets
18 for corrective action.

19 Q. And again, I think we stated here they
20 saw a total reimbursement for 3,795 cubic yards --

21 A. Yes, I believe so.

22 Q. -- concerning the soil removal and
23 things like that.

24 Item Number 3, \$11,954.06,

1 deduction for costs of early action lacking
2 supporting documentation. Can you, sort of,
3 describe what the background is on this secondary
4 denial point, so to speak?

5 A. There was no invoices provided from
6 the companies that actually provided the work, like
7 the laboratory, the contaminated water disposal.

8 It also goes on to say that for
9 the -- I think in 3C, the bottom, they wanted all
10 subcontractor invoices for the excavation and
11 transportation, and they want the landfill built and
12 stuff like that that weren't provided.

13 Q. So that point, sort of, relates back
14 to Item Number 2. Is that correct?

15 A. Yeah. 3C reflects back to Item 2.

16 Q. And basically, this concern is the
17 subcontractors that were doing the lab work, as well
18 as working with the dirt or providing backfill or
19 hauling or whatever things like that?

20 A. That's correct.

21 Q. And D on Page 405, what's the problem
22 there as far as supporting documentation?

23 A. There wasn't enough information on
24 Benchmark Environmental's invoices to determine

1 dates and hours of when they worked. If it was --
2 if it was regarding the four feet or if it was after
3 the 50 -- you know, if they did some work before the
4 59 days, stuff like that. So they wanted more
5 detail to make that determination.

6 Q. Okay. And lastly, Item 4 on Page 405,
7 that's \$11,423.86, an adjustment in handling charges
8 due to the deduction in eligible costs. And what is
9 the background on that item?

10 A. I wanted proof of payment of the
11 subcontractors. Proof of payment -- benchmark is
12 the contractor. And you don't want proof of payment
13 to Benchmark, you want proof of payment from
14 Benchmark to the subcontractors to get the handling
15 charge.

16 Q. And that's required by the
17 regulations. Is that correct?

18 A. That's correct, yes.

19 MR. RICHARDSON: This will be my
20 Exhibit 2.

21 (Document marked as Respondent's
22 Exhibit No. 2 for
23 identification.)

24 MR. RICHARDSON: And if I can approach

1 the witness with a copy of the exhibit?

2 MR. HALLORAN: You may.

3 (Document tendered.)

4 BY MR. RICHARDSON:

5 Q. Now, Brian, I've shown you just what's
6 been market as Respondent's Exhibit 2. Is that
7 correct?

8 A. That's correct.

9 Q. And there are some handwritten -- on
10 Page 304, Page 306, you wrote those on there. Is
11 that right?

12 A. That's correct, to correspond with the
13 record.

14 Q. Okay. So those are the page numbers
15 from the administrative records?

16 A. Yes.

17 Q. And also, I believe the administrative
18 record copies, at least for Page 304, are really
19 hard to see some of the numbers there, so you blew
20 some of these up to better handle the depiction of
21 what's going on in those pages?

22 A. That's correct.

23 Q. But otherwise, these are just what's
24 in the administrative record on those pages?

1 A. Yes.

2 Q. As far as Page 304, what is depicted
3 on that page?

4 A. It depicts the location of the soil
5 borings they conducted and the results of the four
6 soil borings where contamination was encountered
7 over the remediation objectives.

8 Q. Okay. So the borings, as described
9 further in the record, some were C and some were B.
10 I think that's basically because they were from two
11 different time periods. But where it has boxes,
12 that shows what the exceedances was that was
13 detected at that boring. Is that right?

14 A. That's correct.

15 Q. And then Page 306, what is depicted on
16 that page?

17 A. That is what appears to be the
18 proposed remediation boundaries that they were going
19 to excavate prior to -- that they submitted to the
20 owner/operator prior to conducting the excavation.

21 Q. If my memory serves me correctly, that
22 remedial side investigation, that was completed
23 either in December of '07 or January of '08. Is
24 that correct?

1 A. That's correct.

2 Q. Okay. And do you recall -- there's
3 two -- one looks like a square -- but two boxes with
4 a dotted line, so to speak, or a line with dots and
5 dashes. Do you recall what those depict?

6 A. That was where they proposed to do
7 some limited excavation.

8 Q. Okay. And am I also correct that the
9 amount proposed in that remedial side investigation
10 for excavation was 480 cubic yards?

