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BEFORE THE POLLUTION CONTROL BOARD
STATE OF ILLINOIS

IN THE MATTER OF:
SITE REMEDIATION PROGRAM (BROWNFIELDS)
35 ILL. ADM. CODE 740
NO. R97-011

Hearing held, pursuant to Notice, on the 18th day
of December, 1996, at the hour of 10:00 a.m., at 201
Municipal Center West, Council Chambers, Springfield,
Illinois, before Amy Hoogasian, duly appointed Hearing
Officer.

TRANSCRIPT OF PROCEEDINGS

1 PRESENT:

2 MS. AMY C. HOOGASIAN Hearing Officer
3 MS. MARILI McFAWN Board Member
4 MR. JOSEPH YI Board Member
5 MS. KATHLEEN HENNESSEY Board Member
6 DR. TANNER GIRARD Board Member
7 MR. CHARLES FEINEN Board Attorney
8 MS. AMY MURAN Board Attorney
9 MS. K.C. POULOS Board Attorney
10 MR. KEVIN DESHARNAIS Board Attorney
11 MR. ANAND RAO Technical Staff
12 MR. H. MARK WIGHT Attorney, IEPA
13 MR. GARY P. KING IEPA
14 MR. ROBERT O'HARA IEPA
15 MR. RICK LUCAS IEPA
16 MR. TODD RETTIG IEPA
17 MR. LAWRENCE EASTEP IEPA
18 MS. SHIRLEY BAER IEPA

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1 HEARING OFFICER HOOGASIAN: All right, why
2 don't we go ahead and get started today. I'd like to
3 welcome everyone back on our second day of our second
4 set of hearings in 97-11, in the matter of the Site
5 Remediation Program 35 Illinois Administrative Code
6 Part 740.

7 We left off yesterday with the Agency's responses
8 regarding certain revisions to proposed Part 740
9 suggested in the testimony of Linda Huff and Fred
10 Feldman, and I believe we ended with Section 740.310.
11 If there are no further questions on that, we can go
12 ahead and proceed with Section 740.415 and the
13 Agency's response to that.

14 I'd like to remind everyone that they're under
15 oath as well. Go ahead, Mr. Wight.

16 MR. WIGHT: Okay. I'll maybe just briefly to
17 introduce once again who is with us today. We have
18 Todd Rettig, we have Gary King, Larry Eastep is with
19 us today, he's returned from his meetings in Chicago.
20 Robert O'Hara and Rick Lucas on the far left, and
21 behind me to my left is Shirley Baer who was ill
22 yesterday but who's back with us today.

23 So a couple of new faces that -- or at least old
24 faces that weren't here yesterday.

1 With that we're ready to go right to our comments
2 on 740.415.

3 MR. KING: We thought that -- we had
4 suggested some additional word changes, and then we
5 thought it would be okay to list these other methods
6 in the rule.

7 However, it was our understanding that to -- I
8 think if the Board is going to reference those
9 documents in this kind of way, then they would have to
10 be incorporated by reference. And we saw that as
11 being the -- really the people who were proposing the
12 addition of this -- these additional methods should be
13 providing the proper documentation to allow the
14 incorporation by reference by the Board.

15 HEARING OFFICER HOOGASIAN: Does anyone else
16 have any further comments on that? Mr. Watson.

17 MR. WATSON: For the record my name is John
18 Watson from Gardener, Carton & Douglas.

19 Mr. King, is there a legal requirement that you
20 have to incorporate these things by reference?

21 MR. KING: I don't think I'm a person to ask
22 on that. I think that's probably -- the Board
23 probably knows its own procedures better than I would.
24 That's the way I understood the rule making process.

1 MR. WATSON: And I guess our view would be
2 that these would be not appropriate perhaps for
3 incorporation by reference given that -- given Miss
4 Huff's testimony yesterday that these standards and
5 methods are evolving, and I think even these documents
6 themselves recognize that there are continuing efforts
7 to revise these methods and alternatives to perfect
8 them, and that to incorporate them by reference would
9 limit the ability perhaps to utilize refinements to
10 these procedures.

11 HEARING OFFICER HOOGASIAN: Is there anything
12 further on that point then? Mr. Rieser.

13 MR. RIESER: David Rieser from Ross and
14 Hardies for the record. Why would you need Agency
15 approval to use ASTM, use activities conducted in
16 accordance with the ASTM standards or the compendium
17 of Superfund field operations methods or the other
18 specific standardized methods that are outlined in the
19 proposed change?

20 MR. KING: Why would you need approval, is
21 that what you were asking?

22 MR. RIESER: Yes, because previously the
23 rules did not require Agency approval for using the
24 ASTM procedures, it was just other procedures as

1 approved. And now you're requiring specific Agency
2 approval for something you didn't previously do it, as
3 well as USEPA standard methods for Superfund sites.

4 MR. KING: We didn't see that -- if you look
5 at it in the context of where that sentence appears,
6 that wasn't a change in substance. We were just
7 reorganizing the language to account for these other
8 new things being included, so this was not from our
9 standpoint a change of intent.

10 MR. RIESER: Well, I just read that last
11 clause as the original or other procedures as approved
12 by the Agency as applying to the other procedures and
13 not to the ASTM standards.

14 MR. KING: Well, we were reading it as
15 applying to both.

16 MR. RIESER: Both. Why would you need Agency
17 approval to use Superfund, USEPA Superfund
18 methodology?

19 MR. KING: Well, you know, one of the
20 difficulties that -- again it was kind of a problem if
21 you look at it as just the general ASTM reference or
22 any of these documents, is to make sure that they're
23 being used in the proper way, the proper methodology.

24 Sometimes these things apply in certain situations

1 and sometimes they don't. And I think that was what
2 Linda Huff was really talking about yesterday, kind of
3 the disinclination to see them incorporated by
4 reference because, you know, how do you -- what does
5 that say then as far as the -- how you use them kind
6 of issue.

7 MR. RIESER: Okay, thank you. Mr. Watson.

8 MR. WATSON: In terms of approval by the
9 Agency, what would the Agency look at in determining
10 whether or not a test method would be approved or a
11 sampling method?

12 MR. KING: If it's the right method for use.

13 MR. WATSON: I mean it really is only an
14 issue of the technical adequacy or appropriateness of
15 the procedure, right?

16 MR. KING: Well, yeah, but I mean these
17 procedures govern different things. I mean if you
18 were using a procedure to analyze for metals which are
19 a contaminant of concern was benzene, then that
20 wouldn't make any sense.

21 MR. WATSON: Right. But if it's consistent
22 with the use or methodology identified in these
23 documents, then one would anticipate that that would
24 be approvable by the Agency?

1 MR. KING: Right, that's correct.

2 HEARING OFFICER HOOGASIAN: Is there anything
3 further on that point?

4 (No response.)

5 HEARING OFFICER HOOGASIAN: Seeing nothing,
6 why don't we proceed to Section 740.420 and the
7 Agency's response to Miss Huff's testimony on that
8 section.

9 MR. KING: We had indicated that we thought
10 that the first change there was -- that that was an
11 okay change to make.

12 The other three we didn't agree with because of
13 the way they confined the nature of the -- of the
14 potential investigation under Phase II activities.

15 If you had a situation where the Phase I could be
16 incomplete, it may not have looked at off-site issues.
17 It is a good initial screening document and it
18 deserves a lot of credence and credibility for that.
19 But there could very well be circumstances in which
20 additional investigation activities need to occur
21 under the Phase II issue.

