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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:
PROPOSED AMENDMENTS TO CLEAN CONSTRUCTION OR DEMOLITION DEBRIS FILL OPERATIONS (CCDD): PROPOSED AMENDMENTS TO 35 Ill. Adm. Code 1100

DOCKET NO. R12-009

HEARING

SEPTEMBER 26, 2011

ORIGINAL

NATIONWIDE SCHEDULING

OFFICES: MISSOURI Springfield Jefferson City Kansas City Columbia Rolla Cape Girardeau ■ KANSAS Overland Park ■ ILLINOIS Springfield

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLEAN CONSTRUCTION OR	)	
DEMOLITION DEBRIS FILL	)	Docket No. R12-009
OPERATIONS (CCDD):	)	(Rulemaking - Land)
PROPOSED AMENDMENTS TO	)	
35 Ill. Adm. Code 1100	)	

HEARING HELD

SEPTEMBER 26, 2011

(Hearing commenced at 12:30 p.m.)

I N D E X

(Exhibits retained by Hearing Officer Tipsord.)

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Hearing held, pursuant to Notice, on the 26th day of September, 2011, between the hours of 12:30 p.m. and 3:45 p.m., at 1021 North Grand Avenue East, Sangamo Room, Springfield, Illinois, before Ms. Marie Tipsord, duly appointed Hearing Officer.

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Mr. Stephen F. Nightingale, P.E.
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Mr. Douglas W. Clay, P.E.
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MS. TIPSORD: Good afternoon. My name is Marie Tipsord and I've been appointed by the Board to serve as hearing officer in this proceeding entitled Proposed Amendments To Clean Construction Or Demolition Debris Fill Operations (CCDD): Proposed Amendments to 35 Ill. Admin. Code 1100. The Docket Number is R12-9.

To my immediate left is Acting Chairman G. Tanner Girard. He's the presiding Board Member assigned to this matter. To my far right is Board Member Thomas Johnson, and to my immediate right is Anand Rao from our technical unit.

The purpose of today's hearing is to hear prefiled testimony of the Illinois Environmental Protection Agency and allow questions to be asked of the Agency. The witnesses for the Agency are Douglas Clay, Stephen Nightingale, Paul Purseglove, and Leslie Morrow.

We will swear the witnesses in, enter the testimony as if read as an exhibit, and then begin with the questions. Many of the questions are addressed to the panel, so we will have the witnesses as a panel.

We will begin with the questions filed by

the Illinois Association of Aggregate Producers, then proceed with Waste Management of Illinois, and conclude with Land Reclamation & Recycling Association. And that order is based purely on the number of questions. The Aggregate Producers had the most questions, so I thought that might be the smartest way to start, and we can follow up there.

And anyone may ask a question. However, I do ask you raise your hand, wait for me to acknowledge you. After I have acknowledged you, please state your name and who you represent before you begin your question.

Please speak one at a time. If you speak over each other, the court reporter will not be able to get your questions on the record.

Please note that any question asked by a Board member or staff are intended to help build a complete record for the Board's decision and not to express any preconceived notion or bias.

Are there any questions on how we're going to proceed today?

(No response)

MS. TIPSORD: Dr. Girard.

DR. GIRARD: Good afternoon. On behalf of

the Board, I welcome everyone to the hearing.

There's already been a considerable amount of work put into this proceeding. We're very grateful for that. And we look forward to the testimony and questions this afternoon to round out the record. Thank you.

MS. TIPSORD: With that, I believe we're going to go to the Agency.

MR. WIGHT: Good afternoon. My name is Mark Wight and I'm an Assistant Counsel with the Illinois Environmental Protection Agency. I've worked for the Agency for about 20 years and most of my work is with the Bureau of Land.

Also assigned to this project are Assistant Counsels Stephanie Flowers on my left and Kim Geving who is in the second row.

Also here on behalf of the Agency are the four witnesses who have prefiled testimony, three additional witnesses who will participate on the panel, and additional staff members who are here in a consulting role.

The four witnesses who have prefiled testimony are Doug Clay, Manager of the Division of Land Pollution Control in the Bureau of Land -- Doug,

if you'd raise your hand and kind of acknowledge -- Steve Nightingale, Steve is manager of the Bureau of Land, Permit Section; Paul Purseglove, Paul is manager of the Bureau of Land, Field Operations Section; and Les Morrow, Environmental Toxicologist in the Agency's Toxicity Assessment Unit.

The three additional witnesses on the panel are Dr. Tom Hornshaw, who is manager of the Agency's Toxicity Assessment Unit; Chris Liebman, Chris is the manager of the Solid Waste Unit in the Bureau of Land, Permit Section; and Terri Blake Myers, Manager, RCRA - Groundwater Assistance Unit in the Bureau of Land, Permit Section.

Additional staff members here on behalf of the Agency who have also been involved in the work groups are Heather Nifong, Programs Advisor in the Bureau of Land; Tom Hubbard, Environmental Protection Engineer III in the Solid Waste Unit of the Bureau of Land, Permit Section; Greg Morris, Environmental Protection Engineer III in the Solid Waste Unit of the Bureau of Land, Permit Section; and Jacki Cooperider, Environmental Protection Engineer III in the Solid Waste Unit of the Bureau of Land, Permit Section.

Is this the point where you would like to

swear in the witnesses?

MS. TIPSORD: Yeah. Let's go ahead and do that.

MR. WIGHT: Okay.

MS. TIPSORD: If you would all raise your hands.

(Whereupon the witnesses were duly sworn.)

MS. TIPSORD: Do you want to go ahead and enter the testimony as an exhibit at this point?

MR. WIGHT: That would be fine.

MS. TIPSORD: All right.

MR. WIGHT: And then I'll have a few remarks, as will Doug Clay.

MS. TIPSORD: If there's no objection, we will enter the testimony as if read, starting with the testimony of Stephen F. Nightingale as Exhibit 1, if there's no objection.

Seeing none, it's Exhibit 1.

The testimony of Paul Purseglove will be Exhibit 2 if there's no objection.

Seeing none, it's Exhibit 2.

The testimony of Douglas Clay will be Exhibit 3 if there's no objection.

Seeing none, it's Exhibit 3.

And finally, the testimony of Leslie Morrow will be Exhibit 4, if there's no objection.

Seeing none, it's Exhibit 4.

Go ahead, Mr. Wight.

MR. WIGHT: Some may have noticed that this is a larger contingent of witnesses and supporting staff than the Bureau of Land typically would bring to a regulatory hearing. And the explanation for that is in the way that the project was assigned out.

The statutory provisions require or authorize numerous technical and operational revisions to the existing Part 1100 rules, as well as the addition to the rules of the soil-only fill sites. Stephanie Flowers and the Bureau of Land participants were assigned that task. They are the remaining and new members of the work group that brought the original Part 1100 proposal to the Board in late 2005 in PCB R2006-19.

The statute also requires the development of maximum allowable concentrations of contaminants in uncontaminated soil for purposes of CCDD fill operations. A second work group was assigned to this

task. That work group consists of me, the toxicologists, and some of the members of the primary work group.

In addition to having overlapping membership, portions of the two work groups met periodically throughout the project to update the others on the progress that was being made and also to discuss and attempt to revolve outstanding issues.

Once that process was completed, Subpart F was then merged with the proposed amendments to the rest of Part 1100, resulting in the proposal before you today.

So this provides some of the background on how the proposal was developed and explains the number of Agency personnel here today.

I'd also like to turn it over to Doug Clay, who has a few remarks in opening.

MR. CLAY: Good afternoon. My name is Doug Clay, and I would like to provide just a brief opening statement with regard to the Agency's proposal.

Public Act 96-1416 became law on July 30th, 2010. It requires that the Illinois EPA propose rules to the Illinois Pollution Control Board within

one year, by July 30th, 2011, to establish additional technical standards for CCDD facilities currently regulated by the Illinois EPA, set operating standards for uncontaminated soil fill operations, and develop standards for maximum allowable concentrations of chemical constituents in uncontaminated soil generated during construction or demolition activities used as fill at either of these types of sites.

Some of the major provisions of the proposed rule include: professional engineer and geologist uncontaminated soil certifications, methods for determining numeric standards for uncontaminated soil going to regulated sites, operating standards for uncontaminated soil fill operations that had not previously been regulated, and groundwater monitoring at sites subject to this rule.

Illinois EPA's goal was to propose a rule that is fair and workable while also being sufficiently protective of the environment. To do this, we sought input from a diverse set of stakeholder groups. We posted interactive drafts -- or, interim drafts of the rule on Illinois EPA's website for comment on February 17th and April 29th, and from these two drafts received 160 comments from

over 24 stakeholders. And some of the stakeholders included the Illinois Association of Aggregate Producers, the Illinois Society of Professional Engineers, the Illinois Landscape Contractors Association, and the Illinois Department of Transportation.

Illinois EPA appreciates the comments, issues, and concerns raised by the stakeholders. Their careful review of the draft proposal greatly improved our approach to regulating CCDD and uncontaminated soil. I would like to emphasize that we reviewed and considered all of the comments and revised our draft rules as we believe appropriate to create the proposed rule that is currently before the Board.

As I mentioned, Illinois EPA made a number of changes as a result of comments received on our draft rules. Some of the more significant changes include an addition -- the addition of professional geologists to certify uncontaminated soil, replacing the term "industrial/commercial" with "potentially impacted property", revising the definition of "other excavation", and taking into consideration dewatering activities when establishing the groundwater

monitoring requirements.

And finally, I would like to point out there are two areas that received considerable attention from both the Agency in our internal discussions and from stakeholders.

One is the use of background values in development -- in developing standards for uncontaminated soil. The statute was amended with Public Act 97-137 on July 14th, 2011, to allow the use of background, and consequently, our proposal includes background values in the maximum allowable concentrations for soil.

And two, the Agency decided to require groundwater monitoring. The Agency believes that certification and the screening procedures will be effective in ensuring that only uncontaminated soil goes to CCDD and soil fill operations. However, no system is fail-proof. We believe that groundwater monitoring should be required to verify that groundwater, an essential natural resource, is not adversely impacted.

Thank you.

MS. TIPSORD: Anything further?

MR. WIGHT: I believe that's it.

MS. TIPSORD: Okay. All right. And then let's begin with the Illinois Aggregate -- Association of Aggregate Producers, please.

Whenever you're ready, if you could introduce yourself and who's with you for the record.

MR. HENRIKSEN: Thank you. My name is John Henriksen. I'm the Executive Director of the Illinois Association of Aggregate Producers, and I'm making an appearance today as counsel for the association.

With me to my right is technical expert John Hock from Civil & Environmental Consultants, Inc.

There may be a point where I ask the Hearing Officer's indulgence to perhaps get leave from the Board to have Mr. Hock ask a question or two. But during this he'll be, I'm sure, submitting some follow-up questions for me.

MS. TIPSORD: Okay. Thank you.

MR. HENRIKSEN: Now, I know that you all plan to answer as a panel, but we tried to in our prefiled testimony point you to the part of the set of testimony that we're referring to.

Referring to Steve Nightingale, Mr. Nightingale's testimony, at pages 5 and 37, states

at a CCDD or uncontaminated soil operation where a cone of depression is maintained, a verification report and annual notifications must be submitted to the Agency.

What are the requirements of this report and subsequent annual notifications?

MR. NIGHTINGALE: In the proposed amendments to Part 1100.103, dewatering is defined as removing water from a fill operation such that a cone of depression is created. Therefore, initial reports demonstrating that a fill operation is being dewatered would logically include things like the rate at which the water was pumped out of the fill operation over the past year, as well as the pumping rate anticipated during the next year, and drawings showing the current and anticipated configuration of the cone of depression, i.e. its depth, lateral extent, and shape, based on calculations and/or field data. The same type of information would need to be provided in the subsequent annual updates.

MR. HENRIKSEN: Thank you.

Stephen Nightingale's testimony, at pages 6, 11, and 12, outlines the IEPA's rationale for replacing the commercial/industrial standard in

Section 100.103 with a new standard entitled potentially impacted property.

Please provide examples of properties the IEPA would not consider potentially impacted.

MS. TIPSORD: And, Mr. Henriksen, are you referring to 1100.103?

MR. HENRIKSEN: I certainly am. Thank you for that. Yes, I certainly am. Thank you.

MR. NIGHTINGALE: The decision as to whether a property is potentially impacted must be made on a case-by-case basis. Potentially impacted property means property on which an historical or current use or contaminant migration from a nearby site increases the presence or potential presence of contamination at the source site.

MR. HENRIKSEN: How does an owner or operator determine if a property is potentially impacted?

MR. NIGHTINGALE: When determining whether a property is potentially impacted, the owner or operator should consider the current use of the property, the prior use of the property, and the use of the adjoining property.

MR. RAO: May I ask a follow-up question?

MR. HENRIKSEN: Certainly.

MR. RAO: The response that you just gave now appears to be part of a Board note in the proposal. Is that right? How an owner or operator determines what a potentially impacted property is.

MR. NIGHTINGALE: I believe it is. It's identified in the definition, but there is a Board note also.

MR. RAO: Yeah. The Board note, the way it's stated here, it almost seems like it's a requirement for an owner or operator to go through some of the things that you are mentioning in the Board note. And the question is, should that note be made part of the rule language?

Just to give you some background, a lot of times we have issues with the JCAR when they see substantive Board notes but they're not part of the rule language since the Board notes cannot be enforced. And we just wanted to know if they should be part of the rule.