11 A. I believe that's correct.

12 Q. And lastly, I want to show you or have
13 you take a look at Page 59. And what is depicted on
14 that page?

15 A. That is the limits of the final
16 excavation and the locations of the soil samples
17 that were collected to demonstrate closure.

18 Q. Okay. I think what I previously
19 called, like, the floor and wall samples. Is that
20 right?

21 A. Correct. Yeah, the --

22 Q. Those numbered areas there, I guess?

23 A. Yeah. Each one represents typically a
24 wall sample on the dotted line, and the other ones

1 are typically floor samples.

2 Q. And looking at that map from Page 59,
3 and going back to Page 304 where actual exceedances
4 were found, based upon your experience as a project
5 manager, are you seeing anything unusual about what
6 was excavated versus where contamination exceeded
7 the remediation objectives?

8 A. It appears that they over-excavated
9 clean soil, the soil that was below the remediation.

10 Q. Okay. So basically, the excavation
11 footprint on Page 59 goes well beyond what would
12 have appeared to be necessary just to remove the hot
13 spots of contamination shown on Page 304?

14 A. Yes, 304 and 306.

15 Q. Now, if this had come across your desk
16 as a project manager, as a corrective action plan
17 for this background information in the proposal to
18 excavate the footprints shown on Page 59, what would
19 you have done with respect to that proposal?

20 A. I would have either denied it or
21 modified it to a much less area to be excavated.

22 Q. Okay. But you're saying that broad of
23 area would be unacceptable based on the information
24 you have?

1 A. It wouldn't be approved as part of a
2 corrective action plan, no.

3 Q. Now, in the petition for review,
4 there's been discussion about the -- of the state
5 fire marshall's eligibility and deductible letter
6 basically being presented as why didn't the Illinois
7 EPA defer to the determination in that letter.

8 First of all, what is an
9 eligibility and deductible letter from the office of
10 the state fire marshall?

11 A. It's a letter that the fire marshall
12 issues that will say that yes, you're eligible to
13 seek costs from the fund. And it sets the
14 deductible amount, which would be applied to any
15 claim that would come into the Agency to be
16 reviewed.

17 Q. And is that based upon the tank
18 status, whether it's been registered or whatever,
19 things of that nature?

20 A. The deductible, yes, is --

21 Q. I mean, that whole letter is based
22 upon a fire marshall action, based upon their
23 required duties under the statutes. Is that right?

24 A. Yes.

1 Q. Now, when the Agency gets a matter and
2 somebody is either seeking to perform corrective
3 action in the LUST program or to get reimbursement,
4 what impact does that letter have on the Illinois
5 EPA's work under the statutes and the regs?

6 A. Well, the cost still has to be
7 eligible. So that's one step they have to get
8 eligibility from the fire marshall or they can't
9 make a payment. And then all the costs have to be
10 eligible corrective action costs.

11 Q. So just because you get the letter
12 from the fire marshall does not mean you'll be
13 reimbursed from the LUST fund?

14 A. That's correct.

15 Q. To be reimbursed from the LUST fund,
16 you have to meet the requirements of the regs that
17 the Agency oversees and the statutory provisions?

18 A. That's correct.

19 MR. RICHARDSON: I have no further
20 questions of this witness.

21 MR. HALLORAN: Thank you,
22 Mr. Richardson. Mr. Collins?

23

24

1 CROSS - EXAMINATION

2 BY MR. COLLINS:

3 Q. I wanted to try and clarify. When you
4 said with respect to the three pages that I believe
5 have been marked as an exhibit comprised of 304,
6 306, and 59, "Clean soil was excavated." Just what
7 do you mean when you state that?

8 A. I meant soil that was below the
9 remediation objective.

10 Q. Well, isn't the purpose of the
11 remediation to get to the point where you are below
12 the objective?

13 A. Yes.

14 Q. And doesn't it almost necessarily
15 follow that you have to get to the point that's
16 below the objective to achieve the objective?

17 A. I guess.

18 Q. And on what basis are you saying that
19 clean soil was -- I think the implication at
20 least -- unnecessarily excavated?

21 A. Well, some of the borings that were
22 outside those boxes on 306, a couple of them weren't
23 sampled, but all the other ones -- I think four and
24 six were not sampled, but all the rest of them were

1 sampled, and the soil samples collected from those
2 borings were below remediation objectives.

