

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF BFI WASTE SYSTEMS) AS 08-5
OF NORTH AMERICA, INC., FOR)
WASTE DELISTING,)

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STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

TRANSCRIPT OF PROCEEDINGS had in the
above-entitled cause, taken before MARGARET R.
BEDDARD, a Notary Public within and for the County of
Kane, State of Illinois, and a Certified Shorthand
Reporter of said state, at Room 301, 106 South 5th
Street, Oregon, Illinois, on the 15th day of May,
A.D. 2008, at 9:00 a.m.

HEARING OFFICER: BRADLEY P. HALLORAN.

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PRESENT:

McGUIRE WOODS, LLP,
(77 West Wacker Drive, Suite 4100,
Chicago, Illinois 60601),
BY: MS. PATRICIA F. SHARKEY and
MR. BRADLEY R. DANIELS,

appeared on behalf of the Petitioner;

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
(1021 North Grand Avenue East,
Post Office Box 19276,
Springfield, Illinois 62794),
BY: MR. WILLIAM D. INGERSOLL,

- and -

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
(9511 West Harrison Street,
Des Plaines, Illinois 60016),
BY: MR. PAUL R. JAGIELLO,

appeared on behalf of the Agency.

REPORTED BY MARGARET R. BEDDARD, CSR.

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OPENING PROCEEDINGS

PAGE NO.

OPENING STATEMENT ON BEHALF
OF THE PETITIONER

5

WITNESSES

DX CX RDX RCX

ELIZABETH A. STEINHOOR

By Ms. Sharkey

14

By Mr. Ingersoll

21

30

MICHAEL B. MAXWELL

By Ms. Sharkey

33

MARK L. CRITES

By Mr. Ingersoll

87

By Ms. Sharkey

91

E X H I B I T S

NUMBER

MARKED FOR ID

NO EXHIBITS MARKED.

1 HEARING OFFICER HALLORAN: Good morning,
2 everyone. We're on the record now. My name is
3 Bradley Halloran. I'm the hearing officer with the
4 Illinois Pollution Control Board. I'm also assigned
5 to this matter entitled In the Matter of Petition of
6 BFI Waste Systems of North America, Inc., for Waste
7 Delisting as documented as AS 08-5. Today is May 15,
8 2008, approximately 9:10 a.m.

9 I do want to note that -- at the top, that
10 there are no members of the public here. If there
11 were, they would be allowed to state their peace.

12 We're going to run this hearing pursuant to
13 Section 104, Subpart D, and Section 101, Subpart F,
14 of the Board's procedural rules.

15 I also want to note, for the record, that
16 this hearing was properly noticed up. This hearing
17 is intended to develop a record for the Illinois
18 Pollution Control Board. I will not be making the
19 ultimate decision in the case. That's left up to the
20 four esteemed members of the Board. I'm only here to
21 rule on evidentiary matters to make sure the hearing
22 goes without a hitch.

23 A brief note. On April 15, 2008, I
24 forwarded, via an hearing officer order, questions

1 from our technical units to the respective parties.
2 The Petitioner filed prefiled testimony addressing
3 those issues on May 6, 2008. To that end, we have
4 Alisa Liu from our technical unit as well as Anand
5 Rao that may or may not be asking questions.

6 With that said, Ms. Sharkey, would you like
7 to introduce yourself, please.

8 MS. SHARKEY: My name is Patricia Sharkey. I'm
9 with the law firm of McGuire Woods. I'm representing
10 BFI -- I'm representing BFI Waste Systems of North
11 America, Inc., today. Thank you. And we're going to
12 be having -- With me I have two other witnesses who
13 will be testifying on behalf of BFI, Mike Maxwell of
14 Weaver Boos Consultants and Beth Steinhour --
15 Elizabeth Steinhour of Weaver Boos Consultants.

16 We do have an opening statement that we'd
17 like to make, but perhaps you'd like to go through
18 introductions first.

19 HEARING OFFICER HALLORAN: Mr. Ingersoll?

20 MR. INGERSOLL: I'm Bill Ingersoll from the
21 Illinois EPA, Division of Legal Counsel, representing
22 the Agency. Accompanying me today is Paul Jagiello
23 also from our Division of Legal Counsel and Mark
24 Crites. Mark is the permit engineer who has reviewed

1 the petition and interacted with technical staff for
2 BFI -- the technical representatives of BFI. And
3 Mark will be available if needed or if questions need
4 to be directed -- technical questions need to be
5 directed to the Agency.

6 HEARING OFFICER HALLORAN: Thank you,
7 Mr. Ingersoll.

8 Ms. Sharkey, opening.

9 MS. SHARKEY: Yes. Thank you.

10 OPENING STATEMENT ON BEHALF OF
11 BFI WASTE SYSTEMS OF NORTH AMERICA, INC.

12 MS. SHARKEY: What we wanted to do is put into
13 perspective what this petition is about, and I think
14 we'd like to start by thanking the Board for the
15 opportunity to have this hearing and particularly for
16 having two members of its technical staff here today.
17 And we really do appreciate both the opportunity to
18 explain our petition and the opportunity to address
19 any questions that the technical staff and the Board
20 may have. And we look forward to this hearing as
21 something of a dialogue to allow us to understand the
22 Board's concerns and to be able to provide answers to
23 any questions that may come up.

24 There is a lot of minutia involved in a

1 petition of this sort, and we are talking about
2 delisting FO39, which is a leachate from multiple
3 sources. As a result, the list of constituents
4 involved is quite long, and the petition here is
5 actually quite extensive because we have provided the
6 Board with probably the fullest demonstration of the
7 character of a leachate or of a waste stream that it
8 may have seen in any delisting petitions before.
9 That's because we have a full nine years of sampling
10 data from this landfill, which has been closed for 25
11 years. The reason for not nine years rather than 25
12 years is we, frankly, felt it was just enough, but
13 also it is a period of time that represents the time
14 since the landfill had a new cap put in place, an
15 impermeable cover, and we believe that it's the best
16 representation of how that landfill is functioning at
17 this point.

18 But apart from all of the data that's
19 here -- and there's an extensive amount of data --
20 what we want to make sure everybody understands is
21 that the big picture here is that this is a very
22 simple delisting, in fact. What we have is a
23 leachate that is being generated in one unit at the
24 Davis Junction Landfill. There are three units at

1 that landfill. One of them accepted hazardous waste
2 for a period of, I believe, seven years. And the
3 other landfills otherwise took the same material that
4 this landfill took. This landfill had 2 percent
5 hazardous waste. And, as a result, it is
6 character -- the leachate is characterized as a
7 hazardous leachate. The other two units at the same
8 landfill did not take any hazardous material. And,
9 as a result, the leachate from those units is not
10 characterized as hazardous.

11 The leachate from the hazardous unit is --
12 must at this point be trucked 350 miles into Ohio in
13 order for it to be handled at a facility that is
14 permitted and authorized to accept hazardous liquid
15 waste. Previously it was being hauled to the CID
16 chemical waste management treatment facility in
17 Calumet City over 100 miles from Davis Junction.
18 However, recently BFI's been informed that CID cannot
19 handle that material at this point. As a result,
20 it's now going to Ohio, quite a distance. In
21 contrast, the leachate from the nonhazardous units at
22 the Davis Junction Landfill is going to a facility
23 IPC that is in the Rockford area. I believe it's
24 approximately seven miles from the Davis Junction

1 Landfill.

2 So what this is about is about not anything
3 particularly new or dramatic that's going to happen
4 with this leachate. The leachate is going to be
5 hauled for treatment under this delisting. It could
6 be hauled for treatment seven miles rather than being
7 hauled for treatment 350 miles. We believe at the
8 end of the day this is actually an environmentally
9 beneficial delisting and that it certainly is going
10 to minimize air emissions and use of energy. But,
11 even beyond that, it's minimizing the risk of hauling
12 a liquid material in a tanker truck over highways for
13 a great distance -- greater distance than necessary.
14 So the big picture on this is we're simply taking
15 this material to one treatment plant instead of
16 another, and it's a closer treatment plant. And both
17 treatment plants are permitted to handle this type of
18 material.

19 The only impediment for IPC being able to
20 handle this material is the fact that it is
21 characterized as a hazardous liquid -- hazardous
22 waste under RCRA because of the fact that 2 percent
23 of the waste handled in that landfill was hazardous
24 waste. So we believe that the situation here is

1 actually pretty simple. We're not asking for a
2 wide-open delisting. We are not asking for an
3 across-the-board delisting. We're asking for a very
4 limited type of delisting. And that is very limited
5 by the language in the adjusted standard that we've
6 proposed and put in the petition that's in front of
7 the Board.

8 That language limits the disposal to a
9 treatment facility, and it also limits the
10 applicability of the delisting to the point at which
11 the material leaves the facility. So all the while
12 that the leachate is handled at the Davis Junction
13 Landfill, it will be treated as it is now, as a RCRA
14 hazardous waste. It will loaded on to a tanker
15 truck -- a 5,000-gallon tanker truck as it is now,
16 and it will leave the facility under an Illinois
17 waste -- an Illinois special waste manifest. It will
18 then arrive at the treatment facility where it will
19 be subject to Clean Water Act requirements. The
20 facility, pursuant to our adjusted standard, would be
21 required to be one that is permitted by USEPA and
22 under its pre-treatment program.

23 So what we believe we're talking about
24 under the conditional delisting and the way that

1 we've set this up in that delisting language is that
2 it's a cradle to grave situation for governmental
3 control of this waste stream. There's no point at
4 which it's leaving or exiting a regulatory system.
5 And I think when we look at how EPA has thought about
6 this in the past and talked about the kinds of risks
7 that delisting present, the biggest risk is -- and
8 the biggest concern is where a waste stream is
9 actually exiting a regulatory system. And that will
10 never happen in this case.

11 Apart from that, we have, I think, a lot to
12 talk about in terms of answering specific questions.
13 We're well aware of there being guidance out there
14 and a lot of history on delisting. And we believe
15 what we have here is actually something that the
16 Board has done before and talked about before, and
17 that is conditional delistings that essentially allow
18 for a waste that may not meet -- every constituent
19 may not meet the parameters that it would be required
20 for an open listing, but where by virtue of the type
21 of delisting that's being requested and that
22 condition listing -- the conditions in the delisting
23 that some of those concerns are alleviated.

24 What we've given you is a lot of

1 information in this very, very big binder that --
2 We've presented two large binders as a part of the
3 petition. But what you get out of that after nine
4 years of testing for all of the Appendix 9
5 constituents is a very large majority of those
6 constituents fall by the way stream, have not been
7 detected. What we then come down to is a handful of
8 constituents that we've identified as the final list
9 of constituents. Many of those we have DRAS -- The
10 DRAS being the model that EPA has required. The DRAS
11 model has yielded a number of those that are -- We
12 have analyzed under DRAS all of those that have
13 actually been detected. For those, only a handful
14 fall out as presenting any question outside of DRAS,
15 meaning that they exceed of DRAS limits.

16 Of those, we have taken a hard look at each
17 one of those. So this is really a situation where we
18 go from quite a bit of data -- and, again, on a very
19 conservative scenario that we've looked at this
20 data -- and narrowed it down to a few constituents
21 that are subject to other types of standards that we
22 believe are appropriate to look at in this instance.
23 And we will be talking about those in greater depth.
24 But, again, this is a scenario of a package that

1 could look very big, but at the end of the day comes
2 down to a few issues.

3 We appreciate the questions we received
4 from the Board's technical staff. What we'd like to
5 do is put on two witnesses. We're going to have
6 Ms. Steinhour to begin with give an overview of the
7 petition itself and what we've gone through in
8 putting together the petition. Mr. Maxwell then is
9 going to talk a bit about the modeling and the data.
10 And then what we would like to do is actually turn to
11 the questions that the Board -- the Board's technical
12 staff presented us with and provide our prefiled
13 testimony -- our testimony on that, a short
14 discussion of each one of those, and then provide an
15 opportunity for additional questions on those
16 questions, if that is an acceptable way to proceed.

17 HEARING OFFICER HALLORAN: That sounds fine.
18 Thank you, Mr. Sharkey.

19 Mr. Ingersoll, before Ms. Sharkey calls
20 Ms. Steinhour, do you have any opening?

21 MR. INGERSOLL: Nothing. Thank you.

22 HEARING OFFICER HALLORAN: Thank you.

23 Ms. Sharkey?

24 MS. SHARKEY: I'd like to begin by having

1 Ms. Steinhour sworn in.

2 HEARING OFFICER HALLORAN: If you'd just raise
3 your right hand, the court reporter will swear you
4 in.

5 (WHEREUPON, the witness was duly
6 sworn.)

7 ELIZABETH A. STEINHOURL,
8 called as a witness herein, having been first duly
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 MS. STEINHOURL: Thank you for the opportunity to
12 present the petition to the --

13 MS. SHARKEY: Excuse me. Before you begin, if I
14 could ask Ms. Steinhour to state, for the record, her
15 educational and professional background.

16 HEARING OFFICER HALLORAN: And spell your name,
17 please.

18 MS. STEINHOURL: My name is Elizabeth,
19 E-l-i-z-a-b-e-t-h, Steinhour, S-t-e-i-n-h-o-u-r. I
20 have a bachelor's in legal studies from the
21 University of Illinois. I've worked for the Illinois
22 Environmental Regulatory Group for approximately
23 eight years in development of the major environmental
24 laws and regulations. And since then I've been in

1 the consulting field to sustain our clients with
2 compliance issues and maintaining compliance with the
3 environmental laws and regulations.

4 MS. SHARKEY: And I would just like to say that
5 Ms. Steinhour's resume is in the petition itself
6 under Appendix I.

7 MS. STEINHOOR: And all of the land, air, water
8 matters that I was involved with stemming back to the
9 actual landfill regulations.

10 I am a senior project manager for
11 Weaver Boos Consultants along with Mike Maxwell.
12 I've been responsible for managing and assisting our
13 clients in complying with the post-closure care
14 activities at Davis Junction Landfill. I've been
15 involved with that since 2001.

16 Ms. Sharkey, as she stated, Davis Junction
17 Landfill, it's a closed landfill that has three
18 units, one of the units, which is the subject of
19 today's phase one. I wanted to just add to what
20 Ms. Sharkey had stated by saying the 26,000 cubic
21 yards of hazardous waste that was handled at Davis
22 Junction is -- was 26,000 out of 1.9 million cubic
23 yards of waste that was disposed of within that unit.
24 Of the 1.9 million cubic yards, 87 percent of it was

1 general municipal waste, 11 percent was special
2 waste, and the remaining 2 percent was hazardous
3 waste.

4 The reason we looked back nine years, I
5 also wanted to clarify, was because in 1998, '99 the
6 landfill had put a new liner on -- over the phase one
7 unit, and they put a dual leachate gas extraction
8 system within the landfill. So we felt that the past
9 nine years has been representative of the conditions
10 as they stand today and will stand until final
11 closure of these final post-closure activities.

12 I also wanted to clarify that the reason
13 CID is not accepting the waste from Davis Junction
14 Landfill -- the wastewater is because they are
15 overwhelmed with their own internal leachate that
16 they're creating, so they do not have the capacity to
17 handle leachate accepted from outside sources. It
18 doesn't have anything to do with the characteristics
19 of the leachate or anything like that. There are
20 detailed records within the petition that detail what
21 type of hazardous waste was received, where it came
22 from. The landfill kept very good records as far as
23 waste receipts.

24 The process -- What I wanted to focus on

1 today was to make the Board aware of the process that
2 we've undertaken to prepare the delisting package.
3 It began a long time ago, and it's interesting. It
4 was in May of 2003 that we actually had a meeting
5 with the Agency to discuss the potential for
6 delisting this hazardous waste leachate. During that
7 meeting, Weaver Boos outlined our suggested approach
8 for preparing a delisting package for the Board.
9 There was also discussion at that time concerning the
10 potential for discharging to this -- to the sanitary
11 sewer system, which would, thus, exempt the leachate
12 from coverage under the RCRA program. What we did
13 was we went back. And Weaver Boos and BFI, we both
14 worked on evaluating the potential for a sanitary
15 sewer system. Given the rural location of this
16 landfill and the cost, it was not a feasible --
17 economically feasible option.

18 In 2003 we submitted a draft delisting
19 petition to the Illinois EPA, which also included a
20 draft sampling analysis plan. And the sampling and
21 analysis plan was prepared after we had evaluated
22 five years of leachate data and we'd also had
23 discussions with USEPA and we'd reviewed their RCRA
24 delisting guidance manual. We suggested further

1 monitoring at that time for certain selected
2 constituents, and we said we would conduct that
3 monitoring in addition to the annual leachate
4 sampling that we conduct at the site.

5 In May of 2004 we provided the Agency with
6 a draft delisting petition. During the summer of
7 2004, we, again, met with the Illinois EPA, and the
8 Illinois EPA asked us to do a comparison of the
9 hazardous versus the nonhazardous leachate. That
10 comparison is provided in Appendix D to the petition.
11 And our analysis resulted in showing no statistical
12 significance between the non-haz and the haz leachate
13 at the site.

14 In January of 2005 we received verbal
15 comments from the IEPA regarding our draft petition
16 and our sampling analysis plan. From February to
17 June 5 -- June 2005, we implemented our SAP. We did
18 six sampling events. We tried to sample so we had a
19 representative idea of what was happening from
20 different months other than our annual sampling
21 event, which is in January and February.

22 In October of 2006 we, once again, met with
23 the Agency. And in February 2008 we met with them to
24 discuss the final draft to present it to the Illinois

1 EPA. We provided nine years of leachate data, 15
2 sampling events. There's over 10,000 data points
3 that have been evaluated for approximately 300
4 constituents. The majority of the constituents have
5 been non-detect for years. There has been little
6 statistical significant variability in the
7 concentration of the constituents that are present.
8 As Ms. Sharkey stated, the disposal options are
9 limited for this facility. And right now BFI's
10 transporting the waste to Ohio, which is over 350
11 miles away.

12 We are requesting the adjusted standard and
13 belief that it provides cradle to grave governmental
14 control over this delisted waste. It will only allow
15 BFI to transport the leachate to a regulated -- a
16 wastewater treatment facility with a regulated
17 treatment program, such as Interstate Pollution
18 Control, which is seven miles -- not even seven miles
19 away. And so, in essence, they will be able to
20 transport the leachate -- the hazardous leachate in
21 the same manner that they're transporting the
22 nonhazardous leachate from that site.

23 I think we've provided protections in how
24 we are going to handle the leachate by providing

1 notification to the Illinois EPA 60 days before we
2 start transporting it under an approved delisting
3 program. We've talked to the Agency and agreed that
4 we'll sample the first initial trucks -- consecutive
5 trucks going out of the facility, and we'll continue
6 to do quarterly sampling on the first year and then
7 semiannual sampling. So we will do -- be doing more
8 sampling than we're currently doing under their
9 post-closure permit.

10 We're going to transport it by a licensed
11 hauler. We're going to transport it under a special
12 waste manifest. And I think it's important to note
13 that we're not going to be applying -- this
14 wastewater is not going to be going into any land
15 surface impoundment. It's not going to be going into
16 a lined pond. It's actually going to go to this
17 wastewater treatment, be pretreated, and have to
18 comply with the MPDS permit requirements before its
19 ultimate disposal.

20 We are not asking for any changes to the
21 landfill's ground water monitoring program. We will
22 continue to monitor that program in accordance with
23 our RCRA post-closure permit. And, as Ms. Sharkey
24 stated, if we have a spill, it's going to be covered

1 under the RCRA program because we're not handling it
2 in -- It wouldn't be handled in accordance with the
3 provisions of a delisting regulation site specific.

4 So if you have any questions.

5 HEARING OFFICER HALLORAN: Ms. Sharkey, do you
6 have any direct, so to speak?

7 MS. SHARKEY: No, I don't. Thank you.

8 HEARING OFFICER HALLORAN: Before we go,
9 Mr. Ingersoll, any queries?

10 MR. INGERSOLL: Yes, please.

11 CROSS-EXAMINATION

12 BY MR. INGERSOLL:

13 Q. Ms. Steinhour, exactly when in the
14 process -- It's going to be -- The leachate is going
15 to be in a tanker truck, and it's going to go to the
16 receiving facility?

17 A. Right.

18 Q. Exactly at what point does the proposed
19 delisting attach to that leachate?

20 A. We would like the proposed delisting to
21 attach at the time. It will be handled as a -- It
22 will be manifested as a special waste, and so from
23 the point at which it leaves the facility. At the
24 point at which it arrives at IPC's door, the manifest

1 that's attached to it, it's very important that it's
2 a special waste manifest and not a RCRA hazardous
3 waste manifest because then they would be precluded
4 from accepting the wastewater.

5 Q. So as it's going down the road -- even
6 though it's a lot shorter than it's traveling now --
7 it would be a special waste and not a hazardous
8 waste?

9 A. Right. But if there were a spill, it's our
10 position that it wouldn't be -- it's not being
11 handled in accordance with the delisting petition, so
12 it would be a spill that's been manifested as a
13 special waste from Davis Junction. And if it does
14 spill, we would have to clean it up under the RCRA
15 permitting program -- clean-up program.

16 Q. Because one of the conditions would have
17 failed?

18 A. Right.

19 So the RCRA clean-up program would
20 supersede the delisting petition if we had a spill
21 and a release to the environment because the
22 delisting petition says you manifest it, you
23 transport it, and you have to dispose of it at IPC.
24 If we dispose of it in any other manner -- We can't

1 put it in a landfill because it's a RCRA -- it would
2 be a RCRA waste. We can't spread it on the ground or
3 land apply it. It would be considered a RCRA
4 wastewater.

5 Q. Okay. Now, as just a factual matter, when
6 it gets to IPC, it's in a truck -- your truck --
7 BFI's truck. Then what's going to happen to it? I
8 don't know what IPC's facility looks like. It's just
9 factual background, not a regulatory question.

10 A. IPC has a chemical process that they use to
11 treat their wastewater --

12 Q. Before that. Just physically what happens
13 to the stuff?

14 A. Typically, it's my understanding that they
15 put it in a separate holding tank. And they test it
16 there, decide how they're going to treat it, and then
17 they feed it into their system. So they don't
18 just -- That's how typically the wastewater treatment
19 facilities handle all leachate, whether it's
20 hazardous or nonhazardous, because they want -- they
21 have it coming from different facilities.

22 Q. That was just for we nontechnical folks
23 here.

24 A. So what they'll do is they'll put it in

1 this holding tank. They'll test it. They have
2 certain parameters that you have to meet. And then
3 they'll treat it and dispose -- You know, it's
4 discharged along with the other wastewater that
5 they're handling at the facility.

6 MR. INGERSOLL: Okay. Thank you. I have
7 nothing further.

8 HEARING OFFICER HALLORAN: Thank you,
9 Mr. Ingersoll.

10 MR. RAO: I have a follow-up.

11 HEARING OFFICER HALLORAN: Yes, Mr. Rao.

12 MR. RAO: You just mentioned how once the
13 leachate gets to the wastewater treatment plant
14 they're going to hold it in some kind of a storage
15 tank?

16 MS. STEINHOOR: What they'll do is they'll
17 transfer it from the tank into a storage -- one of
18 their holding tanks that they use for treating the
19 wastewater.

20 MR RAO: Okay. Earlier, in your testimony, you
21 also mentioned about how this leachate would be
22 pretreated in accordance with MPDS permit --

23 MS. STEINHOOR: No. It will be subject to IPC's
24 wastewater treatment facility, their pretreatment

1 program. So what we have agreed during discussions
2 with the Illinois EPA is to make sure that the
3 delisting petition language is written to clarify
4 that we can't go to a wastewater treatment facility
5 that doesn't have an approved pretreatment program
6 and that they haven't -- you know, don't have an
7 approved pretreatment program.

8 MR. RAO: Okay. And I'm assuming that you had
9 conversations with the wastewater treatment plant
10 about accepting your leachate?

11 MS. STEINHOOR: Yes.

12 MR. RAO: And they looked at your leachate
13 quality and, you know, made a decision that it can be
14 treated at that particular plant?

15 MS. STEINHOOR: Yeah, with IPC.

16 MR. RAO: And I have one other follow-up related
17 to what Mr. Ingersoll was asking about at what point
18 the waste will become delisted.

19 MS. STEINHOOR: Right.

20 MR. RAO: You said you would like that to be in
21 a point where it leaves --

22 MS. STEINHOOR: The storage tank at the -- When
23 it leaves the storage tank at the facility and is
24 transferred to the truck.

1 MR. RAO: Okay. And is that clearly reflected
2 in the proposed language you're giving to the Board?
3 I'll specifically refer you to Subsection G of the
4 proposed language. And here it says, "The leachate
5 is transported in compliance with the requirements
6 applicable to an Illinois special waste" -- within
7 brackets it says, "35 Ill. Adm. Code Part 809" --
8 "and received by a permitted wastewater treatment
9 plant facility."

10 Does that mean that it also has to be
11 received for the delisting to apply?

12 MS. SHARKEY: If I could respond.

13 We amended the petition, as you know, a few
14 weeks ago after speaking with the Illinois EPA about
15 some of their concerns and found that the -- that
16 particular language "received by." So it must be
17 transported to and received by a wastewater treatment
18 facility that is permitted to accept this waste under
19 U.S. EPA's pretreatment program. So the "received
20 by" language came in in the amendment, particularly
21 in response to Illinois EPA's concerns that it
22 couldn't just start out for the treatment facility.
23 It had to actually arrive there and be accepted by
24 the facility.

1 MR. RAO: Okay.

2 MS. SHARKEY: But is what we're getting at is it
3 delisted while it's on route?

4 MR. RAO: Yes.

5 MS. SHARKEY: Our belief is that language covers
6 it as being delisted while on route.

7 MS. STEINHOOR: As long as it remains within the
8 actual tanker truck.

9 MS. SHARKEY: And under a special waste
10 manifest.

11 MS. STEINHOOR: Right.

12 MR. RAO: Because when we looked at this amended
13 language of "received by," I think we read it as
14 delisting applies only when it is received by the
15 facility, not when it is put into the tanker at your
16 landfill.

17 MS. SHARKEY: Let me say I think this is a
18 paperwork problem. I don't think the facility --
19 that BFI would have any problem with continuing to
20 manifest it under the RCRA Subtitle C program --

21 MS. STEINHOOR: Yes.

22 MS. SHARKEY: -- except for the fact that once
23 it's received at the other end they cannot accept it,
24 and so it's a paperwork issue. And, therefore, we'd

1 like it to be delisted at the point that it leaves
2 the plant under a special waste manifest.

3 MR. RAO: Okay.

4 MS. STEINHOOR: And if there needs to be
5 clarification that the waste is delisted, as long as
6 it's going into a tanker truck, remains in a tanker
7 truck until such point, and received by a facility,
8 then we can cover the actual emptying from the
9 tank -- the storage tank into the tanker truck and
10 the transport. And I think what that would do is
11 afford the protection that everybody's concerned
12 about, and that's with the spill and if it's -- if
13 there's a spill situation, who's going -- under what
14 program is it going to be cleaned up under? Even
15 though I would argue that the State site remediation
16 program would -- is as good as the federal RCRA
17 program.

18 MS. SHARKEY: But it would be under the federal
19 RCRA program. And it would be -- It would be a
20 clean-up governed by the federal RCRA -- hazardous
21 waste RCRA program. And that would include all of
22 the corrective action parameters that would
23 automatically apply in that instance. And the
24 modeling, in fact -- and Mr. Maxwell's going to talk

1 about this some more -- is all done on that
2 mismanagement scenario of a catastrophic spill. And
3 we've looked at the risk of that intensely here. I
4 think all of the work that's really been done here on
5 the risk analysis is really oriented toward that one
6 mismanagement scenario.

7 MR. RAO: Thank you.

8 MS. LIU: I do have one more question for you.

9 Good morning.

10 MS. STEINHOOR: Hi.

11 MS. LIU: In the original petition, BFI
12 estimated the cost for transporting and deposing of
13 it at CID. Now, since you've had this turn of events
14 and you're actually probably spending a lot more,
15 would you like to revise those cost figures just so
16 that we have some more updated information to use?

17 MS. STEINHOOR: It's \$2,000 per tanker truck.

18 MS. LIU: Okay.

19 MS. STEINHOOR: So \$2,000 per 5,000 gallons.

20 MS. SHARKEY: But we can get you more specific
21 written --

22 MR. BALLENGER: It's approximately that.

23 MS. SHARKEY: We can get you something in
24 writing responding to that question. Any questions

1 you have that we can't answer right here we will
2 follow up with written responses.

3 MR. RAO: You had earlier mentioned how you are
4 going to get into the prefiled testimony after the
5 summaries.

6 MS. SHARKEY: Yes.

7 MR. RAO: Is it all right with you if we ask our
8 follow-up questions on each topic that we had
9 earlier? That way it keeps the discussion together.

10 MS. SHARKEY: I think that makes sense.

11 MR. RAO: All right.

12 MS. SHARKEY: Okay. At this point --

13 HEARING OFFICER HALLORAN: Mr. Ingersoll?

14 MR. INGERSOLL: If I may. I mean, we're kind of
15 going out of sequence here.

16 HEARING OFFICER HALLORAN: Yeah, I agree.

17 RE CROSS-EXAMINATION

18 BY MR. INGERSOLL:

19 Q. The question that Dr. Rao asked --

20 MR. RAO: Mr.

21 MR. INGERSOLL: I'm sorry.

22 MR. RAO: Everybody calls me doctor, but that's
23 all right.

24 BY MR. INGERSOLL:

1 Q. -- Mr. Rao asked, I mean, are we really
2 zeroing in on the use of the word "and" here?
3 Because my super critical reading of the language may
4 indicate by the word "and" that both conditions have
5 to be met before the delisting attaches.

6 A. I think though we could clarify the
7 language to state that the delisting -- the delisting
8 starts at the point at which it's -- that it's
9 actually transferred from the on-site storage tanks
10 to the tanker truck, and it applies as long as it's
11 handled in accordance with that box that we've drawn
12 around our delisting proposal.

13 Q. So we could maybe tweak the language and
14 maintain the conceptional framework?

15 A. Right.

16 MS. SHARKEY: I think we'd be amenable to that
17 definitely. If the Board were to feel that there's
18 some ambiguity here, if the Agency feels there's
19 ambiguity, we'd be happy to. I think conceptually
20 we've expressed it pretty well for today.

21 MR. INGERSOLL: Exactly. I mean, the
22 testimony -- I understand the testimony. I'm trying
23 to make sure that the testimony squares with the
24 literal reading of the proposal. I mean, the Agency

1 did, in fact, come to agreement with BFI on this
2 language. But seeing that it -- you know, it has
3 raised a question, then maybe we can get together and
4 address that.

5 MR. RAO: That would be helpful.

6 MS. STEINHOOR: Is there any potential -- and I
7 know the Board has done this in other rulemakings --
8 where you could actually include a clarifying note?

9 MR. RAO: Actually in this situation, you know,
10 you can just add it as one of the conditions and
11 clarify the language.

12 MS. STEINHOOR: Okay.

13 MR. RAO: And one of the reasons, you know, we
14 read it the way we did was because I think there was
15 solid waste determination at the Board a few years
16 ago where the condition very clearly said that
17 material will no longer be solid waste only upon
18 being received at a certain facility. When we saw
19 this, we thought, "Wow, is this what you guys are
20 asking for?"

21 MS. SHARKEY: We apologize for the ambiguity on
22 this. It's a point that when you're -- Maybe when
23 you're working on something as long as we've been
24 working on this we knew what we wanted to do. The

1 language didn't quite make it as clear as it could.
2 We'd be happy to get together with Illinois EPA and
3 provide some revised language to the Board following
4 this hearing to attempt to capture this.

5 MR. RAO: Okay. And we have some more questions
6 related to the proposed language. We'll get to it
7 later.

8 MS. SHARKEY: Okay.

9 HEARING OFFICER HALLORAN: Any further questions
10 of Ms. Steinhour?

11 All right. Mr. Maxwell, you can raise your
12 right hand and the court reporter will swear you in.

13 (WHEREUPON, the witness was duly
14 sworn.)

15 MICHAEL B. MAXWELL,
16 called as a witness herein, having been first duly
17 sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. SHARKEY:

20 Q. Mr. Maxwell, would you state, for the
21 record, your educational background and your
22 professional credentials?

23 A. Yes. I have a bachelor's of arts in
24 geological sciences from the State University of

1 New York at Geneseo and a master's in geology from
2 the University of Iowa. And I've been working for
3 Weaver Boos for approximately 12 years. And I'm a
4 senior project manager there and do many of the
5 management and technical tasks similar to
6 Ms. Steinhour, experienced with a number of different
7 RCRA landfills, and also focus on air, water, and
8 waste issues as well.