MR. NIGHTINGALE: Are you talking about the Board note that -- one of the things is we were just asked to give an example of what --

MS. FLOWERS: I mean we can look at it, I

guess.

MR. RAO: Can you? Because there are -- I mean it's not just this Board note. There are a few more in the rules where it seems like you're, you know, saying what an owner or operator should be doing, providing the explanation in a note rather than putting it in the rules.

MR. CLAY: I think part of it, too, was we tried to give an example in the Board note as far as we'd -- you know, how we would interpret it. And so I don't know -- is an example -- it probably isn't appropriate for the actual regulation, but would that be appropriate for a Board note?

MS. TIPSORD: I think Anand said it the best. A Board note's not enforceable.

MR. CLAY: Right.

MS. TIPSORD: So if it's something that you expect someone to do as a part of the process, then it shouldn't be a Board note.

MR. CLAY: Okay.

MS. FLOWERS: Right. And I think the issue is we don't -- we don't necessarily expect them to do a set of anything. We're just saying these are the types of things you should look at just to provide

clarification on what -- what is potentially impacted property.

MS. TIPSORD: So do you --

MS. FLOWERS: But we'll look at it.

MS. TIPSORD: Okay. And do you want to ask Mr. Clay if that's correct that that's what you were doing or do you want me to have you sworn in?

MS. FLOWERS: Is that correct, Doug, is that what we were doing?

MR. CLAY: That's correct.

MS. TIPSORD: Thank you.

MR. RAO: Thank you.

MR. HENRIKSEN: Thank you for that.

Going further, would a property that has been -- that has historically been agricultural be considered a potentially impacted property?

MR. NIGHTINGALE: Well, no type of property can be categorically excluded. Agricultural land would tend to be uncontaminated but may have historic spills of pesticides or fertilizer or may be situated near a contaminated site.

So again, the owner should use his knowledge of the history of the site and nearby sites or, if the history is unknown, consult a professional

engineer or geologist for their input.

MR. HENRIKSEN: So I guess they're not automatically considered --

MR. NIGHTINGALE: I think in general it would be uncontaminated unless there was situations that make -- make it potentially impacted.

MR. HENRIKSEN: A greenfield site then would assume to be not potentially impacted?

MR. NIGHTINGALE: A what type site?

MR. HENRIKSEN: A greenfield site, never been developed.

MR. CLAY: Again, I think that's a case-by-case basis and depending upon what had gone on at the site in the past.

MR. HENRIKSEN: Okay. If potentially impacted property is not defined within the Illinois Environmental Protection Act, can it be added and enforced under the proposed Part 1100 rule in Title 35 of the Illinois Administrative Code?

MR. NIGHTINGALE: Yes. The Agency has added many definitions that are not in the Illinois Environmental Protection Act.

MR. HENRIKSEN: And does this power to add this new definition come from Public Act 96-1416 or is

it -- does it come from the IEPA's overall power under the act?

MR. CLAY: I would say we -- we routinely in rulemakings add definitions as part of the rulemaking.

MR. HENRIKSEN: Section 1100.103 and pages 23 and 24 of Stephen Nightingale's testimony mentions incidental amounts of rock, stone, sand, clay, and vegetation in uncontaminated soils.

Is the IEPA interpretation that uncontaminated rock, stone, sand, and clay do not meet the definition of uncontaminated soils?

MR. NIGHTINGALE: Our response I think is really the Agency recognizes that this may cause confusion with the public and we're -- and is considering addressing this issue as an errata sheet for the second hearing.

MR. HENRIKSEN: Thank you.

Stephen Nightingale's testimony, at page 26, states that CCDD and uncontaminated soil operations pose a threat to groundwater because they're "unlined allowing direct access to groundwater." However, naturally occurring low spots and other unregulated areas where fill is allowed to

be placed do not have IEPA oversight.

Why is the concern for registered or permitted facilities greater than for unregistered facilities?

MR. PURSEGLOVE: The Agency is charged with enforcing environmental law and regulations, and this Agency is obligated to focus attention on registered sites because those sites are covered by the statute.

Nevertheless, properties that are lawfully used to deposit CCDD and soils but which are not required to obtain permits or file notifications can be inspected by the Agency, and if contaminated materials are found, an enforcement action will begin with the outcome being the removal of the offending materials.

MR. NIGHTINGALE: I have a follow-up on that.

First, Section 3.160(b) of the Act specifically allows CCDD to be used as fill with certain restrictions.

Second, the sites regulated by Part 1100 have much greater volumes of material than is required for filling a low spot. The greater volume increases

the chance that some contaminated material could be accepted in the fill operation.

MR. HENRIKSEN: Can we ask this just -- just so I understand, currently the IEPA does not register or regulate farmers, landowners that have naturally occurring low spots in their fields. They don't require them to get permits. Correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: They don't allow them to -- don't require them to register. Correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: Okay. More for Stephen Nightingale. Stephen Nightingale's testimony, at page 32, states that the IEPA chose, in proposed Section 1100.735, to require that monitoring be performed for all parameters which have a Class I groundwater standard in 35 Illinois Admin. Code 620.410.

Are all of these parameters, including PCBs and radionuclides, required to be analyzed at all sites?

MR. NIGHTINGALE: Yes. The groundwater samples must be tested for all parameters that are listed in Part 620.410.

MR. HENRIKSEN: Including radionuclides?

MR. NIGHTINGALE: Yes.

MR. HENRIKSEN: And PCBs?

MR. NIGHTINGALE: Yes.

MR. HENRIKSEN: What data has the IEPA collected showing that these Class I parameters, metals, radionuclides, such as radium-226, radium-228, tritium, and strontium-90, and other inorganic parameters, volatile organic compounds, semi-volatile compounds, pesticides, herbicides, and PCBs, are found in CCDD fill? What data justifies the breadth of that kind of test requirement?

MR. PURSEGLOVE: Because groundwater monitoring currently isn't required at these sites, data collection is virtually nonexistent. However, at a quarry site that operated in Lynwood prior to the requirements to obtain permits some very limited groundwater sampling has shown levels of lead and cadmium many times higher than the groundwater standards. The state's enforcement action at the Lynwood site has resulted in, among other requirements, an order by the court to install a groundwater monitoring network at that facility.

MR. HENRIKSEN: Any test data from that site showing the existence of radionuclides?

MR. PURSEGLOVE: No.

MR. HENRIKSEN: PCBs?

MR. PURSEGLOVE: No.

MR. RAO: May I ask a follow-up?

MR. HENRIKSEN: Please.

MR. RAO: Does the Agency want owners or operators to monitor for these parameters on an annual basis? Or if they monitor it once and they find some of these constituents not detectable, can they drop it and drop those constituents off the list?

MR. NIGHTINGALE: Well, the way that the regulation is written now, we are expecting that they would do the testing annually for all of the parameters. In other words, we don't have any provisions in there that would allow them to back off over time.

MR. RAO: Would you consider adding those provisions to the rules?

MR. CLAY: I think that would be applicable if the site was closed and they were continuing to do groundwater monitoring.

In this situation, they could be monitoring groundwater for -- for 10, 20, 30 years while they're still adding additional material. So we

think it's appropriate that they do all of the parameters on an annual basis.

MR. RAO: Okay. Thanks.

MR. HENRIKSEN: What data has the IEPA collected that justifies monitoring for all parameters rather than for an indicator list based on potential contaminants of concern based on the fill material accepted at the facility?

MR. NIGHTINGALE: There is limited data available on the CCDD fill sites, as previously discussed by Paul Purseglove. However, since the soil can be accepted from almost anywhere, almost anything could be in it.

MR. HENRIKSEN: But if I heard what Paul was saying when he was testifying, the data -- the only data that you all have in-house from one site shows elevated levels of two heavy metals. Correct?

MR. PURSEGLOVE: Very -- it was very limited groundwater data that was made available to us. It was not any sort of comprehensive analysis on those samples.

MR. HENRIKSEN: And that's the only data you have that shows a concern of contaminants from one of these sites. Correct?

MR. PURSEGLOVE: That's all the data we have. Correct.

MR. HENRIKSEN: Thank you.

Does the IEPA know the estimated cost of analyzing for all these parameters?

MR. NIGHTINGALE: We've requested cost estimates from our Bureau of Water as well as from our Agency librarian. I would like to add, however, that when we were developing these regulations, we -- we did -- or, I looked at some reimbursement costs through our site remediation program.

MR. HENRIKSEN: Now, the IEPA has been regulating CCDD for a number of years; correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: And you've been, I presume, taking data from these sites, analytical data from -- regarding what's in the material being deposited?

MR. PURSEGLOVE: We have been conducting compliance inspections at the sites for several years. Any data that would be kept by the site operators is available for our use.

Other than that, I'm not exactly sure what -- what question you're asking.

MR. HENRIKSEN: Well, I'll try to sharpen it then.

Do you have any data -- does the IEPA have any data about what is in CCDD, what kind of contaminants, what components are in the CCDD that the companies that have been taking this for a number of years that you all have been regulating for a number of years have?

MR. PURSEGLOVE: We did a round of compliance inspections in the infancy of this program, collected samples, and we did find contaminants at a variety of sites across the state. Some of which were at very low levels. Others were at elevated levels. And using our enforcement prerogative and discretion, we proceeded on with enforcement cases against those that had higher levels of contaminants.

MR. HENRIKSEN: We're going -- these are follow-up questions for Mr. Nightingale that focus on his groundwater monitoring testimony, his filed testimony.

As I read Section 22.51(f)(1) of the Act, that requires the IEPA to propose standards and procedures for CCDD fill operations that are necessary to protect groundwater, which shall include, but not

be limited to, testing and certification of soil used as fill materials and requirements for recordkeeping. Correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: And that would also include groundwater monitoring. Correct?

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: But Section 50 -- 22.51a(d)(1) of the Act does not require groundwater monitoring. Correct?

MR. NIGHTINGALE: Would you repeat your question one more time, please?

MR. HENRIKSEN: Okay. Section 22.51 of the Act governs clean construction or demolition debris fill operations. Correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: Then going to Subsection (f)(1) of that section of your statute, that requires that a -- that would require that these rules that are being promulgated include standards and procedures necessary to protect groundwater, which may include, but shall not be limited to -- and going to it, it talks about groundwater monitoring. Correct?

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: Then going to the statute that deals with uncontaminated soil fill operations, that's 22.51a. Correct?

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: (d)(1) of that statute does talk about standards and procedures necessary to protect groundwater, but that does not specifically require groundwater monitoring. Is that correct?

MR. NIGHTINGALE: That would be correct.

MR. HENRIKSEN: Why did the IEPA elect to mandate groundwater monitoring for uncontaminated soil fill operations despite the fact that groundwater monitoring for these operations was not specified in Section 22.51a(d)(1) of the Act?

MR. CLAY: I think the -- we believe the Board does have the authority to require groundwater monitoring. The statute specifically does not require it. And we want to be consistent with regard to the CCDD facilities and the soil fill operations with regard to the maximum level of concentrations in groundwater monitoring because that's really where the contaminant is carried in the soil. And so to require groundwater monitoring in one and not the other didn't make a lot of sense to us.

MR. HENRIKSEN: Even though the statute that creates the regulatory program for uncontaminated soil operations does not require monitoring, you all elected to require that on that sector. That's correct?

MR. CLAY: That's correct. We elected to include that to protect groundwater.

MR. HENRIKSEN: And so what analytical data has the IEPA gathered from uncontaminated soil fill operations that would support the imposition of a groundwater monitoring program on the sites, a program that's not mandated by the Illinois Environmental Protection Act?

MR. PURSEGLOVE: I think the answer to that is similar to our previous response. There is no monitoring at any of these sites, so the availability of data is -- is limited, nonexistent with the exception of the site in Lynwood that I mentioned earlier.

MR. HENRIKSEN: I guess I go back to the question that I was posing before that. I don't know if it was answered.

Do you all -- does the IEPA know the estimated cost of analyzing these parameters for

either a CCDD site or a clean soil fill site? Do you have -- do you know the estimated cost -- what it's going to cost the industry to do this test work?

MR. CLAY: We can provide that information in supplemental testimony or prior to the next hearing.

MR. HENRIKSEN: Thank you.

Okay. Referring to Section 1100.101, why is it acceptable, from an environmental protection standard, to use CCDD and uncontaminated soil as fill in a topographically low area without a permit if the topographically low area is not a former quarry, mine, or other excavation, such as a natural low area in a farm field?

MR. NIGHTINGALE: First, Section 3.160(b) of the Act specifically allows CCDD to be used as a fill with certain restrictions.

Second, a site regulated by Part 1100 has much greater volumes of materials than is required by filling a low spot. The greater volume increases the chance that some contaminated material could be accepted in a fill operation.

MR. HENRIKSEN: So from an environmental -- it's okay from an environmental standpoint because

of the, in your mind, in EPA's opinion, smaller volume of materials that's deposited in an unregistered or unpermitted site, that makes it okay?

MR. CLAY: No. What -- what the Act allows in 3.160(b) allows for low-lying areas. It does not talk about at all any contamination of the material. So it should be uncontaminated material.

The potential for contamination of the groundwater is higher with a much larger volume and material coming from hundreds, if not thousands, of different locations.

MR. HENRIKSEN: What steps are the IEPA taking to prevent these occurrences which violate other IEPA regulations? In places that -- that you don't -- where the site's not registered and they're not permitted, what's -- what's the IEPA doing?