3 Q. Which would facilitate obtaining an
4 NFR. If they had been above the objectives, that
5 might have precluded an NFR.

6 A. This was done prior to the excavation.

7 Q. Right. These are just soil borings?

8 A. Right.

9 Q. So in effect, what you're saying is if
10 what they found in the excavation had been
11 consistent with the soil borings that were the early
12 testing, they wouldn't have needed to take out the
13 quantity of soil that was ultimately removed?

14 A. Yes. The soil was -- it was defined
15 up to those borings and to those limits, and so they
16 wouldn't have needed to go beyond those limits.

17 Q. Right. But this was all based on the
18 information they had at the time, which did not
19 include knowledge about the existence of the tank or
20 its contamination component to the site. Is that
21 right?

22 A. It was prior to the knowledge of the
23 tank, of them discovering a tank.

24 Q. And I believe you said previously

1 prior to the excavation?

2 A. That's correct.

3 Q. So what -- is it fair to say then that
4 had the site been what they'd anticipated, as
5 reflected in these preliminary materials, it would
6 have been a much smaller remediation than what
7 turned out to be necessary?

8 A. Yes.

9 Q. Now, you mentioned with regard to some
10 of the parts of the claim that there was not enough
11 information provided, not enough detail?

12 A. That's correct.

13 Q. No request was made for any additional
14 detail. Is that correct?

15 A. I do not believe so.

16 Q. And, in fact, the letter of denial
17 doesn't encourage or suggest or invite the
18 possibility of any additional information being
19 submitted, does it?

20 A. The letter does not.

21 Q. And is there a reason it doesn't?

22 A. I think it's well known that you can
23 submit additional information and ask for a rereview
24 of your claim with the additional information.

1 Q. Well, but the letter does state, does
2 it not, on 401, the next to the last paragraph, the
3 last sentence, "This constitutes the Illinois EPA's
4 final action with regard to the above applications
5 for payment."

6 A. It does say that.

7 Q. And it states, "The appeal rights,"
8 does it not?

9 A. Yes.

10 Q. And on direct examination, you said
11 something, I believe, to the effect that the amount
12 of soil ultimately removed, the 3,795 yards, I
13 believe, would not have been proved as a corrective
14 action plan based on the information on Pages 304
15 and 306?

16 A. Correct.

17 Q. And that is because the extent of the
18 contamination is not really reflected in the
19 information on those pages because of what was
20 subsequently discovered. Is that correct?

21 A. I believe that this was the extent of
22 the contamination still.

23 Q. Are you now saying that only the
24 preliminary borings on 304 defined contamination?

1 A. I am saying that those borings limited
2 and defined the extent of contamination at the site,
3 yes.

4 Q. That had been discovered as of that
5 date, or in the totality?

6 A. I think that in totality, yes.

7 Q. I want to make sure I understand
8 correctly. So you're saying that the initial
9 remediation or remedial investigation results depict
10 or identify the full extent of what was found during
11 the process of excavation?

12 A. I don't know what was found during
13 excavation. No documentation has been submitted to
14 the Agency to show otherwise.

15 Q. So is it fair to say you're saying
16 that as far as the Agency is concerned, only the
17 approximately 480 cubic yards originally anticipated
18 was necessary?

19 A. All I was saying is that some of the
20 soil samples that were taken from those borings were
21 over-excavated, and there doesn't appear to be a
22 reason why.

23 Q. And is this based on your having
24 reviewed all of the material submitted regarding the

1 cleanup that was done and approved for NFR purposes?

2 A. Yes.

3 MR. COLLINS: May I have a moment
4 here?

5 MR. HALLORAN: Yes, Mr. Collins. You
6 know what I'm going to do -- and we can go
7 off the record.

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

10 MR. HALLORAN: We're back on the
11 record. Mr. Bauer is on the stand and it's
12 still Mr. Collins' cross.

13 BY MR. COLLINS:

14 Q. If I understood you correctly before
15 the break, is it fair to say that your position is
16 that only the 480 yards initially anticipated of
17 material needed to be removed?