9 HEARING OFFICER HALLORAN: Mr. Maxwell, could
10 you please state your first name for the record,
11 please.

12 MS. MAXWELL: Michael, M-i-c-h-a-e-l.

13 HEARING OFFICER HALLORAN: Thank you.

14 MR. MAXWELL: And Maxwell is spelled
15 M-a-x-w-e-l-l.

16 MS. SHARKEY: And Mr. Maxwell's credentials are
17 also contained in Appendix I to the petition.

18 MR. MAXWELL: And I am here to present the
19 discussion relative to the delisting risk assessment
20 software or DRAS, D-R-A-S, model, which is an
21 integral part of the risk assessment that's
22 associated with a delisting petition.

23 In this specific instance, one of the
24 things that we've had to face is that -- because of

1 the delisting language that's been proposed and the
2 assumptions associated with the draft DRAS model and
3 associated with the generic delisting guidance
4 manual, really the manual and the DRAS software has
5 limited applicability, we think, to our delisting
6 proposal because we are proposing this conditional
7 delisting that we've talked about here today. And
8 that puts strict limits on how the waste would be
9 managed in order for it to comply with the delisting
10 language.

11 The DRAS model and the guidance manual for
12 delisting, it's really built upon conservative
13 assumption upon conservative assumption in terms of
14 assuming a worst case type of land disposal scenario
15 where the delisted waste is disposed of in either an
16 unlined landfill or an unlined surface impoundment.
17 We've talked about here this morning that's not the
18 case for the BFI waste. So one of things we had to
19 face is that the DRAS model does have these
20 limitations. Unfortunately, the DRAS model only
21 assumes disposal in the unlined landfill or in the
22 surface impoundment whereas our condition in
23 delisting is contrary to that. Nevertheless though,
24 in order to be conservative, we have focused on

1 developing a DRAS model. One of the things that we
2 face though is -- Essentially, in our situation, the
3 question that we had to ask ourself is how do you
4 model -- Let me back up.

5 This idea of the conditional delisting,
6 USEPA guidance that we've reviewed indicates that
7 your risk assessment model needs to be consistent
8 with your proposed management scenario of the waste.
9 Using DRAS strictly, those two things don't match up.
10 We actually though have employed a DRAS model. The
11 assumptions that we've made associated with the DRAS
12 model is the worst-case mismanagement scenario where
13 the 5,000-gallon tanker truck actually gets spilled.
14 So that was the focus of our DRAS model.

15 The other question that we had to ask is --
16 Because of the delisting language, essentially what
17 we're doing is we're transferring the regulatory
18 framework of our leachate from RCRA to the Clean
19 Water Act by specifying that the waste must be
20 treated at the pretreatment facility. And so we
21 tried to find a model that matched that, and really
22 one of the conclusions that we came up with was --
23 Essentially because all of the risk is going to be
24 transferred to the Clean Water Act, in some ways the

1 model may not even be applicable. How does one model
2 risk associated with waste being treated at the
3 treatment facility? So one conclusion that we looked
4 at was that modeling maybe isn't applicable in this
5 case. But in light of the delisting requirements in
6 the guidance manual, we did employ a DRAS model
7 focused on the 5,000-gallon spill scenario so that we
8 can say that we've performed a risk assessment. And
9 in most cases we found that our parameters of
10 concern, the concentrations that we've seen were
11 below the delisting levels.

12 So the key -- I think I've touched on the
13 key DRAS inputs, the 5,000-gallon volume in terms of
14 the leachate. Because we're dealing with a liquid,
15 we assumed that we're dealing with a surface
16 impoundment scenario as opposed to a landfill, which
17 typically would receive solids. In terms of the DRAS
18 input, we assumed that the maximum concentrations
19 that we saw of the constituents of concern in the
20 leachate were entered as both the TCLP and the total
21 concentrations in our DRAS model, which we think is
22 conservative.

23 In terms of the risks, we understand, based
24 on prior petitions heard in Illinois, that the one

1 times ten minus six cancer risk was the assumption
2 that was made. We assumed that the hazard index of
3 1.0, which is consistent with the default number
4 associated with the Illinois TACO program. And we
5 assumed that the active life of the facility as one
6 year intended -- which was the shortest duration that
7 was allowed to be modeled in DRAS to match up with
8 the assumed catastrophic tanker spill.

9 In terms of the DRAS results, we ended up
10 modeling 43 constituents of concern in DRAS. The
11 constituents that were modeled in DRAS were based
12 upon those constituents that we detected during the
13 nine years of data that we had collected from the
14 leachate. We believe that the constituents that were
15 non-detect of the 200 or more total constituents that
16 we looked at, based on the nine years of data that
17 we've got, based on the fact that we've got a closed
18 landfill that's been closed for a number of years,
19 that if something didn't present itself in the
20 analytical data that we have to date that it didn't
21 warrant modeling in the DRAS model. In fact,
22 that's what we found with some later research that
23 was supported with some prior decisions on delistings
24 in Region V that we were able to locate.

1 So -- And I should point out that initially
2 in our petition we had 39 constituents of concern.
3 There were four constituents pointed out by the Board
4 in comments that we addressed prehearing indicating
5 that there were another four. We added those four to
6 our DRAS model and submitted that with the prehearing
7 testimony. So we ended up with -- Out of 43
8 constituents of concern that were modeled in DRAS, we
9 ended up with a situation where, of those 43, 39
10 constituents, the maximum concentrations that we saw
11 in the leachate, were less than the delisting levels
12 that were produced by the DRAS model. And we ended
13 up with four constituents of concern where
14 concentrations were greater than the delisting levels
15 that were -- the generic delisting levels that were
16 produced by DRAS.

17 Because of the method that we're proposing
18 to -- the box that we've drawn around the delisting,
19 we think that warranted taking a closer look at these
20 other four parameters to try to match up with the
21 actual risk of these four parameters as relative to
22 our disposal method. And in the case of -- Methylene
23 chloride and TCE were two of the parameters that
24 exceeded the DRAS generic delisting levels.

1 In taking a close look at the data, we
2 found that actually the concentrations that -- the
3 single concentrations that had exceeded the generic
4 DRAS delisting numbers were from the same sampling
5 event in 2006, I believe. And those stood out as
6 outliers. It seemed like there was something
7 atypical that was occurring with those -- with that
8 particular data point. And the other data from the
9 other eight years seemed to suggest that those were
10 outliers. As a result, what we've proposed is the
11 DRAS generic delisting level for both methylene
12 chloride and for TCE.

13 The other -- One other parameter that we
14 found with concentrations that exceeded our generic
15 DRAS delisting level was vinyl chloride. For vinyl
16 chloride, in accordance with 35 IAC 721.111, we
17 looked at the standards that need to be met in order
18 to delist a waste. And there are various criteria
19 that are laid out in those regulations. And we
20 attempted to focus on a number of those relative to
21 the vinyl chloride and the fourth of the four, which
22 I'll talk about here in just a minute.

23 But one of the criteria for vinyl chloride
24 that should be considered is other relevant

1 regulatory programs and the toxicity characteristic
2 procedure -- or the toxicity characteristic
3 evaluation that was undertaken by USEPA to develop the
4 current toxicity characteristic. Concentrations was
5 one very relative other regulatory program that we
6 think is applicable here. Based upon that, we have
7 proposed that the toxicity characteristic level for
8 vinyl chloride, 0.2 milligrams per liter, be the
9 proposed delisting level for vinyl chloride.

10 The last constituent that exceeded -- that
11 identified concentrations over the generic DRAS
12 delisting numbers was 1, 4 dioxane. And, again, using
13 that same criteria that's laid out in the regulation
14 referenced earlier, we looked at developing a
15 site-specific model relative to the scenario where
16 1, 4 dioxane does happen to spill from the tanker
17 truck. And the two primary parameters associated
18 with the transport of that specific constituent as
19 it's spilled to the environment are the infiltration
20 rate into the soil and also the environmental
21 degradation rate after it enters the environment.
22 And we presented in the petition a model that
23 documents that -- Actually, based upon those input
24 parameters, the -- the 1, 4 dioxane concentration

1 should it be released into the environment in a
2 catastrophic tanker spill actually decreased the
3 concentrations very quickly based upon the geology of
4 the area and the degradation rate of that particular
5 parameter. And that result showed that a
6 concentration of 1, 4 dioxane that's very high could
7 legitimately be a delisting level. We defaulted that
8 to a number of 100 milligrams per liter as the
9 delisting level for 1, 4 dioxane based upon this
10 model.

11 And that was the summary of the model that
12 I had intended to cover.

13 MS. SHARKEY: I have one direct.

14 BY MS. SHARKEY:

15 Q. Could you elaborate a little bit more on
16 the 1, 4 dioxane and what numbers you actually came
17 to when you did the model and explain a little bit
18 more about what modeling for the 1, 4 dioxane was,
19 what you look at specifically?

20 A. Yeah. What we looked at was we looked
21 at -- The degradation rate is the rate that it
22 degrades, and we looked at the half life, meaning
23 similar to radioactivity in the sense that it will
24 degrade -- half of it will degrade. It will take a

1 certain time for half of it to degrade. Based upon
2 the half life, the degradation will take place over
3 time. As a result of the very low permeability of
4 the local soils, the amount of time that the leachate
5 will take to percolate down to the uppermost aquifer
6 is relatively large. In that time so many half lives
7 go by -- so many half lives proceed. In fact, it
8 takes hundreds of years for the leachate to get to
9 the groundwater that by the time it reaches the
10 groundwater there is very little risk.

11 And there was an equation that was
12 presented in our petition that indicated that -- In
13 fact, the number that was supported by the equation
14 actually exceeded the one million part per million
15 number, which, of course, is physically possible.
16 And 100 was a round number, and we were racheting it
17 back to 100. We think there's very little risk in
18 the unlikely event that there's the catastrophic
19 tanker spill during the transit.

20 MS. SHARKEY: That's all I have.

21 HEARING OFFICER HALLORAN: Thank you.

22 Mr. Ingersoll?

23 MR. INGERSOLL: No questions. Thank you.

24 HEARING OFFICER HALLORAN: Ms. Liu? Mr. Rao?

1 MR. RAO: We will wait until you get to the
2 responses.

3 HEARING OFFICER HALLORAN: Thanks, Mr. Maxwell.
4 You may stay seated, I guess.

5 MS. SHARKEY: Mr. Halloran, what I'd like to do
6 at this point is if I could provide the legal -- our
7 view of what the legal framework for the delisting
8 petition in this instance is and some of the relevant
9 legal questions. Then we go to the -- After I finish
10 that, of course, if you had any questions about how
11 we interpret the regulation, we'd be happy to take
12 any questions on that as well. And then we would go
13 to the prefiled testimony in response to the Agency's
14 questions -- or the Board's questions.

15 HEARING OFFICER HALLORAN: Did you represent
16 earlier you wanted to be put under oath?

17 MS. SHARKEY: I'd be happy to do that if you'd
18 like me to.

19 HEARING OFFICER HALLORAN: It's entirely up to
20 you.

21 Mr. Ingersoll, do you have a problem with
22 that?

23 MR. INGERSOLL: No preference.

24 HEARING OFFICER HALLORAN: Please raise your

1 right hand.

2 (WHEREUPON, the witness was duly
3 sworn.)

4 MS. SHARKEY: What we wanted to do is give a
5 framework for the legal requirements here. We begin,
6 I believe, with the Illinois Administrative Code
7 720.122(a), and that actually directs us to the
8 parameters that the Board needs to look at in order
9 to make its decision. Of course, the first is that
10 the -- If you'll give me one moment. I apologize. I
11 should have pulled out the regulations.

12 721.122 is the waste delisting provision in
13 the Board's regulations. It, as I said, provides the
14 conditions under which the Board can grant the
15 petition. The first is under (a)(1), that the
16 petition must demonstrate that the waste produced
17 does not meet any of the criteria under which the
18 waste was listed as a hazardous or acute waste. The
19 second is that the Board must determine that there is
20 a reasonable basis to believe that factors, including
21 additional constituents other than those for which
22 the waste was listed, could cause the waste to be a
23 hazardous waste and that such factors do not warrant
24 retaining the waste as a hazardous waste.

1 Notably, that particular decision is --
2 There is then a reference to the EPA RCRA delisting
3 program guidance manual, and it says that a Board
4 determination of that other factors question is to be
5 looked at under the -- in reliance upon and in a
6 manner consistent with the EPA guidance manual.

7 The interesting thing about that is that --
8 I just want to point out that the guidance manual
9 is -- has been apparently adopted by the Board as --
10 and incorporated into this regulation. Although,
11 it's just an EPA guidance document. I did a little
12 research and homework on this, and I'm quite sure
13 Mr. Rao is nodding his head because he probably knows
14 the history on this as well. What's interesting is
15 that -- I'm not aware of very many instances in which
16 the Board has ever adopted a guidance manual as an
17 actual part of its regulation and decisionmaking in
18 any way by an EPA guidance manual. Nonetheless, the
19 Board appears to have done it here. And I think it
20 was a matter of something that was done back in 1993.

21 And then when the Board -- When that manual
22 was updated, the Board realized there was a problem
23 when it asked this question and was told -- the
24 record of that rulemaking indicates that the Agency

1 at that time said, "Well, we look at this, and we
2 treat it as something that we're required to look
3 at." So the Board went ahead and adopted this as a
4 part of its regulations.

5 But I point out that it is an unusual
6 situation in that it ought to cause us to look
7 carefully at this because some of what we're going to
8 be talking about, I think, as we get into the
9 discussion of the technical staff's questions is that
10 EPA itself does not treat the -- its guidance manual
11 as something rigid that they must live within. In
12 fact, they consider it -- They probably, in large
13 part, act consistently with it, and there certainly
14 are parts of it that they hold as being the Bible.
15 But there are many parts of it that, indeed, they
16 take different positions on. So I want to point out
17 that the language here is that the Board must be in
18 reliance upon and in a manner consistent with the EPA
19 manual. And that does not necessarily mean word for
20 word what the manual says.

21 Going beyond that, I think it's interesting
22 that when you have a toxic waste you go to
23 720.122(d). And for a toxic waste we have a specific
24 type of demonstration that must be made in the

1 petition. Petitioner must demonstrate, once again,
2 that the waste does not contain the constituent or
3 constituents that caused USEPA to list it as a waste.
4 Secondly, that although containing it -- If you have
5 the constituent in there, it's not a non-detect. You
6 found you have that constituent. You then have to
7 demonstrate that it -- that that constituent does not
8 cause the waste to -- Excuse me. Let me reword that.
9 Although containing one or more of the hazardous
10 constituents that caused EPA to list the waste, the
11 waste does not meet the criterion in 35 Ill. Adm.
12 Code 721.11(a)(3) when considering the factors that
13 are listed there, which are A through K under that
14 provision.

15 So what's very interesting here is if you
16 look at this there's no reference here to the
17 guidance manual anymore. The guidance manual is
18 referred to for characteristic waste. It is not
19 referred to for toxic waste. And I just want to
20 point out that I think that there appears to be some
21 intention here because the guidance manual is
22 referenced in some places and not others.

23 In lieu of the guidance manual, in fact,
24 what we do with the toxic wastes is we go to 721.111

1 and we look at those specific criteria. I think
2 there's a tendency in the delisting process for
3 everyone to get wrapped up in this EPA guidance
4 manual and the modeling and the procedures and forget
5 that the actual regulation itself prescribes the
6 criteria. The DRAS modeling and the manual are one
7 way to get there. They're one way to, in fact,
8 address some of those provisions that are in 721.111.

9 But I want -- I think it's worth going
10 through and just focusing on the fact that if you
11 have a toxic waste it's after considering the
12 following factors, USEPA concludes that the waste is
13 capable of posing a substantial present or potential
14 hazard to human health or the environment. So there
15 has to be -- That's the ultimate determination. It's
16 a criterion actually interestingly, not criteria.
17 There are not many criteria. There's a single
18 criterion. It must meet that standard after
19 considering a number of factors.

20 So what we want to point out is that --
21 What's interesting -- and I believe this is the
22 correct interpretation -- is that toxicity,
23 concentration, potential of the constituent to
24 degrade, to migrate, persistence, bioaccumulation,

1 plausible types of improper mismanagement, quantity
2 of the waste generated, nature and severity of the
3 health and environment impacts that have been seen
4 with improper management, and then actions taken by
5 other agencies or regulatory programs based on health
6 or environmental hazard. And then such other factors
7 as may be appropriate.

8 So all of those are really the factors to
9 be considered for a toxic waste to determine if it
10 can be listed in the first instance -- that's what
11 EPA considered when they were listing it -- and if it
12 can be delisted in this instance. And we just wanted
13 to go back through that because we think this is
14 something that we will see as we go through some of
15 the questions. And we want to make sure that our
16 understanding of this and our reading of this is not
17 inconsistent with what the Board's interpretation is.
18 And if there is another interpretation that we should
19 be addressing, we would very much like to have the
20 Board direct us to how they view these regulations.
21 I don't mean to put the technical staff on the spot
22 with this, but I just wanted to point out how we are
23 looking at it and make sure that's a part of the
24 record as we're going. And I think it's helpful as

1 we're going forward with this.

2 For right now, that's all of the overview
3 that I wanted to give on the legal. I would be open
4 to any questions.

5 HEARING OFFICER HALLORAN: Mr. Ingersoll, any
6 questions?

7 MR. INGERSOLL: Nothing. Thank you.

8 MR. RADO: I have just a question. Since
9 Ms. Sharkey gave very interesting testimony, I
10 thought I could ask her, you know, some questions to
11 shed more light.

12 As you know, Ms. Sharkey, one of the things
13 with the Board's RCRA regulations are their identical
14 and substance rules. Whenever we deal with some of
15 these adjusted standards, either delisting or other
16 RCRA delisting standards, we try to be as consistent
17 as possible with what USEPA does because that's what
18 these rules are about, trying to be consistent with
19 the federal actions. In delistings, I think in some
20 of the prior decisions the Board has looked to US
21 EPA's decisions on individual delistings.

22 Having said that, could you comment on
23 whether you think what you proposed is consistent
24 with some of the recent decisions that the USEPA has

1 issued, specifically Shell Oil that you cited in your
2 prefiled testimony?

3 MS. SHARKEY: Yes. I would be happy to.

4 And I guess I'd like to separate for a
5 moment that the Board adopted the delisting
6 regulations almost completely in -- They adopted them
7 in an identical and substance rulemaking, and they
8 are almost word for word what the federal regulations
9 are except for this reference to this guidance
10 manual. So that is -- That, frankly, is a step that
11 took the Board beyond an identical and substance
12 rulemaking, and it's my legal opinion it's actually
13 challengeable that that type of change could have
14 been made in the identical and substance rulemaking.
15 Nobody challenged it, I have to say, in part, because
16 they were doing an identical and substance rulemaking
17 and there was no lengthy first notice, second notice,
18 comment period, and public participation in that
19 proceeding. However -- So let's put to the side the
20 question of whether or not that guidance manual is,
21 in fact, mandatory in some fashion here in Illinois.

22 If the question is do we believe -- does
23 BFI and do the people who are representing BFI here
24 today believe that it is relevant what USEPA is doing

1 in their delistings, I think by virtue of the fact --
2 It's my legal opinion by virtue of the fact that it's
3 the same language except for this manual being
4 incorporated. I think it's very relevant what USEPA
5 has done in many of its delisting. We have gone
6 through and taken a hard look at a number of
7 delistings that we thought potentially relevant. We
8 were looking for ones that involved wastewaters. We
9 were looking for ones that involved FO39. There are
10 very few out there. But we've highlighted the Shell
11 Oil Company case because that's out of a Texas -- a
12 facility in Texas. The reason we've highlighted that
13 one is because it is an FO39 delisting case. We
14 think there are a large number of elements of that
15 case that are very pertinent here. And we'll talk
16 about them in greater depth when we talk about the
17 questions that have been posed.

18 But, for example, just to say -- For
19 example, we think the testing regimen for verifying
20 the nature of the constituents in the waste and the
21 concentrations that the -- what you have is a number
22 of multi-year delistings by the federal government --
23 and we'll be happy to go through in greater depth
24 with you -- that have looked at -- multi-year

1 delistings where they are looking at land application
2 even. And they have not required load-by-load
3 testing. They've required verification testing that,
4 indeed, looks very much like the program that we've
5 proposed. That is more intensive initial testing of
6 the material and then quarterly testing. And then
7 ultimately most of those go to annual testing. We've
8 only proposed going to semi-annual testing. We think
9 our testing regimen is more conservative than what
10 USEPA is proposing for even higher risk types of
11 disposal scenarios. So I think they are very
12 relevant.

13 We are -- Our plan, by the way, would be to
14 follow up in greater depth on some of those providing
15 the Board with those decisions and giving you more
16 indepth on that following this hearing in writing.

17 MR. RAO: That would be very helpful.

18 HEARING OFFICER HALLORAN: Mr. Ingersoll?

19 MR. INGERSOLL: Nothing. Thank you.

20 HEARING OFFICER HALLORAN: Do you want to take a
21 ten-minute break?

22 We're off the record.

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

1 HEARING OFFICER HALLORAN: We're back on the
2 record after a short break.

3 Ms. Sharkey, you may proceed.

4 MS. SHARKEY: Thank you.

5 At this point we'd be prepared to turn to
6 the questions that were raised by the technical
7 staff. Would you prefer to go to the Agency
8 questions -- questions for the Agency? Because I
9 have a question for the Agency, but I can put that
10 after.

11 HEARING OFFICER HALLORAN: Let's put that
12 after.

13 MS. SHARKEY: Okay. What we would like to do
14 is, for the record, go through the eight questions
15 that the Board's technical staff posed to us through
16 a hearing officer order. We filed prefiled testimony
17 responding to those questions. What we would propose
18 to do is to simply read each question, go through --
19 in as brief a manner as possible provide a synopsis
20 of the -- our prefiled testimony answering those
21 questions, and then be prepared to answer any other
22 questions on those particular points that either the
23 Board or the Agency may have for us.

24 With that -- Also, we're going to divide --

1 The panel here will be prepared to answer questions.
2 By the panel, I mean Mr. Maxwell, Ms. Steinhour, and
3 myself will be prepared to answer any questions.
4 However, in terms of presenting the answers, we're
5 going to be dividing them between myself and
6 Mr. Maxwell.

7 The first question is one I'm going to
8 take. The question was posed regarding monitoring
9 frequency. The question was, "Please elaborate on
10 the adequacy of quarterly and semi-annual leachate
11 monitoring to demonstrate that each batch of leachate
12 meets the proposed delisting levels."

13 What we've proposed in the adjusted
14 standard language is the following. The first three
15 consecutive loads of leachate after approval of this
16 delisting petition will be tested for compliance with
17 the delisting levels, so the first three loads.
18 Thereafter, there would be quarterly sampling and
19 analysis for the first year. Following that there
20 would be semiannual sampling and analysis every year.
21 We believe this is consistent and even more stringent
22 than the monitoring frequency that USEPA has required
23 in other multi-year delistings, as I mentioned
24 earlier.

1 For example in Shell Oil, in that case,
2 which we have provided in our -- We've provided the
3 post rule and final rule for the Shell Oil delisting
4 in our prefiled testimony. In that case, USEPA
5 required eight samples to be taken within the first
6 60 following the delisting. After that Shell was to
7 sample quarterly and thereafter annually.

8 In another case -- Excuse me for just a
9 moment. In another case on a delisting case on
10 behalf of Auto Alliance International, EPA provided
11 simply for quarterly sampling and then went to an
12 annual verification sampling.

13 In another case, this one involved the
14 Hanford Nuclear Site in Washington, the applicant for
15 the delisting was the Department of Energy. They
16 provided that DOE was to submit a plan. And they, in
17 that instance, were sampling every 15th tank from the
18 site. So it, again -- By the way, that was a land
19 disposal scenario, I believe.

20 Nissan, a case that the Board had
21 referenced -- had questions referenced, involved
22 one -- I believe it involved one initial test within
23 60 days and annual testing thereafter.

24 Tenneco is another one, T-e-n-n-e-c-o.

1 Just a one-time notification. I don't believe they
2 had any verification sampling.

3 Eastman Case, delisting quarterly for one
4 year. Subsequently annual.

5 And Shaparel is another one we looked at,
6 eight full-scale treated batches and then annual.

7 So all of these delistings, I should say,
8 except for Tenneco, were waste streams that were
9 being generated by an ongoing process. And I think
10 it's significant because an ongoing process or an
11 ongoing activity, of course, could change. So
12 consistency of that waste stream would be a real
13 question. Of course, we argue that's not the case
14 here, that we, in fact, have a very consistent waste
15 stream and that we know what it is.

16 I guess I also wanted to say that in the
17 Waste Management case, the petition before the Board,
18 in that case they had proposed to delist a filter
19 cake. But it was a filter cake that was being
20 generated on an ongoing basis. It was not a closed
21 situation such as we're suggesting here. And in that
22 one the Board noted particularly that it was the fact
23 that the future waste could be variable that was of
24 concern and why there was a discussion of actually

1 testing every load and every batch. So we contrast
2 the BFI waste as very unchanging. The landfill's
3 been closed for 20 years. As you've heard, it has a
4 low permeability cap. We have nine years of
5 monitoring data showing very little variability in
6 it.

7 Another distinguishing factor is BFI's
8 large amount of analytical data and the lengthy
9 period over which it was obtained. I think that
10 gives, again, the specific chemicals that are there
11 over this period of time. The range of
12 concentrations are not -- We believe we have enough
13 data here -- And Mr. Maxwell can testify to this in
14 more depth. We have more data than others have, and
15 we think it's enough to demonstrate the stability and
16 the lack of significant variability of this waste.

17 In contrast, BP Amoco, when they presented
18 the Board with a petition, came in with just three
19 sampling events that were taken over a six-month
20 period. In Shell Oil, which is another example
21 before USEPA, they had four monitoring events
22 performed over a period of approximately three
23 months.

24 I think the Board also asked about

1 whether -- the question of whether this is a batch
2 operation and looking at some of the particular
3 language that USEPA in its manual has about multiple
4 batch operations. And our answer to this is this is
5 not a batch operation at all. This is a single
6 source, a continual source, that is generating
7 leachate. It's the landfill. And it's not in any
8 way -- The fact that we are taking it out in
9 5,000-gallon batches does not convert this to being a
10 batch source.

11 To close on this, we think that monitoring
12 every batch would be extraordinarily expensive. It
13 would be extraordinarily onerous. It would effect --
14 probably would put us at a question mark of about
15 whether or not it's worth doing this kind of thing if
16 you're talking about having to sample every single
17 load of this waste as it goes out. We think that it
18 hasn't been required elsewhere, that it goes beyond
19 even what the manual itself requires because the
20 manual looks at that from multi-batch scenarios. All
21 of the above delistings that I mentioned, with the
22 exception of Tenneco, I believe were multi-year,
23 ongoing source scenarios. So all of those, and still
24 USEPA has not required that level of sampling. So we

1 think it's unwarranted.

2 With that, we'd be happy to answer any
3 questions on the sampling regime we've proposed.

4 HEARING OFFICER HALLORAN: Mr. Ingersoll, any
5 questions?

6 MR. INGERSOLL: No. Thank you.

7 HEARING OFFICER HALLORAN: Mr. Rao? Ms. Liu?

8 MR. RAO: Yeah. We have some follow-ups on it.

9 MS. LIU: Thank you for that synopsis of what
10 you put in your prefiled testimony. I do have a
11 question, and it's a little wordy. I apologize.

12 On page 2 of BFI's prefiled testimony in
13 response to this question about monitoring frequency
14 BFI states that, "BFI's proposed sampling frequency
15 is consistent with that required by USEPA in its 2005
16 multi-year delisting of the FO39 leachate for Shell
17 Oil Company." BFI goes on to state that, "Shell's
18 leachate was derived from an active landfilling
19 operation and subject to more variation than leachate
20 from BFI's closed landfill."

21 It appears that Shell Oil's waste exclusion
22 includes a section stating quote, "If Shell Oil's
23 company significantly changes the process described
24 in its petition or starts any process use that

1 generates the waste that may or could significantly
2 affect the composition or type of waste generated as
3 established, it must notify EPA in writing, it may no
4 longer handle the waste generated from the new
5 process as nonhazardous until the wastes meet the
6 delisting levels, and it has received written
7 approval to do so from EPA." The citation is
8 70 Fed. Reg. 49, 192. This provision implies that
9 Shell Oil's leachate is derived from a relatively
10 consistent source and any process changes affecting
11 the leachate quality need to be reevaluated and
12 reapproved by USEPA.

13 The question now is, would you please
14 comment on whether BFI is aware of any other
15 delistings where USEPA has allowed monitoring
16 frequency as proposed here for an F039 leachate from
17 a landfill that had accepted many different types of
18 hazardous waste over a period of time for which the
19 waste types, including raw materials, are not fully
20 documented? If can't provide that obviously today,
21 in a post-hearing comment that would be wonderful.

22 MS. SHARKEY: Can I have one moment?

23 MS. LIU: Sure.

24 (WHEREUPON, there was a short

1 interruption.)

2 MS. SHARKEY: Yes. Thank you. We have a couple
3 of responses.

4 I think the first and simplest response is
5 we have looked for another delisting that looks --
6 that is doing the same thing that we are proposing to
7 do here. And we will say to you, no, we haven't seen
8 that. With the exception, I would suppose, of
9 being -- If you talk about a multi-source type of
10 leachate, if you were looking at your Waste
11 Management proposal, of course, that was a filter
12 cake that was derived from a multi-source scenario.
13 But, again, that was not a closed landfill scenario
14 or a closed facility. It was an ongoing process. I
15 can tell you that we have absolutely looked for
16 delistings that have involved FO39 from a closed
17 landfill that accepted multiple waste streams and
18 haven't found them.

19 But let me say to you this as well. The
20 only reason -- Keep in mind the only reason that this
21 landfill is deemed hazardous and that this leachate
22 then is deemed hazardous is because the -- because
23 2 percent of the waste was hazardous. There is an
24 excellent record of what all of that waste is. So if

1 we're talking about some of these on-site landfill
2 scenarios where they have -- And some of these that
3 I've just mentioned previously are, indeed, on-site
4 leachate scenarios with ongoing -- generally ongoing
5 activities. They have -- They know what their wastes
6 are. That, as you were saying in the case of Shell,
7 may give some comfort of the consistency of that
8 waste stream.

9 Here in this instance we actually know real
10 well what the wastes were. There was a limited
11 period of time. The records were kept under the RCRA
12 program pursuant to the permit. We've put those
13 records -- One of the reasons your second volume, I
14 believe, is as big as it is -- the binder that we've
15 provided, is because it's filled with the records of
16 that material, and the types of materials are well
17 known. If we had been limited to only looking at the
18 types of -- If we weren't looking at FO39, we might
19 have argued -- but for the fact that this went into a
20 landfill that also had other wastes in it, we would
21 have only be looking at a limited category of
22 materials that had gone in there. I think that --
23 Although we haven't seen any others, I think you can
24 take -- the Board should take some comfort in the

1 situation that we know what those waste streams are.

2 Again, we think -- We think we've got
3 greater data -- volume of data and greater controls
4 in this situation. And, of course, because it's
5 being destined for pretreatment, all of those things
6 go into giving greater comfort than the ones that
7 you've -- that USEPA has looked at where they're
8 ongoing operations. They're talking about land
9 disposal, and they don't have the kinds of very
10 limited -- They're not going to be pretreated.

11 And I guess this is the moment where I can
12 get this point as well. I want to make it clear that
13 this material's not only going to be pretreated at a
14 pretreatment plant at IPC, it will then go to POTW
15 where it will be treated again. So it's going to get
16 double treatment as opposed to those others that are
17 land disposal.

18 MS. STEINHOOR: I think it's important to note,
19 if you look at all the delisting petitions, we
20 couldn't find a delisting petition that had as much
21 data covering as many years with the seasonal
22 variations. That data was actually collected, and we
23 have collected it over this nine-year period. In
24 these other instances, the source of that

1 nonhazardous -- that hazardous waste source was going
2 to remain present by placing it in a land
3 impoundment. With us, the source is actually being
4 treated, doubly treated, and then they're going to
5 discharge it under the Clean Water Act program. So
6 this isn't an instance where we're delisting it,
7 placing it in a lined pond or a lined landfill, and
8 leaving it there with the potential hazard for some
9 future event.

10 MS. SHARKEY: I think part of that is to say, if
11 there were some slight variability to occur, the
12 comfort you get here is that it's going to be
13 treated, you know. In the other scenarios, it's not.
14 It's just going to be there. It's going to go into
15 the ground. So if they have that variability
16 problem, it has serious consequences. Here the only
17 scenario would be some variability that would be --
18 affects somehow the analysis done on that worst-case
19 mismanagement scenario of the catastrophic spill.
20 But other than that, it's going to a treatment --
21 And, by the way, we're going to provide you with
22 evidence, for the record, on the fact that the
23 catastrophic spill -- there's no experience of having
24 that kind of spill by BFI in this region and by the

1 hauler that they use.

2 MR. RAO: I have a question relating to what you
3 were just talking about, variability in leachate
4 quality. You have testified that BFI has submitted
5 extensive leachate monitoring data to the Board, nine
6 years worth of data. Also, earlier Mr. Maxwell
7 testified about, I think, four chemical constituents
8 which you found were about at delisting levels, which
9 I think some of them you indicated were outliers.