MR. PURSEGLOVE: FOS would respond to complaints from the public about the dumping of wastes, which could include contaminated soils. For regulated sites, the soil certification forms and the load checking procedures and the potential groundwater monitoring are all designed to protect human health in the environment by either preventing contaminated materials from being accepted or detecting

contamination requiring -- and requiring corrective action before it affects the neighboring properties.

MS. TIPSORD: Excuse me. You said FOS would respond?

MR. PURSEGLOVE: I'm sorry. FOS is Field Operations Section.

MS. TIPSORD: Thank you.

MR. HENRIKSEN: Referring to Section 1100.101(b)(3) of the rules -- proposed rules, is there less environmental risk associated with CCDD and uncontaminated soil used as fill material in an excavation in accordance with IDOT specifications?

MR. NIGHTINGALE: Section 22.51b(4)(b) of the Act provides an exemption for the use of CCDD as fill material in an excavation other than a current or former quarry or mine if the use complies with IDOT specifications. The exemption predates Public Act 96-1416, and because it is a statutory exemption, the Agency has not evaluated the environmental risk.

MR. RAO: May I ask a follow-up on the same provision?

You have added the uncontaminated soil to the previous rule language which addressed just CCDD. I just wanted a clarification from the Agency if the

IDOT specifications address soils also.

MR. NIGHTINGALE: Are you -- are you asking about the proposed regulation or the practices of IDOT?

MR. RAO: IDOT. That was part of the rule which addressed CCDD and now we have added soils to that provision. I just want to make sure the IDOT specification covers soils.

You can get back to us if you want to take a look at it.

MS. FLOWERS: We will get back to you.

MR. NIGHTINGALE: Yeah.

MR. RAO: And also, you know, the Board note under that provision was one of the Board notes I had, you know, highlighted to see if that should be part of the rules, if you can take a look at it.

MR. NIGHTINGALE: Okay.

MR. RAO: Thank you.

MR. HENRIKSEN: When using soil as fill per the IDOT exemption, does IDOT have to test the soil consistent with the new rules to demonstrate that the material is uncontaminated, to demonstrate that the material is truly CCDD or uncontaminated soil?

MR. NIGHTINGALE: Per proposed Part

1100.101(b)(3), the proposed amendments would not apply to IDOT fill operations. The Agency does not oversee IDOT and is not familiar with its practices.

MR. HENRIKSEN: Is IDOT material used as fill in a former quarry or mine required to be tested in accordance with these rules?

MR. NIGHTINGALE: IDOT material taken to a fill operation regulated under Part 1100 is subject to the same requirements as material from other source sites. Thus, IDOT soil cannot be accepted at a fill operation regulated by Part 1100 unless a form certifying the soil to be -- I'm sorry -- unless a form certifying the soil to be uncontaminated has been completed for it. However, laboratory analysis is not absolutely necessary for such certification.

MR. HENRIKSEN: Earlier -- going to Paul Purseglove -- back to Paul Purseglove -- you talked about the Lynwood site. Is that correct?

MR. PURSEGLOVE: Yes.

MR. HENRIKSEN: Was that a site that only accepted clean construction demolition debris and uncontaminated soil or was the Lynwood site a place that accepted a, shall we say, wide variety of material, much of which could never be considered

CCDD?

MR. PURSEGLOVE: It was purported to be operating as a site that accepted clean construction demolition debris, but, in practice, we observed many instances where they had taken general construction demolition debris.

MR. HENRIKSEN: The sites that you currently regulate, the sites that are subject to this rulemaking, are they taking general construction demolition debris?

MR. PURSEGLOVE: No.

MR. HENRIKSEN: And the site that had the high -- these readings of high metals, that was the Lynwood site, a site that's not a CCDD site. Correct?

MR. PURSEGLOVE: It is not a permitted CCDD site.

MR. HENRIKSEN: And was not a -- it's not a registered soil fill operation. Correct?

MR. PURSEGLOVE: That's correct.

MR. HENRIKSEN: Okay. And that's the -- but that's the example of a site that -- that data from that site is data that you have that causes you to want to regulate the industry under these rules, requiring them to come up with test data every year on

all of these parameters. Correct?

MR. PURSEGLOVE: No, I wouldn't -- I wouldn't phrase it that way.

MR. HENRIKSEN: Do you have data from other -- do you have data from sites that are -- that are the subject of these proposed rules that show high contaminant levels?

MR. PURSEGLOVE: The question that you asked earlier is what data do we have for impacted groundwater, and our response to that is we have virtually none because groundwater monitoring is not required at these sites. However, we did have that limited data from the site in Lynwood that was a pit, quarry, or other excavation that was authorized, was operating under the law that allowed them to take CCDD. They took things other than CCDD. But, nevertheless, that limited data, all we have, showed some extremely elevated levels of lead and cadmium.

But for you to characterize it as based on this data alone you're going forward with groundwater is where I depart from your statement. That is not the reason why we're proposing groundwater assessment at these sites.

MR. HENRIKSEN: Thank you.

For Leslie Morrow, page 7 of Leslie Morrow's testimony states that the IEPA "proposes a conservative approach of utilizing the lowest pH-dependent value from Appendix B, Table C for each ionizing organic constituent as the value to substitute for the pH-neutral soil-to-groundwater value from Appendix B, Table A."

Is this decision based upon the IEPA's conclusion, as stated on page 7 of Leslie Morrow's testimony, that pH conditions at fill operations are expected to be variable and unpredictable?

MR. MORROW: The simple answer is yes. The Agency expects pH variability between the numerous fill operations currently in the state and future operations. At various depths we expect variation in pH, and we expect variability and unpredictability in the loads that are coming into the fill operations.

MR. HENRIKSEN: What soil pH data has been gathered by the IEPA that supports the notion that pH conditions at these fill operations are expected to be variable and unpredictable?

MR. MORROW: The Agency has relied primarily on the Natural Resources Conservation Service website, the STATSCO database. NRCS is a

division of the Department of Agriculture. The database organizes soil data by county and includes soil pH at various depths.

MR. HENRIKSEN: So you don't have soil pH data gathered from particular operations that would support this?

MR. MORROW: We gathered our data from a Web-based database.

MR. HENRIKSEN: That has soil profiles associated with a county?

MR. MORROW: Yes, sir.

MR. HENRIKSEN: But not soil pH data gathered from the sites that are currently accepting this material. Correct?

MR. MORROW: That's correct.

MR. HENRIKSEN: So you all do not know -- you do not have data that shows what the soil pH is at any of the sites that are currently accepting --

MR. MORROW: Generally for the county that that site is in we have that information. For the operation itself specifically, no, we do not.

MR. HENRIKSEN: Thank you.

MR. CLAY: And I'd like to add, too, that, you know, it's not the soil pH of the -- of the

facility receiving the material. Remember, we're bringing in soil from, you know, anywhere inside or conceivably outside the state into that hole in the ground. And so it doesn't really matter what the pH of the soil at that site is as much as the pH of the soil being brought in there I would think.

MR. HENRIKSEN: Okay.

MS. TIPSORD: Excuse me, Mr. Henriksen. Does somebody have a follow-up?

MS. MAENHOUT: Yeah. My name is Annick Maenhout -- and I can spell that for you, A-n-n-i-c-k M-a-e-n-h-o-u-t -- with Prairie Materials.

I just wanted to make sure I heard you correctly, Mr. Clay. Did you say soil brought in from outside the state?

MR. CLAY: I mean it could be brought in from outside the state.

MS. MAENHOUT: What do you think the likelihood is of a contractor bringing material in from a state that has no regulations into Illinois for disposal?

MR. CLAY: I don't know what the likelihood of that is.

MS. MAENHOUT: Okay. Thank you.

MS. TIPSORD: Mr. Henriksen.

MR. HENRIKSEN: Yes. Thank you.

Doesn't monthly NPDES permit water discharge monitoring data on file with the IEPA, Bureau of Water, for these fill operations support the use of the pH-neutral soil-to-groundwater value from Appendix B, Table A?

MR. MORROW: The Agency is hesitant to equate NPDES effluent pH results to the pH conditions of the fill material. As we understand the situation, operations that pump large volumes of water to create this cone of depression in the groundwater are discharging water that has not come into contact with the fill material. Thus, the NPDES results more accurately represent groundwater conditions than they do conditions in the fill.

MR. HENRIKSEN: If the soil pH data actually gathered revealed that the soil at these facilities has neutral pH values, would the proposed maximum allowable concentrations, MAC, still use worst-case pH values for ionizing compounds?

MR. MORROW: The Agency seeks to develop a statewide program that can be applied uniformly. For this reason, we see fill operation specific soil pH

criteria as unacceptable. Furthermore, local pH conditions will not account for soils of variable pH that are deposited into the fill.

MR. HENRIKSEN: Referring to Section 1100.610. There are acceptable ASTM averaging methods. Why does the IEPA not allow for these methods in Section 1100.610(d)?

MR. MORROW: Averaging could not be allowed in this program for several reasons. MACs are derived from the lowest of the applicable TACO objectives. This includes objectives that prohibit averaging, such as the construction worker receptor and the objectives for the soil component of the groundwater ingestion pathway. These same constraints must be applied to the MAC tables.

For some receptors and pathways averaging is allowed in TACO cleanups. The underlying premise in TACO cleanups is that the soil will, for the most part, remain in place.

Because of the inherent alteration of the receptor pathway designations for soil that have been excavated, mixed, and redeposited, no averaging of analytical results can be allowed.

Finally, averaging can mask potentially

elevated samples which would otherwise be prohibited from a fill operation.

MR. HENRIKSEN: The testing methods and procedures are not currently -- currently are not specified in the proposed rules. Does IEPA intend on issuing guidance on this or will this be left up to the discretion of the P.E. or P.G.?

MR. MORROW: The proposed rule directs soil analysis procedures to conform to USEPA SW-846 methods. The determination of which contaminants to evaluate and where samples are to be obtained is at the discretion of the P.E. or P.G..

MR. RAO: May I ask a follow-up related to that?

MR. MORROW: Please.

MR. RAO: In Section 1100.610, Subsection (c), the provision sets forth that chemical analysis of soil samples must be conducted in accordance with the requirements of Part 742 and USEPA's "Test Methods for Evaluating Solid Waste", SW-846.

My first question is, could you please clarify whether the requirements of Part 742 referred to in this subsection are the test methods incorporated by reference in Section 742.210?

MR. MORROW: One second.

Dr. Rao --

MR. RAO: Mister.

MR. MORROW: -- I don't know the answer to that right now.

MR. RAO: Yeah.

MR. MORROW: Can we get back to you on that?

MR. RAO: You can get back to us.

And if those requirements are not the ones in 742.210, please provide what those specific requirements are.

MR. MORROW: I think they are, but I'd like to check before I say.

MR. RAO: Okay. And my next question also deals with that same subsection. The USEPA's test method SW-846 that you have proposed in your rule language, is that the same version of the standard incorporated by reference in the proposed rules at 1100.104?

You have -- I think the provision has statutory language in there in Subsection (c). I just want to make sure that's the same version that you've proposed for incorporation by reference.

MR. WIGHT: Your reference is to the TACO regulation?

MR. RAO: No, no. In the proposed rules you have SW-846 incorporated by reference.

MR. WIGHT: Yes.

MR. RAO: I want to make sure what you have in Subsection (c) is the same version, because Subsection (c) doesn't refer to the Section 1100.104.

MS. TIPSORD: And the incorporation is existing language, so -- the incorporation from SW-846 is Third Edition from 1986. And since you used the statutory language, we just want to be sure that what the legislature intended is the most updated version of what you intended.

MR. WIGHT: Okay.

MR. MORROW: Okay. I'll go back and check that and make any corrections.

MR. RAO: Thank you.

MR. HENRIKSEN: What if parameter result is reported as not detected but the detection limit of analyses is above the MAC due to sample interference or dilution issues?

MR. MORROW: Analytical results of nondetection above the MAC value cannot confirm

compliance. In these cases special analytical services can be used to better identify the actual concentration of the contaminant or the sample should be considered in violation.

MR. HENRIKSEN: Thank you.

A question for Douglas Clay. On page 2, Mr. Clay mentions the use of ecological receptor. Will ecological receptors be taken into account when developing standards?

MR. CLAY: No. Ecological receptors were not taken into account in developing the maximum allowable concentrations. They were based on TACO which is designed to protect human health.

If at some point in the future these numbers are developed and adopted, i.e. the protection of ecological receptors, these rules could be modified to reflect these new standards.

MR. HENRIKSEN: Thank you.

Now for the panel as a whole. In the July 6th, 2006, opinion and order of the Board to add Part 1100 the following statement was made: "Because the People base their recommendations on other states' regulations governing C & D rather than CCDD, the Board finds no basis for adding leachate testing,

groundwater monitoring, or financial assurance requirements to the proposed rules."

What has changed that would constitute a need to implement groundwater monitoring at fill operations where load screening procedures are in place?

MR. NIGHTINGALE: What has changed is the 2010 modification of the Act by Public Act 96-1416 by adding Section 22.51(f)(1), which states in part: "The rules must include standards and procedures necessary to protect groundwater, which may include, but shall not be limited to, the following: requirements regarding testing and certification of soil used as fill material, surface water runoff, liners or other protective barriers, monitoring (including, but not limited to, groundwater monitoring) . . ."

MR. HENRIKSEN: So what has changed is the -- it's solely because of the passage of this PA 96-1416, that's why the IEPA is promulgating rules with groundwater monitoring?