22 So we saw this as really that the approach that
23 was taken in items 2, 3 and 4 really said you couldn't
24 look at anything other than what was looked at in a

1 Phase I, and we just thought that was too limiting.

2 HEARING OFFICER HOOGASIAN: Mr. Watson.

3 MR. WATSON: I guess I'm having trouble with
4 this one. It's hard for me to contemplate situations
5 where the Phase I would not identify the recognized
6 environmental conditions that have been identified at
7 a site. And I'm wondering in what circumstances do
8 you believe that that could happen?

9 MR. KING: Well, for instance the Phase I may
10 show -- have indications of contamination going
11 off-site, and again that's -- if you look at item 4 as
12 it was proposed, the characterization was limited to
13 at the remediation site, and so there was no
14 opportunity even to look at off-site issues. There
15 could be off-site issues that need to be addressed as
16 part of the Phase II activities.

17 MR. WATSON: Well, what are the obligations
18 of a remediation applicant if -- to address conditions
19 that are off-site? I mean to the extent that they're
20 defining the remediation site as being the boundaries
21 of the site, I don't see how that's relevant to the
22 determination.

23 MR. KING: Well, it becomes an issue of
24 narrowing the scope of all these activities. We

1 conceive this, we've always conceived the nature of
2 this program as being one, you want to have it broad
3 enough that you can include all the potential issues,
4 particularly under a comprehensive investigation, so
5 that the NFR letter when it comes out has some real
6 meaning to it.

7 You know, under the scenario that you're laying
8 out, if it -- if something is found that wasn't
9 covered in the Phase I investigation, well, then that
10 would be excluded from the whole process, that would
11 be outside the bounds of this, because it's not
12 included in the Phase I.

13 So you have to go back and do another Phase I,
14 refind what you found in a second setting, and then go
15 back through the process. We just didn't see any real
16 purpose to having those kind of limitations on the
17 process.

18 MR. WATSON: Are you saying here by these
19 comments that you interpret the Illinois EPA's
20 authority under 740.420 to be that you could have --
21 at your discretion you could impose upon a remediation
22 applicant the requirement to conduct sampling for all
23 compound list, Target Compound List contaminants or
24 where you deem that appropriate?

1 MR. KING: We're just quickly reviewing this,
2 I think that's what's called for already.

3 MR. WATSON: I mean I guess I have some
4 confusion. I think just to summarize where we've been
5 on this issue, I think in Mr. O'Hara's original
6 testimony there was some confusion, confusing language
7 at least in my mind about the fact that you could
8 focus your sampling in Phase II based upon the results
9 of Phase I.

10 But then later on in the testimony I believe there
11 was some statement that suggested that perhaps you had
12 to do a Target Compound List sampling at every site in
13 Phase II.

14 And then I thought that we had clarified that with
15 Mr. Eastep's testimony, and he basically said that,
16 you know, in each case you take a look at the results
17 of the Phase I and then you determine the
18 appropriateness of sampling for specific Target
19 Compound List contaminants in the Phase II process and
20 that you would, you know, have the opportunity to
21 scope that sampling as part of the Phase II based upon
22 the results of the Phase I.

23 And now it seems like what I read in your comments
24 here is that the Agency would like to maintain the

1 fundamental discretion to impose upon a remediation
2 applicant the obligation to sample the Target Compound
3 List, the full Target Compound List contaminants where
4 they deem that to be appropriate. And I guess I'm
5 just wondering whether or not we can --

6 MR. KING: I don't -- it doesn't seem like
7 that's all -- I'm not sure that's all inconsistent.

8 MR. EASTEP: I think what you're saying at
9 least when you characterize my testimony was accurate.
10 But if you get out and you're doing your Phase I, I
11 don't think it would be unusual to expect that you
12 might be able to -- you might come across things that
13 you couldn't have identified as part of doing
14 investigation. You may come across things you could
15 not have anticipated with a Phase I simply because
16 there wasn't a paper trail or there wasn't any visual
17 type of indication.

18 So what do you do? You can't get an NFR if you
19 can't address -- I mean you've got to address
20 something to get the NFR, and it's there and you don't
21 want to address it? I mean --

22 HEARING OFFICER HOOGASIAN: Mr. Rieser.

23 MR. RIESER: Is the issue with the proposed
24 language looking at 420(2), let's take an example, the

1 "at the remediation site" language or the "as
2 identified by the Phase I site assessment" language?

3 MR. WIGHT: Looking where?

4 MR. WATSON: It's on page 13 of Linda Huff's
5 testimony.

6 MR. RIESER: Page 13 of Linda Huff's
7 testimony, and Mr. Eastep, you said it was the "as
8 identified by the Phase I site assessment" language,
9 is that correct?

10 MR. EASTEP: Mostly.

11 MR. RIESER: That's one of your main problems
12 with this?

13 MR. EASTEP: Mostly. I suppose you could
14 have a circumstance where if you had a release from
15 off-site that was on your site and you wanted to
16 address it, then that particular language might create
17 a bit of a problem with that.

18 MR. RIESER: But the discussion we have had
19 so far seems to have been centered mostly on the "as
20 identified by the Phase I site assessment", that the
21 Agency has an issue with that as a limitation on the
22 scope of Phase II, is that correct?

23 MR. EASTEP: That's correct.

24 MR. RIESER: And the basis for that concern

1 is that there are things that would not be identified
2 in the Phase I that the Agency would want people to
3 look at, is that correct?

4 MR. EASTEP: Yes, that could be correct.

5 MR. RIESER: Now, the purpose of the Phase I
6 of course is to identify based on visual site walk
7 through, historical records, based on all of those
8 things, the purpose of the Phase I is to identify
9 potential recognized environmental conditions,
10 correct?

11 MR. EASTEP: That's correct.

12 MR. RIESER: So a good Phase I will identify
13 all potential conditions, will it not?

14 MR. EASTEP: It may. You could have the best
15 Phase I in the world, and if there's just no visual
16 evidence or there's no record of somebody doing
17 something there, then you can have the best Phase I in
18 the world and you still might not identify something.

19 MR. RIESER: But it would be appropriate when
20 you're talking about the scope of a proposed Phase II
21 to organize the sampling activities called for in a
22 Phase II based on the results of a Phase I, would it
23 not?

24 MR. EASTEP: Yes, it would.

1 MR. RIESER: You really have no other basis
2 for scoping a Phase II other than what's in the Phase
3 I report?

4 MR. EASTEP: That's correct.

5 MR. RIESER: Okay. It may be that in doing
6 the Phase II you run across other contaminants or
7 other issues that were not identified previously,
8 correct?

9 MR. EASTEP: It's possible.

10 MR. RIESER: And those are the things you're
11 concerned about that in doing Phase II you will find
12 things that weren't in the Phase I that need to be
13 addressed, correct?

14 MR. EASTEP: That is correct.

15 MR. RIESER: Okay. So you don't really have
16 an issue with limiting the Phase II based on the Phase
17 I, but you have an issue which is if things come up
18 during the Phase II analysis, that those also have to
19 be included if the person wants a comprehensive NFR
20 letter?

21 MR. EASTEP: That's correct. There might
22 also be an issue with the design of the Phase I to
23 begin with and how you're going to limit the scope of
24 your study and kind of what you think you know about

1 the site. You may -- well, there's a couple things
2 that could happen.

3 One, for example, if you had a site where you
4 didn't think you needed a very detailed Phase I
5 because you knew that for example there might have
6 been an old gas plant there years ago, and you don't
7 find anything initially in the records, and so you've
8 kind of limited yourself on your Phase I because you
9 know where you're headed because you've maybe done one
10 of these before, and all of a sudden you get in and
11 find out lo and behold somebody had a little backyard
12 plating shop there that nobody knew about.