18 A. If a corrective action plan was
19 submitted to the Agency, we would only have approved
20 the 480 cubic yards.

21 Q. Now, I believe you said that would be
22 the case even with the subsequent discovery of the
23 tank?

24 A. They would need to provide additional

1 information to document that and to request -- you'd
2 have to have a corrective action plan amendment and
3 budget amendment and technical documentation
4 supporting why you wanted to remediate further.

5 Q. Are you saying that the additional
6 remediation that was, in fact, done was not
7 justified by the materials submitted? And when I
8 say "the materials submitted," I don't mean just the
9 original materials at the time the tank was an
10 unknown.

11 A. I don't think I could make that
12 determination. Not enough technical documentation,
13 beyond what has been submitted, warrants further
14 remediation.

15 Q. Beyond the 480 yards?

16 A. Correct.

17 Q. And you say that because there were
18 not more soil borings or soil samples? What is the
19 basis for your opinion on that?

20 A. Yeah, I think there would need to be
21 more soil samples.

22 Q. And are you familiar with what's
23 called the PID measurement?

24 A. Yes, I am.

1 Q. And what does that mean?

2 A. Photo ionization detector.

3 Q. And where you have significant
4 petroleum contamination, does that frequently give a
5 reasonable result as to whether or not you are in
6 exceedance?

7 A. It could be a false positive. It's a
8 screening tool. It's not analytical black and white
9 data.

10 Q. Are you familiar with any recent
11 appeal decisions before the pollution parole board
12 dealing with PID with the needs of corroborating the
13 need to remediate?

14 A. I think you're referring to the
15 Dickerson case?

16 Q. Mm-hmm.

17 A. I didn't read their decision and I
18 didn't -- I don't know.

19 Q. But it's still your current view that
20 PID isn't sufficient?

21 A. Sufficient for what?

22 Q. To justify remediating contaminated
23 soil.

24 A. No, I don't think so. That's why we

1 have the corrective action plan process. You define
2 the extent, you take borings, and you excavate up to
3 those borings.

4 Q. Now, it's a lot more expensive to take
5 borings than to do PID as you excavate. Is that
6 correct?

7 A. I would probably contest possibly not.
8 If you're excavating less soil, a boring can save a
9 substantial amount of money.

10 Q. Even when you are excavating and you
11 are -- as you excavate, finding contaminated soil,
12 you're saying that it may be more cost effective to
13 take soil borings and send those out for exam?

14 A. Yeah, it could be.

15 Q. And that taking that a step further,
16 are you saying that that is the only approach that
17 should be taken before the scope of a remediation is
18 expanded to address what is found?

19 A. If they -- if you want reimbursement
20 and you want to go through our program, that's what
21 we ask you to do, yes.

22 Q. And then submit it and wait for it to
23 be approved before you go to the next step?

24 A. Correct.

1 Q. Is it fair to say then that the
2 information in the record regarding the PID results
3 is something that you would not consider relevant to
4 the remediation?

5 A. I'd look at it like all the
6 information submitted and review the whole thing as
7 a whole.

8 MR. COLLINS: I don't have anything
9 further of this witness at this point.

10 MR. HALLORAN: Thank you, Mr. Collins.
11 Mr. Richardson?

12 R E D I R E C T E X A M I N A T I O N
13 BY MR. RICHARDSON:

14 Q. Mr. Bauer, were there PID readings in
15 the record, do you recall? If you can't recall,
16 it's okay. I just didn't know if you recall ever
17 seeing those.

18 A. I don't recall.

19 Q. Now, the 480 cubic yard number that
20 you earlier referenced, you obtained that from the
21 petitioner's own documents, correct?

22 A. That's correct.

23 Q. That's not a number you generated or
24 that you developed on your own?

1 A. No, that was in their report -- their
2 site investigation report type thing that they did.

3 Q. In fact, it was a proposal on how to
4 act. Is that right?

5 A. That's correct.

6 Q. Talking about the PID, I think you
7 referred to it as a screening device. Is that
8 right?

9 A. That's correct.

10 Q. Can the PID tell you what contaminant
11 is there, benzine, versus xylene, versus something
12 else?

13 A. No.

14 Q. Can it tell you the level of
15 contamination of benzine or xylene or whatever else?

16 A. No, it cannot.

17 Q. So when you talk about an analytical
18 result, that would be similar to, like, a scientific
19 or objective result that says, "This contaminant is
20 here in this magnitude?"