MR. NIGHTINGALE: Yes.

MR. HENRIKSEN: Rather than data in your possession that shows the need for groundwater

monitoring?

MR. NIGHTINGALE: That's correct.

MR. WIGHT: Excuse me, Mr. Nightingale, is that the sole reason we've proposed groundwater monitoring or just the starting point for our --

MR. NIGHTINGALE: Well, I think that would be the starting point. When you're talking about bringing in these -- this volume of material that potentially could be contaminated, some of the material will only be tested by or evaluated by a PID and visual inspection. When you're talking about those potential large quantities, we felt that there was a need to add groundwater monitoring as the final check.

MR. HENRIKSEN: And you felt there was a need to add this even though this material has been accepted for decades in existing -- in quarry pits and quarries. Correct?

MR. NIGHTINGALE: As Paul said, I don't think we have very much data telling us one way or the other whether there's contamination.

MR. HENRIKSEN: But you talk about a large -- your testimony focused -- as I heard, you talked about large quantities of material. Are there

concerns on the EPA's part that there's going to be -- you know, is this a new problem or haven't we, in fact -- our industry, in fact, been accepting large volumes of this material for many years without the need for groundwater monitoring? A fact that the Board order of 2006 understood based on the testimony.

What -- you know, so I'm trying to understand that you say it's a starting point. I understand how the law has changed. But what evidence, what data, you know, what do you have in hand that would justify the imposition of groundwater monitoring, not just on the CCDD sites but also uncontaminated soil fill operations that never had, never shown to have a need for this kind of monitoring?

MR. NIGHTINGALE: Well, I -- these -- these sites previously were not regulated. They are being regulated at this point and we have the opportunity to evaluate the site in its entirety.

And when you're talking about bringing in large quantities of material that could potentially be contaminated, the natural approach would be to put a groundwater monitoring system in since there is no type of engineered barrier that would be put in place

here. We're not requiring any type of engineered barrier. So we do feel that it's an important component of this -- these proposed regulations.

MR. HENRIKSEN: Again, and mostly for the benefit of the Board, our industry has been accepting this material for decades without groundwater monitoring in place. Correct?

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: And you've -- the panel has previously testified you don't have data in hand from clean soil fill operations that shows the need of groundwater monitoring from an industry-wide level. Correct?

MR. NIGHTINGALE: We don't have data that shows that it's causing groundwater contamination or it's not causing groundwater contamination. We don't have any data to support it either way.

MR. HENRIKSEN: Thank you.

With respect to soil removed from a site regulated under an Agency remediation program, such as the Leaking Underground Storage Tank Program or the Site Remediation Program, would there be any instance where the soil being removed, not as a part of a cleanup or removal of contaminants, would not be

analyzed? If the incident is closed and remediated, can the soils be certified without any further analysis?

MR. CLAY: To answer your -- the first part of the -- your first question, yes, soil being removed as part of a construction project may be in an area that had previously been sampled and analyzed as part of the LUST release and defining the extent of contamination and was nondetect. So in that case I don't think additional sampling would be necessarily be warranted or the professional engineer or geologist may determine that additional sampling would not be warranted.

With regard to your second question, if the incident was closed and remediated, can soil be certified without further analysis, the answer is no. The instance may have been closed with contaminated soil in place utilizing institution controls or engineered barriers. You cannot assume that the soil is uncontaminated just because it comes from a site that has received an NFR letter, a no further remediation letter.

MR. HENRIKSEN: There are significant inconsistencies with the certification project for

LPC-662 and LPC-663 forms which result in some operators losing business for doing the right thing. For instance, if an LPC-662 form is completed and signed for a site known to have been used for commercial or industrial purposes, is the fill operation responsible for verifying whether or not the correct form has been completed? Is there any enforcement action that can be taken against the property owner in a case such as this?

MR. PURSEGLOVE: Ultimately, it's the fill site operator's responsibility to accept only uncontaminated soils and CCDD at their facilities. So verification that the correct form is accompanying a shipment received is the responsibility of the fill site operator.

Fill sites may report fraudulent certifications to the Illinois Department of Financial and Professional Regulations. This is the Agency that's responsible for licensing the engineers and geologists.

MR. HENRIKSEN: But is there any enforcement action that your Agency could take against the property owner, the entity that filled out this form, in a case like this?

MR. PURSEGLOVE: Was your question, Mr. Henriksen, would we take enforcement against the fill site operator or the generator of the soil?

MR. HENRIKSEN: The generator of the soil, sir.

MR. PURSEGLOVE: If we could identify the generator and their intent was to falsify records in order to deliver what we believe would be then contaminated soil to a CCDD site or an uncontaminated soil site, then, yes, we would have the opportunity to take enforcement against that generator of the soil.

MR. HENRIKSEN: Thank you.

If an LPC-663 form is completed by a licensed professional engineer or geologist for a site where there is known contamination identified and present, based on analytical results, above the MAC for the soil, is the fill operation responsible for verifying whether or not the information is valid?

And the second part of that question, is there any enforcement action that the IEPA will take against the licensed professional engineer or geologist in a case such as this?

MR. PURSEGLOVE: As I stated previously, it's the fill site operator's responsibility to accept

only uncontaminated soils and CCDD at their facility. The site operator is responsible for verifying that the data that they base their acceptance on is accurate.

If the Agency takes enforcement action, it would be against the site owner and operator. However, if the Agency's aware of professional engineers or professional geologists who are certifying that contaminated soils and CCDD aren't contaminated, we would also make referrals to the Illinois Department of Financial and Professional Regulations.

MR. HENRIKSEN: Thank you.

Page 26 of the IEPA Statement of Reasons provides that: "In the fill operation scenario, the relevant pH affecting constituent leachability is not the pH at the site where the soil was generated or the pH of the native soil in the vicinity of the fill operation . . . it is the pH of the soil being placed inside the fill area, which the IEPA believes will be variable and unpredictable. . . . the IEPA proposes . . . the lowest pH-dependent values must be selected . . . to determine the MACs for those constituents."

The first question, is the best indicator

of potential groundwater contamination -- excuse me -- if the best indicator of potential groundwater contamination is through extraction analysis, to avoid confusion and misinterpretation, why doesn't the IEPA remove the option to analyze soil using totals and comparing the lowest pH-dependent value?

MR. MORROW: In developing this proposal, the Agency sought to find a simple approach to screening potentially contaminated soil. We understand the totals analysis uses fewer resources and is quicker. The current proposal provides these benefits and is equally protective.

MR. HENRIKSEN: Thank you.

In addition, could the option to analyze results and compare against a multiplier of the soil component of the groundwater ingestion route value also be removed?

MR. MORROW: Within the framework the Agency has proposed the multiplier method only could be removed if an alternative method is substituted to provide totals analysis criteria for the soil component of the groundwater ingestion pathway. This is necessary for determining MACs for a limited number of inorganic constituents under Section

1100.605. Although conservative, the multiplier method is protective and potentially conserves resources when analysis is needed.

MR. HENRIKSEN: Thank you.

Earlier you spoke of the IEPA -- let me direct my question to Paul, if I may, Mr. Purseglove.

Mr. Purseglove, earlier you testified that the IEPA can and does do inspections of areas that are not registered or under permit. Correct?

MR. PURSEGLOVE: Yes.

MR. HENRIKSEN: Such as a farm field or other site that might be accepting material used to fill a low spot. Correct?

MR. PURSEGLOVE: That's correct.

MR. HENRIKSEN: But if this is an unregulated site, it's not registered or if they don't have a permit, this site that you'd be going to has no prescreened procedures. Correct?

MR. PURSEGLOVE: That's correct.

MR. HENRIKSEN: Follow-up questions from you?

MR. RAO: I just had a follow-up regarding registration. You know, we talk about different land pollution control forms for registration and, you

know, certification. Would it be possible for you to enter those forms into the record? I know -- I think Mr. Nightingale's testimony said that they're available on your website. But it would be helpful if you could submit them into the record.

And also, could you comment on whether those forms will be modified in any way to reflect the proposed rules?

MR. CLAY: Yes, we can submit those into the record and comment.

MR. RAO: Okay. Specifically what I wanted to know is, right now for registration, LPC-665 generally requires name and address of the owner and operator and the location of the facility. I'd like to know if the form should also include a description of the fill operation. Thank you.

MR. WIGHT: I'm sorry, what was your second request?

MR. RAO: Your comment on whether the registration form should include a description of the facility in addition to the name and address of the owner or operator and the location of the facility. Just to get an idea as to whether -- you know, how the Agency will know what kind of facility that they are

registering.

MR. LIEBMAN: You're talking about the fill operation?

MR. RAO: Soil registration.

MR. LIEBMAN: Yeah. It's the soil registration form, but you want on that -- which is for -- mostly identifies the source site. And are you suggesting that it also identify the -- well, where the soil is going to be placed?

MR. RAO: Yeah, that's correct. Information about the fill site.

MR. LIEBMAN: Okay. Sure. Yeah, we can comment on that.

MR. RAO: Thank you.

MS. TIPSORD: Thank you, Mr. Henriksen. That's all you've got?

MR. HENRIKSEN: Yes, thanks.

MS. TIPSORD: We'll move on to Waste Management.

MS. FLOWERS: We were wondering if we could take a short break at this time.

MS. TIPSORD: Sure. Ten minutes.

MS. FLOWERS: Thank you.

(A recess was taken from 1:50 p.m. until 2:04 p.m..)

MS. TIPSORD: I think we're ready to go back on the record.

And before we start with Waste Management's questions, I understand the Agency had a question.

MR. WIGHT: Yes. On Mr. Rao's last comment about various forms and adding provisions that would include a description of the facility, there's a little confusion on our end about which form he's referring to, whether he was referring to the certification forms, the 662 and the 663, which are completed to accompany soil coming to the facility, or were you referring to the form where the soil-only sites file a registration form with the Agency, as opposed to the certification form that accompanies the soil?

MR. RAO: I was referring to the registration form LPC-665.

MR. WIGHT: 665.

MR. RAO: Not the other two forms.

MR. WIGHT: Okay.

MR. RAO: Regarding the other forms, I

just wanted the Agency to submit those forms into the record.

MR. WIGHT: Okay.

MR. CLAY: So you're looking for maybe a description such as how much fill area they have available and maybe a diagram of the --

MR. RAO: The site.

MR. CLAY: -- facility? Okay.

MR. RAO: Yes.

MR. WIGHT: We do have copies of the 662 and 663 that we could submit to the record now.

MS. TIPSORD: All right. That's fine.

MR. WIGHT: Okay. I have multiple copies here. How would you like me to distribute them?

MS. TIPSORD: One for each of us up here.

If there's no objection, we'll mark LPC-662, Source Site Certification By Owner or Operator for Use of Uncontaminated Soil as Fill in a CCDD or Uncontaminated Soil Fill Operation as Exhibit Number 5.

If there's no objection, it's Exhibit Number 5.

And if there's no objection, we'll admit Form LPC-663, Uncontaminated Soil Certification by

Licensed Professional Engineer or Licensed Professional Geologist for Use of Uncontaminated Soil as Fill in a CCDD or Uncontaminated Soil Fill Operation as Exhibit Number 6.

Seeing none, it's Exhibit Number 6.

MR. WIGHT: I would like to add that these forms are currently in use based on the interim standard program that is operating under the Act until the rules go into place. So it's certain that these forms would change if the rule is adopted in the form that the Agency has proposed.

I believe we also maybe have one more clarifying question.

Doug, did you want to ask about specific components of the description that might be included?

MR. CLAY: I think Mr. Rao answered that.

MR. WIGHT: Okay.

MR. CLAY: Thank you.

MS. TIPSORD: All right. Was there anything else from the IEPA?

(No response)

MS. TIPSORD: Okay. Then let's begin with Waste Management. If you would introduce yourself for the record, please.

MR. WILT: My name is Dennis Wilt. I'm the general counsel for Waste Management's Midwest Group, and I'm here today on behalf of Waste Management of Illinois.

In our prefiled questions we made a preliminary comment, and I'd like to repeat it at this time, really commending the Agency for doing a very commendable, very good job on the draft regulations, the changes to the process. It's been a difficult process. It's been a long process. We're participating not because we're disappointed in the result. It's because we think there are some meaningful changes that should be made, modest changes, but changes that can really help protect the environment and the people of Illinois.

With that said, I'll start out with just a few questions on the self-implementing nature of the rules. And on page 6 of the Statement of Reasons the Agency states that it cannot be sure that the front-end screening process will keep 100 percent of the contamination out of the fill operations and that currently permitted CCDD fill operations are located in close proximity to both public and private wells.

And the question is, given that, given

those two statements, why are the rules self-implementing as opposed to requiring the submission of a permit application and review and approval of the plans?

MR. NIGHTINGALE: Well, the Illinois EPA does not concede that these fill operations will cause groundwater contamination. The decision not to administer the groundwater monitoring required for fill operations through the permit program was based on the potential threat level to groundwater posed by these fill operations.

Part 615, which was used as a template in developing proposed Part 1100 Subpart G, is an existing regulation that includes self-implementing groundwater monitoring requirements.

Also, Part 815 is another example of existing regulations that include self-implementing groundwater monitoring requirements.