13 And so by design you kind of limited yourself,
14 too. So there could be other circumstances that would
15 drive how you conduct a Phase II based on the Phase I.

16 MR. RIESER: But that information would come
17 to light while somebody was either doing the Phase I,
18 although they self-limited themselves going in, while
19 they were actually doing it they were able to observe
20 these additional conditions that they hadn't believed
21 were there, or again during the Phase II while they
22 were doing their sampling, correct?

23 MR. EASTEP: Yes.

24 MR. RIESER: Okay. So the Agency shouldn't

1 have a problem with people limiting the scope of the
2 Phase II either on the Phase I or on objective
3 findings that are received during the Phase II,
4 correct?

5 MR. EASTEP: I think that is how the rules
6 are structured now is that the first one, what you
7 determine in the Phase I is what drives the Phase II.

8 MR. RIESER: Okay, that key point I think is
9 the point of -- that what you just said I think was
10 the point of Miss Huff's proposal, is that they wanted
11 to -- I think the point that we're trying to make is
12 to make it so the Agency does not add additional
13 target compounds just because of some thought that
14 somebody has, but it's based on the observations that
15 are made in the -- observations made at the site that
16 are contained in the Phase I.

17 MR. KING: That's what (b)(1) says.

18 MR. RIESER: And that the addition of the "as
19 identified by the Phase I site assessment" doesn't
20 detract -- how does the addition of "as identified by
21 the Phase I site assessment" detract from that?

22 MR. EASTEP: It would --

23 MR. RIESER: In terms of how you scope a
24 Phase II?

1 MR. EASTEP: It would limit it to a certain
2 extent first of all, and it would be a little bit
3 inconsistent.

4 MR. KING: The limitation now would be
5 expressly in the rule and prevent looking at other
6 things.

7 MR. RIESER: But how about if you were to add
8 "as identified by the Phase I site assessment or
9 information derived during the Phase II site
10 assessment".

11 MR. KING: Is there a question pending?

12 MR. RIESER: Whether that additional language
13 would be acceptable.

14 MR. KING: You know I don't think we can
15 respond to that kind of specific language change right
16 here. I mean none of this seems to really get to the
17 fundamental issue that we were concerned about, and
18 that is using a Phase I, which is an initial screening
19 document that can -- you know, it's original design,
20 if it's a good Phase I it can be extremely useful in
21 going to the next phase.

22 If it was a bad Phase I, then it really doesn't
23 have a whole lot of use as far as going to Phase II.

24 You know, the Phase I could be an older document,

1 you know, it doesn't -- it isn't really looking
2 towards the most current issues at the site. So we
3 were just concerned about ending up limiting by rule
4 the ability to look at whether you had other
5 environmental issues at the site.

6 MR. RIESER: But it's correct that the Agency
7 couldn't require additional Phase II work unless they
8 had some objective determination indicated by either
9 the Phase I or some independent knowledge regarding
10 the site to require that such work be performed?

11 MR. KING: Would you repeat that, please.

12 MR. RIESER: Could you read it back, please?

13 (The reporter read the requested
14 material.)

15 MR. KING: I think that's correct.

16 MR. RIESER: All right, thank you.

17 HEARING OFFICER HOOGASIAN: Mr. Watson?

18 MR. WATSON: I've got one additional
19 question. Would you have any objection in
20 740.420(b)(1), the last sentence which says, "Based on
21 the Phase I environmental site assessment, the Agency
22 may add or delete contaminants from the Target
23 Compound List for sampling, analyses, and field
24 screening measurements."

1 Would you have any objection to changing the word
2 "may" there, "may add or delete contaminants" to
3 "shall add or delete contaminants" to confirm that
4 this valuation is completed on a -- in every
5 situation?

6 MR. KING: You're saying put the words -- you
7 change the word "may" to a "shall"? What would be the
8 purpose of doing that?

9 MR. WATSON: Well, because right now you read
10 that and you say well, the Agency has only -- well,
11 the Agency in its discretion can look at limiting
12 Target Compound List contaminants for Phase II
13 sampling based on the Phase I results.

14 And what I would like to see is language that says
15 that the Agency will do that in every case, will look
16 at the appropriateness of adding or deleting Target
17 Compound List contaminants prior to conducting its
18 Phase II sampling.

19 MR. EASTEP: Would you want the Agency then
20 to take a more active part in developing the Phase I
21 and working through the Phase II and -- because I
22 think what the implication there the way you arrive at
23 those decisions is through a lot of effort, and that
24 would become fairly resource intensive.

1 And is that your intent for the Agency to start
2 acting more in a consultant's role to doing some of
3 this?

4 MR. WATSON: I guess I see this coming up in
5 almost every case where a remediation applicant will
6 want to scope its sampling efforts in Phase II
7 consistent with the results of Phase I. I don't see a
8 lot of remediation applicants willing to or believe
9 that it's necessary to do a whole Target Compound List
10 sampling effort for their sites.

11 What they'd like to do is look at the Phase I, see
12 what is warranted based on the Phase I, and then go
13 ahead and do that as part of the Phase II.

14 MR. EASTEP: I don't think that's what your
15 question was. Your question -- you indicated that
16 you're proposing that the Agency would do an
17 independent analysis and make this determination
18 independent of any of the wishes of the remedial
19 applicant?

20 MR. WATSON: No, I think that it necessarily
21 will involve some discussion between EPA project
22 manager and the remediation applicant.

23 MR. KING: Not if you put a shall there.
24 Then you're mandating that we look at the Phase I site

1 assessment and we make a decision to add or delete,
2 and that's it. We're going to look at the Phase I,
3 and whatever the Phase I says we must then add or
4 delete contaminants from the Target Compound List.
5 There's a two-edged sword.

6 If you don't want us to have any discretion on
7 that issue, then I think there would be a lot of
8 companies that wouldn't like that kind of situation,
9 and because simply we're going to be taking that Phase
10 I and you'll be living and dying by it just as well.

11 So I mean this is an issue that it comes back to
12 the concept that Mr. Walton was talking about
13 yesterday about, you know, at what point do you stop
14 or can you stop making a totally prescriptive kind of
15 effort.

16 I think everybody would think it would be a
17 wonderful idea if you would design a Phase II that was
18 totally regimented and went through the process simply
19 the way a Phase I does. You can't do that.

20 I mean we tried to do that as far as drafting of
21 the rules. We couldn't do that. When we discussed it
22 with the Site Remediation Advisory Committee, they
23 couldn't do it.

24 I mean a lot of experienced people as far as

1 remediation from consulting field companies, it's --
2 we get to a point or an issue where there has to be a
3 level of discretion and interaction which allows
4 people to evaluate sites as they appear.

5 MR. WATSON: Okay.

6 HEARING OFFICER HOOGASIAN: I believe Dr.
7 Girard has a comment at this time.

8 DR. GIRARD: Thank you. I have a question
9 for Mr. King. What criteria would the Agency use in
10 determining whether you had a good Phase I or a bad
11 Phase I?

12 For instance, you gave the age of the Phase I as
13 being one criterion that you would look at in
14 evaluating whether you had a good Phase I or a bad
15 Phase I. What are some other criteria that you would
16 use?

17 MR. EASTEP: Well, we look at the
18 requirements of the reference to ASTM and initially at
19 least go down and ensure that they had complied with
20 the various requirements in terms of what they were
21 supposed to look at and how they were supposed to look
22 at it.

23 MR. KING: I think we'd also probably, you
24 know, look at what documentation we have on our

1 existing files relative to a site, and if it turns up
2 something's missing that should have been addressed,
3 that would be another factor.