21 A. That's correct.

22 Q. PID can't do that?

23 A. No, it can not.

24 Q. And when we talked about the

1 confirmatory sampling, the floor and wall samples,
2 PIDs aren't sufficient for that sampling, is it?

3 A. No, it's not.

4 Q. You actually need analytical
5 scientific data to pass that requirement of the
6 regulations?

7 A. That's correct.

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

10 MR. HALLORAN: Thank you,

11 Mr. Richardson. Mr. Collins?

12 R E C R O S S E X A M I N A T I O N

13 BY MR. COLLINS:

14 Q. Which requirement of the regulations
15 were you saying is applicable in terms of the PID
16 not being a sufficient determination?

17 A. I don't have the regulations in front
18 of me. I mean, I could go through them and look if
19 you want me to find it.

20 Q. But it's your position that the
21 regulations specifically require the tests that
22 you've already tested but find about the soil test
23 as opposed to the on-site PID test?

24 A. Yeah. You're supposed to define the

1 full extent of contamination as part of site
2 investigation. You submit a corrective action plan,
3 and you do your remediation.

4 Q. And it's your position that the PID
5 does not --

6 A. Define the extent of contamination?

7 Q. Sufficiently --

8 A. No, it does not.

9 Q. -- for the Agency purpose?

10 A. I believe the regulations for site
11 investigation require soil sampling and groundwater
12 sampling.

13 Q. Well, there was soil sampling
14 originally, was there not?

15 A. Yes, there was.

16 Q. And the scope of the contamination
17 subsequently was found to be much greater than
18 initially thought. Is that correct?

19 A. So you say. That's, I think, the
20 point of contention. You're saying you took soil
21 borings, you showed that it was clean, and then you
22 over-excavated that soil based on the PID.

23 Q. Isn't it possible that the strata and
24 depth at which those samples were taken were not, in

1 fact, geologically where the contamination was, even
2 at those locations in a vertical dimension?

3 A. Then they may have done something
4 wrong when they did the borings. The borings are
5 screened with the PID to collect the worst case
6 sample to submit to a laboratory.

7 Q. Now, you said a moment ago that there
8 wasn't anything to confirm the need to do more.
9 Well, taking to its logical conclusion, you're
10 saying that there was no need to remove the tank
11 that was discovered later?

12 A. I didn't say that.

13 Q. I find that --

14 A. I didn't say that.

15 Q. Well, you said there was no need to do
16 more than what was reflected by those soil borings.

17 A. If this was submitted as a corrective
18 action plan, we would not have approved more than
19 the 480 cubic yards that was proposed in the
20 original investigation that wasn't submitted to the
21 Agency.

22 Q. And as far as you're concerned, the
23 only way that you would have considered that would
24 have been if there had been more soil testing and an

1 amended application and a lengthy process?

2 A. It's the proper way to do it, yes.

3 Q. Is it your contention that it would
4 have been any more cost effective to do that?

5 A. I believe it would have been. You
6 didn't do a tier two analysis. They excavated to
7 the most stringent tier one remediation objectives.

8 Q. So as far as you're concerned, PID,
9 with appropriately calibrated instruments, is not a
10 sufficient confirmation?

11 A. Right.

12 MR. COLLINS: I don't have anything
13 further, but I would like to recall the
14 witness.

15 MR. HALLORAN: Okay. Thank you,
16 Mr. Collins. Mr. Richardson?

17 MR. RICHARDSON: I have nothing
18 further.

19 MR. HALLORAN: Okay. Before we go on,
20 Mr. Richardson, you have Respondent's Exhibit
21 Number 1 and 2 up here. Are you going to
22 move that into evidence or not?

23 MR. RICHARDSON: I would do that at
24 this time.

1 MR. HALLORAN: Any objection,
2 Mr. Collins?

3 MR. COLLINS: Okay.

4 MR. HALLORAN: Okay. Respondent's
5 Exhibit Number 1 and 2 are admitted into
6 evidence.

7 And Mr. Collins, while I think of
8 it, you have Petitioner's Exhibit Number 5.
9 It was a portion of the code, Section 735.
10 Are you going to move that into evidence?