10 So did you do statistical analysis of this
11 monitoring data to see what kind of variability's
12 there were with the leachate quality and how that may
13 affect compliance with the delisting levels?

14 MR. MAXWELL: We have not.

15 MR. RAO: How did you determine those values for
16 outliers? Was it based on a statistical analysis, or
17 was it more about observing the data?

18 MR. MAXWELL: Primarily observing the data
19 relative to the other data points that were out there
20 and the fact that they both -- the higher
21 concentrations both occurred during the same sampling
22 events was the trigger for us thinking that there was
23 something atypical or unusual about that particular
24 sampling event.

1 MR. RAO: Would it be possible to?

2 MR. MAXWELL: It's possible.

3 MS. SHARKEY: We can give you a fuller answer to
4 that in our written remarks because we'd need to go
5 back -- I think Mike would need to go back and look.
6 But what I'm believing is, at the time that we looked
7 at it, there were other constituents that were
8 also -- while they didn't exceed anything, that were
9 also higher in that event, which led us to believe
10 that there's something going on with that event, not
11 just these two constituents.

12 MR. RAO: Yeah. Any additional information
13 relating to the variability of data would be helpful.
14 We were hoping that if you had any statistical
15 analysis that would also support your monitoring
16 frequency, that, you know, the analysis shows that
17 the radiations are not significant for any concern in
18 terms of going over the delisting levels.

19 MR. MAXWELL: So the focus that you would have
20 would be -- or the focus that you would suggest would
21 be that we focus on the phase I -- the statistical
22 analysis of the phase I data to try to represent
23 variability within that data?

24 MR. RAO: Yes.

1 MR. MAXWELL: Okay.

2 MR. RAO: That's all we have on the monitoring
3 frequency.

4 MS. SHARKEY: We'd move then -- If there are no
5 further questions on that, we would move to number
6 two, which was a question regarding one-time
7 delistings versus multi-year delistings. That
8 question was as follows. "Explain BFI's rationale
9 for not utilizing the multi-year approach to derive
10 the delisting levels using the multi-year values of
11 500,000 gallons per year versus" -- excuse me --
12 "5,000 gallons per year and seven-year" -- "a
13 seven-year anticipated closure period." And I'm
14 going to take the answer to this one.

15 BFI's delisting petition seeks a
16 conditional delisting as defined in the United States
17 Environmental Protection Agency's National Policy for
18 Hazardous Waste Delistings, which was issued by
19 Elizabeth A. Cotsworth, C-o-t-s-w-o-r-t-h, who at the
20 time was acting director of the Office of Solid
21 Waste. This is a July 1998 document. We've provided
22 a copy with our prefiled testimony.

23 The restrictions here do not allow for any
24 amount of leachate to be directly deposited on the

1 land in either a landfill or a surface impoundment,
2 as we've said now probably over and over again. But,
3 in contrast, the majority of EPA's delistings that
4 we've reviewed are land disposal. And I want to take
5 and walk through this. This is by way of getting to
6 the answer to your question, but to point out that
7 land disposal is the focus of almost all of these.

8 The Automotive International Alliance --
9 Automotive Alliance International, that one was a
10 delisting of a sludge filter cake that was going to a
11 Subtitle D lined landfill. The Shell was -- We
12 believe that the Shell case involved going to an
13 on-site facility that we believe was a land-based
14 facility. It's difficult to tell from -- if it was
15 going to a land-based, on-site treatment system. It
16 was going to on-site treatment. Okay. So that one
17 was not a landfill.

18 The Department of Energy was going to a
19 state land disposal situation. That's the Hanford
20 case. Nissan was going to a Subtitle D landfill.
21 Tenneco to a Subtitle D landfill. Eastman to a
22 Subtitle D landfill. Shaparel to either an on-site
23 land disposal or a municipal industrial solid waste
24 landfill. And another one we found was a USG case

1 going to a Subtitle D solid waste landfill. We will
2 provide you, by the way, with the Federal Registers
3 on all these USEPA delistings.

4 MS. STEINHOOR: I think it's important to note,
5 too, that in the Shell situation they were
6 discharging directly to a stream. They weren't going
7 to -- like we have, to a pretreatment facility, then
8 to another facility that's going to pretreat it,
9 before it's disposed and discharged under an NPDES
10 firm.

11 MS. SHARKEY: So rather than modeling, those
12 folks did, indeed, I think -- It's unclear. It's
13 very difficult --

14 I shouldn't tell you this. I don't know if
15 you've tried to do this yourselves. But it's very
16 difficult to get the underlying petitions. What you
17 can get -- What's publically available information,
18 easy to get hold of, are the Federal Registers in
19 which these delistings have been adopted. What's
20 more difficult is to actually get the petition behind
21 them. And we actually did get the petition behind
22 the Shell case. I have to say it was a Freedom of
23 Information Act request. It took us -- It probably
24 took six months to get an answer from USEPA, and it

1 was missing a key page once we got it. As a result,
2 the amount of information you have on these is
3 somewhat limited.

4 As you know, the facts involved are really,
5 really critical, we think, to the kind of
6 determination that's made in each of these cases.
7 But what we -- The information I've given you we were
8 able to derive from the Federal Registers. What
9 they've each done is they've -- We believe they have
10 modeled -- they've modeled one year of leachate in
11 their DRAS modeling, we believe -- or leachate waste
12 stream. What we've done here is not done that, and
13 we've not done it because we're not going to a land
14 disposal unit. What we've done here is modeled what
15 we considered to be the reasonable worst-case
16 mismanagement scenario. We think that's consistent
17 with -- as we've said, with the Illinois
18 Administrative Code, Section 720.111(a)(3). I
19 believe it's (j). The one that talks about the
20 implausible -- the plausible mismanagement scenarios
21 and that that's the risk you're looking at.

22 In this case, of course -- We think this is
23 conservative. To be honest with you, I think that
24 we've been -- Some have suggested to us, "Why have

1 you gone this far? Why haven't you simply said it's
2 going to a pretreatment facility? Why are you
3 modeling at all?" And the answer to this is because
4 we believed that the Board would like to see this
5 type of modeling, and it has required it in other
6 scenarios. But, indeed, we would point out that most
7 of those other scenarios were not as limited as this.
8 By virtue of limiting this, we've now got the only
9 scenario in which there could be land application,
10 which is what you would be looking at with putting
11 all of that material in one place.

12 The only scenario is this catastrophic
13 5,000-gallon spill, and -- So we think it's
14 conservative under the document that we've given you.
15 But we also think it's just -- you know, that the
16 common sense behind this is -- should be evident.
17 There is no practical possibility that more than one
18 tanker truck of leachate would be involved in a
19 catastrophic accident at the same location. We think
20 that there's -- We're talking about some multiples of
21 the 5,000-gallon tanker truck. We think that's
22 really pretty implausible. Moreover, there's clearly
23 no possibility that all of the tanker trucks
24 dispatched over an anticipated seven-year period

1 would be involved in catastrophic accidents. I'm
2 sorry. I kind of like this. Even the more
3 farfetched is that there would be a scenario where
4 all of these tanker trucks would be involved in an
5 incident -- catastrophic accidents at the same
6 location. And that's what you'd have to do to get to
7 the scenarios that people are looking at when they
8 look at land disposal and they talk about modeling
9 all of the material generated because they have to
10 because they're going into a land disposal scenario
11 where all of that material actually could leach down
12 into the groundwater into the ground. Here there is
13 no possibility of that.

14 So we think we've really done the
15 worst-case scenario. And I want to point out that
16 it's consistent with -- This is consistent with the
17 way that USEPA has approached coming up with the most
18 serious -- In the Federal OPA act, the Oil Pollution
19 Control Act --

20 MS. STEINHOOR: The Oil Pollution -- The Oil
21 Pollution Act. And it's a spill prevention control
22 countermeasures program, the worst-case discharge
23 scenario.

24 MS. SHARKEY: This can be found -- I've found

1 my notes. It can be found at 40 CFR 112, Appendix D.
2 They have an appendix there that is entitled
3 Determining Worst-Case Discharge Planning Volumes for
4 Purposes of Spill Prevention, Control, and
5 Countermeasure Plan under the Federal Oil Pollution
6 Prevention Regulations. So they have said one tanker
7 truck is the correct volume to look at.

8 MS. STEINHOOR: And it's important to note that
9 when they developed this worst-case discharge they
10 were concerned about a tanker truck that was actually
11 going to spill and run into a water of the US. So
12 there would be some potential for transporting that
13 spill across a large area other than just the ground.

14 MS. SHARKEY: And I think this is a very
15 important point because at this point we recognize
16 that the DRAS model has -- you know, generally says,
17 you know, put in a whole year's worth of your waste
18 stream and model that. But this is where we come
19 back to the DRAS is one tool. It doesn't fit this
20 situation very well. It really was a pretreatment
21 and treatment situation. Therefore, it's
22 inappropriate to use that one-year volume in it.

23 And we looked to and we provided you with
24 that 1998 policy guidance because we think that it

1 explains that USEPA is well aware that conditional
2 listings can provide safeguards and that an agency,
3 like the Board, that is charged with doing these
4 delistings can use its professional judgment to make
5 decisions where that model and where the DRAS manual
6 doesn't fit precisely. And, again, we go to the 1998
7 policy memo where they've said, "The Agency
8 realizes" -- This is quote. "The Agency realizes
9 that for a relatively small number of petition wastes
10 that are not or will not be managed under a scenario
11 our generic delisting models can assess regions" --
12 in this case it would be the Board -- "may have to
13 consider site specific circumstances or consider
14 adding specific conditions on a case-by-case basis."
15 And this is, of course, in their policy guidance on
16 conditional delistings.

17 So, again, under the unconditional
18 delistings, the Agency loses control. The Board
19 loses control. USEPA loses control of the waste
20 stream. It's out of the system. Nobody -- It's
21 considered nonhazardous and nobody cares about it
22 anymore. In many states that don't have the special
23 waste manifesting like Illinois does. The material
24 might not even be tracked at all. The opposite is

1 true where you have a conditional delisting. And,
2 again -- I won't go over it again and again.

3 The conservative assumptions that EPA has
4 made in its DRAS model and including -- assuming that
5 all of the waste generated will be disposed of in one
6 unlined landfill don't need to be made. You don't
7 need to have 100 percent assurance in this situation
8 from that because you are getting assurance from the
9 conditional delisting itself. And we've put more on
10 this in the record in our prefiled testimony.

11 But I would like to take you back to the
12 Board's own response to Waste Management in an
13 opinion in AS 05-07 where the Board found that Waste
14 Management had proposed to use a model that was for a
15 lined landfill instead of for an unlined landfill.
16 The Board said, you know, "That's inconsistent with
17 USEPA policy. You really can't do this." But they
18 said, "What you can do is come back to us and tell us
19 why you can do this" -- "or why it is consistent."
20 And I'm going to quote here. I'll take the quote.
21 "While having no bearing on risk and hazard analysis,
22 Waste Management, Inc., may also propose adjusted
23 standard language that would condition the delisting
24 on the disposal of the petitioned waste. For

1 example, only in a lined landfill."

2 So here was an instance -- We point this
3 out because this is an instance of the Board itself
4 saying -- recognizing that even if -- even if your
5 modeling is different, if you're going to model for a
6 different scenario, you need to limit your adjusted
7 standard to that scenario. And so that's what we've
8 done. We think that it's very consistent with what
9 the Board said in Waste Management.

10 I don't want to be repetitive. I guess I
11 would just close by saying that we think this is an
12 instance in which the use of the total volume of the
13 material here does not comport with the -- with any
14 reality involved with this situation. There's no
15 common sense scenario that would result in the total
16 volume being released to the environment. Apart from
17 that, the EPA has allowed this kind of thing.
18 There's latitude under the EPA policy documents for
19 fashioning in a conditioned, adjusted standard here
20 that would address the concerns.

21 I think I will leave it at that. I'll be
22 happy to answer any questions.

23 HEARING OFFICER HALLORAN: Mr. Ingersoll?

24 MR. INGERSOLL: No.

1 HEARING OFFICER HALLORAN: Mr. Rao? Ms. Liu?

2 MS. LIU: Can I have a moment to confer?

3 HEARING OFFICER HALLORAN: Sure.

4 (WHEREUPON, there was a short
5 interruption.)

6 MR. RAO: I just had a follow-up. This is more
7 related to what you testified earlier about getting
8 information from Shell Oil.

9 Just reviewing the Shell Oil decision that
10 you had attached to the prefiled answers, it seemed
11 like they used one year's worth of leachate that they
12 generated. It seems like they used that -- At least
13 they say they used the maximum volume. So in the
14 information you got from them -- Because it's hard to
15 tell from the Federal Register that they used. So I
16 just wanted to know did you get that information from
17 them as to what volumes or how they modeled?

18 MS. SHARKEY: I'm smiling because last night I
19 asked my colleague at my law firm to look into that
20 very question because we were asking ourselves -- We
21 know what the volume was they talked about, but we
22 don't know what they used in their model. We know
23 what their annual production was. We're not sure
24 what they used in their model. I don't think -- We'd

1 be happy to provide you with the portion of that --
2 of the application from Shell that talks about that,
3 if that would be helpful. But we believe -- I'm
4 getting the nod that we believe that the amount used
5 was their annual volume

6 MR. RAO: Okay. In going through the additional
7 information you got from Shell, were you able to
8 discern why they did maximum volume over -- I don't
9 know how many years they modeled. When I was looking
10 at it, it seemed like their situation was similar to
11 BFI's except they were hardpiping their leachate to
12 the on-site treatment plant instead of shipping it
13 out. But the modeling for -- If you can answer that.
14 If have you any comments to make on that, it would be
15 helpful to distinguish their situation from BFI's.
16 If not now, in comments that's fine, too.

17 MS. SHARKEY: I would like to make a note of
18 that and get back to you in writing with an answer on
19 that question.

20 MR. RAO: That would be helpful.

21 MS. SHARKEY: Thank you.

22 MR. RAO: That is just a clarification question
23 I had based on your response.

24 On page 5 of your prefiled answers and

1 looking at footnote 2, this footnote states that --
2 as follows. "Like RCRA treatment regulations, the
3 Clean Water Act provides regulatory assurance that
4 the leachate in this case will be treated to
5 nonhazardous levels at the wastewater treatment
6 facility before discharge to environment. Therefore,
7 there is no risk associated with the disposal of the
8 entire multi-year volume of leachate."

9 Could you please explain what the phrase
10 "treated to nonhazardous level" means in the context
11 of this proposed standard?

12 MS. SHARKEY: We're talking at the treatment
13 plant?

14 MR. RAO: Yes.

15 MS. SHARKEY: Well, we believe that the
16 treatment process at IPC and then the subsequent
17 treatment process at the POTW will assure compliance
18 with the Clean Water Act standards. Therefore,
19 they're going to be treated to a level of treatment
20 that is equivalent -- that would be at a nonhazardous
21 level.

22 MR. RAO: When you say that it would be
23 treated -- the leachate would be treated to
24 nonhazardous levels at the treatment plant, will they

1 be specifically focusing on all the constituents that
2 are listed in Table A of the proposed language or
3 whatever the applicable water quality standards are
4 specified in their NPDS permit?

5 MS. SHARKEY: I think it's certainly the latter.
6 They're going to be treating this waste stream, as
7 they do every waste stream, for the constituents that
8 are -- I want to say that are trigger constituents,
9 that are constituents that are deemed to allow them
10 to -- If they treat for this particular constituent,
11 they are assumed to be treating for others. I
12 believe that that's the way they work. I probably
13 should defer to Mr. Maxwell to answer this question.

14 MR. MAXWELL: Indicator parameters. They would
15 be indicators of an overall issue.

16 MR. RAO: Okay.

17 MS. LIU: You mentioned earlier, I think, that
18 the leachate from the other two phases goes to IPC
19 already --

20 MS. SHARKEY: Correct.

21 MS. LIU: -- and that there was no statistical
22 difference really that you found between the
23 constituents and their concentrations and the
24 leachate in the other two phases, and so far IPC

1 hasn't shown any concerns with the type of discharge
2 they're getting from their treatment process; is that
3 correct?

4 MR. MAXWELL: That's correct, yes.

5 MS. SHARKEY: I just want to make it clear, and
6 I think your question was going there.

7 The kind of treatment that they'll be
8 getting there will be -- There will be some testing
9 to ensure that this material can be handled. And we
10 actually have obtained -- through a Freedom of
11 Information Act request to Illinois EPA have obtained
12 files on IPC and what their treatment process is. We
13 wanted to see the entire thing. And we have looked
14 at what the treatment process is. It does involve
15 pretesting of the materials that come in, and it does
16 involve then several levels of chemical treatment
17 that I believe our technical people -- and I probably
18 ought to ask Beth and Mike to answer this. But we
19 believe maybe -- it's as good as or better than
20 actually the treatment that the same material -- that
21 the hazardous material right now is receiving was
22 receiving at CID at its facility.

23 MR. MAXWELL: I would agree with that.

24 MS. STEINHOOR: And these facilities -- This

1 isn't the only wastewater that they treat. Like you
2 say, they're accepting wastewater from the
3 nonhazardous units. They're accepting wastewater
4 from other industrial facilities, as well as what
5 they're receiving from the local communities. So,
6 you know, what we found is whenever we're asking
7 wastewater treatment facilities to accept
8 nonhazardous waste leachate they look at the
9 leachate. They look at their pretreatment program
10 because this is data that they have to provide to the
11 Illinois EPA in order to have an approved
12 pretreatment program. So they're very cognizant of
13 what they can accept, what they can treat, and how
14 that impacts their destruction of it.

15 In this case, you not only have one entity
16 besides BFI that's going to be looking at the
17 leachate, you're going to have the second entity,
18 which is the Rock River Reclamation District. So
19 through the line, unlike Shell who has one
20 pretreatment and then the discharge, ours is going to
21 an independent entity that's going to be looking at
22 it and then to a second independent entity that will
23 be looking at what they're receiving.

24 MS. SHARKEY: Mr. Halloran, I wonder if it would

1 be appropriate at this point -- I know this will, to
2 some extent, interfere with our -- the way we're
3 proceeding. But, as you know, BFI met with Illinois
4 EPA to discuss the adjusted standard over many years.
5 In addition, we met with them after they filed their
6 original recommendation, which was for denial of this
7 adjusted standard. After that meeting and further
8 discussion, the Agency changed its position and filed
9 a recommendation with no objection to this adjusted
10 standard. You'll notice that some of what went in
11 there in the change -- And we filed with our response
12 to that document an amended petition that included
13 the language that it shall have an improved -- USEPA
14 approved pretreatment program at the facility that
15 it's going to.

16 My question here is whether or not it would
17 be useful to have Illinois EPA's perspective on the
18 pretreatment program at this point in the record or
19 if we just want to save that for later? I don't want
20 to speak for the Agency, but I believe the
21 Agency's -- part of the Agency's change in their
22 position was, indeed, based on the fact that they are
23 satisfied that the pretreatment program would address
24 any issue that -- any constituents in that waste

1 stream.

2 HEARING OFFICER HALLORAN: Mr. Ingersoll, do you
3 have any preference on whether you want to call
4 Mr. Crites now or later?

5 MR. INGERSOLL: I have no preference. If we are
6 going to put him on, I want to have a short break
7 before we do so. And I would like to ask one
8 question.

9 Has BFI gone through a waste acceptance
10 process with IPC yet on this waste stream?

11 MS. SHARKEY: I don't think that we have gone
12 through -- that we have gone through them formally
13 with this particular waste stream, no.

14 MR. INGERSOLL: You have looked at what their
15 acceptance protocols are?

16 MS. SHARKEY: They have seen the data. I'm
17 being told by the BFI principals here that they have
18 shared their data from this particular unit, which is
19 called the phase 1 unit, with the IPC personnel. And
20 they, of course, know very well the data from the
21 other units that are exposing their leachate there on
22 a regular basis, which is very similar. But the
23 answer I think, Mr. Ingersoll, is yes.

24 MR. INGERSOLL: Okay. Thank you.

1 HEARING OFFICER HALLORAN: Let's go off the
2 record for a second.

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

5 HEARING OFFICER HALLORAN: We're back on the
6 record. We're going to take a ten-minute break.
7 We'll be back on the record then. Thank you.

8 (WHEREUPON, a recess was had.)

9 HEARING OFFICER HALLORAN: Mr. Ingersoll, you
10 wanted to call Mr. Crites?

11 MR. INGERSOLL: Yes. Mr. Crites, could you take
12 the witness stand.

13 HEARING OFFICER HALLORAN: Raise your right hand
14 and the court reporter will swear you in, please.

15 (WHEREUPON, the witness was duly
16 sworn.)

17 MARK L. CRITES,
18 called as a witness herein, having been first duly
19 sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. INGERSOLL:

22 Q. Please state your name and spell your last
23 name, please.

24 A. My name is Mark Crites. The last name is

1 C-r-i-t-e-s.

2 Q. Could you give us a description of your
3 educational background and your experience?

4 A. I have a bachelor of science in mechanical
5 engineering from Southern Illinois University at
6 Carbondale. I've been working for Illinois EPA since
7 1990 as a hazardous waste permit reviewer. I've done
8 reviews on various hazardous waste-related issues,
9 including other hazardous waste delistings,
10 regulatory development. If it's related to hazardous
11 waste, I've pretty much worked on it.

12 Q. Could you describe your involvement in this
13 matter that led to the initial Agency recommendation?

14 A. We were contacted several years ago by BFI
15 representatives saying that they were interested in
16 potentially delisting the leachate coming from the
17 phase I landfill at the Davis Junction facility.

18 And, you know, we met with them and, you know, made
19 it clear that it's a decision made by the Illinois
20 Pollution Control Board, but that Illinois EPA does
21 provide comments to the Board. It would be a good
22 idea for them to work out things with us in advance
23 to try to minimize the disagreements.

24 We met with them a few times over that

1 period and reviewed a few draft documents, sampling
2 plans, analytical plans, and so forth. Eventually
3 they submitted a petition to the Board, and we did a
4 formal review on that. And we submitted our initial
5 comments that we weren't happy with the proposed
6 level for the 1, 4 dioxane.

7 Q. So you provided comments to the Division of
8 Legal Counsel for incorporation into the Agency's
9 position, correct?

10 A. Yes.

11 Q. And so all of the technical concerns of the
12 Agency -- technical and regulatory concerns of the
13 Agency found their way into that recommendation,
14 didn't they?

15 A. Yes.

16 Q. That was filed in March of this year.

17 And then what interaction did you have with
18 BFI representatives following that?

19 A. We met with them once after the -- after
20 they submitted the petition, but before we submitted
21 our first comments. And then I believe we had a
22 phone conference call with them after our comments
23 were submitted to the Board.

24 Q. And what were the technical concerns that

1 found their way into the Agency's recommendation?

2 A. Well, our initial concerns were with regard
3 to the modeling and going outside of the DRAS model
4 for -- especially for the one parameter for the
5 1, 4 dioxane and exceeding the land disposal
6 restrictions for that particular constituent as a
7 recommended delisting level. In discussing it with
8 them afterwards and in BFI proposing the more
9 restrictive conditions on the delisting, we felt like
10 we were eliminating that potential mismanagement
11 scenario by restricting the delisting so that it only
12 applies if it meets the proposed delisting standards
13 and is sent to a permitted pretreatment facility.

14 Q. Permitted by USEPA --

15 A. By USEPA.

16 Q. -- through the Clean Water Act?

17 A. Through the Clean Water Act, yes.

18 Q. Did you -- Was there some issue about
19 transport catastrophes or --

20 A. Well, again, that was kind of our initial
21 concern. You know, we were focusing on the modeling
22 and, you know, what would happen if there was an
23 accident. When BFI proposed the delisting would not
24 apply if the waste did not make it to that authorized

1 pretreatment facility, we felt like it kind of
2 sidestepped that issue of the modeling.

3 Q. So the DRAS model may, in fact, be less
4 factually applicable than previously thought?

5 A. Exactly. You know, you have all these
6 controls in place.

7 MR. INGERSOLL: I have no further questions.

8 HEARING OFFICER HALLORAN: Okay. Mr. Ingersoll.

9 Ms. Sharkey?

10 MS. SHARKEY: Just one follow-up question.

11 CROSS-EXAMINATION

12 BY MS. SHARKEY:

13 Q. Mr. Crites, was it the Agency's position
14 then that the pretreatment program -- a pretreatment
15 program that was authorized by USEPA would be
16 sufficient to treat the leachate at issue here to
17 Clean Water Act standards?

18 A. Yes. We believe that's the case.

19 MS. SHARKEY: No further questions.

20 HEARING OFFICER HALLORAN: Mr. Rao? Ms. Liu?

21 MR. RAO: Just a clarification.

22 When you say that the pretreatment program
23 is adequate to meet the Clean Water Act standards, do
24 you mean that if it's pretreated it can be discharged

1 to waters of the state directly, or does it have to
2 go one more step?

3 MR. CRITES: They -- It will be discharged to
4 the POTW, so really it's a two-part process.

5 MR. RAO: When you are talking about complying
6 with the Clean Water Act standards, pretreatment is
7 only one step of it?

8 MR. CRITES: Yes.

9 MR. RAO: Thank you.

10 I may have one more question that I wanted
11 to pose to the Agency later. Can I do it now?

12 MR. INGERSOLL: It's up to you. We're here at
13 your disposal.

14 MR. RAO: This may be a question -- I don't know
15 whether it's for Mr. Crites or the Agency's counsel.

16 We just wanted to get an idea as to how
17 this delisting standard, if granted by the Board,
18 will be implemented. Is there any need for US EPA's
19 approval for this delisting standard?

20 MR. INGERSOLL: Not to my knowledge.

21 MR. RAO: Okay.

22 MR. CRITES: It's a delisting that would only be
23 effective within the state of Illinois, so I don't
24 see a need for US EPA's approval.

1 MR. INGERSOLL: The State is authorized.

2 MR. RAO: The reason I ask is in some of the
3 water delisting standards that the Board grants we
4 have heard from the Agency saying that if -- you
5 know, the Board's -- if the board grants a delisting
6 standard for -- in a certain way that USEPA will not
7 approve it. And I think they made us change the
8 language in some of the delisting standards. I just
9 wanted to get a clarification.

10 MR. INGERSOLL: I can comment better after
11 checking with all of the liaisons -- the record
12 liaisons. In my experience, at least in the RCRA
13 program, we have that same kind of problem.

14 MS. STEINHOOR: Can I add something to that?

15 When we were -- at first initially met with
16 Illinois EPA, we were actually working with USEPA on
17 a delisting petition in the state of Indiana. So the
18 person that -- I wasn't the person directly that had
19 contacted USEPA. It was Ann Fritz from our office
20 who had talked to USEPA about this delisting petition
21 in Illinois that we were going to talk to Illinois
22 EPA about. They said, "Well, you need to make a
23 decision. Are you delisting this on the national
24 level? If you are, to allow this to be a delisted

1 waste that's transported to Indiana or to Missouri or
2 wherever, you need to come to us and get the
3 delisting petition. If you're delisting it within
4 the state of Illinois, don't talk to me. You need to
5 talk to Mark Crites."

6 MR. RAO: Okay. That helps.

7 MS. STEINHOOR: So we met with the Illinois EPA
8 then.

9 MR. INGERSOLL: And we had this definitely
10 within the authorized parts of our program.

11 MR. RAO: And that's one of the conditions, that
12 the delisted waste will be disposed of in Illinois?

13 MS. STEINHOOR: Right.

14 MS. SHARKEY: Can I just ask, Mr. Rao? Would it
15 be possible -- You've got, you said, some water
16 matters, adjusted standards, where this question was
17 raised?

18 MR. RAO: I don't know how well I can recall.
19 But the issue was the Board granting adjusted
20 standard from complying with the water quality
21 standard and IEPA coming back and telling us, "No.
22 You have to change the water quality standard. You
23 cannot just say this particular facility will not
24 meet the water quality standard and the reason is

1 that USEPA will not allow such a change."

2 MS. SHARKEY: I can understand that.

3 MR. INGERSOLL: Maybe the waters of the state
4 are also waters of the United States in that
5 situation. All of this activity is occurring within
6 our state.

7 MR. RAO: This is just something that we wanted
8 to --

9 MR. INGERSOLL: Okay. Like I say, I will check
10 further both with the water people who go through
11 this experience that you're talking about and try to
12 explain a little better why --

13 MR. RAO: No. The only reason I bring it up is,
14 if the board grants an adjusted standard, you know,
15 consistent with the federal actions, is there one
16 more revenue by the facts, or what --

17 MS. SHARKEY: It sounds very distinguishable
18 from what we've got here, but we'd be happy to
19 address that in our follow-up remarks as well.

20 MR. INGERSOLL: As will we.

21 MR. RAO: Thanks.

22 HEARING OFFICER HALLORAN: Sir, you may step
23 down. Thank you.

24 MS. SHARKEY: Thank you for taking that out of

1 order. I appreciate it because I believe that it
2 provides context to put together the discussion of
3 the adequacy of the pretreatment at the point that
4 it's being discussed in the record.

5 If the Board doesn't have any other
6 questions -- I believe we were -- it was the Board's
7 question that led to having the Agency's witness
8 sworn in. I don't know if the Board has any other
9 questions or if we should go on to our next question.

10 HEARING OFFICER HALLORAN: Go on to the next. I
11 think you're on 3.

12 MS. SHARKEY: Mr. Maxwell is going to address
13 this one.

14 MR. MAXWELL: The third topic that was raised by
15 the Board had to do with the constituents of concern.
16 We were asked to elaborate on the test results for
17 the FO39 constituents that were listed in the Board's
18 Attachment A that do not seem to appear to be in
19 Appendix D of our petition, and Appendix D of our
20 petition was our analytical results.

21 We realized after reviewing this comment
22 that the statement in the petition indicating that
23 all FO39 constituents were analyzed went above and
24 beyond the data that we actually had. The

1 clarification that we made with the prefiled
2 testimony is that all of the normally analyzed
3 constituents were analyzed. And the list that we're
4 required to look at on a regular basis are the
5 40 CFR 264, Appendix 9, constituents. So those were
6 the constituents that were evaluated.

7 Just one point of clarification. One
8 parameter that was listed by the Board p nitrol
9 phenol it actually is on Appendix 9. And we did have
10 analytical data on that particular constituent, and
11 the results were non-detect. I just wanted to
12 clarify that.

13 The Appendix 9 parameters that we did
14 evaluate, they're intended to encompass the likely
15 constituents that are found in a hazardous waste
16 landfill leachate and/or environmental monitoring
17 during complying monitors. Also, the Appendix 9
18 parameters are also referenced in the delisting
19 guidance manual as representing the minimum
20 constituent list. Finally, that list -- that
21 Appendix 9 list was also the basis of the petition
22 that we referred to that Shell has submitted as well.

23 We think that, based upon all of the above,
24 that the constituents other than p nitrol phenol that

1 were specified in the comment are atypical
2 constituents and they're not likely to be found in
3 the leachate. We don't see the rationale for
4 continuing to monitor for those especially given the
5 stringent proposed adjusted language required in the
6 pretreatment and final treatment.

7 I guess I'd like to pause at that point to
8 see if there's any question on that information
9 before proceeding.

10 MR. INGERSOLL: Nothing.

11 HEARING OFFICER HALLORAN: Thank you,
12 Mr. Ingersoll.

13 Ms. Liu? Mr. Rao?

14 MS. LIU: You do mention in your prefiled
15 testimony plans to obtain analysis for those
16 parameters. Are you still planning to do that?

17 MR. MAXWELL: Well, we wanted to clarify that
18 here today. Our position is that we're prepared to
19 do that if it would -- if it would foster the
20 approval. We think, though, the rationale is not to
21 do it.

22 MS. SHARKEY: If I could ask a question.

23 Could you explain, for the record, the
24 effort that you went to to determine how we could get

1 these additional atypical constituents analyzed? And
2 explain -- I think it needs also to be said did BFI
3 request -- Maybe I'll ask this as a direct question.

4 Did BFI request that the FO39 -- to your
5 knowledge, that all FO39 constituents be analyzed?

6 MR. MAXWELL: We did request that with the
7 analytical laboratory. It was only upon receipt of
8 the Board's comment that we realized that the
9 laboratory unfortunately wasn't able to deliver on
10 our request. As a result, we followed up with the
11 laboratory. And, in fact, it was necessary to
12 consult a couple of different laboratories to be able
13 to find a specific laboratory that would be able to
14 do all of the parameters that were listed by the
15 Board.

16 MS. SHARKEY: Have you found a single laboratory
17 that's able to do that?

18 MR. MAXWELL: We have not found one laboratory
19 that would be able to do all of the parameters that
20 were listed. If it's required -- or if it's
21 determined that these parameters need to be analyzed,
22 we would have to send one sample to one lab and then
23 a separate sample to another lab.

24 MS. SHARKEY: Are there any specific problems

1 that may arise when you're using different
2 laboratories for different samplings?