MR. WILT: Let me as a follow-up question -- I represent a company with many landfills in the state, and during the permit process we submit a proposed groundwater monitoring plan, certainly prepared by professional engineers, and we don't believe we've ever had a proposed groundwater

monitoring plan approved as we've submitted it, whether it be number of wells, spacing of wells and the like. And given the fact that the Agency -- and I understand it's a sanitary landfill -- so carefully reviews those plans and given the fact that the Agency in its Statement of Reasons regarding this situation acknowledges that there may well be -- end up being contamination, and many of these facilities are adjacent to public wells, it seems to me that there should be the same level of scrutiny on these groundwater monitoring plans. I don't understand why there would not be.

MR. NIGHTINGALE: Well, first off, this is not a waste. It's by -- by definition. And the waste regulations do specifically have a set of requirements that are -- need to be met to verify that that facility is not going to cause contamination.

What we're intending to do here is to put really a final check. We have all of this screening requirements to try to prevent something from getting in there, but we felt it necessary to add something to the back end as the final check with the idea that there would be a potential for something to make it through the system.

MR. WILT: And you know by experience that things have made it through the system with respect to other enforcement actions of facilities that have taken wastes in when they were not permitted to do so.

MR. NIGHTINGALE: Well, there's limited information on that, but there is that potential.

MR. WILT: Let me ask a couple questions then on oversight enforcement.

In light of the fact that the rules are self-implementing, and if you assume that because of the additional material that would be able to go into fill operations, the additional material being material that formerly was considered a waste that's not considered a waste any longer, is the Agency planning on adding personnel and on implementing a robust inspection program?

MR. CLAY: Let me answer that.

At this point we feel we have sufficient regional field staff to inspect the current sites. However, in addition, counties can be delegated to be the inspectors for the Agency at these sites.

And we already do this in our solid waste program. And the counties that are delegated are out at those sites a lot more frequently than we would be

able to be out there with Agency staff.

So there's already been a couple of counties either delegated or expressed delegation that have CCDD or soil fill operations in their counties, so they would be doing those inspections. Paul's staff would train them and certify their inspectors, and then they would do the inspections, and then any violations and a copy of those inspections would be sent to the Agency for -- for enforcement, if necessary.

MR. WILT: If during the enforcement of the regulations it's discovered that waste has been accepted in a soil fill operation, am I correct in assuming that the only remediation that would be acceptable would be complete excavation of the waste and proper disposal in a sanitary landfill?

MR. PURSEGLOVE: If a facility has been found to have accepted waste, they will be required to remove the offending material and properly transport it to a facility which is properly permitted to accept it.

Perhaps the simplest example would be accepting some small amount of plastic pipe or wood which can be simply retrieved and removed. However,

if a random scan of an area with a PID indicates the presence of contamination, then material will have to be removed until the PID indicates no detection, and after that, confirmation samples will need to be collected for laboratory analysis. The impacted area of the fill will have to be quarantined until the lab results are obtained.

If circumstances are such that the contaminated material cannot be removed, then an enforcement action would ensue, and the terms for future groundwater monitoring would be determined by the courts. Depending upon the facts, the Agency could recommend additional groundwater monitoring and analysis that is supplemental to what is required by Part 1100.

MR. WILT: In the event that there is -- it's determined that waste has been accepted, the rules now require that the remediation plan be submitted to the Agency, but I don't believe requires any review and approval of that plan. And given your answer, isn't it a necessity that the Agency be involved in reviewing and approving a remediation plan and shouldn't the rules be modified in that regard?

MR. PURSEGLOVE: If a fill site is found

to have accepted waste, the Agency would issue a violation notice and the required corrective action in response -- and tell them what the required corrective action is. Any actions taken to resolve the violation would be overseen by the Agency's Field Operations Section. This kind of corrective action is separate from the corrective action associated with groundwater contamination.

MR. WILT: A few questions regarding the postclosure time period and groundwater monitoring in particular. As I read Section 1100.209, the postclosure period could be as short as one year. I may not be reading it correctly. But it could be as short as one year. If that's the case, I believe then that the groundwater monitoring postclosure could be as short as one year.

First, is that a correct reading?

And second, does that make sense to have such a limited postclosure monitoring period that could be as short as one year?

MR. NIGHTINGALE: I think I'd like to answer that.

As far as the postclosure care period, the regulations do have a one-year postclosure care in

there, but they also have a requirement that the facility have sampled their groundwater and have not violated the 620 numeric standards or the background, whichever is higher, for three consecutive years.

So what you would end up with is that maybe for the first two years before postclosure care that they were doing groundwater monitoring they would show up clean -- yeah, the two years before they can show up clean for both those two years and then when they started -- they closed and they started postclosure care, they would have one year of postclosure care. But if they have any problems with groundwater to where they have to get into any corrective action, the postclosure care period could go on indefinitely, at least until they got to the point where they were in compliance with the 620 numeric standards.

MR. WILT: This is an example of a concern: If there is a quarry operation, a small quarry operation that accepts in a short period of time a substantial amount of what previously was uncontaminated soil which is now tainted soil or not waste, and it takes that material, because many of these projects are large projects, that's the type of

projects we service at our landfills, can be hundreds of thousands of yards, and could close that quarry in a very short period of time, two years, three years, and then when you add that to the one-year postclosure period, you could have as little as two, three, four years of groundwater monitoring.

Are you confident in that type of a situation that if there was a problem it would be identified in three to four years?

MR. NIGHTINGALE: I think we are confident in that. First off, these facilities don't have any engineered barrier. There's nothing -- there's no liners that are being put in. So there will be three years -- at least three years of sampling for them to show that they're not having any problems.

MR. WILT: There were a couple questions in the prefiled questions, 10 and 11, that I will not be asking at this point in time.

I have a few questions that are questions that I'd like to ask as a result of the questions that were previously asked and some of the comments by the previous counsel.

A comment was made that many of these soil fill operations have been accepting the same material

for decades. Am I correct in interpreting Public Act 96-1416 that it really allows those operations to accept additional materials, not that they will definitely, but materials that were formerly considered as waste materials that are now no longer going to be considered as waste materials? Is that a correct interpretation of the law and the regulations?

MR. CLAY: Well, in the past, uncontaminated was not defined. What this proposed rule would do is define what uncontaminated is. And so have they been taking materials up to this point, I'm not -- I don't know. But the previous -- the previous standard was uncontaminated soil, which was undefined. So we're trying to provide a bright line, if you will, instead -- a bright line as far as what is contaminated and what isn't for the purposes of mines, quarries, and other excavations.

MR. WILT: I understand that and I appreciate that answer. But clearly, under the wording of the statute there is certain material that was formerly considered waste, perhaps difficult to define, that is no longer being considered waste. If that's not the case, then the statute wouldn't be needed. That being the case, it seems to me that the

soil fill operators have an opportunity to accept more material than they could have accepted in the past. Is that a true statement?

MR. CLAY: I don't know that that's a fair statement. As we -- we just testified to, it was a gray area as far as what is considered uncontaminated. There were no numeric standards. As far as what fill operators and CCDD facilities received, you know, we would -- we inspect -- we inspected the CCDD facilities on a regular basis and used our enforcement discretion based on the samples that we took and what the levels were as to what -- what cases we would take forward and refer to the Attorney General's office.

So I don't -- I don't think I can make that statement that you made. It's possible that it's not a -- I don't think it's an absolute statement.

MR. WILT: Yeah, and I respect the answer. The answer is to a difficult question because there wasn't a bright line and I suppose there is now a bright line.

Let me ask one final question along those lines. A generator in the past either generated clean fill -- isn't it true that a generator in the past either generated clean fill or contaminated soil that

was waste?

MR. CLAY: Yes. Uncontaminated -- CCDD which included uncontaminated soil or waste that would have to go to a landfill.

MR. WILT: And isn't it true that the Act that we're here to discuss rules for now in effect says -- it doesn't say this, but it ends up -- and this isn't a trick question. I'm just trying to understand. Clean fill hasn't changed. Clean fill is clean fill. And you have contaminated soil on the other side. And in the middle you have, if I understand the law, contaminated soil that used to be a waste that's no longer a waste because it's not contaminated. You have three -- don't you have really three categories of materials? Or am I just confused by the whole framework?

MR. CLAY: Well, I think -- and again, this is for purposes of mines, quarries, and other excavations. I think you have two. You have uncontaminated fill material and something that's considered a waste. You know, those are the two.

I mean something you need to remember is just because there's a chemical constituent in the soil doesn't make it contaminated. It could be

naturally occurring.

So I think we have two categories. We have uncontaminated soil and you have contaminated soil which would be considered a waste. And what the -- in part what these proposed rules do is define that in numeric standards.

MR. WILT: I have no further questions.

MS. TIPSORD: Thank you very much.

MR. WILT: Thank you.

MS. TIPSORD: Then let's move on to Land Reclamation & Recycling Association.

Good afternoon, gentlemen, if you could introduce yourselves for the record.

MR. LANSU: Good afternoon. My name is Brian Lansu, L-a-n-s-u. I have an appearance on file as counsel for the Land Reclamation & Recycling Association.

To my right is Mr. Gregory Wilcox, who is the executive director of the association.

I have also prefiled certain questions of the Illinois Environmental Protection Agency, and Mr. Wilcox may be asking follow-up questions based on the responses of the witnesses.

The first question I have today is for

Mr. Nightingale and relates to the proposed amendments to the CCDD fill operation regulations and specifically Section 1100.103.

It appears that the EPA proposes to replace the term "industrial/commercial" with the term "potentially impacted property". Can a property owner continue to use the definition of industrial/commercial as prescribed in the law to determine if P.E. certification is required?

MR. NIGHTINGALE: The answer -- short answer would be no. But industrial/commercial may be used as part of the decision-making. The use of property that is industrial/commercial does raise the probability that the site is impacted. The term industrial/commercial is closely identified with zoning designations and, as a result, has caused confusion among stakeholders.

The law's intention was to identify soil that is more likely to be contaminated and in need of professional evaluation and certification before placement within a fill site. To better align with the purpose of the certification requirements and to give more flexibility to source site owners and operators, receiving facilities, contractors, and

environmental professionals, Illinois EPA created a new term "potentially impacted property".

MR. LANSU: At this point I'd like to withdraw the first two questions that I had previously prefiled for the panel as they relate to groundwater monitoring, as those are redundant of the questions asked by the Illinois Association of Aggregate Producers and the answers that were provided.

Moving on to the third question for the panel: In developing the MAC tables for CCDD, did the IEPA establish standards for compounds that are more conservative than the one in one million risk for contamination of groundwater?

MR. MORROW: The Agency relied on the methods and equations in TACO. To our knowledge, no MAC values for carcinogenic constituents are more protective than one in a million.

MR. LANSU: Prefiled question number 4, and this is again for the panel: In the IEPA testimony it states that, for carcinogens, the maximum concentrations shall not allow exposure to exceed an excess upper-bound lifetime risk of one in one million.

In developing the MAC standards, did EPA

consider what pathways are involved in calculating the one in one million risk?

MR. MORROW: We did. Five TACO receptor pathways were considered. The Agency used the lowest objective from the TACO residential ingestion/inhalation, the construction worker inhalation -- ingestion/inhalation, and the soil component of the Class I groundwater ingestion pathway.

MR. LANSU: Was the length of time of exposure to carcinogens in a quarry or mine used in the MAC determination?

MR. MORROW: No, they were not. No exposure duration for time spent in a quarry, mine, or other excavation were utilized.

MR. LANSU: I have no further questions.

MS. TIPSORD: I actually have a couple of questions on the -- on your testimony, Mr. Morrow.

You, on page 5, in discussing the MACs are talking about the MAC table that you're going to put into the rules or into -- on the website. And your -- you state that the Illinois EPA's position is that publication of the table will not constitute a generally applicable rule under the Administrative

Procedure Act as long as the values published in the table are determined using the promulgated methodology.

My question is: Once you publish that table, are those standards applicable to anyone in the state or are you going to redo those every time?

MR. MORROW: They will be revised as TACO is revised.

MS. TIPSORD: But TACO --

MR. MORROW: And anytime --

MS. TIPSORD: The TACO is revised by rule; correct?

MR. MORROW: Correct.

MS. TIPSORD: So -- but these you don't believe are a rule, and I guess I'm looking for more explanation on why they're not a rule.

MR. WIGHT: We'll have --

MR. MORROW: Because they -- go ahead.

MR. WIGHT: We'll have to -- if you're speaking of legal research, we'll have to provide that later.

MS. TIPSORD: I think we need more than just this as a reason for this not being a rule. To me, they appear to be a generally applicable standard.

Even though you're using a methodology and rule, they are a generally applicable standard that you're going to apply statewide.

MR. RAO: Also, could you look into whether, if we go with the Agency's proposal, should a link be provided in the rules to your web page on your website where those tables could reside?

MR. WIGHT: We could look into that.

MR. RAO: Thank you.

MS. TIPSORD: Is there any other questions for the Agency from anyone else?

You can stay there or if you want to go back to your seats.

We have a few from -- I saw someone. Sure. Could you stand up, give me your name, and who you represent.

MR. GOBELMAN: Steve Gobelman, Illinois Department of Transportation. We have like five or six questions we'd like to ask.

MS. TIPSORD: Okay. Why don't you come on up here. That way you don't have to shout so much.

MR. GOBELMAN: I am Steve Gobelman, G-o-b-e-l-m-a-n. I'm a professional engineer, professional geologist with the Illinois Department of

Transportation.

Section 1100.101(b)(6) provides that Part 1100 does not apply to the portion of a site not used for CCDD fill operations or an uncontaminated fill operation.