11 MR. COLLINS: If I may.

12 MR. HALLORAN: Any objection,
13 Mr. Richardson?

14 MR. RICHARDSON: No.

15 MR. HALLORAN: Okay. Petitioner's
16 Exhibit Number 5 admitted.

17 MR. COLLINS: I'd like to recall
18 Alison Rosenberg.

19 MR. HALLORAN: Mr. Richardson, are you
20 finished with your case in chief then?

21 MR. RICHARDSON: I'll rest, yes.

22 MR. HALLORAN: Okay. Thank you.
23 We're in petitioner's rebuttal.

24 Ms. Rosenberg, please remember

1 you're under oath. Thank you.

2 MR. COLLINS: Off the record.

3 (Whereupon, a discussion was had
4 off the record.)

5 MR. HALLORAN: We're back on the
6 record.

7 WHEREUPON:

8 ALISON ROSENBERG

9 called as a rebuttal witness herein, having been
10 first duly sworn, deposes and saith as follows:

11 D I R E C T E X A M I N A T I O N

12 BY MR. COLLINS:

13 Q. Ms. Rosenberg, you were present
14 throughout the remediation process on almost a daily
15 basis, were you not?

16 A. Yes.

17 Q. And you were the project supervisor
18 from Benchmark for it?

19 A. The project manager, yes.

20 Q. And can you tell me what your process
21 was with regard to determining the need for
22 remediation, i.e., whether or not you had
23 contamination?

24 A. Well, like I said before, we did an

1 initial phase two that determined that contamination
2 was present on the property. We followed that up
3 with the remedial site investigation, which
4 determines some of the extent of the contamination.
5 And then based on the decision from our client, we
6 proceeded with remediation.

7 Q. And what testing was done as you
8 remediated and removed contaminated material?

9 A. As we were excavating, we screened
10 soils every few feet with a PID meter to determine
11 if, in fact, we need to continue the excavation or
12 if that would be an endpoint for the excavation.
13 And that's done repeatedly throughout -- until a low
14 PID rating is achieved. And that is the point where
15 a soil sample is collected.

16 Q. And that soil sample is then collected
17 because you anticipate that it's going to confirm a
18 clean level?

19 A. Correct.

20 Q. And what would be the point of taking
21 soil samples before you got to a clean level?

22 A. That -- there really is no point. It
23 would be completely not cost effective in any way to
24 submit a soil sample that you know is definitely

1 dirty when you're trying to achieve a clean status.

2 Q. Okay. And as far as during the
3 remediation of the site, the PID, was that a
4 calibrated instrument?

5 A. Correct.

6 Q. And what level were you seeking in
7 terms of a PID reading?

8 A. Typically we like to have as close to
9 zero as possible. But yeah, a low reading below
10 five parts per million.

11 Q. And you testified previously about the
12 discoloration in the excavation?

13 A. Yes.

14 Q. And what that signifies with regard to
15 the PID sampling, you find in your experience that's
16 a cost effective way when you're in the process of
17 remediating a site to determine how far to go with
18 the removal?

19 A. Yes. That is typically how it
20 is -- how we proceed. Instead of taking samples of
21 dirty soil, you use the meter to determine your
22 general extent and how far to extend the excavation.

23 Q. And referring you to Page 22 of the
24 record, and then within that sequence of pages,

1 drawing your attention to Page 25 of the record,
2 numbered as Page 4 of the corrective action
3 completion report, can you tell me what is stated
4 there with regard to the testing and the process
5 that you were utilizing?

6 A. Beginning from the beginning of this?
7 Well, the PID is calibrated more than once depending
8 on -- in a day depending on how long you're on the
9 site. And we typically like samples that register
10 less than one part per million. And that was
11 repeatedly done throughout the excavation period.

12 Q. And in addition to the PID readings,
13 are there old factory indications of contamination?

14 A. Yes. And on this particular site, you
15 could smell the petroleum from across the street.
16 Our client actually came out to visit us on site and
17 he smelled it before he even pulled in to the
18 property. So it was highly contaminated.

19 Q. And that's not just in the area of the
20 tank?

21 A. Correct.

22 Q. In your opinion, was more removed than
23 needed to be removed?

24 A. Not at all. Not at all.

1 Q. It was far more, however, than what
2 had been originally anticipated?

3 A. Yes, it was. And for reasons that I
4 can't explain, for some reason the initial soil
5 borings did not detect some of the contamination
6 that was, in fact, on site, whether they weren't
7 deep enough, or they just happened to be in a tiny
8 little location, because the borings are only two
9 inches in diameter.