3 MR. MAXWELL: Yes. Generally, good technical
4 policy is you would prefer to limit the number of
5 laboratories involved in a project. Even though
6 standard methods are utilized, they're -- oftentimes
7 inconsistencies are introduced as a result of the
8 laboratory. One would rather not have different
9 laboratories involved if one could help.

10 MS. STEINHOOR: Isn't it correct that the
11 laboratory that has been actually running the samples
12 for BFI Waste Systems have tried to keep it as
13 consistent as possible?

14 MR. MAXWELL: In fact, yes. All of the data
15 that was presented in our original petition was
16 generated by one laboratory, Heritage in
17 Indianapolis.

18 MS. LIU: Could I jump in?

19 MS. SHARKEY: Yes, please.

20 MS. LIU: There was one constituent of concern
21 that jumped out at me that was among the F039
22 constituents, but not included in your analysis so
23 far. Although you've made some discussion as to
24 perhaps why those other ones wouldn't necessarily

1 reason they didn't analyze it in the first place?

2 MR. MAXWELL: The reason was that it's not part
3 of their standard VOC or SVOC analysis, whichever
4 category that happens to be in. You've got to
5 specifically request it. We thought we did request
6 it by asking for the FO39 constituents. But we'll
7 have to remind them obviously this time around that
8 that specific analysis is of interest.

9 MS. SHARKEY: And I guess I would -- If I may
10 ask the Board if that would be adequate in terms of
11 responding to your question? I'm sort of hearing
12 that that's the constituent that really was of
13 concern. Given the -- some difficulties that are
14 posed by going through different laboratories for
15 different constituent analysis, would it be
16 satisfactory to simply test for this particular
17 constituent, which we can do at the same laboratory,
18 and would you still want to see that additional
19 analysis from other laboratories to answer your
20 questions?

21 MS. LIU: I don't think that's my call.

22 MR. RAO: Yeah. We just, you know, review it
23 and let you know what we think is maybe missing. So
24 you can make a judgment call.

1 MS. SHARKEY: We're in a process here that's
2 difficult to communicate sometimes. We would like to
3 provide -- As I said, we think there's a risk going to
4 another lab of inserting more ambiguities into our
5 data. But if -- Obviously there's been a tremendous
6 amount of work done on this petition. If that were a
7 critical point for the Board, we'd request that the
8 Board provide us with an opportunity to get that to
9 you if that would be critical to your decision.

10 HEARING OFFICER HALLORAN: You've made your
11 comment. It's on the record. If that's the case,
12 the Board will probably notify me. There's a hearing
13 officer order addressing such.

14 MS. SHARKEY: Very good. Thank you.

15 MR. MAXWELL: Moving on then to comment number
16 4. It has to do with the final list of constituents
17 of concern. The question was, "Please elaborate on
18 BFI's reasons for not including certain specified
19 constituents in the final list of constituents." The
20 answer to this is that there were constituents --
21 four constituents that were identified that were
22 inadvertently left off of what we called the final
23 list of constituents, which was the list of
24 constituents that we modeled in the DRAS model.

1 Upon receipt of the comments from the
2 Board, we did rerun the DRAS model, and we included
3 those four constituents that were cited by the Board.
4 The results from the revised DRAS model indicated
5 that the default delisting levels that DRAS produced
6 for those four parameters were less than -- or that
7 the maximum detected concentrations in the leachate
8 were less than the DRAS generic delisting levels.

9 There were three constituents that were
10 cited in this comment by the Board that were not part
11 of the constituents available as part of the DRAS
12 model, and, therefore, could not be modeled in
13 accordance with DRAS. In order to address those
14 three constituents, BFI undertook an analysis of
15 other applicable standards that were out there. We
16 looked at the class I groundwater quality standards,
17 the USEPA secondary contaminate levels for drinking
18 water, and we also reviewed data in the IRIS
19 database.

20 As summarized in our response, using those
21 three various criteria, we found that the
22 concentrations that were present in the leachate did
23 not exceed any of those specific generic standards.
24 So we think that the other three parameters, although

1 they're not in DRAS, the concentrations of the
2 leachate do not present any significant health
3 concern.

4 MS. SHARKEY: And did we provide that data in
5 the response to the prefiled testimony?

6 MR. MAXWELL: There was revised output from the
7 DRAS model. It was provided previously, yes.

8 HEARING OFFICER HALLORAN: It that it for
9 number 4?

10 MR. MAXWELL: That's all we have for number 4.

11 HEARING OFFICER HALLORAN: Mr. Ingersoll,
12 anything?

13 MR. INGERSOLL: Nothing. Thank you.

14 HEARING OFFICER HALLORAN: Ms. Liu?

15 MS. LIU: Mike, you and I received an e-mail
16 from Todd Ramaly at USEPA, which we docketed as
17 public comment number 1. He included some background
18 information on updates to the DRAS software. I was
19 wondering whether or not anything in there struck you
20 as an update that you might want to make to what you
21 submitted in your prefiled testimony?

22 MR. MAXWELL: That is comment number -- It's the
23 last comment? Do we want to jump ahead? Is that
24 okay? That's the comment relative --

1 MS. SHARKEY: Question number 8.

2 MS. LIU: I apologize.

3 MR. MAXWELL: We can jump to 8, if you'd prefer.

4 MR. RAO: You might as well since she asked the
5 question.

6 MR. MAXWELL: Comment number 8 had to do with
7 the DRAS Version 2 user alert. Since DRAS Version 2
8 has been issued, time has gone by. They found
9 various quirks and various errors in the DRAS
10 Version 2 model. I'm told that they're working on a
11 DRAS Version 3, but it's close to being out now for
12 over a year.

13 EPA suggested looking at these various
14 factors that were laid out in the user alert. I've
15 looked at -- And the first issue was the dilution
16 attenuation factors or the DAF's. The user alert
17 pointed out that the DAF's were landfills. It's
18 incorrect, as has been discussed earlier. We're
19 modeling a surface impoundment scenario. But the
20 DAF's for various parameters that were cited in our
21 petition were zero for these few constituents, and
22 that doesn't allow the model to run.

23 We discussed with Mr. Ramaly at USEPA what
24 the appropriate DAF's were for a surface impoundment.

1 Unfortunately, he did not have significant experience
2 with a surface impoundment and wasn't able to readily
3 give us the proper DAF's for those parameters. He
4 indicated that he would get back to us. This was a
5 week ago. We haven't heard from him since we
6 spoke -- since he issued that e-mail about a week
7 ago.

8 But what we have done is we have inserted a
9 dilution attenuation factor, a non-zero number,
10 because you have to have a non-zero number.
11 Otherwise, the model won't run. We have selected the
12 lowest dilution attenuation factor for the various
13 categories of chemicals that we're modeling. We
14 think that that's conservative in the absence of
15 hearing anything otherwise from Mr. Ramaly. So
16 that's how we've addressed the dilution attenuation
17 factor question.

18 Questions?

19 MS. LIU: There's additional information that he
20 included in his e-mail as to toxicity values and
21 things like that that would have been modified in a
22 Version 3 of the DRAS. Are those consistent with the
23 ones that you updated on your own?

24 MR. MAXWELL: We've looked at the items that

1 were updated since DRAS came out, and in our prefiled
2 testimony we cited a number of different constituents
3 for which the toxicity factors have changed. We've
4 updated those in the revised model that was submitted
5 with the prefiled testimony. So there's nothing,
6 other than the updates, that were included in our
7 prefiled testimony relative to the updated toxicity
8 factors.

9 MS. SHARKEY: Is that going to the IRIS database
10 at this point?

11 MR. MAXWELL: Yes, that's right. IRIS database.

12 MS. SHARKEY: And have you submitted updated
13 DRAS modeling data then with that to --

14 MR. MAXWELL: We have.

15 MS. SHARKEY: That was submitted along with the
16 prefiled testimony?

17 MR. MAXWELL: Yes.

18 MS. LIU: And you believe that's consistent with
19 what USEPA provided us?

20 MR. MAXWELL: Yes.

21 MS. SHARKEY: Do you want to address these other
22 elements of question number 8?

23 MR. MAXWELL: Jumping back to number 2, the
24 second item addressed in the user alert was the

1 carcinogenic/noncarcinogenic effects. That was
2 pointed out in the user alert that -- for certain
3 parameters that have both effects. The proper means
4 for evaluating them is to enter them twice into the
5 DRAS model. We have listed a number of constituents
6 in our prefiled testimony for which that was that the
7 case. They have both carcinogenic and
8 noncarcinogenic effects. We did enter those twice in
9 the model. We reran the model submitted with the
10 prefiled testimony. It turns out that the delisting
11 levels that were produced under the carcinogenic and
12 noncarcinogenic factor approach were the same. So we
13 have updated our model, but it doesn't significantly
14 change our conclusions.

15 And then the final issue was -- that was
16 raised in the user alert is this idea of the fish
17 ingestion and the air volatiles pathway. Now, this
18 one I have looked at subsequent to the filing that
19 was made filed -- or the prefiled testimony. The
20 fish ingestion -- The issue is that the
21 calculation of -- the delisting levels that are
22 produced by DRAS for the fish ingestion and the air
23 volatiles pathway in some cases may be inaccurate.

24 I've looked closer at that and found that

1 the fish ingestion pathway isn't a relevant pathway
2 that's part of our risk for any parameter. However,
3 the air volatiles pathway is a part of the risk for
4 several different parameters. The user alert
5 provides an equation to hand calculate the delisting
6 level for that specific pathway, which I've done for
7 all the parameters that we modeled for which the air
8 volatile pathway was part of the risk. And we found
9 that in the case of every parameter, except for two,
10 the delisting level that was produced using the air
11 volatiles pathway was actually higher than the
12 delisting level that we used. So that has no
13 influence at all on our delisting levels because you
14 want to propose the most stringent delisting level.

15 There were two parameters that we
16 identified where the delisting level for the air
17 volatiles pathway was less than the delisting level
18 that we proposed. Consequently, I think it's
19 appropriate to submit as a follow-up to this hearing
20 a revised explanation indicating what's been
21 performed since we spoke with USEPA.

22 MS. SHARKEY: And those constituents were
23 produced. Tell us what the constituents were.

24 MR. MAXWELL: They were cis-1,3 dichloropropene

1 and heptachlor.

2 MS. SHARKEY: And the maximum detected leachate
3 concentrations were below the air exposure pathway?

4 MR. MAXWELL: Yes.

5 MS. SHARKEY: I guess what we're proposing is
6 that we will submit a revised -- I don't want to call
7 it a petition. But we're going -- We'll submit a
8 revision with our comments -- a suggested revision
9 that would incorporate those new levels into the list
10 of delisting levels that we will be sampling for.

11 If there are no other questions, the next
12 is number -- I believe it was number 5, which is a
13 question that I was going to answer. This pertains
14 to land disposal restrictions. The question is,
15 "Please explain whether USEPA delisting guidance or
16 policy allows delisting levels for constituents of
17 concern to be higher than the land disposal
18 restriction universal treatment standards," which,
19 for the court reporter's benefit, we refer to as LDR
20 and UTS.

21 Our response to this question is that UTS
22 are technology-based standards. They must be met
23 before a waste -- a hazardous waste can be applied to
24 the land -- can be land disposed. As the name

1 implies, land disposal restrictions, they are
2 intended for disposal scenarios that involve land.
3 They are, indeed, technology based. The record on
4 the adoption of those -- the UTS standards is very
5 clear on this point that the distinction between --
6 Excuse me. It's very clear on this point, and there
7 is a lengthy discussion in the preamble to the
8 adoption of the land disposal restrictions,
9 particularly the third third.

10 There were three sets of land disposal
11 restriction regulatory dockets, and in a third
12 they discuss the issue of the relationship between
13 land disposal restrictions and the universal
14 treatment standards concentrations that were
15 developed for those and risk-based health and
16 environmental hazard-based limits. And they make it
17 very clear that USEPA was unable at the time that
18 they adopted the UTS to actually promulgate
19 risk-health and environmental risk-based standards
20 for the UTS.

21 As a result, what they did was they went
22 with a standard for treatability. And that standard
23 is known as best demonstrated technology, BDT. It's
24 based on best demonstrated technology for specific

1 categories of waste that the UTS were established.
2 So they really serve a totally different function.
3 They were technology based to begin with, and they
4 are designed for ensuring that wastes that go into
5 landfills are treated to the maximum extent possible
6 under this best demonstrated technology.

7 In contrast, what the delisting -- what
8 listing and delisting involves are those -- again,
9 those -- that criterion that I mentioned in 721.111,
10 which is the -- You know, again, I want to go back
11 and make sure that it's in the record. The criterion
12 is that after considering those multiple factors
13 listed in the regulation there must be a conclusion
14 that the waste is capable of posing a substantial
15 present or potential hazard to human health or the
16 environment. So that's the criterion for listing,
17 and it's also the criterion for delisting. And you
18 look at that long list of items that I've mentioned
19 before, the nature of the toxicity, the
20 concentration, persistence, bioaccumulation, all of
21 that kind of thing. All of those are appropriate.

22 But I would point out that treatability --
23 ability to treat is not on that list at all. So it's
24 not a criteria for which you list or delist a waste.

1 And I think that USEPA -- This question was actually
2 brought up in a lawsuit that was filed in -- on the
3 basis of the first two LDR UTS rulemakings. In the
4 first third and the second third, they had not used a
5 health-based criteria. In some instances, the
6 health-based criteria was higher than the
7 treatability standard. Frankly, industry people
8 brought that lawsuit and said, "wait a minute. You
9 should have to consider the health-based standards."
10 And the Agency -- the Court found, no, they were not
11 required to do it. In fact, the Resource
12 Conservation Recovery Act requirement for LDR's
13 was -- EPA was authorized to do it on a treatment
14 basis.

15 EPA explains then in the preamble to the
16 third third that -- you know, it goes back and
17 explains again its action and explains that lawsuit
18 and the opinion and better explains why they adopted
19 these as technology-based standards. So I think that
20 the record and history of these regulations make it
21 clear that it's not a delisting criteria.

22 Treatability should not be a delisting criteria.

23 I'd also just like to say that they also
24 distinguish, by the way, in the Federal Register.

1 And this is from Fed. Reg. 6640, February 26, 1990.
2 EPA distinguishes the generally applicable treatment
3 standards from -- and this is a quote -- "Standards
4 that are applied in particularized circumstances,
5 such as RCRA clean closures, no migration
6 determinations, and delistings." So I think they
7 clearly were saying that these are not the kinds of
8 standards that you would apply in a particularized
9 situation where, indeed, you do the case-by-case
10 look, as we're doing here at the -- whether or not
11 that criterion -- that health-based and environmental
12 criterion is met.

13 We did look for any other EPA guidance on
14 this question of how LDR's are actually used. And I
15 wanted to -- I'll go back to the point that they are
16 land based. Therefore, land disposal. So they, in
17 particular, would not seem to have a relevance in
18 this case. We did not find any reference to LDR's in
19 the USEPA guidance manual. I've tried to search
20 using various terms and did not find any reference to
21 it at all.

22 What we did find was a RCRA call center
23 response, and this is the extent to which I found
24 anything on this. And I will read it for the record.

1 This is the -- a call center response. And I
2 apologize. I don't have the date of it here in front
3 of me, but I will get that to you. They said, "The
4 generator must comply with the LDR requirements
5 before disposing of the delisted waste because LDR
6 attaches at the point of generation. A delisting
7 only absolves the generator from his obligation of
8 handling the waste as hazardous. If a particular
9 hazardous waste is eligible for a delisting and is
10 granted, the delisting prior to generation, then the
11 LDR requirements would not apply. Conversely, if a
12 waste is generated and subsequently delisted, the
13 generator would need to comply with the applicable
14 part 268 requirements before disposal."

15 My view is -- in looking at this, is that
16 what USEPA is doing is distinguishing LDR
17 determinations from delisting determinations. What
18 you hear is that there are two distinct elements to
19 it. There's a delisting, and then there's a question
20 of whether LDR applies. It's a two-step process.
21 Notably, under this definition, the waste -- the
22 leachate that BFI is generating would not be subject
23 to LDR's even if it was going to a land disposal unit
24 if it was generated after the point that this

1 delisting is issued. And so at that point -- Let's
2 say --

3 I think that BFI at the Davis Junction
4 Landfill has a large tank that is holding this
5 material. After that material that had already been
6 generated were gone, were hauled off to Ohio
7 unfortunately, the rest of that leachate, I presume
8 under this definition, would not be covered under
9 LDR's even if it was going to a land unit.

10 I also wanted to point out a precedent for
11 how EPA has dealt with this since because I think --
12 We don't have to get to that question because it's
13 irrelevant because it's not going to a land unit.
14 But another -- A case in which it was going to a land
15 unit is the Nissan case that the Board had
16 referenced, the Nissan delisting by USEPA. There you
17 can see EPA's approach to land disposal restriction
18 UTS and how they used those in that delisting.

19 What happened is that EPA asked -- in the
20 proposed rule asked for comments on the use of LDR
21 UTS's for evaluating Nissan's delisting petition.
22 Nissan got back in its comments and said that UTS are
23 inappropriate for setting delisting levels because
24 they are not designed for such use. Rather UTS were

1 established to determined whether a hazardous waste
2 could be land disposed. Then in the final rule EPA
3 decided not to set delisting levels based on LDR UTS
4 for Nissan. Again, you know, one could wish they
5 would be more express and talk about this better.
6 But I think this is an example of where they asked
7 the question, they got an answer, and they ended up
8 not using LDR's as delisting levels.

9 Finally, just to say, I think that it
10 actually could be counterproductive to use LDR levels
11 as delisting levels because the incentives that were
12 designed for the LDR program are to get waste streams
13 out of land, keep them out of land as much as
14 possible, and have them pretreated before. So that
15 what we're doing here is actually very consistent
16 with that. None of this is going to go to land. It
17 will all be pretreated.

18 I hope that answers your questions, but
19 we'll be happy to answer any other questions on this.

20 MS. LIU: Thank you actually for your very
21 lengthy analysis kind of exploring perhaps what USEPA
22 didn't have a chance or didn't vocalize. Thank you.

23 HEARING OFFICER HALLORAN: Mr. Ingersoll?

24 MR. INGERSOLL: Nothing.

1 HEARING OFFICER HALLORAN: You may proceed,
2 Ms. Sharkey.

3 MS. SHARKEY: Okay. The next question involves
4 the delisting levels and toxicity characteristic
5 levels. So just -- Previously we were talking about
6 the relationship between delisting levels and
7 treatability levels. Now, we're talking about the
8 relationship between delisting levels and the
9 toxicity characteristic levels. And, in particular,
10 the Board's question was, "Please explain BFI's
11 rationale for not proposing the lower DRAS value as
12 the delisting value for vinyl chloride."

13 Our response to this is that, indeed, the
14 DRAS model calculated what we consider to be an
15 overly conservative number for vinyl chloride. The
16 number that it calculated was .028 milligrams per
17 liter. We believe that number overstates the risk
18 for vinyl chloride in this situation. We think that
19 the land-based assumption that you have to put into
20 the DRAS model results in a -- an overly conservative
21 number here.

22 BFI has used the DRAS model and is very
23 willing to accept the output of the DRAS model for
24 the vast majority of the constituents that it looked

1 at. However, when you come down to one constituent
2 such as this or two because we'll be -- look at one
3 for dioxane as well, that actually -- that exceed
4 that, we think it's appropriate at that point to go
5 back -- as I said earlier, go back and look at what
6 are the real risks here. What's involved here? Do
7 these two constituents solely on their own out of
8 lists of hundreds -- the fact that these are slightly
9 over -- And I'd say it's an order of magnitude
10 difference to the criteria we're proposing for vinyl
11 chloride. Is that difference enough to say this
12 entire leachate must be treated as a hazardous
13 leachate? Our argument is no.

14 With these two it's appropriate to go back
15 and look carefully at the criteria in 721.111(a)(3)
16 and to walk through -- look at that criterion and
17 walk through the factors that need to be considered.
18 In doing that, I think we've -- we've gone through
19 and taken a look at that. Among those that need to
20 be considered is the criteria -- factor J, which is
21 "Action taken by other governmental agencies or
22 regulatory programs based on the health or
23 environmental hazards posed by the waste or waste
24 constituents."

1 Unlike the technology-based treatability
2 standards in the UTS, the toxic characteristic
3 standards in RCRA -- I'm going to get my RCRA
4 regulations wrong, but I believe it's 261.24,
5 Table I, for vinyl chloride. The standard for vinyl
6 chloride toxicity is .2. And that's an instance in
7 which EPA listed specific levels at which they
8 believe certain constituents are hazardous based on a
9 health-based analysis.

10 It's very -- To me it's a very parallel
11 analysis as the DRAS performs. And we took a look at
12 the actual language in which EPA adapted the vinyl
13 chloride standard for the toxicity characteristic,
14 and what they did was very similar. They first
15 identified health-based concentration thresholds
16 where drinking water was -- where drinking water
17 MCL's were available, as was the case for vinyl
18 chloride. EPA used the MCL in the model saying that
19 MCL's are the most appropriate health criterion to
20 use because they address groundwater ingestion
21 pathways and were developed pursuant to a rigorous
22 methodology in which all health information is
23 evaluated. So they took the MCL's and they then put
24 them into -- they applied a dilution and attenuation

1 factor that was developed using the subsurface fate
2 and transport model known as EPACML. It incorporated
3 an unlined landfill or surface impoundment as the
4 worst-case mismanagement scenario. And then they
5 used a Monte Carlo approach for the dilution
6 attenuation factors, which includes a full range of
7 distribution of values for all parameters rather than
8 judgments made as to worst-case values. So they
9 used -- They used that model. And the number that
10 they came up with was 0.2 milligrams per liter. And
11 that -- As I said, that number is almost an order of
12 magnitude higher than the number that the DRAS model
13 modeled here.

14 We believe that the analysis that EPA did
15 for that characteristic is a very valid review of the
16 risk posed -- the health-based risk posed by vinyl
17 chloride at the .2 level. Clearly, EPA has accepted
18 that level. And, clearly, wastes all over this
19 country are being land disposed and being treated --
20 sent to treatment facilities and everything else at
21 that level. And, in fact, the leachate at the
22 phase 2 and phase 2 units at the Davis Junction
23 Landfill in some instances would exceed the DRAS
24 generated level here for vinyl chloride on that very

1 restrictive level.

2 Waste stream leachate all over the
3 country -- BFI has particular experience in this,
4 knows that vinyl chloride is a very typical
5 degradation product of a number of waste streams that
6 occur in municipal waste landfills as well as
7 occurring in hazardous waste landfills. And the
8 number that's being generated here, if it were really
9 hazardous -- if it were really something that were
10 hazardous to health and the environment, we are
11 then -- we would say that, indeed, that lower level
12 should be applied to all of these waste streams, and
13 it's not being applied that way. So we think the
14 particularized factors here are ones that would need
15 to be -- should be considered.

16 And the fact that this waste stream is
17 going to be handled through pretreatment ought to
18 allow us to step outside the DRAS model and look at a
19 criterion that is health based as 721.111 allows and
20 a criterion that is very consistent with how waste
21 streams are being handled all over the country with
22 that same level of that constituent in it.

23 And thank you. I'd be happy to answer any
24 questions.

1 HEARING OFFICER HALLORAN: Mr. Ingersoll?

2 MR. INGERSOLL: Nothing. Thank you.

3 HEARING OFFICER HALLORAN: Thank you,

4 Mr. Ingersoll.

5 Mr. Rao?

6 MR. RAO: We had a question not about vinyl
7 chloride. But the question that was submitted to you
8 through the hearing officer order, it was a two-part
9 question. I think there was one on lead. And we
10 didn't see an answer in your response.

11 MR. MAXWELL: The issue was that the proposed
12 delisting level for lead was greater than the
13 toxicity --

14 MR. RAO: Yeah.

15 MR. MAXWELL: Perhaps that was an oversight on
16 our part. I don't think that there's an issue with
17 defaulting to the toxicity characteristic for lead as
18 the delisting level.

19 MS. SHARKEY: I'm sorry. I now recall. What
20 Mr. Maxwell said is absolutely right. We will go
21 ahead and, again, in our comments recommend that the
22 Board insert the characteristic level as the default
23 delisting level for lead.

24 MR. RAO: Okay. Thank you.

1 HEARING OFFICER HALLORAN: Last but not least,
2 number 7.

3 MR. MAXWELL: Number 7 is detection limits. The
4 issue here is how do we handle constituents that we
5 analyzed for that weren't detected above the
6 laboratory detection limits. Let me point out that
7 since we've filed our prehearing comments we've done
8 some further research, and we looked specifically at
9 a petition that USEPA Region V acted on in Ohio, the
10 USG facility in Ohio, because we think it speaks to
11 this issue.

12 In looking at that decision by Region V
13 EPA, they indicated that -- and I'll quote -- "We
14 believe it's inappropriate to evaluate a constituent
15 in our modeling efforts if the constituent was not
16 detected using an appropriate analytical method." So
17 we think that would be relevant in this case.
18 Because of all of the data that we've got, we think
19 that that ought to be sufficient to demonstrate that
20 if it's not detected it's not going to be a
21 significant part of the risk. Therefore, it
22 shouldn't go into DRAS, and it shouldn't have to be
23 modeled, especially given the restrictive proposed
24 adjusted standard language. So that would be our

1 position.

2 It was a little -- in other prehearing
3 testimony, we did want to seek some clarification
4 from the Board as to where you were coming from with
5 these -- with these comments as well. So that's kind
6 of our position, but we do want to have some dialogue
7 about it as well.

8 MS. LIU: I think in the DRAS user guide it
9 actually states that all risk assessments are
10 conducted twice, once including those chemicals
11 specified with concentrations that are detection
12 limits and once omitting them. That was on page 11.
13 The reason for that was to make sure that whatever
14 analysis that the lab was using was producing a
15 defection limit that was actually low enough that it
16 wouldn't be a risk concern itself. I understand it
17 would probably be a lot of extra work to go through
18 that process. I would like to hear that from you as
19 a justification as to why you wouldn't want to run it
20 twice.

21 MS. SHARKEY: Well, one of the things to say
22 here is that, unlike many delisting petitions,
23 because this is FO39, there are literally -- there
24 are hundreds of constituents that were non-detect.

1 We'd be talking about a lot -- a significant amount
2 of work to do that. So that's why you're hearing us
3 saying, you know, unless we really think there's a
4 justification for this, this is a level we would hope
5 we would not have to go through. We think that --

6 MS. STEINHOOR: Can I add one thing?

7 Also, you know, in the delisting petition
8 that we've presented to the Board, unlike the other
9 petitions where they've gathered, you know, four
10 samples over a period of six months, we have nine
11 years of data that's consistently shown that it's
12 non-detect.

13 MS. LIU: Thank you.

14 MR. MAXWELL: One other issue, too, is the
15 comment making reference to the target risk level of
16 10 minus 6. Is the implication there that -- Of
17 course, the 10 minus 6 risk level is associated with
18 carcinogens. Is the aim there that carcinogens are
19 of concern, or all parameters are of concern?

20 MS. LIU: I believe the user guide just referred
21 to the target risk level. I don't know that they
22 mentioned the hazard index separately.

23 MR. MAXWELL: You know, that's more manageable
24 to look at the carcinogens.

1 MS. STEINHOOR: It's still considerable.

2 MR. MAXWELL: Is it considerable?

3 MS. STEINHOOR: Yes.

4 MS. LIU: I can imagine. I know that even the
5 detection limits aren't necessarily the same from
6 test to test.

7 MS. STEINHOOR: Nine years of data would be --
8 not manipulating, but evaluating.

9 MR. RAO: I guess we wanted to hear from you as
10 to why that was not done. It's not, like, we want
11 you to do it.

12 MR. MAXWELL: The answer to that question is we
13 think that we've got enough data that's there to
14 demonstrate that it's not warranted.

15 MS. LIU: Thank you.

16 MS. SHARKEY: With that, I think we have made it
17 through the questions that the Board's technical
18 staff had posed to BFI and our prefiled testimony.
19 We would be happy to hear any additional questions
20 that the Board may have for us. If there's anything
21 that's come up that is outside of those, we would
22 also be happy to answer questions, as we have
23 these -- our technical experts here today.

24 MR. RAO: We do have questions mainly pertaining

1 to the proposed adjusted standard language.

2 In Shell Oil's decision from USEPA, USEPA
3 allowed Shell Oil to manage and dispose of
4 multi-landfill leachate as nonhazardous waste only
5 after the initial verification and testing was
6 completed to demonstrate compliance with the
7 delisting levels. And this is stated at
8 69 Fed. Reg. 77699. In contrast, the proposed
9 initial testing requirement in Subsection D of your
10 proposed language allows shipment and disposal of
11 leachate as nonhazardous waste prior to completion of
12 initial testing and verification.

13 Could you please explain the rationale for
14 allowing disposal of leachate as nonhazardous waste
15 prior to initial demonstration that leachate complies
16 with the delisting levels?

17 MS. STEINHOOR: I would respond -- Our response,
18 I think, is that in the Shell case they had a very
19 limited amount of data for a very limited period of
20 time that they were relying on for their delisting
21 petition where we have data that encompasses a
22 nine-year period versus, you know, three or four
23 samples over a six-month period. Also, they were
24 doing some different -- a batch processing type

1 situation. We have a covered, closed landfill. The
2 leachate we generate is fairly consistent, and it's
3 going to a tank. We're not doing any type of filter
4 pressing or a situation like that.

5 MS. SHARKEY: Could I take a moment?

6 (WHEREUPON, there was a short
7 interruption.)

8 MS. SHARKEY: If I could try -- I think I
9 understand the question to be, by virtue of the way
10 that we have structured our sampling regimen, which
11 is to look at these individual tanker truck loads,
12 and by virtue of the fact that this is not a type of
13 analysis that can be done on the spot, that involves
14 sending the sample to a lab for analysis, we end up
15 with a situation where we would need to have a tanker
16 truck of this material sitting there, you know,
17 waiting for a week potentially to get that
18 information back, which is just very unworkable and
19 expensive for the facility.

20 Given that difficulty, we believe that what
21 we're doing is based on all of the data that we
22 already have and that the leachate variability,
23 again, is going to be very small, as Ms. Steinhour
24 said. If there were some additional avenue for

1 reasonably testing this prior to that first load
2 going out, I think BFI would be happy to do that. I
3 think we have testing activity that is going on
4 pursuant to the RCRA permit.

5 MS. STEINHOOR: We have February data, right?

6 MR. MAXWELL: Right now?

7 MS. STEINHOOR: No. We have February data we
8 just collected in February for 2008?

9 MR. MAXWELL: Yes.

10 MS. SHARKEY: So, for example, we have that
11 data. If it would be of -- If it would be of --
12 helpful to the Board, I think we would be happy to
13 amend this to have a sampling event immediately
14 before or a week before, two weeks before the first
15 load goes out in order to do that. I think what's
16 difficult is to do it on the tanker truck by tanker
17 truck basis because of the fact that you'd have
18 tanker trucks hanging out at this facility filled
19 with leachate waiting to go.

20 Our suggestion would be that if we -- If
21 that's a concern, our response is, A, that we already
22 have that data or, B, if the Board believes it's
23 necessary to have some more immediately before the
24 first truck goes out, we could accept an amendment to

1 our delisting language that would have that type of
2 testing immediately before the first truck goes out.
3 We'd like to suggest that might be in lieu of testing
4 individual truck loads if that were amenable to the
5 Board.

6 MR. RAO: In your petition also, I think you
7 mentioned that there's some kind of a storage tank
8 where this leachate would be stored before it's
9 shipped out?

10 MS. STEINHOOR: That's where we collect it
11 within a storage tank, and then what we do is we take
12 a sample from the storage tank on an annual basis and
13 analyze it. Under this delisting petition, we were
14 taking it more frequently under a sampling and
15 analysis plan to get the seasonal variation. It's
16 all consolidated within one tank. So it's virtually
17 like taking, you know, part of a glass of water and
18 pouring it into a smaller -- or a pitcher into a
19 glass. So we're taking it from that one storage area
20 and then sampling.

21 MS. SHARKEY: I believe it's a 60,000-gallon
22 tank.

23 MS. STEINHOOR: No. It's 20. It's a
24 20,000-gallon tank.

1 MR. RAO: Well, this is just -- In reviewing
2 Shell, we saw this difference, and we wanted to bring
3 it up. I don't know whether I can --

4 MS. STEINHOOR: Is the difference though that
5 Shell was actually taking -- It appears from -- And
6 we're going to look into this a little more deeply.
7 It appeared that what Shell was doing though was
8 taking their wastewater -- They were somehow doing
9 some pretreatment to pull off the filter cake and
10 doing this within some kind of surface impoundment on
11 site before hard piping it to a discharge --

12 MR. RAO: I'm not very sure as to how they were
13 handling it. But the delisting decision that USEPA
14 handed down very clearly said, you know, they had to
15 do this testing before they can take advantage of the
16 delisting. That was their initial sampling and
17 verification. You had similar sampling and
18 verification, but this was while the waste was being
19 handled as a delisted waste.