4 DR. GIRARD: If there was a newer edition of
5 an ASTM document published and we still had an older
6 edition incorporated by reference, how would the
7 Agency deal with that situation?

8 MR. KING: That's a little bit of a, you
9 know, a tricky issue, because we can't be in a
10 position where we're directly incorporating some new
11 methodology because of the state rules on rules.

12 But we have included a provision which allows
13 somebody to propose other procedures that have
14 equivalent or better methodology related to them, and
15 I would expect that if there was a new ASTM Phase I
16 process that came forward, you know, somebody could
17 suggest that that was an equivalent procedure to use.

18 I mean they could use the old one or propose the
19 new one as an alternative one that has equivalent
20 safeguards. So I think that will be the way we would
21 probably try to handle that situation.

22 And then -- and then, you know, there's certainly
23 the opportunity if you have a particularly critical
24 issue to come back and update the Board rules relative

1 to that new document. I mean we've been doing that as
2 part of the LUST program and we've gone through
3 subsequent iterations of the LUST rules. We have
4 updated other documents as we've gotten new references
5 to them to clarify that issue.

6 DR. GIRARD: Thank you.

7 HEARING OFFICER HOOGASIAN: Mr. Rieser.

8 MR. RIESER: And Gary, just following -- Mr.
9 King, excuse me, following up on that answer, doesn't
10 420(a) specifically allow an alternative to be
11 approved by the Agency?

12 MR. KING: There it is.

13 MR. RIESER: Thank you.

14 MR. KING: I knew it was there somewhere.

15 HEARING OFFICER HOOGASIAN: Mr. Feinen.

16 MR. FEINEN: Is the Agency's decision on the
17 Phase I and scope of the Phase II appealable at that
18 point or at some other point?

19 MR. KING: The -- it would be appealable in
20 terms of -- I believe it's once the report is
21 approved.

22 MR. FEINEN: Is that after they do the
23 action?

24 MR. KING: The point of appeal would come at

1 the point where you have the site investigation
2 report, whether it's denied or modified, and that
3 would be after the investigative activities, but
4 before, obviously before a Remedial Action Plan has
5 been prepared.

6 HEARING OFFICER HOOGASIAN: Mr. Watson.

7 MR. WATSON: I've got one more question. It
8 is not though the agency's intent to simply require
9 remediation applicants to conduct full Target Compound
10 List sampling in Phase II without going through and
11 looking at the appropriateness of reducing the scope
12 of those sampling efforts based on the Phase I, is
13 that correct?

14 MR. EASTEP: I think we spent a lot of time
15 talking about that a couple weeks ago, and I think we
16 kind of answered your question previously and I don't
17 think that's changed.

18 MR. WATSON: What's the answer, it is not the
19 Agency's intent?

20 MR. EASTEP: Well, I mean we spent an awful
21 lot of time discussing it, and I think we indicated,
22 you know, the Phase I is going to drive the Phase II,
23 and we were going to look at what the applicant had
24 proposed, and we'd probably enter into discussions.

1 And for a large site they might have one or two
2 samples where maybe they do the whole Target Compound
3 List, and they might have ten where they'd only do a
4 limited number, and that's just to kind of scope
5 things out. And that ends up frequently being the
6 proposal of several of the consultants that we've
7 dealt with anyway. So --

8 MR. WATSON: And this is done on a
9 case-by-case basis?

10 MR. EASTEP: Absolutely.

11 MR. WATSON: Okay.

12 HEARING OFFICER HOOGASIAN: Is there anything
13 further on this section?

14 (No response.)

15 HEARING OFFICER HOOGASIAN: Seeing nothing,
16 let's proceed then to Section 740.425 and 435, the
17 site investigation reports.

18 MR. KING: We need to include one more point
19 on the discussion of (b)(4). I had touched on that
20 before, but Mr. Eastep brought up another issue of
21 significance that we probably should discuss.

22 HEARING OFFICER HOOGASIAN: That's fine,
23 before we proceed into the next section.

24 MR. EASTEP: With number (4), they've

1 inserted -- the paragraph (4) they've inserted the
2 phrase "at the remediation site". And with regard to
3 characterizing exposure routes, a lot of sites that
4 may be significant to address the exposure route
5 off-site for the purposes of completing the
6 investigation. In some instances if you're going to
7 consider eliminating an exposure route pathway from
8 consideration, you would have to address the exposure
9 route because that's what's called for.

10 For example with the groundwater pathway
11 elimination, you'd have to consider the off-site
12 exposure pathway. And similarly I guess you could do
13 that with the inhalation pathway, with the difference
14 there you may have to go off-site. So that really
15 would change I think the intent at that point.

16 MR. WATSON: But that's only true with
17 respect to sub (4), correct? That's really the
18 only --

19 MR. EASTEP: My comment was just addressing
20 paragraph (4).

21 MR. WATSON: Okay. Limiting sub (2) and sub
22 (3) would be appropriate at the remediation site?

23 MR. EASTEP: I didn't say that, no.

24 MR. WATSON: Is that true?

1 MR. EASTEP: I think I mentioned before, I
2 didn't address those, but you could have contamination
3 that originated off-site that came onto your site, and
4 that might be a source, and that might be to the
5 applicant's benefit to address that or they may even
6 want to remediate it. So I guess we would oppose that
7 type of language for varying reasons in the other
8 paragraphs as well.

9 MR. WATSON: Okay.

10 HEARING OFFICER HOOGASIAN: Okay, and I
11 believe Miss Hennessey has a couple questions on this
12 section.

13 MS. HENNESSEY: Just while we're on this
14 section, in (b)(4) later on there's a reference to
15 identifying locations of human and environmental
16 receptors, and also in the next subparagraph (c)
17 reference to habitats. Those -- the term preceptor
18 and the term habitat are not defined in these rules or
19 in the T.A.C.O. rules.

20 Do you think it would be appropriate to include a
21 definition?

22 MR. KING: There is a -- under the T.A.C.O.
23 rules the notion of what is an exposure route is
24 defined. There is a specific definition of an

1 exposure route in the T.A.C.O. rules. And I don't
2 think there's a definition of the term receptor, but,
3 you know, there are terms like point of human exposure
4 and human exposure pathway, natural pathways, you
5 know.

6 So I'm not sure that there's a direct
7 correspondence in language but -- we were just
8 conferring that perhaps we should go back and look at
9 a -- this is you're referring to (4)(B), (b)(4)(B)?

10 MS. HENNESSEY: Yes.

11 MR. KING: That maybe it would be better to
12 go back and we could include that in our comments or
13 second errata sheet as to whether some language that
14 would make a better consistency between this
15 subsection (b)(4)(B) and what's -- the words that are
16 used in the T.A.C.O. provision relative to these
17 concepts.

18 MS. HENNESSEY: Okay. Well, I note that in
19 the T.A.C.O. rules exposure route is defined as the
20 transport mechanism by which a contaminant of concern
21 reaches a receptor. So again that term receptor is
22 used.

23 Perhaps that's -- everyone understands what a
24 receptor is, but I think that it's not a term that's

1 commonly used, and it might be wise to include some
2 kind of definition so there's no confusion about how
3 it should be applied.

4 And Mr. Rao's just mentioned to me that there
5 might also be some value just giving some examples or
6 defining what an environmental receptor is.

7 HEARING OFFICER HOOGASIAN: Does anyone else
8 have any further comments on that?

9 MR. RIESER: Just a minute.

10 HEARING OFFICER HOOGASIAN: Mr. Rieser.

11 MR. RIESER: With respect to a definition of
12 receptor, isn't it accurate that we selected a term of
13 point of -- the Agency in its proposal selected a term
14 point of human exposure based on the difficulty in
15 coming up with a definition of receptor that really
16 served the needs of the 742 and 740 proposal?