10 Q. You might miss it due to the geology?

11 A. Correct.

12 Q. And with regard to the fact that the
13 original anticipation was so much less complex and
14 so much smaller than what was ultimately discovered,
15 one would not have, based on the initial
16 anticipation, thought that this was a project of the
17 scope that one would seek approval for, particularly
18 when you didn't know there was a tank?

19 A. Correct. That is exactly correct.

20 Q. And what's been your experience with
21 using the PID meter?

22 A. I find that it's a very useful tool.
23 Yes, I know it does not give you exact levels or
24 what type of contaminants, but it definitely lets

1 you know if there is a volatile substance in that
2 soil.

3 Q. And whether or not it's a significant
4 concentration?

5 A. Correct, correct.

6 Q. Is there any rule of thumb in terms of
7 the PID reading and what you'll find in the soil
8 test with respect to petroleum products?

9 A. I'm not sure what you mean.

10 Q. Okay. When you get to -- I think your
11 report indicates a one part per billion?

12 A. Correct..

13 Q. Then you're going to be probably
14 clean, right?

15 A. Oh, yeah. More than likely.

16 Q. But if you're much above that --

17 A. Oh, yeah. We were getting readings
18 that were above the scope of the PID.

19 Q. Off the scale?

20 A. Yeah. So it was very strong.

21 Q. Okay. And in terms of the odor, that
22 really didn't dissipate as you opened the area of
23 excavation up?

24 A. No, it did not. It actually was

1 starting to get stronger as we got closer to the
2 tank that we later discovered.

3 MR. COLLINS: Thank you.

4 MR. HALLORAN: Thank you, Mr. Collins.

5 Mr. Richardson, cross?

6 C R O S S - E X A M I N A T I O N

7 BY MR. RICHARDSON:

8 Q. Just a couple of things. I have
9 Page 321 from the record in my hand. I guess it's a
10 boring log for C7. And these numbers here, I guess,
11 as it got deeper, they get 160, 220, 300, and 120.

12 Now what -- there was something
13 said about parts per million or something. How does
14 that correlate to parts per million, those numbers
15 in the --

16 A. That is the number that came off of
17 the PID meter itself. And the PID meter -- the
18 numbers are in parts per million. That's the
19 configuration.

20 Q. So this is saying 300 parts per
21 million?

22 A. Correct.

23 Q. And I take it that's, sort of, a
24 higher number?

1 A. Yeah, that's very high.

2 Q. But am I also correct -- and this is
3 the exhibit -- I believe it's Exhibit 2, my maps,
4 which is Page 304. And then you look at the C7
5 boring location, yet there were no hits obtained in
6 that boring when you got -- obtained the analytical
7 results. Is that right?

8 A. There were hits, but they were not
9 above the remediation objectives.

10 Q. Right. And I assume that that's a
11 common occurrence. The PID may be saying this, but
12 yet when we get the lab sample back, it's not there
13 for whatever reason?

14 A. Yes.

15 MR. COLLINS: Well, with regard to --

16 MR. RICHARDSON: I wasn't done yet.

17 MR. COLLINS: I'm sorry. I apologize.

18 Please go ahead.

19 MR. RICHARDSON: I have nothing else.

20 I just wanted to check.

21 MR. HALLORAN: Thank you,

22 Mr. Richardson. Mr. Collins?

23

24 R E D I R E C T E X A M I N A T I O N

1 BY MR. COLLINS:

2 Q. With regard to soil results from a
3 soil analytical test versus the PID, you could
4 simply hit a geological variation or a pocket when
5 you do a soil test?

6 A. Yes. Especially -- you know, it
7 depends, too, what type of soil you're dealing with.
8 Yes, it's very possible.

9 Q. And it's a small sample area?

10 A. Mm-hmm, correct.

11 Q. Therefore, a clean test, in terms of
12 the soil sample, could be a pocket that's quite
13 small and surrounded by heavily contaminated
14 petroleum?

15 A. Yes.

16 Q. So really, as a practical matter, the
17 PID, when you experience heavy contamination with
18 petroleum materials, is much more reflective of
19 what's really there than a soil test might be
20 depending on the geology and the elevation?