20 Also, earlier one of the questions we
21 talked about was the variability of the leachate,
22 which Mr. Maxwell said he is going to take a look at
23 to see if this particular analysis could be given to
24 show that the leachate does not have significant

1 variability.

2 MS. LIU: We have a few more questions, and they
3 all pertain to the structure of the proposed adjusted
4 standard language.

5 Again, mentioning Shell Oil because of the
6 similarity, USEPA had included several provisions
7 addressing recordkeeping and notification
8 requirements. The citation was 69 Fed. Reg. 77699.
9 Except for requiring a one-time notification to
10 Illinois EPA whenever there's a change in the
11 disposal facility, the proposed adjusted standard
12 language doesn't require that the Petitioner notify
13 the Agency of the initial sampling and verification
14 to comply with the delisting levels or any other
15 subsequent exceedants if the delisting levels are
16 exceeded.

17 Could you please comment on whether or not
18 such provisions should be included in the proposed
19 adjusted standard language?

20 MS. SHARKEY: I believe it should be included.
21 I think we would be happy to include that.

22 MS. LIU: Thank you.

23 MR. RAO: The next question goes to Subsection D
24 of your proposed adjusted standard language.

1 Subsection D requires, "Monitoring samples to be
2 analyzed for constituents listed in Table A and
3 hazardous characteristics as defined in part 721."
4 Further, Subsection D sets forward that, "Testing may
5 be continued on a semiannual basis if the delisting
6 levels have not exceeded."

7 Could you please clarify whether testing
8 should also show that the leachate does not exhibit
9 any hazardous waste characteristics before being
10 tested on a semiannual basis, or is your intent just
11 to limit it to the delisting levels?

12 MS. SHARKEY: I think we would intend the
13 characteristics as well, yes.

14 MR. RAO: So the language needs to be clarified.

15 MS. SHARKEY: Thank you.

16 MR. RAO: We are sharing our questions here.

17 MS. STEINHOOR: We appreciate the fact that you
18 took a hard look at this.

19 MS. LIU: The proposed adjusted standard
20 language at Section -- Subsection E sets forth that,
21 "If concentrations of constituents listed in Table A
22 are confirmed to exceed the delisting levels using
23 the verification procedures of Subsection D or if the
24 leachate is confirmed to exhibit a hazardous

1 characteristic, then the leachate shall be managed as
2 a hazardous waste until the Petitioner demonstrates
3 that the leachate is below the adjusted standard
4 criteria."

5 Would you please clarify whether the
6 provisions of Subsection C apply to both initial
7 testing and the ongoing semiannual testing?

8 MS. SHARKEY: Our intention is that the
9 characteristics would be considered as well. Yes, I
10 think this is -- I think it was an oversight, but I
11 think it was because we were basing what we were
12 doing on some other petitions and delistings that
13 didn't appear to have that. We believe that is
14 appropriate, and we'd be happy to recommend amending
15 the language to include that. Thank you.

16 MR. RAO: And the last issue is -- it relates to
17 Subsection E of the proposed language. Subsection E
18 states that, "Prior to reinitiating management and
19 disposal pursuant to this adjusted standard,
20 additional testing should be done to confirm that
21 concentrations of FO39 constituents are below the
22 delisting levels."

23 Could you please clarify whether FO39
24 constituents referred to the Table A constituents

1 included in the proposed adjusted standards, or is it
2 a more limited number of constituents you're talking
3 about? Or should we just reference it to Table A
4 instead of bringing in FO39?

5 MS. SHARKEY: I believe our intent was Table A,
6 so that would be an improvement in the adjusted
7 standard language.

8 MR. RAO: Okay.

9 MS. SHARKEY: Thank you.

10 MR. RAO: That's all we had.

11 We really thank you very much for all the
12 responses you gave us. We appreciate the time you've
13 taken to go over this stuff. That's a lot of work.
14 We realize that.

15 MS. SHARKEY: Well, thank you. We very much
16 appreciate all the time you've taken to carefully
17 analyze this and recommend improvements in the
18 adjusted standard language. We're very grateful to
19 have this opportunity to -- It's an opportunity to
20 talk with you because it's a process that is somewhat
21 difficult because it's an arm's length process unlike
22 the USEPA delistings. It makes it, I think, a little
23 bit more difficult for us to make sure there's a
24 meeting of the minds on the areas of concern here.

1 We, again, thank the Board for this opportunity and
2 thank the Agency for their cooperation and their work
3 that they've put into this as well.

4 MS. STEINHOOR: We'd just like to acknowledge
5 that the Agency has been working with us over the
6 last five years. We know Mark and the other agency
7 people, you know, have limited resources, and they've
8 just put forth a lot of effort to help us and guide
9 us through this process.

10 MR. RAO: As you know, in most rulemakings we
11 generally state even beforehand that all the
12 questions that are asked by the staff are to develop
13 the record. We know that they work with the Agency,
14 and, you know, they have a lot of input in this. We
15 try to just help complete the record so that it will
16 be easier for the Board to make its decision.

17 MS. SHARKEY: It's our goal to -- The reason we
18 asked for this hearing was to allow us to have this
19 kind of dialogue because we know the process was very
20 arm's length. With the amount of work that's been
21 put into this, what we wanted to make sure is that we
22 didn't end up with a delisting being denied on the
23 basis of some -- either some misunderstanding or some
24 possible tweaking to the language that could be done

1 to make it an acceptable delisting to the Board. So
2 it would be our request that we would -- I assume
3 we'll have an opportunity to put in additional
4 information responding to some of the questions that
5 haven't been answered today. But we also understand
6 that --

7 I guess I have a question. Would the
8 adjusted standard be issued in a proposed form
9 allowing us another opportunity to review it before
10 it goes final?

11 MR. RAO: I don't think we can answer. All I
12 can say is there is the motion for reconsideration.
13 We have a number of instances where the Board has
14 issued an order and reconsidered some of the
15 conditions later on.

16 HEARING OFFICER HALLORAN: Before we go off the
17 record and discuss post-hearing briefing schedules,
18 such as it is, Mr. William Ingersoll, are you
19 finished for today?

20 MR. INGERSOLL: Yes, I am.

21 HEARING OFFICER HALLORAN: We'll go off the
22 record for a minute.

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

1 HEARING OFFICER HALLORAN: We can go back on the
2 record.

3 First of all, I want to say that there were
4 no members of the public that presented themselves
5 today. Secondly, I find no credibility with any of
6 witnesses -- credibility issues with any of the
7 witnesses. And I do want to thank everybody for
8 their civility and professionalism. We had fun
9 today.

10 But, in any event, we were off record
11 talking about the post-hearing briefing schedule.
12 It's agreed that Petitioner BFI will file their
13 opening post-hearing brief on or before June 30,
14 2008, and that entails further addressing any other
15 questions by the technical personnel, any revised
16 suggestions, et cetera. The IEPA opening brief
17 response will be due on or before July 11. BFI's
18 reply, if any, is due on or before July 29, 2008.

19 Any further questions? Issues?

20 All right. All have a safe trip home.
21 This concludes the hearing. Thank you.

22 (WHICH WERE ALL THE PROCEEDINGS HAD
23 IN THE FOREGOING CAUSE ON THIS DATE.)

24

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF K A N E)

3

4 I, MARGARET R. BEDDARD, a Certified Shorthand
5 Reporter of the State of Illinois, do hereby certify
6 that I reported in shorthand the proceedings had at
7 the hearing aforesaid and that the foregoing is a
8 true, complete, and correct transcript of the
9 proceedings of said hearing as appears from my
10 stenographic notes so taken and transcribed by me.

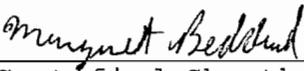
11 IN WITNESS WHEREOF, I do hereunto set my hand at
12 Chicago, Illinois, this 15th day of May, 2008.

13

14

15

16



Certified Shorthand Reporter

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A	93:20,22	accidents	95:5	adapted	51:15	44:9
ability	95:11	74:1,5	131:3	121:12	56:13	49:11,18
113:23	107:6	Accompa...	actual 15:9	add 15:19	77:22	55:2,10
able 6:22	118:5	5:22	27:8 28:8	32:10	78:6,19	55:12
9:19	119:5,7	accordan...	39:21	93:14	85:4,7,9	56:15
19:19	124:6	20:22	46:17	127:6	94:16,19	57:6 85:5
38:24	126:7	21:2	49:5	added 39:5	95:14	85:7
72:8 80:7	127:1	22:11	121:12	adding	98:5	89:19,19
99:9,12	133:21	24:22	actually	76:14	125:24	89:22
99:13,17	137:3	31:11	7:5 9:8	addition	129:1	93:10
99:19	140:11	40:16	10:1 11:9	18:3 85:5	134:3,11	96:21
101:14	above	104:13	11:15	additional	134:19,24	113:12
107:2	60:21	acknowle...	12:13	13:15	135:19	116:24
about 6:13	96:23	138:4	13:10	45:21	136:3,19	117:5
7:1 9:2,2	97:23	across	17:4	68:12	137:1,6	129:5
10:23	125:5	75:13	20:16	80:6 99:1	137:18	afterwards
11:5,6,12	above-en...	across-th...	26:23	102:18	139:8	90:8
11:16	1:9	10:3	29:14	107:19	Adm 26:7	again
12:23	absence	act 10:19	31:9 32:8	128:19	48:11	12:18,24
13:9	107:14	36:19,24	32:9	130:24	Administ...	18:7,22
24:21	absolutely	47:13	36:10,13	136:20	45:6	41:12
25:10,17	63:15	66:5	40:2	139:3	72:18	48:1
26:14	124:20	71:23	41:23	address	adopted	57:18
28:12	absolves	74:18,19	42:2,16	6:18 32:4	46:9,16	59:10
29:1 35:7	116:7	74:21	43:14	49:8	47:3 52:5	63:13
35:17	accept 8:14	81:3,18	45:7	78:20	52:6	65:2,15
40:22	26:18	83:11	49:16	85:23	71:19	70:2 76:6
42:18	27:23	90:16,17	52:12	95:19	112:18	76:17
44:10	84:7,13	91:17,23	58:24	96:12	114:18	77:2,2,2
46:7 47:8	119:23	92:6	64:9	104:13	adoption	90:20
51:18	131:24	114:12	65:22	108:21	112:4,8	113:8,10
53:16,16	acceptable	acted 125:9	66:3	121:20	advance	114:17
59:24	13:16	acting	71:20,21	addressed	88:22	118:4
60:3,14	139:1	69:20	74:11	39:4	advantage	124:21
60:16	acceptance	action	75:10	107:16	133:15	130:23
61:13	86:9,15	28:22	83:10,20	108:24	affect 62:2	134:5
63:9 64:1	accepted	114:17	93:16	addressing	67:13	138:1
65:8 67:3	8:1 16:17	120:21	96:24	5:2 50:19	affecting	agencies
67:7,8,17	26:23	actions	97:9	103:13	62:10	50:5
67:23	62:17	50:4	100:11	134:7	affects	120:21
72:19	63:17	51:19	110:11	140:14	66:18	agency 2:6
73:20	122:17	95:15	112:18	adequacy	afford	2:10,12
74:8	accepting	active 38:5	114:1	56:10	28:11	5:22 6:5
75:10	16:13	61:18	115:14	96:3	aforesaid	17:5 18:5
76:21	22:4	activities	118:10,15	adequate	141:7	18:23
79:7,21	25:10	15:14	118:20	91:23	after 12:3	20:3
80:2	84:2,3	16:11	120:3	102:10	17:21	31:18,24
90:18	accident	64:5	126:9,15	adjusted	26:14	46:24
92:5	73:19	activity	133:5	10:5,20	30:4	55:7,8,9
	90:23	58:11	acute 45:18	19:12	41:21	55:23

76:2,7,8	57:10	132:4	132:15	139:9	78:16	27:14
76:18	70:8,9	amend	133:23	answer	apologize	31:10
85:8,20	allow 6:21	131:13	analytical	30:1	32:21	90:12
88:13	11:17	amended	38:20	55:21	45:10	116:20
89:12,13	19:14	26:13	59:8 89:2	56:1,3	61:11	apply 23:3
92:11	69:23	27:12	96:20	60:4 61:2	106:2	26:11
93:4	82:9	85:12	97:10	68:3	116:2	28:23
114:10	93:24	amending	99:7	69:14	apparently	90:24
134:13	95:1	136:14	125:16	70:6	46:9	115:8
138:2,5,6	106:22	amendm...	analyze	71:24	appear	116:11
138:13	123:18	26:20	101:14,24	73:3	96:18	136:6
Agency's	138:18	131:24	102:1	78:22	136:13	applying
44:13	allowed	America	132:13	80:13,18	appeared	20:13
69:17	4:11 38:7	1:4 4:6	137:17	82:13	2:5,12	appreciate
85:21,21	62:15	5:11 6:11	analyzed	83:18	133:7	6:17 13:3
89:8 90:1	78:17	Amoco	12:12	86:23	appears	96:1
91:13	129:3	59:17	96:23	102:19	46:19	135:17
92:15	allowing	among	97:2,3	103:20	48:20	137:12,16
96:7	129:14	100:21	99:1,5,21	111:13	61:21	approach
ago 17:3	139:9	120:19	125:5	118:7,19	133:5	17:7 69:9
26:14	allows	amount	135:2	123:23	141:9	109:12
32:16	111:16	7:19 43:4	Anand 5:4	124:10	appendix	117:17
88:14	123:19	59:8	and/or	128:12,22	12:4 15:6	122:5
107:5,7	129:10	69:24	97:16	139:11	18:10	approac...
agree 30:16	almost 52:6	72:2 80:4	anhydrite	answered	34:17	74:17
83:23	52:8 70:7	103:6	101:10,15	139:5	75:1,2	appropri...
agreed	122:11	127:1	Ann 93:19	answering	96:19,19	12:22
20:3 25:1	along	129:19	annual	11:12	97:5,9,13	50:7 85:1
140:12	15:11	138:20	18:3,20	55:20	97:17,21	106:24
agreement	24:4	analysis	54:7	answers	applicabi...	110:19
32:1	101:16	17:20,21	57:12,23	6:22 56:4	10:10	113:21
ahead 47:3	108:15	18:11,16	58:4,6	79:10	35:5	120:4,14
105:23	already	29:5	79:23	80:24	applicable	121:19
124:21	82:19	56:19,20	80:5	118:18	26:6 37:1	125:16
aim 127:18	117:5	66:18	132:12	anticipated	37:4 41:6	136:14
air 9:10	130:22	67:10,16	annually	69:13	82:3 91:4	approval
15:7 34:7	131:21	68:15,16	57:7	73:24	104:15	56:15
109:17,22	although	68:22	another	anymore	115:2	62:7
110:3,7	46:10	77:21	9:16 39:5	48:17	116:13	92:19,24
110:10,16	48:4,9	98:15	50:18	76:22	applicant	98:20
111:3	64:23	100:22	57:8,9,13	anything	57:14	approve
alert 106:7	100:23	101:11	57:24	9:2 16:18	applicati...	93:7
106:14,16	104:24	102:3,8	58:5 59:7	16:19	54:1 73:9	approved
108:24	ambiguit...	102:15,19	59:20	68:8	80:2	20:2 25:5
109:2,16	103:4	104:14	63:5	105:12,19	applied	25:7
110:4	ambiguity	118:21	70:24	107:15	111:23	84:11
Alisa 5:4	31:18,19	121:9,11	71:8	115:24	115:4	85:14
alleviated	32:21	122:14	99:23	128:20	121:24	approx...
11:23	amenable	126:14	103:4	apart 7:18	123:12,13	4:8 8:24
Alliance	31:16	130:13,14	117:14	11:11	applies	14:22

19:3	32:20	attached	a.m 1:14	43:1 50:5	31:5	96:4
29:22	79:20	22:1	4:8	67:16	58:17	106:11
34:3	84:6	79:10		80:23	59:21	122:19,19
59:22	102:6	attaches	B	85:22	71:9 81:6	123:8,13
101:5	assess	31:5	B 3:13,20	97:23	86:7	123:21
April 4:23	76:11	116:6	33:15	112:3,24	89:20	133:18
aquifer	assessment	attachme...	131:22	113:3	98:9	135:9
43:5	34:19,21	96:18	bachelor	115:16	111:23	138:22
area 8:23	36:7 37:8	101:2	88:4	118:3	113:19	belief
42:4	assessme...	attempt	bachelor's	120:22	116:5,14	19:13
75:13	126:9	33:4	14:20	121:8	118:14	27:5
132:19	assigned	attempted	33:23	123:19	131:14,14	believe
areas	4:4	40:20	back 15:8	130:21	131:14,23	7:15 8:2
137:24	assisting	attenuati...	16:4	basing	132:2,8	8:23 9:7
argue	15:12	106:16	17:13	136:11	133:11,15	9:24
28:15	associated	107:9,12	36:4	basis 45:20	135:9	10:23
58:13	34:22	107:16	43:17	58:20	139:9,16	11:14
argued	35:2,3	121:24	46:20	76:14	140:13,17	12:22
64:19	36:11	122:6	50:13	86:22	140:18	38:14
argument	37:2 38:4	atypical	55:1 68:5	97:4,21	beforeha...	40:5 45:6
120:13	41:17	40:7	68:5	114:3,14	138:11	45:20
arise 100:1	81:7	67:23	75:19	131:17	began 17:3	49:21
arm's	127:17	98:1 99:1	77:11,18	132:12	begin 13:6	52:22,24
137:21	assume	authorized	80:18	135:5,10	13:24	56:21
138:20	139:2	8:14	87:5,7	138:23	14:13	57:19,22
around	assumed	90:24	94:21	batch	45:5	58:1
31:12	37:15,18	91:15	107:4	56:11	113:3	59:12
39:18	38:2,5,8	93:1	108:23	59:1 60:1	behalf 2:5	60:22
102:7	82:11	94:10	113:10	60:4,5,10	2:12 3:5	64:14
arrive	assumes	114:13	114:16	60:12	5:13 6:10	68:9
10:18	35:21	Auto 57:10	115:15	129:24	57:10	70:12,13
26:23	assuming	automati...	117:22	batches	behind	72:9,11
arrives	25:8	28:23	120:5,5	58:6 60:9	71:20,21	72:19
21:24	35:14	Automot...	120:14	BDT	73:16	80:3,4
arts 33:23	77:4	70:8,9	130:18	112:23	being 7:23	81:15
asked 18:8	assumpti...	available	140:1	bearing	8:15 9:6	82:12
30:19	35:13,13	6:3 71:17	backgro...	77:21	9:19	83:17,19
31:1	38:1	104:11	14:15	become	11:13,21	85:20
46:23	119:19	121:17	23:9	25:18	12:10	89:21
59:24	assumpti...	avenue 2:6	33:21	BEDDA...	22:10	91:18
79:19	35:2	130:24	88:3	1:10 2:15	27:6	96:1,6
96:16	36:11	aware	105:17	141:4	32:18	108:18
106:4	77:3	11:13	BALLE...	before 1:9	37:2	111:12
117:19,20	assurance	17:1	29:22	7:8 11:16	47:14	119:17
118:6	77:7,8	46:15	based	11:16	53:3 58:9	121:4,8
138:12,18	81:3	62:14	37:23	13:19	58:19	122:14
asking 5:5	assure	76:1	38:11,16	14:13	60:9 63:9	125:14
10:1,2,3	81:17	away 19:11	38:17	20:1,18	65:5 66:3	127:20
20:20	attach	19:19	41:6,23	21:8	78:16	130:20
25:17	21:19,21	A.D 1:14	42:3,9	23:12	86:17	132:21

134:20	32:1	bit 12:18	124:22	55:2 86:6	42:16	84:15
136:13	35:18	13:9	126:4	87:6	59:18	91:18
137:5	52:23,23	42:15,17	127:8	brief 4:23	108:1	103:11
believed	59:2	137:23	128:20	55:19	122:10	109:7
73:4	61:14,17	board 1:1	131:12,22	140:13,16	cancer 38:1	110:9
believes	62:14	4:4,18,20	132:5	briefing	cap 7:14	115:18
131:22	66:24	6:14,19	138:1,16	139:17	59:4	117:14,15
believing	67:4	7:6 10:7	139:1,13	140:11	capable	121:17
68:6	84:16	11:16	Board's	bring	49:13	125:17
below	85:3 86:9	13:11	4:14 6:22	95:13	113:14	129:18
37:11	86:17	17:1,8	13:4,11	133:2	capacity	cases 37:9
111:3	88:14	26:2	44:14	bringing	16:16	72:6
136:3,21	89:18	31:17	45:13	137:4	capture	109:23
beneficial	90:8,23	32:7,15	50:17	brought	33:4	case-by-c...
9:9	99:2,4	33:3 39:3	51:13	114:2,8	Carbond...	76:14
benefit	100:12	45:8,14	55:15	built 35:12	88:6	115:9
111:19	104:14	45:19	77:12	<hr/> C <hr/>	carcinog...	catastrop...
besides	116:22	46:3,9,16	93:5 96:6	C 27:20	109:7,11	90:19
84:16	117:3	46:19,21	96:17	136:6	carcinog...	catastrop...
best 7:15	119:22	46:22	99:8	cake 58:19	109:1	29:2 38:8
112:23,24	123:3	47:3,17	119:10	58:19	carcinog...	42:2
113:6	128:18	50:20	128:17	63:12	127:18,18	43:18
Beth 5:14	131:2	51:20	Boos 5:14	70:10	127:24	66:19,23
83:18	140:12	52:5,11	5:15	133:9	care 15:13	73:12,19
better	BFI's 8:18	54:15	15:11	calculate	carefully	74:1,5
83:19	19:9 23:7	55:23	17:7,13	110:5	47:7	categories
93:10	59:7	57:20	34:3	calculated	120:15	107:13
95:12	61:12,14	58:17,22	both 6:17	119:14,16	137:16	113:1
114:18	61:20	59:18,24	9:16	calculation	cares 76:21	category
118:5	69:8,15	64:24	17:13	109:21	Carlo	64:21
between	80:11,15	67:5 73:4	31:4	call 86:3	122:5	102:4
18:12	103:18	76:3,12	37:20	87:10	case 4:19	cause 1:9
56:5	119:10	76:18	40:11	89:22	11:10	45:22
82:22	140:17	77:13,16	67:20,21	102:21,24	35:14,18	47:6 48:8
112:5,12	Bible 47:14	78:3,9	95:10	111:6	37:5	140:23
119:6,8	big 7:21	88:20,21	109:3,7	115:22	39:22	caused
beyond	9:14 12:1	89:3,23	136:6	116:1	53:11,13	48:3,10
9:11	13:1	92:17	bottoms	called 14:8	53:15	center
47:21	64:14	93:3,5	101:8	33:16	57:1,4,8,9	115:22
52:11	biggest	94:19	box 2:7	86:19	57:9,13	116:1
60:18	11:7,8	95:14	31:11	87:18	57:20	certain
96:24	Bill 5:20	96:5,8,15	39:18	103:22	58:3,13	18:1 24:2
BFI 1:3 4:6	binder	97:8	BP 59:17	calls 13:19	58:17,18	32:18
5:10,10	12:1	99:15	brackets	30:22	64:6	43:1 93:6
5:13 6:2	64:14	102:10	26:7	Calumet	70:12,20	103:18
6:2,11	binders	103:7,8	Bradley	8:17	70:24	109:2
17:13	12:2	103:12	1:16 2:4	came 16:21	71:22	121:8
19:15	bioaccu...	104:2,3	4:3	26:20	72:22	certainly
27:19	49:24	104:10	break	36:22	76:12	9:9 47:13
29:11	113:20	117:15	54:21		81:4	82:5

11:22	72:23	130:2	103:19,20	35:23	118:10	49:1,6,16
32:16	73:14	consisten...	103:21,23	contrast	country	49:17
35:22	77:3	47:13	103:24	8:21 59:1	122:19	104:21
77:23	107:14	127:11	104:3,9	59:17	123:3,21	113:24
condition...	119:15,20	consolida...	104:11,14	70:3	County	114:5,6
10:24	consider	132:16	106:21	113:7	1:10	114:21,22
11:17	47:12	constituent	108:2	129:8	141:2	120:10,15
35:6 36:5	76:13,13	11:18	109:5	control 1:1	couple 63:2	120:20
69:16	114:9	41:10,18	110:22,23	4:4,18	99:12	136:4
76:1,16	119:14	48:2,5,6,7	111:16	11:3	course	criterion
77:1,9	consider...	49:23	119:24	19:14,18	43:15	48:11
condition...	128:1,2	82:10	120:7,24	74:19,21	44:10	49:16,18
78:19	considered	90:6	121:8	75:4	45:9	113:9,11
conditions	23:3	97:10,20	125:4	76:18,19	58:11,13	113:16,17
11:22	40:24	100:20	126:24	76:19	63:11	115:11,12
16:9	50:9,11	102:12,15	135:2,21	88:20	65:4	120:16
22:16	72:15	102:17	136:21,24	controls	72:22	121:19
31:4	76:21	120:1	136:24	65:3 91:6	76:15	123:19,20
32:10	120:17,20	123:22	137:2	conversa...	86:20	Crites 3:15
45:14	123:15	125:14,15	consult	25:9	127:17	5:24 86:4
76:14	136:9	constitue...	99:12	Conversely	court 14:3	87:10,11
90:9	consideri...	7:3 12:5	Consulta...	116:11	33:12	87:17,24
94:11	48:12	12:6,8,9	5:14,15	convert	87:14	91:13
139:15	49:11,19	12:20	15:11	60:9	111:19	92:3,8,15
conduct	113:12	18:2 19:4	consulting	cooperati...	114:10	92:22
18:2,4	consisted	19:4,7	15:1	138:2	cover 7:15	94:5
conducted	101:6,7	37:19	contacted	copy 69:22	28:8	critical
126:10	consisten...	38:10,11	88:14	correct	42:12	31:3 72:5
confer 79:2	58:12	38:12,14	93:19	49:22	coverage	103:7,9
conference	64:7	38:15	contain	75:7	17:12	CROSS-...
89:22	consistent	39:2,3,8	48:2	82:20	covered	21:11
confirm	36:7 38:3	39:10,13	contained	83:3,4	20:24	91:11
136:20	46:6	45:21	34:17	89:9	117:8	CSR 2:15
confirmed	47:18	48:3,10	containing	100:10	130:1	141:17
135:22,24	51:16,18	53:20	48:4,9	141:8	covering	cubic 15:20
consecuti...	51:23	67:7 68:7	contamin...	corrective	65:21	15:22,24
20:4	56:21	68:11	104:17	28:22	covers 27:5	101:5
56:15	58:14	82:1,7,8,9	context	cost 17:16	cradle 11:2	current
consequ...	61:15	82:23	81:10	29:12,15	19:13	41:4
66:16	62:10	85:24	96:2	Cotsworth	creating	currently
Consequ...	72:16	96:15,17	continual	69:19	16:16	20:8
110:18	74:16,16	96:23	60:6	counsel	credentials	CX 3:9
Conserv...	77:19	97:3,5,6	continue	5:21,23	33:22	C-o-t-s-w...
114:12	78:8	97:15,24	20:5,22	89:8	34:16	69:19
conserva...	95:15	98:2 99:1	continued	92:15	credibility	C-r-i-t-e-s
12:19	100:13	99:5	135:5	Counter...	140:5,6	88:1
35:12,13	107:22	100:22	continuing	75:5	criteria	
35:24	108:18	101:10	27:19	counter...	40:18,23	<hr/> D <hr/>
37:22	118:15	102:6	98:4	74:22	41:13	D 2:8 3:1
54:9	123:20	103:16,19	contrary	counterp...	45:17	4:13

70:11,20	104:19	decreased	116:5,12	67:13	138:22	depth
70:21,22	108:9,11	42:2	133:19	68:18	139:1	12:23
71:1 75:1	date 38:20	deemed	delisting	69:10,15	delistings	53:16,23
96:19,19	116:2	63:21,22	1:4 4:7	69:16	11:17	54:14
129:9	140:23	82:9	7:2,8,22	70:10	38:23	59:14
134:23	Davis 7:24	deeply	9:5,9	76:11	51:19,21	derive 69:9
135:1,4	8:17,22	133:6	10:2,3,4	77:1,9,23	53:1,7,22	72:8
135:23	8:24	default	10:10,24	88:16	54:1	derived
DAF's	10:12	38:3	11:1,7,14	90:7,9,11	56:23	61:18
106:16,17	15:14,16	104:5	11:21,22	90:12,23	58:7	62:9
106:20,24	15:21	124:22	17:2,6,8	92:17,19	60:21	63:12
107:3	16:13	defaulted	17:18,24	92:22	62:15	Des 2:11
DANIELS	22:13	42:7	18:6 20:2	93:3,5,8	63:16	describe
2:4	88:17	defaulting	21:3,19	93:17,20	69:7,7,18	88:12
data 7:10	117:3	124:17	21:20	93:23	70:3 71:3	described
7:18,19	122:22	defection	22:11,20	94:3,3	71:19	61:23
12:18,20	day 1:13	126:15	22:22	97:18	76:4,16	description
13:9	9:8 13:1	defer 82:13	25:3	104:5,8	76:18	88:2
17:22	141:12	defined	26:11	109:10,21	88:9	designed
19:1,2	days 20:1	69:16	27:14	110:5,10	115:6	113:4
38:13,16	57:23	135:3	31:5,7,7	110:12,13	136:12	117:24
38:20	deal 51:14	definitely	31:12	110:14,16	137:22	118:12
40:1,8,8	dealing	31:17	34:19,22	110:17	deliver	destined
59:5,8,13	37:14,15	94:9	35:1,3,5,7	111:10,15	99:9	65:5
59:14	dealt	definition	35:9,12	111:16	demonst...	destructi...
65:3,3,21	117:11	116:21	35:23	113:7,8	45:16	84:14
65:22	decide	117:8	36:5,16	113:17	48:1,7	detail
67:5,6,11	23:16	degradat...	37:5,11	114:21,22	56:11	16:20
67:17,18	decided	41:21	39:11,14	116:6,9	59:15	detailed
67:19	118:3	42:4,21	39:15,18	116:10,17	125:19	16:20
68:13,22	decision	43:2	39:24	116:19	128:14	detected
68:23	4:19	123:5	40:4,11	117:1,16	129:6	12:7,13
84:10	25:13	degrade	40:15	117:18,21	demonst...	38:12
86:16,18	45:9 46:1	42:24,24	41:9,12	117:23	112:23,24	104:7
86:20	79:9	43:1	42:7,9	118:3,8	113:6	111:2
96:24	88:19	49:24	44:7	118:11	demonst...	125:5,16
97:10	93:23	degrades	45:12	119:4,6,8	136:2	125:20
100:14	103:9	42:22	46:2 49:2	119:12	demonst...	detection
103:5	125:12	delist 40:18	51:15,16	124:12,18	7:6 47:24	125:3,6
104:18	129:2	58:18	52:5 53:5	124:23	129:15	126:11
105:4	133:13	113:24	53:13	126:22	denial 85:6	128:5
108:13	138:16	delisted	56:12,16	127:7	denied	determin...
125:18	decision...	19:14	56:17	129:7,16	138:22	32:15
127:11	46:17	25:18	57:3,6,9	129:20	Departm...	46:4
128:7,13	decisions	27:3,6	57:15	132:1,13	57:15	49:15
129:19,21	38:23	28:1,5	58:3	133:13,16	70:18	72:6
130:21	51:20,21	35:15	61:16	134:14,15	deposing	determin...
131:5,7	51:24	50:12	62:6 63:5	135:5,11	29:12	115:6
131:11,22	54:15	93:24	65:19,20	135:22	deposited	116:17,17
database	76:5	94:12	66:6 67:8	136:22	69:24	determine