17 MR. KING: Yes, my recollection is that when
18 we -- we were trying to settle on some specific terms
19 and not trying to end up in debates over certain kinds
20 of terminology, we really tried to just use this
21 concept of exposure route and point of human exposure
22 as kind of being the driving considerations under
23 T.A.C.O.

24 And to some extent maybe we could just reduce this

1 entire (b)(4)(B) to just the location of any exposure
2 routes. Because that, the term exposure route really
3 is -- you know, it really includes the nature of it
4 being at a receptor at the end of it anyways.

5 MR. RIESER: Thank you.

6 HEARING OFFICER HOOGASIAN: Anything further?

7 MS. HENNESSEY: Well, just can you just give
8 me today just a simple definition of what a receptor
9 is?

10 MR. KING: Yes, a receptor is the -- is the
11 organism that is impacted by the contamination. And
12 the predominant issue within T.A.C.O. is human
13 receptors.

14 I mean where is it that a human is exposed to the
15 contamination, so really we've kind of used the word
16 receptor meaning humans for the most part.

17 As we discussed in the T.A.C.O. proceedings, we
18 have left open the potentiality of coming back and
19 including the notion of environmental organisms other
20 than humans that could be impacted by contamination
21 for subsequent proceedings.

22 MS. HENNESSEY: Thank you.

23 HEARING OFFICER HOOGASIAN: Anything further
24 then?

1 DR. GIRARD: Let me just clarify then. So
2 when you talk about an environmental receptor, you're
3 talking about other living organisms than humans, you
4 are not including the inanimate parts of the
5 environment?

6 MR. KING: That's correct.

7 DR. GIRARD: Thank you.

8 MS. HENNESSEY: And just to further clarify,
9 plants then are environmental receptors?

10 MR. KING: Yes, that would be correct.

11 HEARING OFFICER HOOGASIAN: All right, then
12 why don't we proceed to the next section.

13 MR. KING: This is -- these comments are
14 addressed to Sections 425 and 435, and just taking out
15 one of those, looking at 425, the concept that we're
16 talking about appears in -- this is part of the nature
17 of the site investigation report, and this is the
18 endangerment assessment subsection, this is (b)(5),
19 and then at point (D) is the provision that we're
20 directing our attention to.

21 And that is the way we have set it out is we're
22 requesting that the remediation applicant provide the
23 results of a site investigation in a way that provides
24 a comparison as to what has been found relative to the

1 Tier 1 remediation objectives that appear under
2 T.A.C.O.

3 And as we talked about yesterday morning, we had
4 suggested that the word "applicable" be changed,
5 because we thought maybe that the word applicable was
6 not neutral enough. We're not trying to say that the
7 Tier 1 remediation objectives at this point in time
8 are the applicable -- are the required cleanup
9 objectives, we were just looking at the notion of this
10 is the corresponding -- if you were looking at -- if
11 you had a -- if you had for instance benzene was your
12 contaminant of concern, then you'd be comparing it to
13 the Tier 1 remediation objectives for benzene that are
14 in T.A.C.O. It wouldn't be saying that that had to
15 be the number that you cleaned up to.

16 Now, we didn't -- Linda Huff had proposed some
17 additional language which talked about somebody
18 providing a statement of their intent to prepare
19 remediation objectives under Tier 2 or Tier 3. We see
20 that's the function of the remediation objectives
21 report which is the next document down the line.

22 If they want to provide that as part of that
23 report, that's clearly their option. What we want to
24 do is just have a baseline of comparison to know what

1 types of contaminants can be excluded right off the
2 bat. The comparison also can give us at least an
3 initial handle for us as well as for the remediation
4 applicant as to whether you've got levels that need to
5 be paid more attention to or whether they're really
6 kind of close to the limits anyways.

7 And then, you know, as I said yesterday, this is
8 the kind of thing that whether the remediation
9 applicant does it or not, we're going to make this
10 comparison. And from our standpoint it makes a lot
11 more sense for the RA to do that as part of his
12 presentation of the site investigation results to us,
13 rather than us creating some independent document.

14 So that's kind of -- that's our thoughts on that
15 provision.

16 HEARING OFFICER HOOGASIAN: Does anyone have
17 any comments?

18 MR. WATSON: I do think that we've talked
19 about this at some length, so I don't think it
20 warrants a whole lot of further discussion. And
21 again, I keep trying to convince myself that it's a
22 point or issue and I think it is. Yet at the same
23 time I just think that if the comparison is
24 appropriate, it ought to be made and it will be made.

1 If it's not, then there just -- it just -- it
2 shouldn't be incorporated in any documentation, and
3 that -- I think that's our point. I think that we
4 still think that that is a valid one and it creates
5 any -- it eliminates any confusion associated with
6 potential comparisons and conclusions that can be
7 reached regarding risks.

8 And I think that it's consistent with the Agency's
9 and the Site Remediation Advisory Committee's
10 determination that Tier 1 and Tier 2 and Tier 3 ought
11 to be looked at as being equally protective of human
12 health and the environment.

13 HEARING OFFICER HOOGASIAN: Does anyone have
14 anything further?

15 MS. HENNESSEY: I have a tangential question
16 I just wanted to clear up. Section 435 requires that
17 the site investigation report or a focused site
18 investigation contain a discussion of enforcement or
19 response actions. That's in 740.435(b)(3).

20 Section 740.425, which is the site investigation
21 report for comprehensive site investigation does not
22 require a discussion of enforcement or response
23 actions affecting the property.

24 Is there any particular reason why in a

1 comprehensive site investigation report there's no
2 requirement for a discussion of enforcement response
3 action?

4 MR. KING: The reason for the distinction is
5 that when -- if an NFR letter is the end goal for a
6 comprehensive site investigation, that is going to
7 address all the remedial -- all the conditions at the
8 site that need remedial action with regards to that.
9 So they're all going to be addressed anyways.

10 With a focused investigation you could -- for
11 instance if you had -- if you had perhaps five
12 different recognized conditions, recognized
13 environmental conditions at a site, you could choose
14 to do two of those and not do the other three.

15 Well, if there's some other activities related to
16 the other three, we wanted to know about them so that
17 there isn't the perception that in doing two of those
18 somehow the other three are covered.

19 We want to make sure that we have an understanding
20 of what's going on from an enforcement or response
21 action nature relative to those other environmental
22 conditions that are not being included in the program.
23 With the comprehensive we don't have to worry about
24 that distinction because everything is brought forward

1 anyways.

2 MS. HENNESSEY: So it was part of the ASTM
3 Phase I that you would do a comprehensive site
4 investigation, you would under that methodology be
5 bringing forth information on enforcement or response
6 actions related to the remediation site anyway?

7 MR. KING: I think that's generally true. I
8 don't know if there's a specific -- I see nods in the
9 audience that there's a specific thing in a Phase I
10 that requires that to be looked at, so in essence it
11 is covered in much -- under the Phase I issue anyways
12 as far as the comprehensive.

13 MS. HENNESSEY: Okay, thank you.

14 HEARING OFFICER HOOGASIAN: Does anyone have
15 anything further on that section?

16 (No response.)

17 HEARING OFFICER HOOGASIAN: Seeing nothing
18 let's proceed then to Section 740.440, Agency's
19 response to Linda Huff's testimony.

20 MR. KING: We agreed that this was an
21 appropriate change. And we would be following up with
22 an errata that concluded that.