Does Part 1100 apply to portions of a site not used as a mine or quarry and will the Agency consider modifying 101(b)(6) to include the portions of a site not used for a mine or quarry?

MR. NIGHTINGALE: I think I understand your question. Our intent -- the portion of the site -- basically what it states here is the portion of a site not used for a CCDD fill operation or an uncontaminated soil fill operation, those -- these would not apply to the other part.

Is that what you're -- is that what you're asking?

MR. GOBELMAN: Well, I can give you -- I guess I can give you an example and then maybe that'll make it clear. If a site, let's say it's -- you know, let's just use this room as an example is -- is a site, and in the back corner of the room they have a quarry or a mine that they operate but they're not planning on using it as a fill operation. Can that

site take -- receive uncontaminated soil or CCDD material that isn't going to go into that mine or quarry?

MR. CLAY: Steve, are you asking if, for example, a mine or quarry can they take in CCDD, maybe pull out asphalt and concrete they can recycle, and then dispose of the other?

MR. GOBELMAN: No. I'm asking when it -- it's getting into the definition of a site and whether or not you consider the entire property that a person has that may have a former mine or quarry in it still considered to be the entire site being a mine or quarry? He's not planning on operating it as a fill operation, but it has low-lying topography on the surface that he wants to maybe take material in to level off his land, like you would do in any farm field. Maybe it is used as farming but in one portion of the property is a mine or a quarry.

MR. CLAY: I think that if -- I mean these regulations are only intended to regulate mines and quarries. So if he's filling another portion of his site in accordance with 3.160 of the Act, then I think that would be allowed and would not -- and that portion, if it's not part of the fill operation, would

not be subject to these rules.

MR. GOBELMAN: Okay. With regards to the definition of other excavation in Section 1100.103, can the Agency provide an example of an other excavation which is not a mine or a quarry?

MR. CLAY: One of the things that we had talked about -- and I think we need to research, I guess, the standard definition of quarry, because we don't have it in these rules. If someone was -- had created an excavation just to obtain clay, for example, I think we would consider that an other excavation.

Now, I don't know if that by definition is considered a quarry. I tend to think of a quarry as, you know, rock, gravel, that type of operation, or a mining operation for coal or something like that. But that -- I think that was our intent.

One second.

Other examples would be filling in basements -- other examples of not --

MR. GOBELMAN: That's what's not -- you're saying that is what is not other excavation; right?

MR. CLAY: Yes.

MR. GOBELMAN: I'm asking what is.

MR. LIEBMAN: I think, Steve, it depends on how you define quarry and mine. And if you define them as extracting resources, then probably not.

MR. GOBELMAN: So is IDOT going to be allowed to make its own definition of what a mine or quarry is?

MR. LIEBMAN: Well, I mean if it's consistent -- I think we explain what we consider other excavation to be. Right?

MR. GOBELMAN: Well, the definition of other excavation states it's an excavation used to extract mineral resources.

MR. LIEBMAN: Correct.

MR. GOBELMAN: Isn't that a mine or a quarry?

MR. LIEBMAN: Again, I think a lot of people would say yes, and I would tend to agree with them.

MR. GOBELMAN: Then what is other excavation that is not a mine or a quarry?

MR. LIEBMAN: I'm not sure there is.

MR. GOBELMAN: Then why do we have it?

MR. LIEBMAN: It's statutory language.

MS. TIPSORD: It's not indicated in the

rule as statutory language.

MR. LIEBMAN: Oh, I thought it was.

MS. TIPSORD: And I guess I am confused as well.

MR. LIEBMAN: Do you need a definition?

MS. TIPSORD: Let me finish. I'm a little confused as well, because, Mr. Clay, you just said that, you know, extracting gravel would be a quarry, but you specifically say other excavation means a pit created primarily for the purpose of extracting resources, e.g. sand -- soil, sand, gravel, or clay. So you then define other excavation as someplace where you would extract gravel. So I guess I -- I, too, am a little confused by what other excavation wouldn't be a mine or a quarry.

Because you also exempt from it holes, trenches, or similar earth removal created as a part of normal construction. Which would be the basement. I mean --

MR. GOBELMAN: Or a borrow pit.

MR. CLAY: Well, I think the other excavation was in the regulations adopted in 2006, I believe. I believe that wording -- there was actually clarifying language, because the same question came

up, and that's why there was language put as to what it was not.

We could look -- look further -- we tried to provide the -- by adding the extracted for -- the wording --

MR. LIEBMAN: Excuse me, Doug, if I may. When I said it's regulatory language, I didn't mean the definition. I think the term, though, "other excavation" was statutory language, and we were trying to provide some clarity as to what was meant in the statutory language.

MS. TIPSORD: Okay. Thank you.

MR. LIEBMAN: And we've done that in a way that from our point of view really probably does allow -- you know, depending again how you define quarry or mine, it probably is a quarry or mine.

MR. GOBELMAN: Who is defining quarry or mine then?

MR. LIEBMAN: If by quarry or mine you mean extracting resources, if that's the primary purpose, the proposed regulations do.

MR. GOBELMAN: Okay. So I take it that you will get back to me -- get back and actually give us examples of what is other excavations that aren't

quarries and mines?

MR. CLAY: Well, you know, you've raised this issue, you know, since 2006. I mean if you guys would like to provide language, we'd be happy to look at it.

MR. GOBELMAN: I believe there is no such thing as other excavations.

MR. CLAY: So your suggestion would be to delete that?

MR. GOBELMAN: Based upon the way you have defined it.

MR. CLAY: Okay.

MR. GOBELMAN: You have eliminated anything that would be considered other excavations.

MR. PURSEGLOVE: You mentioned the term "borrow pit". Is a borrow pit a quarry or a mine?

MR. GOBELMAN: Borrow pits have been excluded as part of the transportation infrastructure. I don't have the rules with me, but they're not part of this regulation, so you've excluded them.

MR. CLAY: The "other excavation" wording is in the statute.

MS. TIPSORD: Right.

MR. CLAY: We would welcome, you know, any

language you can provide. I mean I don't know that we can propose striking it out when it's statutory.

MR. GOBELMAN: I can't give you an example of what is because I don't think they exist. So that's why I'm hoping that you guys can clarify what is other.

MS. TIPSORD: And if I may, I think part of the problem is if you look at what was existing language in CCDD fill operations, you've added the statutory language which means a current or former quarry, et cetera, and then you tried to move that into a -- then you tried to move into another definition "other excavation". But when you added the phrase "means a pit created primarily for the purpose", you've almost -- by adding that language, you've really taken and made the meaning, at least the way I read it, almost meaningless.

So you might want to look at what was existing language and what you've done with this definition and see if you can't work something out. Because the "For the purposes of this part, the term other excavation does not include" is repeated in your definition of other excavation, but it's that first sentence -- like I said, Mr. Clay, when you

specifically said, you know, removal of gravel is a quarry, but then you used removal of gravel as an example that's not an other excavation. So you might just want to take a look at that.

MR. CLAY: Okay.

MS. FLOWERS: Are you suggesting that we've excluded certain things that should be included as --

MS. TIPSORD: No.

MS. FLOWERS: -- as an excavation?

MS. TIPSORD: No. What I'm saying is that when -- when he was asked the question -- when Mr. Clay -- or, when you were asked the question what is other excavation, he said that a quarry would be where you remove gravel. And that's the most real example. But your definition of other excavation includes gravel removal as something that would be an other excavation. So you've then said that other excavation is really just a quarry, by this discussion we've just had. Just take a look at it.

MS. FLOWERS: If that's the truth, is it fine how we have it? I mean are you saying there's no -- you're just saying that we may have a confusion with how we've testified or --

MR. RAO: The existing language doesn't, you know, create any confusion. It says what is --

MS. FLOWERS: Oh, I disagree.

MR. GOBELMAN: No, I disagree.

MR. RAO: Compared to what you have proposed.

MS. FLOWERS: We proposed this because of the confusion. Yes.

MR. GOBELMAN: I believe in the existing language DOT would still want to know what is other excavation, an example of it, because I don't think it still would be clarified.

MS. FLOWERS: This has been a problem area since day one.

I think we might -- you know, if we're going to leave it in -- I mean, you know, I'm not sure we're going to change it. So if you want to suggest that we change it, I think there's going to have to be -- come from someone else.

MR. CLAY: I mean, you know, we tried to define it in as clear of terms as we have. And this is an issue that's come up, like I said, over and over again since 2006. And I guess I'm not -- I'm not sure what the concern is or where there's been a problem

with this.

MR. GOBELMAN: Okay.

MR. RAO: Any possibility of requesting a statutory fix?

MR. GOBELMAN: All right. With regard to Section 1100.205(b)(4) regarding rejection of loads, given that a fill operation may have different criteria for rejecting loads, including rejecting a load that meets the standards for uncontaminated soil under Part 1100, will the Agency consider allowing the source site owner or operator to recertify the rejected loads through a P.E. certification and then allowing it to go to another fill site?

MR. LIEBMAN: Steve, I've just gotten to your reference. Could you repeat the question, please?

MR. GOBELMAN: Given that the fill operators may have a different criteria for rejecting loads, meaning that you have the MAC levels but a quarry or a mine can accept something more stringent if that's what they want to accept as far as the criteria. So will the Agency consider allowing those rejected loads to be recertified by the owner or operator through a P.E. certification and then allowed

to go to a different fill operation?

MR. NIGHTINGALE: Because that original fill site had some more restrictive requirements?

MR. GOBELMAN: Right, yeah.

MR. CLAY: I think, one, you need to coordinate with the fill site operator prior to taking material there.

Two, if it was rejected and you can address the reason that it was rejected with that fill operation, with that same fill site, then they can take -- then you could take it back there.

For example, if there was pipe and wood in there and you separated that out and now it was -- it was acceptable to that fill site operator, you could take it back to the same fill site, but you can't take it to other fill sites.

MR. GOBELMAN: Why?

MR. CLAY: Well, I mean part of it is you need to coordinate with the fill site operator and understand what the requirements are up-front. And we don't want someone -- and we've -- we've heard reports of this from the fill industry is they reject a load and it goes to someone else down the road. And when they reject a load, you know, we follow up on that and

want to make sure that -- you know, where those loads are going that are rejected.

MR. GOBELMAN: But if I'm -- but if I'm in a sense certifying loads that are going to a mine or a quarry in a fill operation, I am not necessarily certifying or taking analytical test results on every truck that's leaving that particular job. The P.E. certification is based upon an analytical evaluation of the project as a whole. Which could be, according to that, perfectly acceptable to the quarry fill operation that we're going to take it to. But if a particular truck for whatever reason is rejected, even though we can prove that it is certifiably clean or un -- I should say meets the uncontaminated definition for reanalyzing that particular truck, why can't it then -- that particular truck go to a different fill operation if the original one still doesn't want to take it with the new P.E. cert? I've shown that that material is -- meets the definition, that particular truck.

MR. CLAY: Again, we were trying to prevent someone from shopping around so that, you know, if there is something that causes that load to be rejected, sets off the PID or there's something in

the visual inspection, there's an opportunity to resolve that through -- maybe the PID wasn't calibrated, maybe it was picking up exhaust or something from the truck, maybe it was -- you know, for some reason you got a false positive. You go back, either you recalibrate the PID or maybe you take analysis -- you know, samples from that truck and provide that with the P.E. cert. But, you know -- and so you should be able to resolve that from that fill site, rather than, you know, going down the road and shopping around. So that's what we were trying to prevent.

MR. GOBELMAN: But does the regulation state that I can P.E. certify and go back to the same fill site?

MR. CLAY: You can still -- yeah, you can certify and go back to the same fill site.

MR. GOBELMAN: Where is that at that I can go back to the same fill site with that truck once it's rejected? Because under rejected loads, it specifically says that it cannot go -- if it's rejected, it must go -- it cannot go to another fill site.

MR. CLAY: No, what it says is -- and this

is in (4)(A)(ii), the wording "properly recycled or disposed of at a permitted landfill" was taken out.

MR. GOBELMAN: All right.

MR. CLAY: Okay? And so it talks about material must be taken to -- must not be taken to another fill site -- fill operation, and the material must be managed appropriately.

Now, our intent there was to allow it to go back to the same fill site if the issue that it -- for the reason it was rejected was resolved. There's nothing here that would prohibit that.

MR. GOBELMAN: But the new language that you added that it must be handled appropriately, why couldn't that -- why would that exclude it from going to another fill site if it's been recertified?

Because the process that you've defined before does not allow that particular load to be recertified. Why can't that load be recertified and then allowed to go where it needed to go?

MR. CLAY: Well, again, we were trying to, one, prevent people shopping around. And we identified the fact that, you know, there may be reasons it was rejected that could be resolved and so that it is an acceptable load to these facilities.

And that's why we specifically took out that any rejected loads had to go to a -- either for recycling or a permitted landfill. So we were trying to allow that flexibility, but at the same time not allow, you know, someone to go from site to site to site and shop around until they found somebody that would take the load that had no additional data or information.

MR. GOBELMAN: That's my point. You're defining it as having no additional information. My point is why don't you allow it that if you have new additional information that it can be moved as uncontaminated to another fill site?

MR. CLAY: The second fill site may not know that it was rejected from the other site.

MR. GOBELMAN: He doesn't need to know. He has brand new analytical for that particular truck that says it meets the definition of uncontaminated, where the previous analytical was for the site as a whole. What better information does that fill site need than to have absolute analytical from that truck?