45:19	71:20	discharged	111:14,17	5:21,23	128:10	104:2,4,5
50:9	103:2	24:4 71:9	112:1,2,8	89:7	130:13	104:8,11
67:15	131:16	91:24	112:10,13	docketed	136:20	104:13
98:24	137:21,23	92:3	115:16	105:16	138:24	105:1,7
determin...	difficulties	dischargi...	116:14,23	dockets	door 21:24	105:18
99:21	102:13	17:10	117:17	112:11	double	106:7,7,9
118:1	difficulty	71:6	129:10,14	doctor	65:16	106:11
Determin...	130:20	discuss	134:11	30:22	doubly	107:22
75:3	dilution	17:5	136:19	document	66:4	108:1,13
develop	106:15	18:24	dispose	46:11	down 12:7	109:5,22
4:17 41:3	107:9,12	85:4	22:23,24	69:21	12:20	119:11,14
138:12	107:16	112:12	24:3	73:14	13:2 22:5	119:20,22
developed	121:24	139:17	129:3	85:12	43:5	119:23
75:9	122:5	discussed	disposed	documen...	74:11	121:11
112:15	dioxane	96:4	15:23	4:7 62:20	95:23	122:12,23
121:21	41:12,16	106:18,23	35:15	documents	101:3	123:18
122:1	41:24	discussing	71:9 77:5	41:23	120:1	125:22
developing	42:6,9,16	90:7	94:12	78:18	133:14	126:8
36:1	42:18	discussion	101:4,20	89:1	Dr 30:19	drawn
41:14	89:6 90:5	13:14	111:24	DOE 57:16	draft 17:18	31:11
develop...	120:3	17:9 30:9	118:2	doing 20:7	17:20	39:18
14:23	direct	34:19	122:19	20:8	18:6,15	drinking
88:10	14:10	47:9	disposing	36:17	18:24	104:17
dialogue	21:6	54:23	116:5	52:16,24	35:2 89:1	121:16,16
6:21	33:18	58:24	distance	60:15	dramatic	Drive 2:2
126:6	42:13	85:8 87:3	8:20 9:13	63:6 76:3	9:3	dual 16:7
138:19	50:20	96:2	9:13	115:10	DRAS 12:9	due 140:17
dichloro...	87:20	100:23	distinct	116:16	12:10,10	140:18
110:24	99:3	112:7	116:18	118:15	12:12,14	duly 14:5,8
difference	directed	139:23	distinction	120:18	12:15	33:13,16
82:22	6:4,5	discussions	112:5	129:24	34:20	45:2
120:10,11	directly	17:23	distinguish	130:3,21	35:2,4,11	87:15,18
133:2,4	69:24	25:1	80:15	133:7,8	35:19,20	duration
different	71:6 92:1	dispatched	114:24	133:10	36:1,9,10	38:6
18:20	93:18	73:24	distingui...	136:12	36:11,14	during
23:21	director	disposal	95:17	done 11:16	37:6,13	17:6 18:6
34:6	69:20	10:8 19:8	distingui...	29:1,4	37:17,21	25:1
47:16	directs	20:19	115:2	32:7	38:7,9,10	38:12
62:17	45:7	35:14,21	distingui...	46:19,20	38:11,21	43:19
78:5,6	disagree...	39:22	59:7	53:5	39:6,8,12	67:21
99:12	88:23	54:11	116:16	66:18	39:16,24	97:17
100:1,2,8	discern	57:19	distributi...	72:9,12	40:4,11	DX 3:9
102:14,15	80:8	65:9,17	122:7	72:12,13	40:15	D-R-A-S
108:2	discharge	70:4,7,19	District	72:14	41:11	34:20
110:4	66:5	70:23	84:18	74:14	49:6	
113:2	74:22	72:14	divide	78:8 88:7	72:11	E
129:24	75:3,9	74:8,10	55:24	103:6	75:16,19	E 3:1,20
difficult	81:6 83:1	77:24	dividing	107:8	76:5 77:4	135:20
70:14	84:20	81:7 90:5	56:5	110:6	90:3 91:3	136:17,17
71:13,16	133:11	92:13	Division	125:7	103:24	141:2

13:14	elaborate	120:11	12:10	90:4 98:4	66:9	53:18,19
30:8	42:15	126:15	17:19	125:23	67:24	57:1
55:18	56:9	128:13	18:7,8	essence	68:9,10	59:20
56:11	96:16	ensure	19:1 20:1	19:19	131:13	78:1
72:6,9	103:17	83:9	25:2	essentially	140:10	118:6
earlier	elements	ensuring	26:14	11:17	events	131:10
24:20	53:14	113:4	33:2 46:2	36:2,16	18:18	exceed
30:3,9	108:22	entails	46:6,11	36:23	19:2	12:15
41:14	116:18	140:14	46:18	established	29:13	68:8
44:16	eligible	enter 109:4	47:10,18	62:3	59:19,21	104:23
56:24	116:9	109:8	48:10	113:1	67:22	120:3
67:6 79:7	eliminati...	entered	49:3	118:1	Eventually	122:23
82:17	90:10	37:20	50:11	esteemed	89:2	135:22
106:18	Elizabeth	enters	57:10	4:20	ever 46:16	exceedants
120:5	3:10 5:15	41:21	62:3,7	estimated	every 11:18	134:15
133:20	14:7,18	entire 81:8	77:3	29:12	56:20	exceeded
easier	69:19	83:13	78:17,18	et 140:16	57:17	39:24
138:16	elsewhere	120:12	83:11	evaluate	59:1,1	40:3,14
East 2:6	60:18	entirely	84:11	97:14	60:12,16	41:10
Eastman	emissions	44:19	85:4 88:6	125:14	82:7	43:14
58:3	9:10	entitled 4:5	88:20	evaluated	110:9	134:16
70:21	employ	75:2	93:16,22	17:21	everybody	135:6
easy 71:18	37:6	entity	94:7	19:3 97:6	7:20	exceeding
economic...	employed	84:15,17	106:13	121:23	30:22	90:5
17:17	36:10	84:21,22	114:13,15	evaluating	140:7	excellent
educatio...	emptying	environ...	115:2,13	17:14	everybod...	63:24
14:15	28:8	22:21	117:11,19	109:4	28:11	except
33:21	encompass	41:19,21	118:2	117:21	everyone	27:22
88:3	97:14	42:1	121:7,12	128:8	4:2 49:3	52:9 53:3
effect	encompa...	49:14	121:18	evaluation	everything	58:8
60:13	129:21	50:3	122:14,17	41:3	122:20	80:11
effective	end 5:3 9:8	78:16	125:13	even 9:11	evidence	110:9
92:23	13:1	81:6	134:10	19:18	66:22	134:9
effects	27:23	113:16	EPACML	22:5	evident	exception
109:1,3,8	130:14	123:10	122:2	28:14	73:16	60:22
effort	138:22	environ...	EPA's	37:1 54:2	evidentia...	63:8
98:24	ended 38:9	2:6,10	26:19,21	54:10	4:21	exclusion
138:8	39:7,9,12	14:22,23	51:21	56:21	exactly	61:21
efforts	118:7	15:3	70:3	60:19	21:13,18	excuse
125:15	energy	41:20	85:17	74:2	31:21	14:13
eight 14:23	9:10	50:6	92:18,24	76:24	91:5	48:8 57:8
40:9	57:15	69:17	117:17	78:4,4	EXAMI...	69:11
55:14	70:18	97:16	equation	100:5	14:10	112:6
57:5 58:6	engineer	112:16,19	43:11,13	116:23	33:18	exempt
either	5:24	115:11	110:5	117:9	87:20	17:11
35:15	engineeri...	120:23	equivalent	128:4	examined	exhibit
51:15	88:5	environ...	81:20	138:11	14:9	135:8,24
55:22	enough	9:8	errors	event 18:21	33:17	EXHIBI...
70:1,22	7:12	EPA 5:21	106:9	40:5	87:19	3:22
138:23	59:12,15	11:5	especially	43:18	example	exiting

11:4,9	16:7	131:18	factual	few 12:20	80:16	folks 23:22
expensive	extraordi...	134:11	23:5,9	13:2	finish 44:9	71:12
60:12	60:12,13	fact 7:22	factually	26:13	finished	follow 30:2
130:19	E-l-i-z-a-...	9:20,22	91:4	32:15	139:19	54:14
experience	14:19	27:22	failed	53:10	firm 5:9	followed
66:23	e-mail	28:24	22:17	88:24	71:10	99:10
88:3	105:15	32:1	fairly	89:1	79:19	following
93:12	107:6,20	38:17,21	130:2	106:21	first 5:18	33:3
95:11		43:7,13	fall 12:6,14	134:2	14:8 20:4	49:12
107:1	F	47:12	far 16:22	field 15:1	20:6	54:16
123:3	F 2:3 4:13	48:23	73:1	figures	33:16	56:14,19
experien...	face 34:24	49:7,10	82:24	29:15	34:10	57:6
34:6	35:19	52:21	100:23	file 140:12	45:9,15	89:18
experts	36:2	53:1,2	farfetched	filed 5:2	50:10	follows
128:23	facilities	58:14,22	74:3	55:16	52:17	14:9
explain	23:19,21	60:8	fashion	85:5,8,11	56:7,14	33:17
6:18	83:24	64:19	52:21	89:16	56:17,19	69:8 81:2
42:17	84:4,7	66:22	fashioning	109:19	57:5 63:4	87:19
69:8 81:9	122:20	67:20	78:19	114:2	87:18	follow-up
95:12	facility	85:22	fate 122:1	125:7	89:21	24:10
98:23	8:13,16	91:3	feasible	files 83:12	93:15	25:16
99:2	8:22 10:9	99:11	17:16,17	filing	102:1	30:8 79:6
111:15	10:11,16	100:14	February	109:18	106:15	91:10
119:10	10:18,20	114:11	18:16,21	filled 64:15	114:3,4	95:19
129:13	19:9,16	120:8	18:23	131:18	121:14	101:22
explains	20:5	122:21	115:1	filter 58:18	131:1,14	110:19
76:1	21:16,23	123:16	131:5,7,8	58:19	131:24	follow-ups
114:15,17	23:8 24:5	130:12	Fed 62:8	63:11	132:2	61:8
114:17,18	24:24	131:17	115:1	70:10	140:3	footnote
explanati...	25:4,23	135:17	129:8	130:3	fish 109:16	81:1,1
110:20	26:9,18	factor 59:7	134:8	133:9	109:20,22	foregoing
exploring	26:22,24	107:9,12	federal	final 12:8	110:1	140:23
118:21	27:15,18	107:17	28:16,18	16:10,11	fit 75:19	141:7
exposing	28:7	109:12	28:20	18:24	76:6	forget 49:4
86:21	32:18	120:20	51:19	57:3 98:6	five 17:22	form 139:8
exposure	36:20	122:1	52:8	103:16,19	138:6	formal
111:3	37:3 38:5	factors	53:22	103:22	focus 16:24	89:4
express	53:12	45:20,23	71:2,18	109:15	34:7	formally
118:5	63:14	46:4	72:8	118:2	36:14	86:12
expressed	70:13,14	48:12	74:18	139:10	40:20	forth 89:2
31:20	71:7,8	49:12,19	75:5	Finally	68:19,20	135:20
extensive	73:2 81:6	50:6,8	79:15	97:20	68:21	138:8
7:5,19	83:22	106:14,16	95:15	118:9	70:7	forward
67:5	85:14	108:3,8	114:24	find 36:21	focused	6:20 51:1
extent 85:2	88:17	113:12	feed 23:17	65:20	35:24	135:4
113:5	90:13	120:17	feel 31:17	99:13	37:7	forwarded
115:23	91:1	122:6	feels 31:18	115:18,20	focusing	4:24
extra	94:23	123:14	felt 7:12	115:22	49:10	foster
126:17	125:10	facts 72:4	16:8 90:9	140:5	82:1	98:19
extraction	130:19	95:16	91:1	fine 13:17	90:21	found

37:9	framework	62:16	95:10	35:3	53:23	28:6,13
38:22	31:14	63:12,16	125:8	39:15,24	54:7 55:7	28:14,24
40:2,14	36:18	70:14	135:4	40:3,11	55:14,18	30:4,15
48:6	44:7 45:5	71:24	140:14,19	40:14	65:6,14	36:23
63:18	frankly	72:8 77:8	future	41:11	66:14	47:7,21
67:8	7:12	77:8	58:23	76:11	68:4,5	49:9
70:24	52:10	78:16	66:9	104:8,23	76:6 77:2	50:24
74:24,24	114:7	79:8,14		Geneseo	87:1 92:2	51:1 54:8
75:1	Freedom	79:15,16	G	34:1	95:10	55:24
77:13	71:22	80:2,7,15	G 26:3	geological	96:9,10	56:5,7
82:22	83:10	82:18	gallons	33:24	113:4,10	65:10,13
84:6	frequency	83:2 84:2	29:19	geology	115:15	65:15
89:13	56:9,22	84:4,5	69:11,12	34:1 42:3	118:16	66:1,4,12
90:1	61:13,14	86:18,20	gas 16:7	gets 23:6	120:4,5	66:14,14
97:15	62:16	88:5,16	gathered	24:13	120:14	66:20,21
98:2	68:16	93:4,19	127:9	36:13	124:20	68:10,18
99:16,18	69:3	94:20	gave 51:9	getting	125:22	69:14
104:21	frequently	95:18	137:12	27:2 70:5	126:17	70:10,12
106:8	132:14	102:19	general	77:8 79:7	127:5	70:15,16
109:24	Fritz 93:19	104:1,4	16:1	80:4 83:2	131:19	70:18,20
110:8	from 5:1,4	105:6,16	generally	83:8	137:13	71:1,6,8
114:10	5:20,23	107:5,15	64:4	give 13:6	139:16,21	72:13
115:23	7:2,10,18	115:1,3	75:16	45:4,10	140:1	73:2
four 4:20	8:9,11,17	116:7,17	100:3	51:3 64:7	goal 138:17	74:10
39:3,5,5	8:21,24	126:4,4	115:2	68:3 88:2	goes 4:22	75:11
39:13,20	11:11	126:18	138:11	107:3	60:17,18	77:20
39:21	12:18	128:5,9	generate	given 11:24	61:17	78:5 80:6
40:21	13:4	129:2	130:2	17:15	82:18	81:19
59:21	14:20	132:12,19	generated	72:7	101:9	82:6 83:6
67:7	16:13,17	133:5	7:23 50:2	73:14	114:16	84:16,17
103:21	16:22	141:9	58:9,20	98:4	131:15,24	84:20,21
104:3,6	17:12	front 10:6	62:2,4	102:13	132:2	85:15
127:9	18:15,16	116:2	74:9 77:5	125:23	134:23	86:6 87:6
129:22	18:19	full 7:9	79:12	130:20	139:10	90:3
fourth	19:22	122:6	100:16	133:23	going 4:12	93:21
40:21	21:22	fuller 68:3	116:12,24	gives 59:10	5:11 8:20	96:12
FO39 7:2	22:4,13	fullest 7:6	117:6	giving 26:2	8:22 9:3	101:16
53:9,13	23:21	fully 62:19	122:24	54:15	9:4,9	102:14
61:16	24:17	full-scale	123:8	65:6	13:5,9	103:3
62:16	28:8 31:9	58:6	generates	glass	19:24	108:9
63:16	33:24	fun 140:8	62:1	132:17,19	20:5,10	111:7,13
64:18	34:1	function	generating	go 5:17	20:11,13	116:23
96:17,23	36:18	113:2	60:6	12:18	20:14,14	117:9,13
99:4,5	38:13	functioni...	116:22	20:16	20:15,15	117:14
100:21	40:4,8	7:16	generation	21:8,15	20:16,24	118:16
101:10	41:16	further	116:6,10	25:4 43:7	21:14,14	121:3
102:6	57:17	17:24	generator	44:9,12	21:15	123:17
126:23	60:20	24:7 33:9	116:4,7	47:22	22:5 23:7	125:20
136:21,23	61:18,20	69:5 85:7	116:13	48:24	23:16	130:3,23
137:4	62:4,7,9	91:7,19	generic	50:13,14	24:14	131:2,3

133:6,22	ground	42:24	9:20	131:2,12	22:2,7	37:24
gone 13:7	20:21	43:1,2,6,7	16:17	134:21	23:20	59:3 93:4
53:5	23:2	Halloran	19:24	136:14	28:20	107:5
64:22	66:15	1:16 4:1	23:19	hard 12:16	45:18,23	hearing
73:1 86:9	74:12	4:3 5:19	62:4	53:6	45:24	1:16 4:1
86:11,12	75:13	6:6 13:17	125:4	79:14	48:9	4:3,12,16
106:8	groundw...	13:22	handled	133:11	62:18	4:16,21
117:6	43:9,10	14:2,16	8:13 9:23	135:18	63:21,22	4:24 5:19
120:18	74:12	21:5,8	10:12	hardpipi...	63:23	6:6,15,20
good 4:1	104:16	24:8,11	15:21	80:11	66:1	13:17,22
16:22	121:20	30:13,16	21:2,21	Harrison	69:18	14:2,16
28:16	Group	33:9 34:9	22:11	2:10	83:21	21:5,8
29:9	14:22	34:13	31:11	hauled	88:7,8,9	24:8,11
83:19	guess 44:4	43:21,24	83:9	8:15 9:5	88:10	30:13,16
88:21	52:4	44:3,5,15	123:17,21	9:6,7	97:15	33:4,9
100:3	58:16	44:19,24	133:19	117:6	101:4	34:9,13
101:15	65:11	51:5	handling	hauler	111:23	43:21,24
103:14	78:10	54:18,20	21:1 24:5	20:11	116:8,9	44:3,15
governed	98:7	55:1,11	116:8	67:1	118:1	44:19,24
28:20	102:9	61:4,7	133:13	hauling	120:12	51:5
governm...	111:5	78:23	Hanford	9:11	121:8	54:16,18
53:22	128:9	79:1,3	57:14	having	123:7,9	54:20
governm...	139:7	84:24	70:19	5:12 6:16	123:10	55:1,11
11:2	guidance	86:2 87:1	hanging	13:24	135:3,9	55:16
19:13	11:13	87:5,9,13	131:18	14:8	135:24	61:4,7
120:21	17:24	91:8,20	happen 9:3	33:16	136:2	78:23
Grand 2:6	35:3,11	95:22	11:10	51:22	hazards	79:1,3
grant	36:6 37:6	96:10	23:7	60:16	120:23	86:2 87:1
45:14	46:3,6,8	98:11	41:16	66:23	hazard-b...	87:5,9,13
granted	46:11,16	103:10	90:22	77:21	112:16	91:8,20
92:17	46:18	105:8,11	happened	87:18	head 46:13	95:22
116:10	47:10	105:14	117:19	96:7	health	96:10
granting	48:17,17	118:23	happening	haz 18:12	49:14	98:11
94:19	48:21,23	119:1	18:19	hazard	50:3,5	102:11
grants 93:3	49:3 52:9	124:1,3	happens	38:2	105:2	103:10,12
93:5	52:20	125:1	23:12	49:14	112:15	105:8,11
95:14	75:24	139:16,21	102:4	50:6 66:8	113:15	105:14
grateful	76:15	140:1	happy	77:21	120:22	107:15
137:18	97:19	hand 14:3	31:19	113:15	121:19,22	110:19
grave 11:2	111:15	33:12	33:2	127:22	123:10,19	118:23
19:13	115:13,19	45:1	44:11,17	hazardous	health-b...	119:1
great 9:13	guide	87:13	52:3	8:1,5,7,8	114:5,6,9	124:1,3,8
greater	126:8	110:5	53:23	8:10,11	115:11	125:1
9:13	127:20	141:11	61:2	8:14 9:21	121:9,15	127:2
12:23	138:8	handed	78:22	9:21,23	122:16	138:18
39:14	guys 32:19	133:14	80:1 89:5	10:14	hear	139:16,21
53:16,23	H	handful	95:18	15:21	116:18	140:1,21
54:14	H 3:20	12:7,13	118:19	16:2,21	126:18	141:7,9
65:3,3,6	half 42:22	handle	123:23	17:6 18:9	128:9,19	heavy
124:12		8:19 9:17	128:19,22	19:20	heard	101:6

help 100:9 101:18 138:8,15	homework 46:12	20:1 25:2 26:6,14	impound... 20:15	122:6	125:13	21:9,10
helpful 32:5 50:24 54:17 68:13 80:3,15 80:20 131:12	honest 72:23	26:21 33:2	35:16,22 37:16	including 45:20 62:19 77:4 88:9	indicates 36:6 46:24	21:12 24:6,9 25:17
helps 94:6	hope 118:18 127:4	37:24 38:4 45:6 52:21	66:3 70:1 106:19,24 107:2	103:18 126:10	indicating 39:4 96:22 110:20	30:13,14 30:18,21 30:24 31:21
heptachlor 111:1	hoping 68:14	72:17 76:23	122:3 133:10	inconsist... 100:7	Indicator 82:14	43:22,23 44:21,23
her 14:14 51:10	human 49:14 113:15	83:11 84:11 85:3,17	improper 50:1,4	inconsist... 50:17 77:16	indicators 82:15	51:5,7 54:18,19
hereunto 141:11	hundreds 43:8 120:8 126:24	88:5,6,19 88:20 92:23 93:16,21 93:21 94:4,7,12 134:10	improved 85:13	incorpor... 111:9	individual 51:21 130:11 132:4	61:4,6 78:23,24 86:2,5,14 86:23,24 87:9,11 87:21 91:7,8
Heritage 100:16	I	93:16,21 93:21 94:4,7,12 134:10	improve... 137:6	incorpor... 46:10 53:4 122:2	industrial 70:23 84:4	87:9,11 87:21 91:7,8 92:12,20 93:1,10 94:9 95:3 95:9,20 98:10,12 105:11,13 118:23,24
Hi 29:10	IAC 40:16	141:1,5 141:12	improve... 137:17	incorpor... 89:8	industry 114:7	92:12,20 93:1,10 94:9 95:3 95:9,20 98:10,12 105:11,13 118:23,24
high 42:6	ID 3:21		inaccurate 109:23	incorrect 106:18	infiltration 41:19	124:1,2,4 139:18,20
higher 54:10 67:20 68:9 110:11 111:17 114:6 122:12	idea 18:19 36:5 88:22 92:16 109:16	imagine 128:4	inadvert... 103:22	indeed 47:15 54:4 64:3 71:12 73:6 85:22 112:3 115:9 119:13 123:11	influence 110:13	ingestion 109:17,20 109:22 110:1 121:20
highlight... 53:10,12	identical 51:13 52:7,11 52:14,16	immediat... 131:13,23 132:2	inapprop... 75:22 117:23 125:14	informat... 12:1 29:16 68:12 71:17,23 72:2,7 79:8,14 79:16 80:7 83:11 98:8 101:17 105:18 107:19 121:22 130:18 139:4	initial 20:4 54:5 57:22 88:13 89:4 90:2 90:20 129:5,9 129:12,15 133:16 134:13 136:6	
highways 9:12	identified 12:8 41:11 103:21 110:16 121:15	impacts 50:3 84:14	Inc 1:4 4:6 5:11 6:11 77:22	incentives 118:11	independ... 84:21,22 54:16 38:2 127:22	initially 39:1 93:15
him 86:6 107:5	IEPA 18:15 94:21 140:16	impedim... 9:19	incident 74:5	included 17:19 85:12 100:22 104:2 105:17 107:20 108:6 134:6,18 134:20 137:1	Indiana 93:17 94:1 139:4 100:17	input 37:18 41:23 138:14
history 11:14 46:14 114:20	Ill 26:7 48:11	imperme... 7:15	include 28:21 32:8 134:21 136:15	independ... 84:21,22 54:16 38:2 127:22	informed 8:18	
hitch 4:22	Illinois 1:1 1:11,13 2:3,6,7,10 2:11 4:4 4:17 5:21 10:16,17 14:21,21 17:19 18:7,8,24	impleme... 18:17 92:18	incentives 118:11	independ... 84:21,22 54:16 38:2 127:22	Ingersoll 2:8 3:12 3:16 5:19 5:20,20 6:7 13:19 13:21	
hold 24:14 47:14 71:18	Ill 26:7 48:11	implicati... 127:16	incentives 118:11	independ... 84:21,22 54:16 38:2 127:22	informed 8:18	
holding 23:15 24:1,18 117:4	Illinois 1:1 1:11,13 2:3,6,7,10 2:11 4:4 4:17 5:21 10:16,17 14:21,21 17:19 18:7,8,24	implies 62:8 112:1	incident 74:5	independ... 84:21,22 54:16 38:2 127:22	informed 8:18	
home 140:20	Ill 26:7 48:11	important 20:12 22:1 65:18 71:4 75:8 75:15	include 28:21 32:8 134:21 136:15	independ... 84:21,22 54:16 38:2 127:22	informed 8:18	

laboratory	23:1	60:3	116:11,16	81:4,8,23	53:2 89:8	62:6 67:8
99:7,9,11	27:16	77:23	116:20	82:18,24	legitimat...	67:13
99:13,16	35:16,21	82:2	117:20	84:8,9,17	42:7	68:18
99:18	37:16	85:13	118:3,10	86:21	length	69:10
100:8,11	38:18	93:8 98:5	118:12	88:16	137:21	81:5,24
100:16	60:7	121:12	LDR's	91:16	138:20	83:16
101:14	61:20	125:24	114:12	97:16	lengthy	104:5,8
102:17	62:17	129:1,10	115:14,18	98:3	52:17	104:17
125:6	63:13,17	132:1	116:23	104:7,22	59:8	109:11,21
lack 59:16	63:21	134:4,12	117:9	105:2	112:7	110:13
laid 40:19	64:1,20	134:19,24	118:8	111:2	118:21	111:9,10
41:13	66:7 70:1	135:14,20	leach 74:11	116:22	less 39:11	111:16
106:14	70:11,17	136:15,17	leachate	117:7	91:3	117:23
land 15:7	70:20,21	137:7,18	7:2,7,23	120:12,13	104:6,8	118:3,8
20:14	70:22,24	138:24	8:6,7,9,11	122:21	110:17	118:10,11
23:3	71:1 77:6	large 12:2	8:21 9:4	123:2	let 27:17	119:4,5,6
35:14	77:15,15	12:5 43:6	9:4 10:12	129:4,11	36:4 48:8	119:7,8,9
54:1	78:1	47:12	16:7,15	129:14,15	63:19	121:7
57:18	88:17	53:14	16:17,19	130:2,22	101:17	129:7,16
65:8,17	97:16	59:8	17:6,11	131:19	102:23	134:14,15
66:2 70:1	117:4	75:13	17:22	132:8	125:6	135:6,11
70:4,7,19	122:3,23	117:4	18:3,9,12	133:21,24	let's 52:19	135:22
70:23	130:1	last 41:10	19:1,15	135:8,24	55:11	136:22
72:13	landfilling	79:18	19:20,20	136:1,3	87:1	liaisons
73:9 74:8	61:18	87:22,24	19:22,24	lead 124:9	117:1	93:11,12
74:10	landfills	101:9	21:14,19	124:12,17	level 40:11	licensed
90:5	8:3 34:7	105:23	23:19	124:23	40:15	20:10
111:14,17	106:17	125:1	24:13,21	least 79:12	41:7,9	lieu 48:23
111:24,24	113:5	136:16	25:10,12	93:12	42:7,9	132:3
112:1,2,8	123:6,7	138:6	26:4	125:1	60:24	life 38:5
112:10,13	landfill's	later 33:7	36:18	leave 10:16	81:10,19	42:22
115:16,16	20:21	38:22	37:14,20	78:21	81:21	43:2
116:23	59:2	85:19	38:14	leaves	89:6 90:7	light 37:5
117:9,13	land-based	86:4	39:11	10:11	93:24	51:11
117:14,17	70:13,15	92:11	43:4,8	21:23	110:6,10	like 5:6,17
118:2,13	119:19	139:15	56:10,11	25:21,23	110:12,14	5:17 6:14
118:13,16	language	latitude	56:15	28:1	110:16,17	13:4,10
122:19	10:5,8	78:18	60:7	leaving	122:17,18	13:24
landfill	11:1 25:3	latter 82:5	61:16,18	11:4 66:8	122:21,24	15:4
7:10,14	26:2,4,16	law 5:9	61:19	led 68:9	123:1,11	16:19
7:16,24	26:20	79:19	62:9,11	88:13	123:22	21:20
8:1,4,4,8	27:5,13	laws 14:24	62:16	96:7	124:12,18	23:8
8:22 9:1	31:3,7,13	15:3	63:10,21	left 4:19	124:22,23	25:20
9:23	32:2,11	lawsuit	64:4 67:3	103:22	127:4,15	28:1
10:13	33:1,3,6	114:2,8	67:5,12	legal 5:21	127:17,21	29:15
15:9,14	35:1,10	114:17	69:24	5:23	levels	40:6 44:5
15:17,17	36:16	LDR	72:10,11	14:20	37:11	44:18
16:6,8,14	47:17	111:19	73:18	44:6,7,9	39:11,14	50:19
16:22	53:3	114:3	79:11	45:5 51:3	39:15,24	52:4 54:4
17:16	56:14	116:4,5	80:11	52:12	56:12,17	55:13

71:7 73:4	70:11	126:2	28:5	58:5 63:5	107:12	137:23
74:2 76:3	77:15	133:6	31:10	63:15		138:16,21
76:23	78:1	137:22	32:23	65:7 68:6	M	139:1
77:11	liner 16:6	Liu 5:4	113:18	75:23	made 25:13	makes
79:11,12	liquid 8:14	29:8,11	longer	83:13	36:11	30:10
80:10,17	9:12,21	29:18	32:17	86:14	38:2	137:22
81:2 84:1	37:14	43:24	62:4	104:16	47:24	making
86:7 90:9	list 7:3 12:8	61:7,9	look 6:20	106:15	52:14	4:18
91:1 95:9	48:3,10	62:23	11:5	107:24	72:6 77:4	127:15
98:7	97:3,20	79:1,2	12:16,22	109:18,24	77:6	manage
103:2	97:20,21	82:17,21	13:1	119:24	88:18,19	129:3
107:21	103:16,19	91:20	39:19	125:8	93:7 97:1	managea...
114:23	103:23,23	98:13,14	40:1	looking	100:23	127:23
126:18	111:9	100:18,20	42:19	50:23	103:10	managed
128:10	113:18,23	101:18	45:8 47:1	53:8,9	109:19	35:9
130:4	113:24	102:21	47:2,6	54:1 60:2	122:8	76:10
132:3,17	listed 45:18	105:14,15	48:16	63:10	128:16	136:1
138:4	45:22	106:2	49:1 53:6	64:17,18	magnitude	manage...
likely	48:13	107:19	65:19	64:21	120:9	8:16 34:5
97:14	50:10	108:18	68:5 74:8	72:21	122:12	36:8 50:4
98:2	82:2	118:20	75:7	73:10	mainly	58:17
limit 78:6	96:17	126:8	79:19	74:7 80:9	128:24	63:11
100:4	97:8	127:13,20	84:8,9	81:1	maintain	77:12,14
126:15	99:14,20	128:4,15	97:4	84:16,21	31:14	77:22
135:11	109:5	134:2,22	101:13,17	84:23	maintain...	78:9
limitations	113:13	135:19	113:18	106:13	15:2	136:18
35:20	121:7	live 47:11	115:10,13	116:15	major	manager
limited	135:2,21	lives 43:6,7	120:2,5	125:12	14:23	15:10
10:4,4	listing	LLP 2:2	120:15,16	looks 23:8	majority	34:4
19:9 35:5	11:20,22	load 59:1	120:19	54:4	12:5 19:4	managing
64:10,17	50:11	60:17	121:11	60:20	70:3	15:12
64:21	113:8,16	131:1,15	123:18	63:5	119:24	mandatory
65:10	listings	loaded	127:24	loses 76:18	make 4:21	52:21
72:3 73:7	76:2	10:14	130:11	76:19,19	5:17 7:20	manifest
129:19,19	lists 120:8	loads 56:15	133:6,22	lot 6:24	17:1 25:2	10:17
137:2	liter 41:8	56:17	135:18	11:11,14	31:23	20:12
138:7	42:8	130:11	looked	11:24	33:1 45:9	21:24
limiting	119:17	132:4	12:19	22:6	50:15,23	22:2,3,22
73:8	122:10	load-by-l...	16:4	29:14	65:12	27:10,20
limits 10:8	literal	54:2	25:12	126:17	76:4	28:2
10:9	31:24	local 43:4	27:12	127:1	80:14,17	manifested
12:15	literally	84:5	29:3 37:3	137:13	83:5	21:22
35:8	126:23	locate	38:16	138:8,14	90:24	22:12
112:16	little 19:5	38:24	40:17	low 43:3	93:22	manifesti...
125:3,6	42:15,17	location	41:14	59:4	102:24	76:23
126:12	43:10,17	17:15	42:20,20	126:15	105:20	manipul...
128:5	46:11	73:19	42:22	lower	112:16	128:8
line 84:19	59:5	74:6	46:5	119:11	113:11	manner
lined 20:16	61:11	long 7:4	51:20	123:11	114:20	19:21
66:7,7	95:12	17:3 27:7	53:24	lowest	126:13	22:24