23 HEARING OFFICER HOOGASIAN: Let's proceed
24 then to Section 740.620 and the Agency's response.

1 MR. KING: We thought that it was -- in a lot
2 of ways this was kind of a close call from our
3 standpoint. But we saw this as potentially creating
4 an additional requirement on the part of an owner
5 which may not then be transferable or it may limit
6 their ability to deal with in a contractual setting.

7 Also it wasn't clear to us what this was supposed
8 to have -- what this was supposed to tell us that we
9 were supposed to do relative to an NFR letter.

10 It seemed like this was creating some affirmative
11 -- could be creating some affirmative responsibility
12 that may not have been there already. We thought that
13 under C it was -- the statutory language we
14 incorporated was fairly clear on this idea, and that
15 this additional language could end up confusing the
16 issue.

17 HEARING OFFICER HOOGASIAN: Mr. Rieser.

18 MR. RIESER: The Agency doesn't disagree in
19 concept with the idea that the obligations provided
20 for in this recorded No Further Remediation Letter or
21 deed restriction can be transferred from owner to
22 owner?

23 MR. KING: No, that's clear that that is the
24 case.

1 MR. RIESER: Okay, and so I take it from your
2 testimony that is just concern with the specific
3 language in this location as it says that might create
4 other confusions or other obligations in addition to
5 what the owners agree among themselves in terms of --
6 or owners-tenants in terms of how these
7 responsibilities are to be handled?

8 MR. KING: Right. I mean if you read this
9 real narrowly and you look at the term "the current
10 owner", well, is that specified to a specific time, is
11 that when the guy gets the NFR letter and he's always
12 on the hook forever? You know, so there was just
13 those kind of concerns that we had with that language.

14 MR. RIESER: Thank you.

15 HEARING OFFICER HOOGASIAN: Does anyone have
16 anything further?

17 (No response.)

18 HEARING OFFICER HOOGASIAN: Seeing nothing,
19 then let's proceed to Section 740.625.

20 MR. KING: Linda Huff's testimony proposed
21 two changes on 625(a)(6). The first one was changing
22 the term "contaminants" to "recognized environmental
23 conditions". We thought that was a good change.

24 And the second one was related to just

1 cross-referencing Part 742, and although on the face
2 of that that seems to be a sensible option, we thought
3 it was too limiting in terms of dealing with other
4 potentially acute circumstances or other situations
5 where your remediation were not based on 742.

6 And so this -- we thought this was -- should not
7 be included as far as additional language.

8 HEARING OFFICER HOOGASIAN: And will the
9 Agency be including an errata sheet also on the first
10 change?

11 MR. KING: Yes, that's correct.

12 HEARING OFFICER HOOGASIAN: Okay. Mr.
13 Rieser.

14 MR. RIESER: With respect to a focused NFR
15 letter, would the Agency agree that the discovery of
16 other conditions not dealt with in the NFR letter
17 wouldn't be the basis for voiding that focused NFR
18 letter? In other words, if the NFR letter dealt with
19 a Tank A and there was a problem with Tank B, that
20 wouldn't be a basis for voiding the NFR letter for
21 Tank A?

22 MR. KING: That's correct.

23 HEARING OFFICER HOOGASIAN: Does anyone have
24 anything further?

1 MR. RIESER: And then the standards for --
2 what are the factors that you would use in voiding and
3 determining if something posed a threat to human
4 health and the environment?

5 MR. KING: I think generally we would be
6 using the risk based methodology that was -- that is
7 being proposed for inclusion in 742, I think that's
8 generally where we're going to look to to make those
9 decisions, where that makes sense to do that.

10 Just the situation is if there's contacts where
11 looking at 742 would not provide any answer, then to
12 limit what you look at as 742 doesn't make sense.

13 MR. RIESER: And the field doesn't provide an
14 answer in the acute threat scenario?

15 MR. KING: That's correct.

16 MR. RIESER: Other instances besides that?

17 MR. KING: We talked about the issue of where
18 you have remediation measures that are not based on
19 the remediation objectives in 742.

20 MR. RIESER: Thank you.

21 HEARING OFFICER HOOGASIAN: Mr. Watson.

22 MR. WATSON: Are you saying then that to the
23 extent that someone goes through the 742 process to
24 determine the remediation objectives, that the Agency

1 will then in looking at the appropriateness of voiding
2 it will use 742 including issues like the existence of
3 institutional controls and engineering barriers to
4 decide whether or not the avoidance of a No Further
5 Remediation based on the discovery of additional
6 contamination is appropriate?

7 MR. KING: We would use that as -- in
8 answering the question whether there's a threat to
9 human health or the environment posed.

10 MR. WATSON: Okay.

11 MR. WATSON: And I mean I just think -- I do
12 think that that is critically important, because if
13 you use that process to -- and all the methodologies
14 incorporated in that to get to a point where you've
15 established remediation objectives, you shouldn't be
16 able to undo that by anything other than that kind of
17 analysis.

18 MR. KING: I think that's a sensible position
19 to take.

20 MR. WATSON: Okay.

21 HEARING OFFICER HOOGASIAN: Is there anything
22 further then on this section or anything regarding
23 Miss Huff's testimony?

24 (No response.)

1 HEARING OFFICER HOOGASIAN: Let's proceed
2 then to the Agency's responses to the testimony of Mr.
3 Feldman from the Metropolitan Water Reclamation
4 District.

5 MR. KING: Before talking about the specific
6 provisions, there was a couple issues that I wanted to
7 clarify. I just thought there was a couple errors as
8 far as statements of what was being proposed and the
9 implications of that.

10 There is a -- there's a statement, and this is in
11 Exhibit 8, and it's in the first full -- excuse me,
12 the second full paragraph on the first page of Exhibit
13 8.

14 And looking at the last sentence, there's a
15 statement it begins "Though the clear language and
16 intent of the Act and the regulations being
17 promulgated absolves the District from liability under
18 state law for cleanup of these contaminated sites that
19 have been acquired by the District."

20 I think that's an overly broad statement as to the
21 impact of the Act in the regulations, and I just would
22 just want to indicate that we don't concur that that
23 is necessarily true.

24 As far as in looking at the specific provisions,

1 there was -- I'll reference it as four specific
2 suggestions.

3 MR. DUNHAM: Can we stop there a moment?

4 MR. KING: Sure.

5 MR. DUNHAM: The District is a local unit of
6 government as that is defined in this Act?

7 MR. KING: Right.

8 MR. DUNHAM: Do you believe so?

9 MR. KING: Yes.

10 MR. DUNHAM: Does the Act relieve from
11 liability any local government that acquires property
12 that is contaminated prior to the purchase -- prior to
13 the ownership by that local government agency?

14 MR. KING: There were some provisions
15 included when House Bill 544 became law relative to
16 units of local government. However, it didn't absolve
17 local governments for all liability relative to all
18 contaminated sites that they owned. And that's what
19 -- I just wanted to clarify that it seemed to me that
20 that was kind of the implications as to where this was
21 getting to.

22 MR. DUNHAM: Okay.

23 MR. KING: To me this gave the implication
24 that once the District acquired a piece of property,

1 if it had been contaminated previously it was never
2 going to be liable relative to that piece of property
3 regardless of what happened.

4 And I mean if the District is engaged in
5 additional activities which contaminate that property,
6 well, yeah, there could be liability relative to that.

7 MR. DUNHAM: It's pretty clear that the way
8 the Act reads, the District is not to be held -- not
9 to be enforced by the state against to clean up prior
10 existing contamination. Is that the way you
11 understand that?

12 MR. KING: It depends on whether they caused
13 it or not. If they caused it or allowed it, then they
14 would be responsible for it.