21 A. Yeah, in a sense. The PID gives you
22 an idea -- it gives you a better indication of what
23 is in the soil, that there is definitely something
24 there, whether or not -- whatever the level comes

1 back as on the actual analysis versus what's
2 actually on site, as far as vapors that come out of
3 the soil.

4 MR. COLLINS: Thank you.

5 MR. HALLORAN: Thank you, Mr. Collins,
6 Mr. Richardson?

7 MR. RICHARDSON: I have nothing
8 further.

9 MR. HALLORAN: Thank you. You may
10 step down, Ms. Rosenberg. Thank you. Any
11 further rebuttal, Mr. Collins?

12 MR. COLLINS: No.

13 MR. HALLORAN: Thank you. Let's go
14 off the record for a second.

15 (Whereupon, a discussion was had
16 off the record.)

17 MR. HALLORAN: We're back on the
18 record. Mr. Collins has no further rebuttal
19 witnesses, but he would like to do a closing.
20 Mr. Collins?

21 MR. COLLINS: Just briefly, here we
22 have a situation which is not uncommon: The
23 office of the state fire marshall advising
24 that there is no need or no reason to submit

1 a separate report creating a separate
2 incident number when a tank is discovered in
3 the process of remediation, and then, of
4 course, issuing a determination letter that
5 they are entitled to proceed. And I won't
6 try to characterize that one way or another,
7 but it can be read as saying it is within the
8 number what should be reimbursed under a LUST
9 claim.

10 We also have another component
11 here that, frankly, I was surprised by, and
12 that is that the Agency goes so far as to,
13 notwithstanding prior decisions, reject the
14 idea that PID results have any significance
15 with regard to whether or not there is
16 contamination, whether or not remediation or
17 removal is necessary, which I believe goes
18 beyond the regulations and is perhaps
19 indicative of, notwithstanding Mr. Bauer's
20 testimony, a predisposition on the part of
21 the Agency to, contrary to the purposes and
22 spirit, not be as receptive to the merits of
23 the claim, as we would submit they should be.

24 This is a situation where what was

1 anticipated versus what was found are holes
2 apart. And in this situation, we have what
3 amounts to a very large area of
4 contamination, severe contamination, and it's
5 not easy to bifurcate it. It wasn't
6 anticipated. It needed to be remediated, and
7 it was remediated appropriately. But for the
8 happenstance of the way things evolved in the
9 direction from the state fire marshall's
10 office, this was something that none of us
11 would have anticipated, and meets the
12 criteria, or at least the purposes for which
13 the reimbursement fund was established.
14 Thank you.

15 MR. HALLORAN: Thank you, Mr. Collins.
16 Mr. Richardson, are you going to reserve your
17 closing for your post-hearing brief?

18 MR. RICHARDSON: That's correct.

19 MR. HALLORAN: Thank you. And before
20 I forget, I want to state that I find no
21 credibility with any of the witnesses that
22 testified here today.

23 Off the record we discussed
24 post-hearing brief due dates, and by my

1 calculations, I believe the transcript is due
2 May 4th, May 5th, thereabouts. So with that
3 said, we're going to have the petitioner's
4 post-hearing brief due June 7th, respondent's
5 post-hearing brief due July 9th, and then
6 petitioner's reply, if any, due August 2nd.
7 The record will be closed on August 2nd, and
8 the mailbox rule will not apply to any of the
9 dates given, June 7th, July 9th, or
10 August 2nd. Any further questions?

11 MR. RICHARDSON: I just had a quick
12 comment. When you said no credibility, did
13 you mean to say no credibility problems?

14 MR. HALLORAN: Yeah, no credibility
15 issues, problems.

16 MR. RICHARDSON: I know everybody
17 would know that.

18 MR. HALLORAN: Everybody was credible.

19 MR. RICHARDSON: I like that. I have
20 nothing further.

21 MR. HALLORAN: I apologize. Anyway, I
22 do want to thank you for your civility and
23 your professionalism. It was great again.
24 Thank you and have a safe drive home.

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

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REBECCA A. GRAZIANO, being first
duly sworn on oath, says that she is a court
reporter doing business in the City of Chicago, that
she reported in shorthand the proceedings given at
the taking of said hearing, and that the foregoing
is a true and correct transcript of her shorthand
notes so taken as aforesaid, and contains all the
proceedings given at said hearing.

Rebecca Graziano
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Chicago, Illinois 60603
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of _____, A.D., 2010.

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