46:6	matched	56:6	92:10,14	85:7	33:15	50:1
47:18	36:21	59:13	95:22	137:24	34:12	66:19
55:19	material	67:6,14	100:1	meets	might	72:16,20
manual	8:3,8,19	67:18	102:9	56:12	64:18	90:10
17:24	9:12,15	68:2,19	109:23	90:12	76:24	122:4
35:4,4,11	9:18,20	69:1	119:1	members	105:20	missing
37:6 46:3	10:11	82:13,14	128:20	4:10,20	106:4	72:1
46:6,8,16	32:17	83:4,23	135:4	6:16	132:3	102:23
46:18,21	54:6	96:12,14	141:12	140:4	migrate	Missouri
47:10,19	64:16	98:17	maybe	memo 76:7	49:24	94:1
47:20	73:11	99:6,18	31:13	mention	migration	misunde...
48:17,17	74:9,11	100:3,14	32:3,22	98:14	115:5	138:23
48:21,23	76:23	101:13,21	37:4	mentioned	Mike 5:13	model
49:4,6	78:13	102:2	83:19	24:12,21	15:11	12:10,11
52:10,20	83:9,20	103:15	95:3 99:3	30:3	68:5	34:20
53:3 60:3	83:21	105:6,10	102:23	56:23	83:18	35:2,11
60:19,20	117:5,5	105:22	McGUIRE	60:21	105:15	35:19,20
76:5	130:16	106:3,6	2:2 5:9	64:3	miles 8:12	36:1,4,7
97:19	materials	107:24	MCL	82:17	8:17,24	36:10,12
115:19	62:19	108:11,14	121:18	101:9,12	9:6,7	36:14,21
many 12:9	64:16,22	108:17,20	MCL's	113:9,18	19:11,18	37:1,1,6
34:4 43:6	83:15	108:23	121:17,19	127:22	19:18	37:21
43:7	material's	110:24	121:23	132:7	milligrams	38:21
46:15	65:13	111:4	mean 26:10	mentioni...	41:8 42:8	39:6,12
47:15	matter 1:2	124:11,15	30:14	134:5	119:16	41:15,22
49:17	4:5,5	124:20	31:1,21	met 18:7	122:10	42:10,11
53:5	23:5	125:3	31:24	18:22,23	million	42:17
62:17	46:20	127:14,23	47:19	31:5	15:22,24	75:16,18
65:21	88:13	128:2,12	50:21	40:17	43:14,14	76:5 77:4
76:22	matters	131:6,9	56:2	85:3,5	mind 63:20	77:14
80:9 85:4	4:21 15:8	133:22	91:24	88:18,24	minds	78:5
126:22	94:16	Maxwell's	meaning	89:19	137:24	79:22,24
March	maximum	28:24	12:15	93:15	minimize	90:3 91:3
89:16	37:18	34:16	42:22	94:7	9:10	103:24
MARGA...	39:10	may 1:13	means	111:22	88:23	104:2,4
1:9 2:15	79:13	4:7 5:3,5	81:10	115:12	minimizi...	104:12
141:4	80:8	5:5 6:20	109:3	metal	9:11	105:7
mark 3:15	104:7	6:23 7:8	mechani...	101:6	minimum	106:10,22
5:23,24	111:2	11:18,19	88:4	method	97:19	107:11
6:3 60:14	113:5	17:4 18:5	meet 11:18	39:17,22	minus 38:1	108:4
87:17,24	Maxwell	30:14	11:19	125:16	127:16,17	109:5,9,9
94:5	3:13 5:13	31:3 37:1	24:2	methodol...	minute	109:13
138:6	13:8	44:4 50:7	45:17	121:22	40:22	119:14,20
MARKED	15:11	55:3,23	48:11	methods	114:8	119:22,23
3:21,22	33:11,15	62:1,3	49:18	100:6	139:22	121:18
master's	33:20	64:7	62:5	methylene	minutia	122:2,9
34:1	34:9,12	67:12	91:23	39:22	6:24	122:12
match 36:9	34:14,14	76:12	94:24	40:11	mismana...	123:18
38:7	34:18	77:22	meeting	Michael	29:2,6	modeled
39:20	44:3 56:2	91:3	17:4,7	3:13	36:12	38:7,11

39:8	62:15	110:14	62:3	116:13	109:8,12	nothing
72:10,10	67:5,11	121:19	111:22	120:17,19	None	13:21
72:14	68:15	138:10	113:13	123:14	118:16	24:7 51:7
79:17	69:2	motion	116:4	130:15	Nonethel...	54:19
80:9	97:16	139:12	120:12	needed 6:3	46:18	98:10
103:24	135:1	move 69:4	myself 56:3	needs 28:4	nonhaza...	105:13
104:12	monitors	69:5	56:5	36:7 45:8	8:21 18:9	108:5
110:7	97:17	Moving	M-a-x-w...	99:2	19:22	118:24
122:13	Monte	103:15	34:15	135:14	23:20	124:2
125:23	122:5	MPDS	M-i-c-h...	never	62:5 66:1	notice
modeling	months	20:18	34:12	11:10	76:21	52:17,17
13:9	18:20	24:22		Neverthe...	81:5,10	85:10
28:24	59:23	much	N	35:23	81:20,24	noticed
37:4	71:24	50:19	N 3:1 141:2	new 7:14	84:3,8	4:16
38:10,21	127:10	54:4	name 4:2	9:3 16:6	129:4,11	notificati...
42:18	more 20:7	65:20	5:8 14:16	34:1 62:4	129:14	20:1 58:1
49:4,6	29:1,8,14	88:11	14:18	111:9	nontechn...	134:7,9
71:11	29:16,20	118:13	34:10	next 96:9	23:22	notify 62:3
72:11	33:5	137:11,15	87:22,23	96:10	non-detect	103:12
73:3,5	38:15	multiple	87:24,24	111:11	19:5	134:12
74:8 78:5	42:15,18	7:2 60:3	111:24	119:3	38:15	NPDS 71:9
80:13	48:9	63:17	narrowed	134:23	48:5	82:4
90:3,21	51:11	113:12	12:20	night 79:18	97:11	Nuclear
91:2	54:5,9,15	multiples	national	nine 7:9,11	126:24	57:14
106:19	56:21	73:20	69:17	12:3 16:4	127:12	number
107:13	59:14,14	multi-bat...	93:23	16:9 19:1	non-haz	3:21
108:13	61:19	60:20	nature	38:13,16	18:12	12:11
125:15	67:17	multi-lan...	50:2	59:4 67:5	non-zero	34:6 38:3
models	71:20	129:4	53:20	127:10	107:9,10	38:18
76:11	73:17	multi-so...	113:19	128:7	normally	40:20
modified	74:2 77:9	63:9,12	necessarily	nine-year	97:2	42:8
107:21	79:6 90:8	multi-year	47:19	65:23	North 1:4	43:13,15
moment	92:2,10	53:22,24	100:24	129:22	2:6 4:6	43:16
45:10	95:16	56:23	128:5	Nissan	5:10 6:11	49:19
52:5 57:9	103:4	60:22	necessary	57:20	Notably	53:6,14
62:22	118:5	61:16	9:13	70:20	46:1	53:21
65:11	127:23	69:7,9,10	99:11	117:15,16	116:21	69:5 76:9
79:2	131:23	81:8	131:23	117:22	Notary	100:4
130:5	132:14	municipal	necessitate	118:4	1:10	103:15
monitor	133:6	16:1	101:1	Nissan's	note 4:9,15	105:9,10
20:22	134:2	70:23	need 6:3,4	117:21	4:23	105:17,22
98:4	137:2,23	123:6	40:17	nitrol 97:8	20:12	106:1,6
monitoring	Moreover	must 8:12	62:11	97:24	32:8	107:9,10
18:1,3	73:22	26:16	68:4,5	nobody	65:18	108:2,22
20:21	morning	36:19	77:6,7	52:15	71:4 75:8	108:23
56:8,11	4:1 29:9	45:16,19	78:6	76:20,21	80:17	109:5
56:22	35:17	47:11,17	92:18,24	nod 80:4	noted	111:12,12
59:5,21	most 37:9	47:24	93:22	nodding	58:22	119:15,16
60:11	54:7 73:6	48:1	94:2,4	46:13	notes 75:1	119:17,21
61:13	74:17	49:18	99:21	noncarci...	141:10	122:9,11

122:12	4:1,3,24	129:3	37:1,3,24	65:6	6:10	original
123:5,8	5:19 6:6	134:5	38:5	100:24	13:20	29:11
125:2,3	13:17,22	Oil's 61:21	40:13,23	107:23	140:13,16	85:6
137:2	14:2,16	61:22	41:5	123:14	operation	100:15
139:13	21:5,8	62:9	42:13	one-time	60:2,5	101:2
numbers	24:8,11	129:2	43:14	58:1 69:6	61:19	other 5:12
40:4	30:13,16	okay 23:5	45:10	134:9	operations	8:3,7
41:12	33:9 34:9	24:6,20	48:9 49:6	one-year	60:4 65:8	12:21
42:16	34:13	25:8 26:1	49:7	75:22	opinion	18:20
	43:21,24	27:1 28:3	51:12	ongoing	52:12	22:24
O	44:3,15	29:18	53:13	58:9,10	53:2	24:4
oath 44:16	44:19,24	30:12	56:7	58:11,20	77:13	25:16
objection	51:5	32:12	57:13,22	60:23	114:18	27:23
85:9	54:18,20	33:5,8	57:22,24	63:14	opportun...	32:7
obligation	55:1,11	55:13	58:3,5,22	64:4,4	6:15,17	36:15
116:7	55:16	69:1	62:22	65:8	6:18	39:20
observing	61:4,7	70:16	64:13	136:7	13:15	40:8,9,13
67:17,18	78:23	80:6	69:14	only 4:20	14:11	40:13,24
obtain	79:1,3	82:16	70:9,16	9:19	103:8	41:5
98:15	86:2 87:1	86:24	70:24	12:13	137:19,19	45:21
obtained	87:5,9,13	91:8	72:10,19	19:14	138:1	46:4 50:5
59:9	91:8,20	92:21	73:11,17	27:14	139:3,9	50:6
83:10,11	95:22	94:6 95:9	75:6,19	32:17	opposed	51:15
obviously	96:10	105:24	77:5	35:20	37:16	55:21
62:20	98:11	119:3	79:11	54:8	65:16	56:23
102:7	103:10,13	124:24	84:15,19	63:20,20	opposite	62:14
103:5	105:8,11	137:8	86:7 90:4	64:17,21	76:24	64:20
occur	105:14	omitting	91:10	65:13	option	65:24
66:11	118:23	126:12	92:2,7,10	66:16	17:17	66:13,20
123:6	119:1	once 18:22	94:11	73:8,12	options	67:19
occurred	124:1,3,8	24:12	95:15	78:1 84:1	19:8	68:7 73:5
67:21	125:1	27:22	96:13	84:15	order 4:24	73:7
occurring	139:16,21	48:1 72:1	97:7,7	90:11	8:13 35:9	75:13
40:7 95:5	140:1	89:19	99:18,22	92:7,22	35:24	82:18,24
123:7	oftentimes	126:10,12	99:22	95:13	40:17	84:4
October	100:6	one 7:23	100:8,9	99:7	45:8	86:21
18:22	Ohio 8:12	8:1 9:15	100:16,20	116:7	55:16	88:9 96:5
off 54:22	8:20	10:21	101:1,10	129:4	84:11	96:8
54:24	19:10	12:17	101:19	on-site	96:1	97:24
87:1,4	117:6	13:14	109:18	31:9 64:1	103:13	100:24
103:22	125:9,10	15:18,19	118:4	64:3	104:13	102:19
117:6	Oil 52:1	16:6	120:1,2	70:13,15	120:9	104:15,24
133:9	53:11	22:16	124:9	70:16,22	122:11	108:6,21
139:16,21	57:1,3	24:17	126:21	80:12	124:8	111:11
139:24	59:20	25:16	127:6,14	OPA 74:18	131:15	115:13
140:10	61:17	29:5,8	132:16,19	open 11:20	139:14	118:19
office 2:7	74:18,20	32:10,13	133:20	51:3	Oregon	120:21
69:20	74:20	34:23	onerous	opening	1:13	126:2
93:19	75:5 79:8	35:18	60:13	3:3,5	oriented	127:8,14
officer 1:16	79:9	36:1,22	ones 53:8,9	5:16 6:8	29:5	134:14

136:12	109:2,10	119:15,20	97:13,18	123:3	101:5	140:15
138:6	113:22	oversight	98:16	133:23	percolate	perspecti...
140:14	117:10	124:15	99:14,19	particula...	43:5	6:13
others	118:13,13	136:10	99:21	115:4,8	performed	85:17
48:22	120:7	overstates	104:6,24	123:14	37:8	pertain
59:14	125:6	119:17	106:20	particula...	59:22	134:3
64:23	131:2,15	overview	107:3	6:15 9:3	110:21	pertaining
65:16	131:18,24	13:6 51:2	109:3	26:20	performs	128:24
82:11	132:2,9	overwhel...	110:4,7	58:22	121:11	pertains
otherwise	outliers	16:15	110:15	112:9	perhaps	111:13
8:3	40:6,10	own 16:15	122:7	parties 5:1	5:17	pertinent
107:11,15	67:9,16	77:12	127:19	parts 47:14	100:24	53:15
ought 47:6	outlined	107:23	part 12:2	47:15	118:21	petition 1:3
83:18	17:7	120:7	26:7	94:10	124:15	4:5 6:1
123:17	output		34:21	past 11:6	period 7:13	6:13,18
125:19	105:6	P	43:14	16:8	8:2 52:18	7:1,4
ourself	119:23	p 1:16 97:8	46:17	pathway	59:9,11	10:6 12:3
36:3	outside	97:24	47:4,13	109:17,23	59:20,22	13:7,8
ourselves	12:14	package	50:23	110:1,1,3	62:18	14:12
79:20	16:17	12:24	52:15	110:6,8	64:11	15:5
out 11:13	90:3	17:2,8	66:10	110:11,17	65:23	16:20
12:3,14	123:18	page 3:3	85:21	111:3	69:13	17:19
15:22	128:21	61:12	102:2	pathways	73:24	18:6,10
20:5	over 8:17	72:1	104:10,11	121:21	89:1	18:15
26:22	9:12 16:6	80:24	110:2,3,8	Patricia	127:10	22:11,20
30:15	19:2,10	101:3	116:14	2:3 5:8	129:19,22	22:22
39:1,3,7	19:14	126:12	124:16	Paul 2:11	129:23	25:3
40:5,19	41:11	panel 56:1	125:21	5:22	permeab...	26:13
41:13	43:2 59:9	56:2	132:17	pause 98:7	43:3 59:4	29:11
45:11	59:11,19	paperwork	135:3	peace 4:11	permit	34:17,22
46:8 47:5	59:22	27:18,24	participa...	people	5:24 20:9	39:2
47:16	62:18	paragraph	52:18	52:23	20:18,23	41:22
48:20	65:23	101:3	particular	74:7	24:22	43:12
49:20	68:18	parallel	25:14	83:17	64:12	44:8
50:22	70:2,2	121:10	26:16	95:10	82:4 88:7	45:15,16
53:10,11	73:24	parameter	40:8 42:4	114:7	131:4	48:1
60:8,17	77:2 80:8	40:13	46:1	138:7	permitted	56:16
67:19	85:4	42:5 90:4	55:22	per 29:17	8:14 9:17	58:17
70:6 73:6	88:24	97:8	60:2	29:19	10:21	59:18
74:15	106:12	110:2,9	67:23	41:8 42:8	26:8,18	61:24
76:20	120:9	paramete...	82:10	43:14	90:13,14	65:20
78:3	122:18	11:19	86:13,18	69:11,12	permitting	69:15
80:13	123:2,21	24:2	90:6	119:16	22:15	71:20,21
88:22	127:10	28:22	94:23	122:10	persistence	76:9
95:24	129:23	37:9	97:10	percent 8:4	49:24	85:12
100:21	137:13	39:20,21	101:1	9:22	113:20	89:3,20
104:15	138:5	39:23	102:16	15:24	person	93:17,20
106:11,14	overall	41:17,24	115:17	16:1,2	93:18,18	94:3
106:17	82:15	45:8	116:8	63:23	personnel	96:19,20
108:1	overly	82:14	119:9	77:7	86:19	96:22

97:21	pitcher	111:15	75:24	118:14	5:2 13:12	41:22
100:15	132:18	119:10	76:7,15	138:24	30:4	43:12
101:2	place 7:14	129:13	77:17	post 2:7	44:13	59:17
103:6	43:2	134:17	78:18	57:3	52:2	100:15
106:21	73:11	135:7	100:4	post-clos...	55:16,20	127:8
111:7	91:6	136:5,23	111:16	15:13	57:4	140:4
117:21	102:1	point 7:17	Pollution	16:11	61:10,12	presenting
125:9	places	8:12,19	1:1 4:4	20:9,23	69:22	12:14
127:7	48:22	10:10	4:18	post-hea...	77:10	56:4
129:21	placing	11:3	19:17	62:21	79:10	pressing
132:6,13	66:2,7	21:18,23	74:18,20	139:17	80:24	130:4
petitioned	Plaines	21:24	74:21	140:11,13	97:1	presume
77:24	2:11	25:17,21	75:5	potential	98:14	117:7
Petitioner	plan 17:20	28:1,7	88:20	17:5,10	105:5,21	pretesting
2:5 3:6	17:21	30:12	pond 20:16	17:14	108:1,5,7	83:15
5:2 48:1	18:16	31:8	66:7	32:6	108:16	pretreat
134:12	54:13	32:22	portion	49:13,23	109:6,10	71:8
136:2	57:16	39:1 40:8	80:1	66:8	109:19	pretreated
140:12	75:5	44:6 46:8	pose 92:11	75:12	128:18	20:17
petitions	132:15	47:5,16	posed	90:10	prehearing	24:22
7:8 37:24	planning	48:20	53:17	101:15	39:4,6	65:10,13
65:19	75:3	49:20	55:15	113:15	125:7	91:24
71:16	98:16	50:22	56:8	potentially	126:2	118:14,17
126:22	plans 89:2	55:5	102:14	53:7	prepare	pretreat...
127:9	89:2	65:12	120:23	88:16	17:2	24:24
136:12	98:15	70:6 73:6	122:16,16	130:17	prepared	25:5,7
phase	plant 9:15	74:15	128:18	POTW	17:21	26:19
15:19	9:16	75:15,15	posing	65:14	55:5,21	36:20
16:6	24:13	78:2 85:1	49:13	81:17	56:1,3	65:5,14
68:21,22	25:9,14	85:18	113:14	92:4	98:18	71:7 73:2
86:19	26:9 28:2	96:3 97:7	position	pouring	preparing	75:20
88:17	65:14	98:7	22:10	132:18	17:8	84:9,12
101:4	80:12	103:7	85:8,22	practical	prescribes	84:20
122:22,22	81:13,24	108:10	89:9	73:17	49:5	85:14,18
phases	plants 9:17	112:5,6	91:13	preamble	present 2:1	85:23
82:18,24	plausible	113:22	98:18	112:7	11:7	90:13
phenol	50:1	115:15	126:1,6	114:15	14:12	91:1,14
97:9,24	72:20	116:6,24	positions	precedent	18:24	91:14,22
phone	please 5:7	117:1,10	47:16	117:10	19:7	92:6 96:3
89:22	14:17	120:4	possibility	precisely	34:18	98:6
phrase	21:10	125:6	73:17,23	76:6	38:19	123:17
81:9	34:10,11	pointed	74:13	precluded	49:13	133:9
physically	44:24	39:3	possible	22:3	66:2	pretty 10:1
23:12	56:9	106:17	43:15	prefer 55:7	101:12	31:20
43:15	62:13	109:2	51:17	100:4	104:22	73:22
picture	81:9	points 19:2	55:19	106:3	105:2	88:11
7:21 9:14	87:14,22	55:22	68:1,2	preference	113:15	prevention
101:19	87:23	67:19	94:15	44:23	presented	74:21
piping	100:19	policy	100:13	86:3,5	12:2	75:4,6
133:11	103:17	69:17	113:5	prefiled	13:12	previously

8:15 64:3	proceeding	19:17	26:2,4	66:21	pursuant	21:9
91:4	52:19	20:3,21	33:6 35:1	71:2 76:2	4:12	question
105:7	85:3 98:9	20:22	36:8	80:1	10:20	12:14
119:5	proceedi...	21:1	40:10	84:10	64:12	23:9 29:8
pre-treat...	1:8 3:3	22:15,15	41:7,9	88:21	121:21	29:24
10:22	140:22	22:19	51:23	103:3,8	131:4	30:19
primarily	141:6,9	25:1,5,7	54:5,8	105:4	136:19	32:3 36:3
67:18	process	26:19	56:12,13	provided	put 6:12	36:15
101:7	16:24	27:20	58:18	7:5 18:5	7:14 10:6	46:4,23
primary	17:1	28:14,16	61:3,14	18:10	13:5 16:6	51:8
41:17	21:14	28:17,19	62:16	19:1,23	16:7 23:1	52:20,22
principals	23:10	28:21	77:14	57:2,2,10	23:15,24	55:9,18
86:17	49:2 58:9	38:4 41:5	81:11	57:16	27:15	56:7,8,9
prior 37:24	58:10	46:3 54:4	82:2 89:5	64:15	44:16	58:13
38:23	61:23,24	64:12	90:12,23	69:21	50:21	60:1,14
51:20	62:5,10	66:5	98:5	75:23	52:19	61:11,13
116:10	63:14	74:22	110:18	89:7	55:9,11	62:13
129:11,15	81:16,17	84:9,12	117:20	101:11	60:14	67:2 69:6
131:1	83:2,12	85:14,18	124:11	105:7	61:10	69:8 70:6
136:18	83:14	85:23	125:23	108:19	64:12	79:20
probably	86:10	91:14,15	129:1,8	provides	75:17	80:19,22
7:6 29:14	92:4	91:22	129:10	19:13	77:9 86:6	82:13
46:13	103:1	93:13	134:3,11	45:13	96:2	83:6
47:12	116:20	94:10	134:18,24	81:3 96:2	119:19	85:16
60:14	126:18	118:12	135:19	110:5	121:23	86:8
70:2	137:20,21	programs	136:17	providing	138:3,8	91:10
71:23	138:9,19	41:1 50:5	137:1	19:24	138:21	92:10,14
82:12	processing	120:22	139:8	54:14	139:3	94:16
83:17	129:24	project	proposing	provision	puts 35:8	96:7,9
103:12	produced	15:10	35:6	45:12	putting	98:8,22
126:17	39:12,16	34:4	39:17	48:14	13:8	99:3
problem	45:16	100:5	54:10	62:8	73:10	101:22
27:18,19	104:5	promulg...	63:6 90:8	provisions		102:11
44:21	109:11,22	112:18	111:5	21:3 49:8	Q	103:17
46:22	110:10,23	proper	119:11	134:6,18	quality	106:1,5
66:16	producing	107:3	120:10	136:6	25:13	107:17
93:13	126:14	109:3	protection	pthalic	62:11	108:22
problems	product	properly	2:6,10	101:10,15	67:4,12	111:13,14
99:24	123:5	4:16	28:11	public 1:10	82:3	111:21
procedural	production	proposal	69:17	4:10	94:20,22	114:1
4:14	79:23	31:12,24	protections	52:18	94:24	115:14
procedure	professio...	35:6	19:23	105:17	104:16	116:19
41:2	14:15	63:11	protocols	140:4	quantity	117:12
procedures	33:22	propose	86:15	publically	50:1	118:7
49:4	76:4	55:17	provide	71:17	quarterly	119:3,10
135:23	professio...	77:22	6:22	pull 133:9	20:6 54:6	124:6,7,9
proceed	140:8	110:14	13:12,14	pulled	56:10,18	128:12
13:16	program	proposed	33:3 44:6	45:11	57:7,11	130:9
43:7 55:3	10:22	10:6	55:19	Purposes	58:3	134:23
119:1	17:12	21:18,20	62:20	75:4	queries	139:7

4:24 5:5	quote	43:24	RCRA	29:4,5	13:3	55:2,14
6:3,4,19	61:22	44:1	9:22	31:1 35:4	16:21	63:24
6:23	76:8	46:13	10:13	35:12	18:14	66:22
11:12	77:20,20	54:17	17:12,23	36:21	26:8,11	77:10
13:3,11	115:3	61:7,8	20:23	50:8 72:4	26:16,17	85:18
13:15,16	125:13	67:2,15	21:1 22:2	72:5	26:19	87:2,4,6,7
21:4		68:1,12	22:14,19	73:22	27:13,14	93:11
29:24	R	68:24	23:1,2,3	74:14	27:23	96:4
30:8 33:5	R 1:9 2:4	69:2 79:1	27:20	75:20	28:7	98:23
33:9	2:11,15	79:6 80:6	28:16,19	77:17	32:18	103:11
43:23	141:4	80:20,22	28:20,21	82:22	62:6	112:3
44:9,10	racheting	81:14,22	34:7	92:4	105:15	113:11
44:12,14	43:16	82:16	36:18	102:12	receiving	114:20
44:14	radiations	91:20,21	46:2	113:2	21:16	115:24
47:9	68:17	92:5,9,14	51:13,16	123:8,9	83:21,22	138:13,15
50:15	radioacti...	92:21	64:11	127:3	84:5,23	139:17,22
51:4,6,10	42:23	93:2 94:6	81:2	137:11	recent	139:24
53:17	RADO	94:11,14	93:12	reapprov...	51:24	140:2,10
55:6,8,8	51:8	94:18	115:5,22	62:12	recently	recordke...
55:14,17	raise 14:2	95:7,13	121:3,3	reason	8:18	134:7
55:21,22	33:11	95:21	131:4	7:11 16:4	recess 87:8	records
56:1,3	44:24	98:13	RCX 3:9	16:12	Reclamat...	16:20,22
57:21	87:13	102:22	RDX 3:9	53:12	84:18	64:11,13
61:3,5	101:19	106:4	reaches	63:20,20	recognize	64:15
69:5	raised 32:3	124:5,6	43:9	93:2	75:15	Recovery
78:22	55:6	124:14,24	read 27:13	94:24	recognizi...	114:12
91:7,19	94:17	128:9,24	32:14	95:13	78:4	RECRO...
96:6,9	96:14	132:6	55:18	102:1,2	recomme...	30:17
102:20	109:16	133:1,12	101:3	126:13	124:21	reevaluat...
107:18	Ramaly	134:23	115:24	138:17	136:14	62:11
111:11	105:16	135:14,16	readily	reasonable	137:17	refer 26:3
118:18,19	106:23	136:16	107:2	45:20	recomme...	111:19
123:24	107:15	137:8,10	reading	72:15	85:6,9	reference
128:17,19	range	138:10	31:3,24	reasonably	88:13	46:2
128:22,24	59:11	139:11	50:16	131:1	89:13	48:16
133:20	122:6	rate 41:20	real 58:12	reasons	90:1	52:9
134:2	Rao 5:5	41:21	64:9	32:13	recomme...	115:18,20
135:16	24:10,11	42:4,21	120:6	64:13	90:7	127:15
138:12	24:12,20	42:21	reality	103:18	reconsid...	137:3
139:4	25:8,12	rather 7:11	78:14	recall	139:12	referenced
140:15,19	25:16,20	9:6 71:11	realize	94:18	reconsid...	41:14
quickly	26:1 27:1	100:8	137:14	124:19	139:14	48:22
42:3	27:4,12	117:24	realized	receipt	record 4:2	57:21,21
quirks	28:3 29:7	122:7	46:22	99:7	4:15,17	97:18
106:9	30:3,7,11	rationale	96:21	104:1	14:14	117:16
quite 7:4,5	30:19,20	69:8 98:3	99:8	receipts	33:21	referred
8:20	30:22	98:20	realizes	16:23	34:10	48:18,19
12:18	31:1 32:5	119:11	76:8,8	receive	46:24	97:22
33:1	32:9,13	129:13	really 6:17	37:17	50:24	127:20
46:12	33:5	raw 62:19	12:17	received	54:22,24	136:24

26:1	114:20	54:12	represents	research	69:23	88:8
Reg 62:8	121:4	110:1	7:13	38:22	90:6	revise
115:1	regulatory	125:17	request	46:12	111:14	29:15
129:8	11:4,9	reliance	71:23	125:8	112:1,8	revised
134:8	14:22	46:5	83:11	Resource	112:13	33:3
regard	23:9	47:18	99:3,4,6	114:11	restrictive	104:4
90:2	36:17	relying	99:10	resources	90:9	105:6
regarding	41:1,5	129:20	102:5,5	138:7	123:1	108:4
18:15	50:5 81:3	remain	103:7	respective	125:23	110:20
56:8 69:6	88:10	66:2	139:2	5:1	result 7:3	111:6
regime	89:12	remaining	requested	respond	8:5,9,19	140:15
61:3	112:11	16:2	11:21	26:12	40:10	revision
regimen	120:22	remains	requesting	129:17	42:5 43:3	111:8,8
53:19	reinitiating	27:7 28:6	19:12	respondi...	72:1	reword
54:9	136:18	remarks	require	29:24	78:15	48:8
130:10	related	68:4	134:12	55:17	99:10	right 14:3
region	25:16	95:19	required	102:11	100:7	19:9
38:24	33:6 79:7	remediat...	10:21	139:4	112:21	21:17
66:24	88:10	28:15	11:19	response	resulted	22:9,18
125:9,12	relates	remind	12:10	26:21	18:11	25:19
regions	136:16	102:7	47:2 54:2	44:13	results	27:11
76:11	relating	repetitive	54:3	61:13	38:9	30:1,7,11
Register	67:2	78:10	56:22	63:4	96:16,20	30:23
79:15	68:13	reply	57:5	77:12	97:11	31:15
114:24	relations...	140:18	60:18,24	80:23	104:4	33:11,12
Registers	112:12	reported	61:15	85:11	119:20	45:1 51:2
71:2,18	119:6,8	2:15	73:5 97:4	104:20	resume	83:21
72:8	relative	141:6	98:5	105:5	15:5	87:13
regular	34:19	reporter	99:20	111:21	retaining	94:13
86:22	39:21	1:12 14:3	114:11	115:23	45:24	108:11
97:4	40:20	33:12	requirem...	116:1	revenue	124:20
regulated	41:5,15	87:14	114:12	119:13	95:16	131:5,6
19:15,16	67:19	141:5,16	129:9	124:10	review	140:20
regulation	105:24	reporter's	requirem...	129:17	89:4	rigid 47:11
21:3	108:7	111:19	10:19	131:21	102:22	rigorous
41:13	relatively	represent	20:18	140:17	122:15	121:21
44:11	43:6 62:9	44:15	26:5 37:5	responses	139:9	risk 9:11
46:10,17	76:9	68:22	45:5	30:2 44:2	reviewed	11:7 29:3
49:5	release	represen...	116:4,11	63:3	5:24	29:5
113:13	22:21	7:16	116:14	137:12	17:23	34:19,21
regulations	released	represen...	134:8	responsi...	36:6 70:4	36:7,23
14:24	42:1	16:9	requires	15:12	89:1	37:2,8
15:3,9	78:16	18:19	60:19	rest 117:7	104:18	38:1
40:19	relevance	represen...	135:1	restricting	reviewer	39:21
45:11,13	115:17	6:2 88:15	requiring	90:11	88:7	43:10,17
47:4	relevant	89:18	134:9	restriction	reviewing	54:10
50:20	40:24	represen...	reran	111:18	79:9	72:21
51:13	44:8	5:9,10,21	109:9	112:11	96:21	77:21
52:6,8	52:24	52:23	rerun	117:17	133:1	81:7
75:6 81:2	53:4,7	97:19	104:2	restrictio...	reviews	103:3

110:2,3,8	safe 140:20	132:14,20	scenarios	124:10	66:16	30:6,10
119:17	safeguards	133:16,17	54:11	133:23	74:18	30:12
122:16,16	76:2	134:13	60:20,23	seeing 32:2	serve 113:2	31:16
125:21	same 8:3,7	samplings	64:2,4	seek 126:3	set 11:1	32:21
126:9,16	19:21	100:2	66:13	seeks 69:15	118:3	33:8,19
127:15,17	40:4	sanitary	72:20	seem 96:18	141:11	34:16
127:21	41:13	17:10,14	73:6,7	115:17	sets 112:10	42:13,14
risks 11:6	53:3 63:6	SAP 18:17	74:7	seemed	135:4,20	43:20
37:23	67:21	satisfacto...	112:2	40:6,9	setting	44:5,17
120:6	73:19	102:16	schedule	79:10	117:23	45:4 51:9
risk-based	74:5	satisfied	140:11	80:10	seven 8:2	51:12
112:15,19	83:20	85:23	schedules	seems	8:24 9:6	52:3 55:3
risk-health	93:13	save 85:19	139:17	79:12	19:18,18	55:4,13
112:19	102:17	saw 32:18	science	seen 7:8	seven-year	62:22
River	109:12	37:19	88:4	37:10	69:12,13	63:2
84:18	123:22	39:10	sciences	50:3 63:7	73:24	66:10
road 22:5	128:5	133:2	33:24	64:23	several	68:3 69:4
Rock 84:18	sample	saying	search	86:16	83:16	71:11
Rockford	18:18	15:20	115:19	selected	88:14	74:24
8:23	20:4 57:7	64:6 78:4	seasonal	18:1	110:4	75:14
Room 1:12	60:16	78:11	65:21	107:11	134:6	79:18
round	99:22,23	88:15	132:15	semiann...	severity	80:17,21
43:16	130:14	93:4	seated 44:4	20:7	50:2	81:12,15
route 27:3	132:12	115:7	second	56:20	sewer	82:5,20
27:6	samples	121:18	45:19	135:5,10	17:11,15	83:5
rule 4:21	57:5	127:3	52:17	136:7	Shaparel	84:24
57:3,3	100:11	says 22:22	64:13	semi-ann...	58:5	86:11,16
117:20	127:10	26:4,7	84:17,22	54:8	70:22	91:9,10
118:2	129:23	46:3	87:2	56:10	shared	91:12,19
rulemaki...	135:1	47:20	108:24	send 99:22	86:18	94:14
46:24	sampling	75:16	114:4	sending	sharing	95:2,17
52:7,12	7:9 17:20	scenario	secondary	130:14	135:16	95:24
52:14,16	17:20	12:19,24	104:17	senior	Sharkey	96:12
rulemaki...	18:4,16	29:2,6	Secondly	15:10	2:3 3:11	98:22
32:7	18:18,20	35:14	48:4	34:4	3:14,17	99:16,24
114:3	19:2 20:6	36:8,12	140:5	sense 30:10	5:6,8,8	100:19
138:10	20:7,8	37:7,16	section	42:23	6:8,9,12	101:22
rules 4:14	40:4	41:15	4:13,13	73:16	13:18,19	102:9
51:14,18	56:18,20	57:19	61:22	78:15	13:23,24	103:1,14
run 4:12	57:11,12	63:12,13	72:18	sent 90:13	14:13	105:4
75:11	57:17	66:17,19	135:20	122:20	15:4,16	106:1
106:22	58:2	72:16	see 50:14	separate	15:20	108:9,12
107:11	59:19	73:9,12	67:11	23:15	19:8	108:15,21
126:19	60:24	74:3,10	73:4	52:4	20:23	110:22
running	61:3,14	74:15,23	83:13	99:23	21:5,7	111:2,5
100:11	67:21,24	76:10	92:24	separately	26:12	119:2,3
rural 17:15	89:1	78:6,7,15	98:3,8	127:22	27:2,5,9	124:19
	111:10	90:11	101:14	sequence	27:17,22	126:21
S	130:10	106:19	102:18	30:15	28:18	128:16
S 3:20	131:13	122:4	117:17	serious	29:20,23	130:5,8