15 MR. DUNHAM: I understand that.

16 MR. KING: Okay. Looking at those specific
17 items, we thought that the third one as far as
18 740.605(c), this was the idea of sending a copy of the
19 NFR letter to the owner if he's not the RA, we thought
20 that was really a good suggestion, and from our
21 standpoint it really closes the loop on what was the
22 initial signoff on getting into the program, and then
23 at the end of the process being notified as to what
24 the formal outcome of things were.

1 The other items we were very concerned that they
2 were interjecting the Agency into a position of
3 mediating or deciding disputes that were more related
4 to management of a piece of property or related to
5 liability between private parties, when our function
6 is -- that's not our function. Our function is to --
7 under this program to review plans to determine
8 whether they are going to meet the requirements of the
9 regulations and whether you're going to have an
10 effective cleanup that's going to protect public
11 health under the context of -- that the site has
12 brought forward.

13 You know, for instance looking at the proposed
14 change on 605(d), the notion of an owner appealing to
15 the Board when the Agency has issued an NFR letter, we
16 struggled with what would the appeal be based on?

17 I mean if the Agency has issued an NFR letter, and
18 that was based on the fact that the RA complied with
19 the criteria of the rules, but the owner didn't like
20 that, we're struggling to see what would be the basis
21 for a challenge to the Agency's decision.

22 I mean our decision would have been that yes, the
23 applicant met the requirements of the rules, and what
24 would be the basis for a challenge in that setting.

1 The other items one and two we thought were the
2 kind of concepts that I think would be excellent to
3 make sure are addressed in terms of any agreement,
4 that an owner and a remediation applicant have with
5 regards to sites that are going to enter the program
6 with the Agency. They're good criteria and they
7 should be included in an agreement between the owner
8 and the remediation applicant.

9 That may -- it would be nice to -- in essence it
10 would be nice to see a kind of a standard type
11 agreement that would be -- that could give guidance to
12 owners relative to this issue.

13 But we don't want to be in a position of making
14 decisions between an owner and a remediation
15 applicant. That's really their responsibility as far
16 as we're concerned.

17 HEARING OFFICER HOOGASIAN: Mr. Dunham.

18 MR. DUNHAM: Emmett Dunham on behalf of the
19 Metropolitan Water Reclamation District. Can you
20 point me to the section of the regulations or the
21 portion of the Act that obligates the Agency to honor
22 site agreements between owners and remediation
23 applicants?

24 MR. KING: Requires us to honor agreements?

1 MR. DUNHAM: You're saying that these
2 particular items would be appropriate for a site
3 agreement between the remediation applicant and the
4 owner of a site.

5 Where is the Agency obligated to honor these
6 agreements? And why would the Agency even know of
7 these agreements? Where is the mechanism by which
8 these agreements would be brought to the Agency's
9 attention?

10 MR. KING: We wouldn't know about them, we
11 wouldn't expect to know about them, we wouldn't
12 necessarily want to know about them. All we want to
13 know is that there's a remediation applicant before
14 us. If he's not the owner, then he has the owner's
15 approval to proceed with the process that is going
16 forward. What conditions the owner and RA have, we
17 don't expect we will know. I'm not sure we would want
18 to know.

19 MR. DUNHAM: What assurance is there in this
20 process that what the owner gets at the end of the
21 process is what he signed for at the beginning of the
22 process?

23 MR. KING: If at the end of the process
24 there's an NFR letter that he doesn't accept, then I

1 would assume he would object to it going on his chain
2 of title, and that there would continue to be -- be a
3 continued level of responsibility and liability
4 between the owner and the remediation applicant.

5 MR. DUNHAM: Where would that objection be
6 made?

7 MR. KING: Typically where there's a dispute
8 between an owner and a -- for instance a tenant
9 relative to a piece of property, it's governed by the
10 tenancy agreement, and that's -- enforcement of that
11 occurs in a civil court.

12 MR. DUNHAM: But the NFR letter is given by
13 operation of law presumption that the cleanup has been
14 adequate to satisfy state law, doesn't it?

15 MR. KING: The NFR letter has -- by statute
16 that is a series of criteria which describe what its
17 impact are, and one of them includes a condition
18 relative to a representation as to -- for the
19 contaminants of concern, that it's acceptable for
20 purposes of risk to human health and the environment.

21 MR. DUNHAM: And the fact that the owner at
22 one point signed off to the use of this process as an
23 adequate means of cleaning up that property, would
24 that not in some cases create an estoppel argument

1 against the owner enforcing later?

2 MR. KING: Well, if the owner has entered an
3 agreement with the remediation applicant that says,
4 you know, do whatever you want, we don't really care,
5 just get a letter at the end of the process, we don't
6 care what that letter says, just so that it's there
7 and on file, yeah, it would be an estoppel argument
8 there.

9 But that's why the owner and the RA have to define
10 the nature of their relationship.

11 MR. DUNHAM: Is there any reason that you can
12 think of why an owner would sign off at the
13 beginning of the process, assuming that a circuit
14 court is going to do what he wants done if he has no
15 other -- no assurance that the Agency is going to let
16 him know what's going on, have no assurance that his
17 -- apart from a contract perhaps with his tenant that
18 the tenant will let him know what's going on. Why
19 would there --

20 MR. KING: I think you're minimizing the
21 ability of an owner to control what happens on his own
22 property. I mean if -- he certainly could it seems to
23 me validly demand as a condition of the RA entering
24 this process that he receive periodic reports, that he

1 receive copies of any document that's submitted to the
2 Agency, and any document that the Agency submits to
3 the RA.

4 I think that would be, you know, fully consistent
5 with what an owner could require.

6 MR. DUNHAM: But how does he stop the process
7 if that contract is not enforced or if that contract
8 is not kept? He has to go to circuit court and get an
9 injunction?

10 MR. KING: Well, no, at the end of -- I'm
11 sure at the end of the process he can make sure that
12 he has a final approval of what's happened.

13 MR. DUNHAM: There is no approach at this
14 point, is there, in the regulations or the law for an
15 owner to approach the Agency and say this is not going
16 the way I want it to go, stop the process, is that
17 correct?

18 MR. KING: There certainly -- we run an open
19 institution, and if somebody wants to come in on an
20 informal basis and indicate to the Agency that there's
21 something amiss, that door is open, has always been
22 open.

23 There would not be a formal mechanism, but for
24 instance if an owner came forward and said now wait a

1 minute, this remediation applicant is not honestly
2 telling you the information relative to my site, I
3 think that would be important information for us to
4 know. We certainly would use that as far as dealing
5 with the site at hand.

6 MR. DUNHAM: If that is important
7 information, then why are you so reluctant to
8 formalize the process?

9 MR. KING: Because as I said at the
10 beginning, we don't want to, be nor should we be, an
11 arbiter of formal disputes between an owner and a
12 remediation applicant. That's just not our -- we just
13 don't see that as being our function as Environmental
14 Protection Agency reviewing basically technical
15 documents as to the level of remediation that should
16 occur at a site.

17 HEARING OFFICER HOOGASIAN: Does anyone else
18 have anything further at this point?

19 DR. GIRARD: I have questions.

20 HEARING OFFICER HOOGASIAN: Dr. Girard.

21 DR. GIRARD: I think this is a very important
22 issue protecting the property rights of an owner of a
23 piece of property. Certainly I think everyone
24 possibly feels that it is a very important issue.

1 I think what the Agency's position is at the point
2 in time is that you don't want to get in between an
3 owner and an operator and their relationship.