MR. CLAY: Once again, I don't know that the fill site owner is going to know that this is brand new analytical and that it was done before or after a rejected load. You can still have analytical

and if it fails the PID, it has to be rejected.

MR. GOBELMAN: So you're going to clarify the language to say that it can go back to the same fill operation so it's clear?

MR. CLAY: Well, I --

MR. GOBELMAN: Because I don't think it's clear.

MR. CLAY: We'll look at wording to address that. That was our intent. We felt like this would allow that to happen, but let us look at the wording.

MR. GOBELMAN: Okay. Will the Agency consider excluding residual or incidental pavement markings from the requirements of painted CCDD in Section 1100.212?

MR. PURSEGLOVE: Yes, I think that we would consider that if IDOT could provide us information on the -- what constitutes the pavement markings. I think we're under the general provisions that it isn't paint. It's some sort of epoxy or plastic material that's used to mark the pavement. If that information is available, we could address it.

MR. GOBELMAN: Okay. Under Subpart F does Section 1100.610(a) provide that a professional

engineer or professional geologist determines the chemical constituents to be analyzed under Section 1100.610(c), if any, based upon the site-specific conditions?

I know this may be part of the questions that the -- I think the Ag Producers may have asked, too.

MR. NIGHTINGALE: Can you ask that question again, please?

MR. GOBELMAN: If Subpart F, Section 1100.610(a) provides that the professional engineer/professional geologist determines the -- does it provide that the professional geologist and professional engineer determines the chemical constituents to be analyzed under 610(c)? And is that based upon site-specific conditions?

MR. CLAY: Yes. It's up to the professional judgment of the P.E. or P.G..

MR. GOBELMAN: Okay. All right. That's all the questions we have.

MS. TIPSORD: Thank you.

Any other questions?

(No response)

MS. TIPSORD: Dr. Rao, did you have any

questions -- or, Mr. Rao, sorry.

MR. RAO: Thank you. Yeah, I have a few questions on the proposed rule language, so I'll go section by section.

MS. TIPSORD: And getting back to us is a perfectly appropriate answer --

MR. RAO: Yeah.

MS. TIPSORD: -- to any and all of these as well.

MR. RAO: Starting with 1100.103, Definitions. In the definition of acceptable detection limit, could you please clarify what lowest appropriate Practical Quantitation Limit means? Focusing more on the word "appropriate".

MR. CLAY: Okay. We'll look at where that came from.

MR. RAO: Okay. In the proposed definition of compliance point, could you please clarify the rationale for requiring compliance with Class I groundwater quality standards rather than the groundwater quality standard applicable at the site, for example, Class II or Class III?

MS. FLOWERS: So basically you want us to answer why we're not allowing Class II or Class III?

MR. RAO: Or whatever the applicable groundwater quality standard is at that site.

MS. TIPSORD: For example, if the site is a facility that has Class III groundwater, why would you require, you know, the applicable -- why would you say with your groundwater monitoring Class I if it's a site that's a Class III?

MR. CLAY: The Agency wanted uniformity for CCDD sites and soil fill operations with regard to the maximum allowable concentrations, with the exception of the use of background, for which limited statutory variations from the site -- from site to site are authorized based on the existing location-based TACO tables.

Uniformity is important because establishing site-specific MACs would require substantially more rules and resources for the underlying investigations and the Agency review and approval and would tend to create confusion for implementation. As a conservative approach for uniformity, Class I standards are most appropriate because their use will minimize potential for degradation of groundwater resources.

MR. RAO: Thank you. My next question is

under 1100.205, Certifications and Load Checking. Subsection (a)(3) sets forth that all soil testing must be done in accordance with the requirements of Subpart F of Part 1100.

Please clarify whether soil testing is required on a routine basis. If not, explain under what circumstances soil testing would be required under the proposed rules.

MR. CLAY: Soil testing is not required. This is referring to the -- if a P.E. or P.G. tests the soil, any analyticals that would be associated with that need to be done in accordance with Subpart F. There's no routine or periodic sampling requirements at the fill site.

MR. RAO: So it's left to the discretion of the P.E. or P.G.?

MR. CLAY: Right.

MR. RAO: Okay.

MR. CLAY: Of course, I mean the fill site may take samples as well if they choose to. And if we do inspections, we would likely take samples.

MR. RAO: Okay. So if they do take samples and analyze, it should be done under -- in accordance with Subpart F?

MR. CLAY: Correct.

MR. RAO: Okay. In subsection (b)(5), the proposed rule sets forth that special precautionary measures as specified in the Agency permit must be taken prior to accepting loads from persons or sources found or suspected of sending material other than CCDD or uncontaminated soil.

Please clarify whether the precautionary measures are limited only to permitted fill operations. If not, comment on whether the rule should apply to unpermitted fill operations.

MR. NIGHTINGALE: We can look into that. I think that's an error or typo.

MR. RAO: All right.

MR. NIGHTINGALE: But we'll look into it further.

And next moving on to 1100.212, Use of Painted CCDD as Fill Material. Subsection (c)(2) requires that all quantitative analyses of paint samples are to be performed by an accredited laboratory.

Please clarify whether painted CCDD from outside Illinois should be tested by a laboratory accredited by IEPA in accordance with Part 186 or can

they use, you know, other accreditation for --

MR. WIGHT: We think the circumstances are that Part 186 provides for reciprocal agreements with other states, but we'll have to get back to you on the details of that.

MR. RAO: Okay. Not a problem.

Moving on to 1100.412, Procedures for Closure and Postclosure. Subsection (c)(1)(D) requires groundwater monitoring records to show the fill operation has not contributed to an exceedance of the Class I groundwater quality standards or the background groundwater quality, whichever is higher.

Please clarify whether the proposed rule allows an increase in concentration of a monitored contaminant of concern up to Class I groundwater quality standards if the background groundwater quality is lower than the Class I standard.

MR. CLAY: What was the reference again?

MR. RAO: It's Subsection (c)(1)(D). It's the new language you have proposed.

MR. NIGHTINGALE: I think I'd like to attempt to answer that.

The way that we look at this or the way that we intended to draft up these -- that we intend

for these regulations to be used would be that we are using the 620 Class I standards pretty much as just a check. And as long as you're below the 620 numeric standards, we're not requiring that they do anything more. And I think we're using that in conjunction with the fact that they have all this -- the front-end precautionary measures. And so really, the way that we have this written would be that as long as it's below the 620 numeric standards, they don't have to do any checking.

If they exceed that, then they do have the opportunity to show that the upgradient number, if they're not above that number, then they are still okay, and they don't have to go into any kind of corrective action.

MR. RAO: So are you saying that an owner or operator of a site needs to worry about background only if the monitored levels are above Class I standards?

MR. NIGHTINGALE: Yes.

MR. RAO: Does the rule reflect that intent or do you think it would be helpful to clarify the rule language a little?

MR. NIGHTINGALE: Well, the 620 numeric --

or, the 620 regulations, there's a provision in there that actually allows for us to develop groundwater standards on activity-by-activity basis, and I think that's what we were trying to do here. And I think actually it's under 620.301(d) and it reads: "Nothing in this Section shall limit the Board from promulgating nondegradation provisions applicable to particular types of facilities or activities which impact upon groundwater, including but not limited to landfills regulated pursuant to 35 Illinois Administrative Code: Subtitle G."

So I guess what we -- we did consult with our public water supply counterparts about the possibility of using this approach at these fill sites and got concurrence with them to use the 620 numeric standards pretty much for -- for this situation.

As far as off-site, the facility would be required to -- the way that we have these written would be required to meet the nondegradation provisions as written.

MR. RAO: I'm not -- what I was asking was, you explained that if the levels are below Class I, a site owner doesn't have to worry about background. The rule doesn't say that specifically.

Should the rule clarify that's part of the intent is what I was asking.

MR. CLAY: Are you saying --

MR. RAO: You have the authority to do it under 620. I know that. But just to make the rule clearer. It almost seems like, you know, it doesn't say when background should be established for a site as proposed.

MR. CLAY: Is the concern that you're not sampling the upgradient wells? I mean the intent was to sample --

MR. RAO: Yeah, the --

MR. CLAY: -- all of the wells.

MR. RAO: The concern is and my next question was about, does the rule say how we establish background?

MR. NIGHTINGALE: The rules do reference the RCRA groundwater monitoring draft technical guidance. And that's pretty much what we're anticipating these facilities would use that -- that guidance document that's pretty much used by the landfills to -- to establish background.

MS. MYERS: Actually, background is by the Unified Guidance and is also incorporated by reference

as a statistical guidance from USEPA and it's incorporated by reference.

MR. NIGHTINGALE: Oh, that's right, yeah.

MR. RAO: Does it say anywhere in the rules that you should use that document to establish background?

MS. MYERS: Yeah, I believe so.

MR. RAO: You can take a look at this and get back to us, because right now the way I -- you know, when I read the rule, I saw that groundwater monitoring is required on an annual basis, whereas background was based on statistical groundwater monitoring. So I didn't see any reference in the rules. If you could take a look at it and see if the rules address the issue of how background is established, that's fine.

MS. FLOWERS: I don't think it does. I think that we -- we had decided to put it as a -- because there's different ways or I don't -- but I mean we decided to just put it as a reference document. And I guess what I'm taking you to say is that you don't think that's sufficient. Right?

MR. RAO: No. What I'm saying is you have --

MS. TIPSORD: Excuse me. Before you go any farther, we need to have you sworn in.

MS. FLOWERS: Okay.

MS. TIPSORD: Could we have Ms. Flowers sworn in, please.

(Whereupon Ms. Flowers was duly sworn.)

MS. TIPSORD: Go ahead. Sorry.

MR. RAO: You might have included a document in the incorporation by reference, but usually when you do that, somewhere in the rule you should say, you know, how the background is established in accordance with that document, and that part is missing in the rule. So it looks like, you know, background --

MS. FLOWERS: I think it was intentionally not included. So I guess what I'm saying is you think that we should put --

MR. CLAY: Let us -- let us review that and then --

MR. RAO: Yeah, sure.

MR. CLAY: We'll look at how other groundwater monitoring background is established in other rules --

MR. RAO: Yeah.

MR. CLAY: -- and how it's referenced.

MR. RAO: Yeah, I think that would be helpful.

MR. CLAY: Thank you.

MR. RAO: Okay. This is moving on to Section 1100.500, the general prohibitions under Subpart E. On page 18 of Mr. Nightingale's testimony it states that closure and postclosure periods for uncontaminated soil fill operations are self-implementing with no Agency oversight.

I think you responded to some questions on this section earlier. I just wanted to know if there would be no Agency oversight even during operation of the fill operation?

MR. CLAY: There's no Agency preapproval. When our inspectors go out to the sites, they're required to keep those -- that information on record at the site. They will be looking at, you know, that data.

MR. RAO: Okay.

MR. NIGHTINGALE: And a follow-up, the point that I just wanted to bring up in my comments was that it's -- the self-implementing process is not

new. It is being used in the Part 615 regulations and in the 815 regulations.

MR. RAO: I think one difference between the 815 regulations and this one is there they have to submit annual reports to the Agency. Are they required to do any ongoing reporting in this case?

MR. NIGHTINGALE: No. For the soil-only sites they're required to register, and they are required to address any of the corrective action issues, and then they're required to notify us for closure, and then termination of their postclosure. That would be the only requirements at this point.

MR. CLAY: I might add, though, that on the 815 sites we normally don't inspect those, you know. Where for the CCDD sites and the soil fill operations, you know, those are things that we will be inspecting, certainly, the permitted facilities and then probably periodically the soil fill operations as well, and at that time we can review the groundwater data.

MR. RAO: Moving on to 1100.605, Maximum Allowable Concentrations for Chemical Constituents in Uncontaminated Soils, Subsection (c) allows an owner or operator to request the Agency to develop maximum

allowable concentrations for any chemicals of concern not listed in Part 742, Appendix B, Tables A, B, and C.

The rules do not specify any time frame within which the Agency has to respond to a request for a maximum allowable concentration determination. Please comment on whether the rules should include any time period for the Agency response.

MR. MORROW: We can do that.

MR. RAO: Moving on to Section 1100.700.

MR. WIGHT: Could you pause just a moment, please?

MR. RAO: Yep.

MR. WIGHT: We'll get back to you on that.

MR. RAO: Section 1100.700 sets forth the general requirements for groundwater monitoring. Could you please comment on whether a description of how an owner or operator of a permitted CCDD will comply with the groundwater monitoring program under this subpart, whether the description should be included in a permit application along with other information listed in Section 1100.306? There's a list of information under 1100.306, but that doesn't include anything relating to groundwater monitoring.

MR. LIEBMAN: Are you asking if the proposed wording would already require that?

MR. RAO: No.

MR. LIEBMAN: Or are you suggesting that maybe if that's what we have in mind that we add something like that?

MR. RAO: Right now the permit application requirements does not require them to submit information about their groundwater monitoring system or a description of their monitoring system.

MR. NIGHTINGALE: That's correct.

MR. RAO: And I'm asking whether that should be listed under the permit application information.

MR. NIGHTINGALE: Well, you know, at this point our intent was to have this a self-implementing program, the groundwater monitoring program.

MR. RAO: Even for the permitted facilities?

MR. NIGHTINGALE: Yes, that's correct.