131:10	showed	29:13	129:23	64:24	somewhat	104:23
132:21	42:5	51:8 88:6	slight	66:8,11	72:3	110:6
134:20	showing	101:19	66:11	66:17	137:20	112:24
135:12,15	18:11	106:4,7	slightly	67:9	sorry 30:21	121:7
136:8	59:5	107:5,6	120:8	72:24	74:2	specifically
137:5,9	shown 83:1	108:1	sludge	73:20	124:19	26:3
137:15	127:11	110:21	70:10	75:12	sort 7:1	42:19
138:17	shows	117:11	sludges	83:8 85:2	102:11	52:1 82:1
shed 51:11	68:16	125:7	101:6,8	85:10	sounds	101:11
Shell 52:1	side 52:19	single 40:3	small 76:9	90:18	13:17	102:5
53:10	sidestepp...	49:17	130:23	93:2,8	95:17	125:8
57:1,3,6	91:2	60:5,16	smaller	94:15	source 60:6	specified
59:20	significa...	99:16	132:18	100:23	60:6,10	82:4 98:1
61:16,21	18:12	Sir 95:22	smiling	101:7	60:23	103:18
61:22	significant	site 18:4,13	79:18	102:13	62:10	126:11
62:9 64:6	19:6	19:22	software	105:17	65:24	specifying
70:11,12	58:10	21:3	34:20	109:23	66:1,3	36:19
71:5,22	59:16	28:15	35:4	114:5	sources 7:3	spell 14:16
79:8,9	68:17	57:14,18	105:18	122:23	16:17	87:22
80:2,7	105:2	76:13	soil 41:20	125:8	South 1:12	spelled
84:19	107:1	133:11	soils 43:4	126:3,6	Southern	34:14
97:22	125:21	site-speci...	sold 70:23	129:24	88:5	spending
129:2,3	127:1	41:15	solely	130:24	speak 21:6	29:14
129:18	133:24	sitting	120:7	131:23	85:20	spent 101:7
133:2,5,7	significa...	130:16	solid 32:15	132:7	speaking	101:8
134:5	61:23	situation	32:17	133:9,10	26:14	spill 20:24
Shell's	62:1	9:24 11:2	69:20	136:12	speaks	22:9,12
61:17	109:13	12:17	71:1	138:23,23	125:10	22:14,20
shipment	similar	28:13	solids	138:23	special	28:12,13
129:10	34:5	32:9 36:2	37:17	139:4,14	10:17	29:2 37:7
shipped	42:23	39:9 47:6	solvent	somehow	16:1	38:8
132:9	80:10	58:21	101:8,8	66:18	20:11	41:16
shipping	86:22	65:1,4	some 11:23	133:8	21:22	42:2
80:12	121:14	70:19	24:14	something	22:2,7,13	43:19
short 13:13	133:17	71:5	26:15	6:21	26:6 27:9	66:19,23
55:2	similarity	75:20,21	29:1,16	11:15	28:2	66:24
62:24	134:6	77:7	31:18	29:23	76:22	73:13
79:4 86:6	simple 7:22	78:14	33:3,5	32:23	specific	74:21
130:6	10:1	80:10,15	36:24	38:19	11:12	75:4,11
shorter	simplest	95:5	38:22,23	40:6	21:3	75:13
22:6	63:4	115:9	44:8 47:7	46:20	29:20	spilled
shortest	simply	119:18	48:20,22	47:2,11	34:23	36:13
38:6	9:14	130:1,4	49:8	50:14	41:18	41:19
shorthand	55:18	130:15	50:14	67:23	47:23	spoke
1:11	57:11	six 18:18	51:10,14	68:10	49:1	107:6
141:4,6	73:1	38:1	51:19,24	93:14	59:10	110:21
141:16	102:16	71:24	52:21	95:7	76:13,14	spot 50:21
show	since 7:14	127:10	54:14	123:9	99:13,24	130:13
133:24	14:24	six-month	60:2 61:8	sometimes	101:14,19	spread
135:8	15:15	59:19	64:1,2,7	103:2	102:8	23:2

Springfie...	82:3	126:9	stemming	struck	51:14	sure 4:21
2:7	90:12	136:18	15:8	105:19	52:7,11	7:20 25:2
squares	91:17,23	stating	stenogra...	structure	52:14,16	31:23
31:23	92:6 93:3	61:22	141:10	134:3	substantial	46:12
SS 141:1	93:8	statistical	step 52:10	structured	49:13	50:15,23
stability	94:16	18:11	92:2,7	130:10	113:14	62:23
59:15	104:15,16	19:6	95:22	studies	subsurface	79:3,23
staff 6:1,16	104:23	67:10,16	123:18	14:20	122:1	101:21
6:19 13:4	111:18,22	68:14,21	still 60:23	stuff 23:13	Subtitle	113:11
13:12	112:4,14	82:21	98:16	137:13	27:20	126:13
50:21	112:19	stay 44:4	101:8	subject	70:11,20	133:12
55:7,15	114:9,19	Steinhour	102:18	10:19	70:21,22	137:23
128:18	115:3,3,8	3:10 5:14	128:1	12:21	71:1	138:21
138:12	121:2,3	5:15 13:6	stood 40:5	15:18	sufficient	surface
staff's 47:9	137:1	13:20	storage	24:23	91:16	20:15
stand	start 6:14	14:1,7,11	24:14,17	61:19	125:19	35:16,22
16:10,10	20:2	14:14,18	25:22,23	116:22	suggest	37:15
87:12	26:22	14:19	28:9 31:9	submit	40:9	70:1
standard	starts 31:8	15:7	132:7,11	57:16	68:20	106:19,24
10:5,20	61:24	21:13	132:12,19	110:19	132:3	107:2
19:12	state 1:11	24:16,23	stored	111:6,7	suggested	122:3
49:18	1:12 4:11	25:11,15	132:8	submitted	17:7,24	133:10
56:14	14:14	25:19,22	stream 7:7	17:18	72:24	sustain
77:23	28:15	27:7,11	11:3,8	39:6 67:4	106:13	15:1
78:7,19	31:7	27:21	12:6	89:3,4,20	111:8	SVOC
81:11	33:20,24	28:4	58:12,15	89:20,23	suggesting	102:3
85:4,7,10	34:10	29:10,17	64:8 71:6	97:22	58:21	swear 14:3
92:17,19	61:17	29:19	72:12	105:21	suggestion	33:12
93:6	70:19	32:6,12	75:18	108:4,12	131:20	87:14
94:20,21	87:22	33:10	76:20	108:15	suggestio...	sworn 14:1
94:22,24	92:1,23	34:6 56:2	82:6,7	109:9	140:16	14:6,9
95:14	93:1,17	65:18	86:1,10	124:7	Suite 2:2	33:14,17
100:6	94:4 95:3	71:4	86:13	Subpart	summaries	45:3
102:3	95:6	74:20	123:2,16	4:13,13	30:5	87:16,19
112:22,22	138:11	75:8	streams	Subsection	summari...	96:8
114:7	141:1,5	83:24	58:8	26:3	104:20	synopsis
121:5,13	stated	93:14	63:17	129:9	summary	55:19
125:24	15:16,20	94:7,13	65:1	134:23	42:11	61:9
129:1	19:8	100:10	118:12	135:1,4	summer	system
134:4,11	20:24	127:6	123:5,12	135:20,23	18:6	11:4,9
134:19,24	129:7	128:1,3,7	123:21	136:6,17	super 31:3	16:8
135:19	statement	129:17	Street 1:13	136:17	supersede	17:11,15
136:3,19	3:5 5:16	130:23	2:10	subseque...	22:20	23:17
137:7,18	6:10	131:5,7	strict 35:8	81:16	support	70:15
139:8	96:22	132:10,23	strictly	109:18	68:15	76:20
standards	states	133:4	36:9	134:15	supported	Systems
12:21	61:14	135:17	stringent	subseque...	38:23	1:3 4:6
40:17	69:16	138:4	56:21	58:4	43:13	5:10 6:11
51:15,16	76:22	Steinhou...	98:5	116:12	suppose	100:12
81:18	81:1 95:4	15:5	110:14	substance	63:8	S-t-e-i-n-...

14:19	118:5	73:18,21	Tenneco	77:10	124:2,3	78:17
	137:20	73:23	57:24	97:2	124:24	83:13
T	talked 11:6	74:4 75:6	58:8	98:15	127:13	101:9
T 3:20	11:16	75:10	60:22	105:5,21	128:15	113:21
Table 82:2	20:3 35:7	130:11,15	70:21	108:2,5,7	134:22	127:6
121:5	35:17	131:16,16	ten-minute	108:16	135:15	things
135:2,21	79:21	131:18	54:21	109:6,10	136:15	34:24
136:24	93:20	tanks	87:6	109:19	137:9,11	35:18
137:3,5	133:21	24:18	terms	126:3	137:15	36:1,9
TACO	talking 7:1	31:9	11:12	128:18	138:1,2	51:12
38:4	10:23	target	35:13	testing	140:7,21	65:5
take 8:8	12:23	127:15,21	37:13,17	12:4	thanking	88:22
42:24	47:8	tasks 34:5	37:23	53:19	6:14	101:20
43:2,5	60:16	TCE 39:23	38:9 56:4	54:3,3,5,6	Thanks	107:21
44:11	64:1 65:8	40:12	68:18	54:7,8,9	44:3	126:21
47:16	67:3	TCPLP	102:10	57:23	95:21	think 6:13
54:20	73:20	37:20	115:20	59:1 83:8	their 4:11	11:5,11
56:8	81:12	technical	test 23:15	101:1	16:15	19:23
64:24,24	92:5	5:1,4 6:1	24:1	129:5,9	17:23	20:12
69:14	95:11	6:2,4,16	57:22	129:12	20:8	27:13,17
70:4	119:5,7	6:19 13:4	96:16	131:1,3	23:11,17	27:18
77:11,20	127:1	13:11	102:16	132:2,3	24:18,24	28:10
87:6,11	137:2	34:5 47:9	128:6,6	133:15	26:15	29:4
130:5	140:11	50:21	tested	135:4,7	51:13	30:10
132:11	talks 72:19	55:6,15	56:16	136:7,7	53:1 64:5	31:6,16
133:15,22	80:2	83:17	135:10	136:20	72:11	31:19
taken 1:9	tank 23:15	89:11,12	testified	Texas	76:15	32:14
12:16	24:1,15	89:24	14:9	53:11,12	79:22,23	35:5
50:4 53:6	24:17	100:3	33:17	thank 5:11	79:24	37:12,21
57:5	25:22,23	128:17,23	67:4,7	6:6,9	80:5,10	39:19
59:19	28:9,9	140:15	79:7	13:18,21	80:11,15	41:6
120:19,21	57:17	technology	87:19	13:22	82:4,23	43:17
137:13,16	117:4	112:3,23	testify	14:11	83:2,12	46:19
141:10	130:3	112:24	59:13	21:7 24:6	84:9,14	47:8,21
takes 43:8	132:7,11	113:3,6	testifying	24:8 29:7	85:5,21	48:20
taking 9:14	132:12,16	technolo...	5:13	34:13	86:14,18	49:1,9
39:19	132:22,24	111:22	testimony	43:21,23	86:21	50:13,24
40:1 60:8	tanker	114:19	5:2 13:13	51:7	89:13	51:19,23
95:24	9:12	121:1	13:13	54:19	90:1	53:1,4,14
132:14,17	10:14,15	tell 63:15	24:20	55:4 61:6	102:3	53:19
132:19	21:15	70:14	30:4	61:9 63:2	120:7	54:8,11
133:5,8	27:8,15	71:14	31:22,22	80:21	129:20	58:9 59:9
talk 11:12	28:6,6,9	77:18	31:23	86:24	133:8,16	59:15,24
13:9	29:17	79:15	39:7	87:7 92:9	138:2,2	60:11,17
28:24	31:10	110:23	44:13	95:23,24	140:8,12	61:1 63:4
40:22	36:13	telling	51:9 52:2	98:11	themselves	64:22,23
53:15,16	38:8	94:21	55:16,20	103:14	140:4	65:2,2,18
63:9 74:8	41:16	ten 38:1	57:4	105:13	thing 46:7	66:10
93:21	42:2	tendency	61:10,12	118:20,22	60:15	67:7,9
94:4,5	43:19	49:2	69:22	123:23	63:6	68:5 71:4

71:12	third 96:14	124:8	96:14	transpor...	26:8,17	trucks 20:4
72:5,16	101:3	126:17	total 37:20	26:5,17	26:22	20:5
72:22,23	112:9,9	127:5	38:15	94:1	37:3	73:23
73:13,15	112:11	128:17	78:12,15	transpor...	65:16	74:4
73:19,21	114:4,4	138:9	101:4	19:10,21	66:20	131:18
74:14	114:16,16	time 7:13	totally	20:2	70:15,16	true 77:1
75:14,24	though	7:13 17:3	113:2	29:12	75:21	141:8
78:8,11	22:6	17:9 18:1	touched	75:12	80:12	try 39:20
78:21	28:15	21:21	37:12	traveling	81:2,5,12	51:16
79:24	31:6	43:1,3,4,6	toward	22:6	81:16,17	68:22
82:5,17	35:23	43:9 47:1	29:5	treat 23:11	81:19,24	88:23
83:6	36:2,10	59:11	toxic 47:22	23:16	83:2,7,12	95:11
86:11,23	86:12	62:18	47:23	24:3 47:2	83:14,16	130:8
93:7	98:20	64:11	48:19,24	47:10	83:20	138:15
96:11	100:5	68:6	49:11	82:10	84:7 98:6	trying
97:23	133:4,7	69:20	50:9	84:1,13	111:18	31:22
98:20	thought	102:7	121:2	91:16	112:14	51:18
99:2	11:5	106:8	toxicity	113:23	114:13	turn 13:10
101:13	32:19	112:17	41:1,2,4,7	treatability	115:2	29:13
102:21,23	51:10	129:20	49:22	112:22	122:20	55:5
103:3	53:7 91:4	137:12,16	107:20	113:22	tremend...	turns
104:24	102:5	times 38:1	108:3,7	114:7,22	103:5	109:10
107:14	three 7:24	88:24	113:19	119:7	tried 18:18	tweak
110:18	15:17	today 4:7	119:4,9	121:1	36:21	31:13
114:1,19	56:14,17	5:11,22	121:6,13	treated	71:15	tweaking
115:6	59:18,22	6:16	124:13,17	10:13	100:12	138:24
117:3,11	104:9,14	16:10	tracked	25:14	115:19	twice 109:4
118:6,9	104:21,24	17:1	76:24	36:20	trigger	109:8
119:18	112:10	31:20	transcrib...	37:2 58:6	67:22	126:10,20
120:4,18	129:22	35:7	141:10	65:15	82:8	two 5:12
123:13	thresholds	52:24	transcript	66:4,4,13	trip 140:20	6:16 8:7
124:9,16	121:15	62:20	1:8 141:8	81:4,10	truck 9:12	12:2 13:5
125:10,17	through	98:18	transfer	81:19,23	10:15,15	36:9
125:18	5:17 13:7	128:23	24:17	81:23	21:15	39:23
126:8	48:13	139:5,19	transferr...	113:5	23:6,6,7	41:17
127:3,5	49:10	140:5,9	25:24	120:12	25:24	68:11
128:13,16	50:13,14	today's	31:9	122:19	27:8 28:6	69:6
129:18	53:6,23	15:19	36:24	treating	28:7,9	82:18,24
130:8	55:14,15	Todd	transferr...	24:18	29:17	110:9,15
131:2,3	55:18	105:16	36:17	82:6,11	31:10	114:3
131:12,15	70:5 80:6	together	transit	treatment	36:13	116:18
132:6	83:10	13:8 30:9	43:19	8:16 9:5	41:17	120:2,7
134:21	84:19	32:3 33:2	transport	9:6,7,15	73:18,21	120:14
135:12	86:9,12	96:2	19:15,20	9:16,17	75:7,10	131:14
136:10,10	90:16,17	told 46:23	20:10,11	10:9,18	130:11,16	two-part
136:11	95:10	86:17	22:23	19:16,17	131:16,17	92:4
137:22	102:14	106:10	28:10	20:17	131:24	124:8
139:11	120:16,17	tool 75:19	41:18	23:18	132:2,4	two-step
thinking	120:18	top 4:9	90:19	24:13,24	trucked	116:20
67:22	123:17	topic 30:8	122:2	25:4,9	8:12	type 9:17

10:4	27:9,20	101:5	29:16	56:22	118:8	61:19
11:20	28:2,13	116:23	46:22	57:4	122:1	132:15
16:21	28:14,18	117:9,13	107:23	59:21	125:16	variations
35:14	44:16	117:15	108:1,4,7	60:3,24	126:14	65:22
47:24	45:14,15	United	108:12	61:15	135:22	various
52:13	45:17	69:16	109:13	62:12,15	utilized	40:18
62:2 63:9	46:5	95:4	updates	65:7 71:3	100:6	88:8
73:5 83:1	48:13	units 5:1	105:18	71:24	utilizing	104:21
129:24	64:11	7:24 8:7	108:6	74:17	69:9	106:9,9
130:3,12	66:5 71:9	8:9,21	uppermost	76:1,19	UTS	106:13,20
132:1	73:14	15:18,18	43:5	77:17	111:20,21	107:12
types 12:21	75:5	84:3	use 9:10	85:13	112:4,18	115:20
50:1	76:10,17	86:21	23:10	90:14,15	112:20	vast 119:24
54:10	78:18	122:22	24:18	91:15	113:1	verbal
62:17,19	109:11	universal	29:16	93:6,16	114:3	18:14
64:16,18	113:6	111:18	31:2	93:19,20	117:18,22	verificati...
typical	116:21	112:13	61:24	95:1	117:24	54:3
123:4	117:8,8	University	67:1	104:17	118:3	57:12
typically	132:13,14	14:21	75:22	105:16	121:2	58:2
23:14,18	underlying	33:24	76:4	106:23	UTS's	129:5,12
37:17	71:16	34:2 88:5	77:14	108:19	117:21	133:17,18
T-e-n-n-e...	understa...	unless	78:12	110:21	U.S 26:19	134:13
57:24	6:21	127:3	117:20,24	111:15		135:23
	31:22	unlike	118:10	112:17	V	verifying
U	37:23	84:19	121:20	114:1	V 38:24	53:19
ultimate	95:2	121:1	used 79:11	115:19	125:9,12	Version
4:19	126:16	126:22	79:12,13	116:16	valid	106:7,7
20:19	130:9	127:8	79:15,22	117:16	122:15	106:10,11
49:15	139:5	137:21	79:24	118:21	value	107:22
ultimately	understa...	unlikely	80:4	125:9	119:11,12	versus 18:9
54:7	23:14	43:18	101:16	129:2,2	values	69:7,11
unable	50:16	unlined	110:12	133:13	67:15	129:22
112:17	understa...	35:16,16	114:4	134:6	69:10	very 7:21
unchangi...	7:20	35:21	115:14	137:22	107:20	10:3,4
59:2	undertak...	77:6,15	117:18	user 106:7	122:7,8	12:1,1,5
unclear	17:2	122:3	119:22	106:14,16	variability	12:18
71:12	undertook	until 16:10	121:18	108:24	19:6 59:5	13:1
uncondit...	41:3	28:7 44:1	122:5,9,9	109:2,16	59:16	16:22
76:17	104:14	62:5	useful	110:4	66:11,15	22:1
under 9:5	unfortun...	136:2	85:17	126:8	66:17	32:16
9:22	35:20	unusual	USEPA	127:20	67:3	41:5 42:3
10:16,22	99:9	47:5	10:21	USG 70:24	68:13,23	42:6 43:3
10:24	107:1	67:23	17:23	125:10	130:22	43:10,17
12:12	117:7	unwarra...	36:6 41:3	using 36:9	133:21	46:15
15:6	unit 5:4	61:1	48:3	41:12	134:1	48:15
17:12	7:23 8:11	unworka...	49:12	69:10	variabilit...	50:19
20:2,8,11	15:23	130:18	51:17,24	100:1	67:11	51:9 53:4
21:1	16:7	update	52:24	104:20	variable	53:10,15
22:14	72:14	105:20	53:4	110:10	58:23	54:4,11
26:18	86:18,19	updated	54:10	115:20	variation	54:17

58:14	118:22	111:6	11:3,8,18	75:17	84:2,3,7	5:14,15
59:2,5	volatile	113:10	15:21,23	76:19,23	133:8	15:11
65:9	110:8	126:3,6	16:1,2,3	77:5,12	wastewat...	17:7,13
71:13,15	volatiles	126:19	16:13,21	77:13,22	53:8	34:3
75:14,20	109:17,23	128:10	16:23	77:24	waste-rel...	week 107:5
78:8	110:3,11	140:3,7	17:6	78:9 82:6	88:8	107:6
79:20	110:17	wanted	19:10,14	82:7 84:8	water	130:17
84:12	volume	6:12	20:12	85:24	10:19	131:14
86:20,22	37:13	15:19	21:22	86:9,10	15:7	weeks
95:17	64:13	16:5,12	22:2,3,7,8	86:13	20:21	26:14
103:14	65:3 75:7	16:24	22:13	88:7,9,11	34:7	131:14
112:4,6	75:22	32:24	23:2	90:24	36:19,24	well 5:4
112:17	78:12,16	44:16	25:18	94:1,12	66:5	11:13
118:15,20	79:13,21	45:4	26:6,18	97:15	75:11	31:20
119:22	80:5,8	50:12,22	27:9 28:2	100:12	81:3,18	34:8
121:10,10	81:8	51:3	28:5,21	101:4,12	82:3	44:12
121:14	volumes	58:16	32:15,17	111:23,23	90:16,17	46:14
122:15,24	75:3	79:16	34:8 35:8	113:1,14	91:17,23	47:1
123:4,20	79:17	83:13	35:15,18	113:24	92:6 93:3	63:19
129:18,19		87:10	36:8,19	116:5,8,9	94:15,20	64:10,16
130:18,23	W	92:10,16	37:2	116:12,21	94:22,24	65:12
133:12,14	Wacker	93:9 95:7	40:18	118:1,12	95:10	75:20
137:11,15	2:2	97:11	45:12,16	120:23,23	104:18	76:1
137:18	wait 44:1	98:17	45:18,18	123:2,5,6	121:16,16	81:15
138:19	114:8	115:15	45:22,22	123:7,12	132:17	84:4
via 4:24	waiting	117:10	45:23,24	123:16,20	waters	86:20
view 44:7	130:17	128:9	45:24	129:4,11	92:1 95:3	90:2,20
50:20	131:19	133:2	47:22,23	129:14	95:4	93:22
116:15	walk 70:5	138:21	48:2,3,8	133:18,19	way 10:24	94:18
vinyl 40:15	120:16,17	warrant	48:10,11	135:9	12:6	95:19
40:15,21	want 4:9	38:21	48:18,19	136:2	13:16	97:22
40:23	4:15 7:20	45:23	49:11,12	wastes	30:9	98:17
41:8,9	23:20	warranted	50:2,9	48:24	32:14	106:4
119:12,15	46:8	39:19	53:20	62:5 64:5	46:18	120:3
119:18	47:16	128:14	58:8,12	64:10,20	49:7,7	123:6
120:10	48:19	Washing...	58:14,17	76:9	54:13	126:5,7
121:5,5	49:9,20	57:14	58:23	101:7	57:18	126:21
121:12,17	50:15	wasn't	59:2,16	113:4	60:8	133:1
122:16,24	54:20	93:18	60:17	122:18	66:21	135:13
123:4	65:12	99:9	61:21	wastewat...	70:5 71:2	136:9
124:6	70:4	107:2	62:1,2,4	16:14	74:17	137:15
virtually	74:15	waste 1:3,4	62:18,19	19:16	82:12	138:3
132:16	78:10	4:6,6	63:10,17	20:14,17	85:2	went 17:13
virtue	82:8 83:5	5:10 6:11	63:23,24	22:4 23:4	89:13	47:3
11:20	85:19,19	7:7 8:1,5	64:8 65:1	23:11,18	90:1 93:6	57:11
53:1,2	86:3,6	8:15,16	66:1	24:4,13	114:24	64:19
73:8	102:18	9:22,23	69:18,21	24:19,24	123:13	85:10
130:9,12	105:20,23	9:24	70:23	25:4,9	130:9	96:23
VOC 102:3	108:21	10:14,17	71:1	26:8,17	ways 36:24	98:24
vocalize	110:14	10:17	72:11	81:5 84:1	Weaver	112:21

were 4:11	104:22	21:1 27:2	53:10,12	witnesses	79:11	16:4,9
22:9	106:14,17	30:14	54:4,7	3:9 5:12	wouldn't	17:22
31:17	106:20,21	36:17,17	56:13	13:5	21:2	19:1,5
37:10,20	106:24	37:14,15	57:2 61:3	140:6,7	22:10	32:15
38:11,11	108:1,6	39:17	64:12,14	wonder	100:24	34:3
38:14,24	109:11,12	47:2,7	65:2	84:24	126:16,19	38:13,16
39:3,5,8	110:15,22	50:24	69:21	wonderful	Wow 32:19	38:18
39:11,12	110:23,24	51:1	70:2,4	62:21	wrapped	40:9 43:8
39:14,15	111:3	54:22	72:12,13	wondering	49:3	59:3,4
39:15,23	112:10,14	55:1,24	72:14,17	105:19	writing	65:21
40:4,9	113:1,3	56:4	72:24	Woods 2:2	29:24	67:6 80:9
43:16	114:10	58:21	73:8,14	5:9	54:16	85:4
50:11	115:7	64:1 66:6	74:14	word 31:2	62:3	88:14
52:16	117:6,6	66:21	77:9 78:7	31:4	80:18	127:11
53:8,9	117:24	72:13	95:18	47:19,20	written	128:7
55:6	118:11	73:20	101:16	52:8,8	25:3	138:6
57:17	119:5	79:23	107:16,24	wordy	29:21	year's
58:8,8	121:17,21	81:12	108:3	61:11	30:2 62:6	75:17
59:19	123:8,9,9	84:6 85:2	120:18,18	work 29:4	68:4	79:11
60:22	126:4,24	87:5,6	125:7,7	82:12	wrong	yielded
63:10	129:20,23	92:12	125:18	88:22	121:4	12:11
64:6,10	130:24	97:3	127:8	103:6		York 34:1
64:11	132:4,13	98:18	128:13	126:17	X	
66:11	133:8,12	103:1	WHERE...	127:2	X 3:1,20	Z
67:3,8,9	136:11,11	106:18	141:11	137:13		zero 106:21
67:12,19	140:3,10	107:13	whichever	138:2,13	Y	zeroing
68:7,7,8	140:22	111:5,7	102:3	138:20	yards	31:2
68:14	weren't	115:10	while 10:11	worked	15:21,23	
71:5 72:7	64:18	118:15	27:3,6	14:21	15:24	\$
73:7	71:6 89:5	119:7	68:8	17:14	101:6	\$2,000
75:10	125:5	120:10	77:21	88:11	Yeah 25:15	29:17,19
79:20	West 2:2	130:3,21	133:18	working	30:16	0
80:7,11	2:10	132:19	whole	32:23,24	42:20	0.2 41:8
88:14,15	we'll 20:4,5	133:6	75:17	34:2 88:6	61:8	122:10
89:23,24	33:6	137:18	wide-open	93:16	68:12	028 119:16
90:2,10	53:15,23	we've 10:5	10:2	106:10	102:22	05-07
90:21	87:7	11:1,24	William	138:5	124:14	77:13
93:15,16	102:6	12:2,8,19	2:8	worst	year 20:6	08-5 1:3
93:21	111:7	13:7 17:2	139:18	35:14	38:6	4:7
96:6,16	118:19	19:23	willing	worst-case	56:19,20	
96:17,23	120:2	20:3 29:3	119:23	36:12	58:4	1
97:3,5,6	139:3,21	31:11,20	wish 118:4	66:18	69:11,12	1 41:12,16
97:11	we're 4:2	32:23	witness	72:15	72:10	41:24
98:1	4:12 5:11	34:24	14:5,8	74:15,22	89:16	42:6,9,16
99:14,20	9:14 10:1	35:7,17	33:13,16	75:3,9	106:12	42:18
103:6,20	10:3,23	36:6,11	45:2	122:4,8	years 7:9	45:15
103:21,21	11:13	37:8,10	87:12,15	worth 49:9	7:11,11	86:19
104:3,6,8	13:5 20:8	38:17,17	87:18	60:15	7:12 8:2	89:6 90:5
104:9,9	20:10,11	39:18	96:7	67:6	12:4	101:2,4
104:10,15	20:13	40:10	141:11	75:17	14:23	

105:17	132:24	89:6 90:5	721.11(a)...		
1.0 38:3	200 38:15	103:16	48:12		
1.9 15:22	2001 15:15	105:9,10	721.111		
15:24	2003 17:4	40 75:1	40:16		
10 127:16	17:18	97:5	48:24		
127:17	2004 18:5,7	4100 2:2	49:8		
10,000 19:2	2005 18:14	43 38:10	113:9		
100 8:17	18:17	39:7,9	123:19		
42:8	61:15	49 62:8	721.111(...		
43:16,17	2006 18:22		120:15		
77:7	40:5	5	721.122		
101 4:13	2008 1:14	5 3:6 18:17	45:12		
1021 2:6	4:8,23	80:24	77 2:2		
104 4:13	5:3 18:23	111:12	77699		
106 1:12	131:8	5th 1:12	129:8		
11 16:1	140:14,18	5,000 29:19	134:8		
126:12	141:12	69:12			
140:17	21 3:12	5,000-gal...	8		
112 75:1	25 7:10,11	10:15	8 106:1,3,6		
12 34:3	26 115:1	36:13	108:22		
14 3:11	26,000	37:7,13	809 26:7		
15 4:7,23	15:20,22	60:9	84-3565		
19:1	101:5	73:13,21	141:17		
15th 1:13	261.24	500,000	87 3:16		
57:17	121:4	69:11	15:24		
192 62:8	264 97:5				
19276 2:7	268 116:14	6	9		
1990 88:7	29 140:18	6 5:3 101:3	9 12:4 97:5		
115:1	3	127:16,17	97:9,13		
1993 46:20		60 20:1	97:17,21		
1998 16:5	3 96:11	57:6,23	9:00 1:14		
69:21	106:11	60,000-g...	9:10 4:8		
75:24	107:22	132:21	91 3:17		
76:6	30 3:12	60016 2:11	9511 2:10		
	140:13	60601 2:3	96 101:5		
2	300 19:3	62794 2:7	99 16:5		
2 8:4 9:22	301 1:12	6640 115:1			
16:2	33 3:14	69 129:8			
61:12	35 26:7	134:8			
63:23	40:16	7			
81:1	48:11	7 125:2,3			
106:7,7	350 8:12	70 62:8			
106:10	9:7 19:10	720.111(...			
108:23	39 39:2,9	72:18			
121:6	4	720.122(a)			
122:17,22	4 41:12,16	45:7			
122:22	41:24	720.122(d)			
20 59:3	42:6,9,16	47:23			
132:23	42:18	721 135:3			
20,000-g...					