MR. RAO: So you don't want to know, you know, what kind of monitoring system they're going to put in place or --

MR. NIGHTINGALE: No, you know, based on,

you know, the potential contamination, we felt that the self-implementing program would be appropriate for the uncontaminated fill sites and the permitted sites. They are required to submit to us the results when they do have exceedances and then it kicks them into the -- potentially the additional monitoring and corrective action. But we're requiring that the program that they develop, the groundwater monitoring program, the wells, and the locations of the wells all be certified by a professional engineer and that information be kept on site.

MR. RAO: Okay. Thanks.

Moving on to 1100.720, Subsection (b) of Section 1100.720 sets forth that: "Except as provided in Subsection (d) throughout the compliance period as defined in Section 1100.715, the owner or operator must measure compliance with the Class I groundwater quality standards at the compliance point, or compliance points if more than one such point exists."

But this section doesn't have a Subsection (d) in it. Could you take a look at it?

MR. LIEBMAN: Yes, that is a typo. It should reference 1100.760. And I think we'll have an errata, if we don't already, that makes that

correction.

MR. RAO: Okay. Thank you.

My last question deals with 1100.750, Alternate Non-Compliance Response Program. The provisions of this section allow an owner or operator to demonstrate that an exceedance of a Class I standard resulted from an error in sampling, analysis, or evaluation, or that the exceedance is not statistically significant.

Please comment on the merits of allowing the owner or operator the option to demonstrate that the fill operation is not the source of exceedance.

MR. NIGHTINGALE: This approach, I guess, would be similar to what they do with landfills. I guess the -- I have a question for you. Are you -- now, you're talking about the appropriateness of --

MR. RAO: Whether to have that kind of a demonstration for these fills.

MR. NIGHTINGALE: Well, I think its consistent with what we do at municipal waste landfills, for one. We think that it would be appropriate for these sites, too.

MR. CLAY: I think the idea is that if you have contamination coming from off-site onto your

property and you're not -- you don't exceed the 620 or you're not contributing, that you shouldn't be responsible for corrective action in those situations. It's really looking at the back -- the background groundwater quality situation.

MR. RAO: Actually, the scenario I was looking at was they may be exceeding the background groundwater quality downgradient, but they may not be contributing to the exceedance.

MR. CLAY: Exactly. And that's what we were anticipating here. So, as long as they're not contributing to it, then, you know, they shouldn't be responsible for the corrective action.

MR. RAO: Yeah. Would you consider adding that to the rule, the demonstration that --

MS. FLOWERS: I think I'm --

MR. RAO: -- they can make?

MS. FLOWERS: I'm confused about the question as well. Are you saying that they could be -- they could be -- have elevated background downgradient and still --

MR. RAO: No. I'm saying they may be exceeding the background value downgradient. So will they be allowed to make a demonstration that they are

not contributing to the exceedance?

MR. NIGHTINGALE: Yes, they will be. They will be allowed to show that if they are exceeding the 620 numeric standards and it's from upgradient that they would not be required to clean that up downgradient.

MS. FLOWERS: I think we're not understanding the question.

MR. CLAY: Yeah. I think you're saying that they've got upgradient --

MR. RAO: Yeah.

MR. CLAY: -- and the background and they're exceeding --

MR. RAO: There may be a facility adjacent to them that can be contributing to the exceedance.

MR. CLAY: And it's not being picked up in the upgradient wells?

MR. RAO: Yeah.

MR. CLAY: And so I think they -- they would have to -- I mean they can make that demonstration, but they would probably -- I mean if they're not picking it up upgradient, they would have to install more wells to make that demonstration I would think.

MR. RAO: Will the rule allow them to do it, is what I was asking, as proposed?

MR. CLAY: We think -- yes, we believe it will.

MR. NIGHTINGALE: I think there's enough flexibility in the way the rule's written that would allow them to do that.

MR. RAO: Because right now it kind of limits them to, you know, other than sampling or analysis, or is that -- the term "evaluation" in there allows that flexibility?

MR. NIGHTINGALE: We can look at it closer.

MR. RAO: Yeah. Can you do that?

And that's all I have.

MS. TIPSORD: Are there any other --

MR. RAO: Thank you very much.

MS. TIPSORD: Are there any other questions for the Agency today?

Mr. Henriksen.

MR. HENRIKSEN: Yes. Questions posed regarding the soil-only sites kind of triggered some questions in my mind, so I'll just put these questions to the panel.

How many states in the nation regulate clean soil disposal as proposed in the IEPA's rules to your knowledge?

MR. WIGHT: We're not aware of any.

MS. TIPSORD: Mr. Wight, would you like to be sworn in or would you prefer to ask one of your colleagues if that's correct?

MR. CLAY: We're not aware of any.

MR. WIGHT: I'll ask Mr. Clay to answer.

MR. CLAY: We're not aware of any.

MR. HENRIKSEN: Thank you.

Has the IEPA historically had enforcement issues with soil-only sites?

MR. CLAY: We weren't even aware of where they are. That's why we required the notification and then the similar requirements as far as operation and the groundwater. But unless there was a complaint, we wouldn't necessarily have even known where they are.

MR. HENRIKSEN: I see. So you all don't have in your Agency files groundwater monitoring data or groundwater data that indicates there's been a problem with these sites?

MR. CLAY: No, we don't.

MR. HENRIKSEN: You don't have data or

test results, analytical results in your Agency files that show these sites have been an historical problem?

MR. CLAY: No, we don't. Like I said, we don't even know necessarily where these sites are located.

MR. HENRIKSEN: And isn't it true that the IEPA is only regulating soil-only sites because this requirement is contained within Public Act 96-1416?

MR. CLAY: That -- yes, that's the main reason we're regulating soil-only sites.

MR. HENRIKSEN: That's in fact the reason. Correct?

MR. CLAY: Correct.

MR. HENRIKSEN: Yet, in the absence of IEPA data showing past problems, why is the IEPA imposing a regulatory regime for soil-only sites that is as strict as for CCDD sites?

MR. CLAY: We believe the potential for contamination at the soil fill operations or soil-only sites is similar to that at CCDD sites, because really the soil is the portion that's going to be carrying the contamination in most cases. So we think the potential for groundwater contamination is similar for both of those types of sites. That's why the

screening is similar, the certifications are the same, the groundwater monitoring is the same.

MR. HENRIKSEN: That's your belief, but it's not based on any data that you have in your possession showing that there are any of these problems. Is that correct?

MR. CLAY: We don't have the data. That's correct.

MR. HENRIKSEN: Doesn't the fact that Public Act 96-1416 distinguishes between CCDD and soil fill sites regarding mandatory regulatory requirements indicate the General Assembly's intent that these operations be treated differently?

MR. CLAY: Well, and I -- yes, it does. And I believe they are being treated differently, because the permitted sites have a higher level of regulatory control than the CCDD sites -- or, I mean than the soil-only sites.

MR. HENRIKSEN: If I understand it, don't soil-only sites and CCDD sites have to have basically identical prescreening? Correct?

MR. CLAY: Correct.

MR. HENRIKSEN: Don't they also have to do almost identical due diligence before they accept the

material? Isn't that correct?

MR. CLAY: Correct.

MR. HENRIKSEN: Don't they also have to put in place a groundwater monitoring regime that's identical?

MR. CLAY: That's correct.

MR. HENRIKSEN: Isn't in fact the only difference between these two type of sectors the requirement for getting a permit versus registration?

MR. CLAY: That's correct.

MR. HENRIKSEN: And paying fees, tipping fees. Correct?

MR. CLAY: Those are two things, as well as the permitted sites will be inspected more frequently.

MR. HENRIKSEN: But the -- but you are -- I'm sorry, go ahead, sir.

MR. NIGHTINGALE: I was just going to add and the reporting requirements are different.

MR. HENRIKSEN: Explain how the reporting requirements are different.

MR. NIGHTINGALE: Well, the CCDD sites are required to do an annual report and the uncontaminated soil fill sites are not required to do an annual

report that would include all of the activities that are going on.

MR. HENRIKSEN: So a soil-fill-only site wouldn't have to report how much material they're taking in on an annual basis. Correct?

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: Versus a CCDD site. Correct?

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: However, every load that comes in for, you know, 365 days, they basically have to screen them the same way.

MR. NIGHTINGALE: Correct.

MR. HENRIKSEN: And they do the due diligence up-front the same way.

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: And under your rules they do the groundwater monitoring the same way.

MR. NIGHTINGALE: That's correct.

MR. HENRIKSEN: And the cost -- and the cost for our industry -- whether it's the CCDD industry, the soils industry, or both, the cost comes from these -- these kinds of analytical requirements imposed on us. Correct?

MR. NIGHTINGALE: That would appear to be correct.

MR. HENRIKSEN: As opposed to an annual report saying how many tons of stuff we took or didn't take. My question is, that's -- the annual report is not exactly a very expensive regulatory requirement. Correct?

MR. NIGHTINGALE: The annual report has a substantial amount of information that needs to be included and submitted to the Agency.

MR. HENRIKSEN: Fair enough. But then I go back to my original question. The General Assembly when it -- when it created this program for the clean fill industry and the CCDD industry under this new act, it clearly stated things that were mandated for CCDD and things that were mandated for clean fill, and the mandated things are a lot more extensive for clean fill sites than soil only. That's correct; right? Am I right?

MR. CLAY: I don't believe that I would characterize them as a lot more -- there's a lot more mandatory requirements. I think -- you know, I think part of it is the CCDD sites were already required to have permits, already required that. And so there was

an acknowledgment that the soil-only facilities or the soil fill operations did not have to get a permit. Which I think is a significant cost, up-front anyway. And as Steve pointed out, they don't have the annual report requirements. But the potential for receiving contaminated soil or contaminated material and the similarities in the soil fill operation and the CCDD operations are similar in preventing acceptance of material that's contaminated, the soil screening, the certifications, and the groundwater monitoring.

MR. HENRIKSEN: But this is based on what you think might happen. You don't have data in-house that say these things have happened.

MR. CLAY: We don't have data in-house because these were never regulated facilities.

MR. HENRIKSEN: Okay. And the General Assembly also did not mandate that the soil-only sites would have groundwater monitoring. Correct?

MR. CLAY: Okay. Looking at the statute under 22.51(f)(1) and 22.51a(d)(1), they both have the requirement "must include standards and procedures necessary to protect groundwater."

MR. HENRIKSEN: Correct. And for clean fill sites those do not include mandatory groundwater

monitoring. Correct?

MR. CLAY: Well, I don't think either type of site requires groundwater monitoring. I don't believe the statute says that. I think that it's -- I think the Board -- I don't know if the Board is to consider or the Agency considers in their proposal groundwater monitoring, but both are required to protect groundwater. What we propose is required to protect groundwater.

MR. HENRIKSEN: I appreciate that, but I still have not got a good answer to my question.

The General Assembly when it passed this law clearly made a differentiation between CCDD sites and soil-only sites. They clearly did. That's why they included -- they specifically mentioned groundwater monitoring and a lot of things for CCDD, and they didn't mention that for soil-only. And that fact plus the fact that you don't have historical data in your records showing that clean soil-only sites are a problem for the people of Illinois, I still -- we -- our industry still does not have an answer to why you chose to put an almost identical regulatory regime, maybe not the permit requirement, maybe not the annual report about how much tonnage comes in, granted, but

the things that cost money, the due diligence, screening, you know, and then the groundwater monitoring, the things that cost money are identical. I still haven't received an answer why that you all have elected to do that because you don't have data that would drive you that way.

MR. CLAY: Well, again, I think the Agency believes the potential for contamination at these sites is -- is really with the soil. And so at either one of these sites I don't understand the difference in the potential for contamination -- receiving contaminated soil. I don't understand how you can distinguish for me from a potential contamination standpoint how they're different.

MR. HENRIKSEN: And I understand your answer and respect your opinion. But all -- but -- I guess you've answered my question. The IEPA does not have data in its possession, groundwater data, soil contamination data, that shows that soil-only sites have had problems that justify the same regulatory regime for groundwater monitoring and the screening and testing that CCDD sites have had. That's --

MR. CLAY: Well, we don't -- again, we don't have data because we didn't even know where

these sites were until about a year ago. And you know, we don't have data that they are causing groundwater contamination. But the requirement to protect groundwater and what -- and the standards and procedures that we propose to the Board are, you know, the same for CCDD and for the soil fill operations, and the potential for contamination we believe is the same.

MR. HENRIKSEN: Thank you. I appreciate your answer. Thank you for your indulgence. Again, thank you.

MS. TIPSORD: Are there any other questions for the Agency today?

(No response)

MS. TIPSORD: Thank you. Seeing none, our next hearing is scheduled for October 25th, 2011, in Chicago, at the Thompson Center, Room 2025. I believe we start at 11 a.m.

We will allow for comments and testimony by all other persons, including the IEPA. Testimony must be prefiled by October 7th with prefiled questions by October 17th.

I would anticipate, unless the participants have a specific request, that the first

testimony I receive would be the first person who testifies and so on, unless when we get there that day the participants have another requested order.

With that, anything, Dr. Girard?

DR. GIRARD: No.

MS. TIPSORD: I want to thank you all. I appreciate the level of preparedness and the testimony we got today. Thank you very much. We're adjourned.

(The hearing adjourned at 3:45 p.m.)

CERTIFICATE OF REPORTER

STATE OF ILLINOIS)
) ss
COUNTY OF SANGAMON)

I, DOROTHY J. HART, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the State of Illinois, do hereby certify that the witnesses whose testimony appears in the foregoing hearing were duly sworn by me; that the testimony of said witnesses was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this testimony was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

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The State of Illinois

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Notary Public, State of Illinois
My Commission Expires 6/24/2015

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