4 But I do have a question here, and let me see if I
5 understand this process. I'm not an attorney, but it
6 seems to me that if you have an NFR letter filed with
7 the deed of a piece of property, and that NFR letter
8 is based on something, like say an engineered barrier
9 or an institutional control, what you really have is a
10 pollution easement on that piece of property that will
11 restrict some of the future uses of that property, at
12 least for a particular piece of time.

13 It's no different than say a road easement or a
14 sewer easement or a power line easement across a piece
15 of property, it's registered in the county and it does
16 restrict what the owner can do with that piece of
17 property.

18 Now, given that --

19 MR. KING: I would agree with that
20 characterization, I think that's accurate.

21 DR. GIRARD: Oh, thank you. I'm glad that
22 worked. Are you an attorney?

23 MR. KING: Yeah, I still am.

24 DR. GIRARD: Well, that helps. Okay, so if

1 that's the general principle involved, now let's say
2 an owner signs off on a Remedial Action Plan at the
3 beginning of the process which does not envision using
4 institutional controls or engineered barriers.

5 During the process can the remedial applicant in
6 negotiation with the Agency amend that plan so that at
7 the end of the process when the NFR letter is
8 registered with the county, with the deed, that now we
9 have it based on an engineered barrier or an
10 institutional control, in other words, we have a
11 different sort of NFR letter than the owner had signed
12 off in the beginning. Is that possible in this
13 process?

14 MR. KING: It is possible to move all the way
15 down the line with that occurring, but you can't get
16 to the final end point. Because that NFR letter, I
17 don't see how the NFR letter gets filed on the chain
18 of title without the owner saying that's okay to have
19 that happen. And if that letter doesn't get filed,
20 then the letter is void, I mean it never goes into
21 effect.

22 DR. GIRARD: Well, can you show me where in
23 the regulations it says that the letter cannot be
24 filed without the owner's signature?

1 MR. KING: In the regulations, no, because I
2 don't think that is addressed in these regulations,
3 because that's -- I believe that's an issue of real
4 estate practice. And it's not something that's
5 directly addressed here.

6 DR. GIRARD: Why can't it be addressed? If
7 the owner's permission is required before the NFR
8 letter can be filed, why is it not in the regulations?

9 MR. KING: We had reached a conclusion that
10 that was an issue that would be governed as a matter
11 of real estate law and the criteria that go along with
12 recording documents.

13 We were just reflecting on, you know, if for
14 people who -- for instance they filed bogus mechanics
15 liens on pieces of property, I mean they're subject to
16 prosecution for doing that, and there's various real
17 estate laws that control the whole notion of what
18 appears on a -- on title to a property.

19 You know, nonetheless, I think you have hit on a
20 very important and precise point about how you make
21 sure that the owner has signed off on this going on
22 his chain of title to make sure that this all has
23 flowed back properly through to the beginning, and I
24 think that's something that we need to take a look at

1 and think about.

2 DR. GIRARD: Thank you. In terms of when
3 you're talking about closing the loop, I would agree
4 that maybe a signature at the end would take care of
5 some of the problems raised by the District without
6 you getting in between, you know, the owner and the
7 operator of that piece of property, the owner and the
8 applicant.

9 MR. KING: Right.

10 DR. GIRARD: Thank you.

11 HEARING OFFICER HOOGASIAN: Mr. Dunham.

12 MR. DUNHAM: First of all I would like to
13 thank Dr. Girard for coming to the crux of my argument
14 in the first place. In the second, if I can quote
15 Section 58.8, duty to record of the Brownfield Act.
16 The RA receiving -- Section A says, "The RA receiving
17 a No Further Remediation Letter from the Agency
18 pursuant to Section 58.10 shall submit the letter to
19 the Office of Recorder or the Registrar of Titles of
20 the county in which the site is located within 45 days
21 of receipt of the letter. The Office of the Recorder
22 or the Registrar of Titles shall accept and record
23 that letter in accordance with Illinois law so that it
24 forms a permanent part of the chain of title for the

1 site."

2 It is the RA that does the submission and it is
3 the recorder that records. The owner is not --

4 MR. KING: That was in accordance with
5 Illinois law. The key phrase in there was "in
6 accordance with Illinois law".

7 MR. DUNHAM: Where is the owner's permission
8 to do this included?

9 MR. KING: Well, that's what we were -- I
10 thought I just talked about that before. I mean
11 that's the concept of the civil law and real estate
12 law dealing with what was authorized to be recorded
13 for purposes of Illinois law.

14 MR. DUNHAM: But this is authorized to be
15 recorded by state law.

16 MR. KING: But it says in accordance with
17 Illinois law, and if there's a -- if there is an
18 Illinois law that says you can't do it this way, or
19 you have to have the other approval, or you can't file
20 bogus documents that haven't -- that doesn't have the
21 proper approval, then it would seem to me that, you
22 know, that would still control.

23 MR. DUNHAM: Can you point me to the law that
24 says that an RA cannot file a remediation -- a No

1 Further Remediation that was obtained legitimately
2 from the Agency, that it not file a site agreement
3 with an owner?

4 MR. KING: Can I site to you that law? Well,
5 there's no law that has that kind of specificity that
6 I know of --

7 MR. DUNHAM: That's precisely my problem is
8 there any -- why then do you believe that the owner
9 should have no right to approach the Agency to
10 participate in any way in this program?

11 MR. KING: Again I'm just kind of repeating
12 myself at this point, and that is the notion of we
13 don't want to -- we don't want to be involved in
14 arbitrating disputes between an owner and a RA. I
15 think Board Member Girard has as you noted really hit
16 on the crux of the issue, and that is putting a
17 provision in here that requires owner approval as to
18 that NFR letter being filed. And we made a commitment
19 that we would look at that issue to see if there's a
20 good way to do that.

21 I don't know what more I can -- I or anybody else
22 up here can say on that issue.

23 HEARING OFFICER HOOGASIAN: Does anyone have
24 anything further then at this point?

1 MS. HENNESSEY: I just am wondering whether
2 you considered dealing with this term disclosure by
3 requiring for example the RA to certify his pending
4 application that they had disclosed to the owner of
5 the property that as part of this process the scope of
6 the remediation could be changed or that restrictions
7 on the use of the property could be imposed.

8 MR. KING: We had not considered putting that
9 kind of disclosure statement on here. We just hadn't
10 thought about doing that at this point.

11 MS. HENNESSEY: That's something to consider.
12 I'm not necessarily advocating that, but that's
13 something that you might consider.

14 MR. KING: Thank you.

15 MR. WIGHT: May I ask would you consider that
16 in lieu of the prohibition of the filing of the NFR
17 letter as an alternative to that suggestion or in
18 addition to that suggestion or --

19 MS. HENNESSEY: I haven't -- I don't know as
20 I sit here right now which is the better solution.

21 MR. WIGHT: Something more to think through.

22 MS. HENNESSEY: But I guess some of the
23 concern seems to be that someone unwittingly might
24 sign -- might agree to allow someone else to remediate

1 their property without understanding some of the
2 things that Mr. Dunham has raised, that the scope of
3 the remediation could be changed from comprehensive to
4 focused, or that you might end up with some
5 restrictions being placed on the use of your property.

6 And that one potential solution, and I'm not sure
7 whether it's a partial solution or a complete
8 solution, would be to require some kind of disclosure
9 up front.

10 MR. KING: Normally it's been our experience
11 that people are very careful when it comes to signing
12 agreements relative to environmental issues. If they
13 weren't we wouldn't have this program here to begin
14 with, and people would have just gone about
15 transacting property without regard to environmental
16 issues.

17 And the whole reason why we have this program here
18 now is because people are very attuned to
19 environmental issues and they -- when they're managing
20 real estate and engaged in real estate transactions.

21 So it isn't -- I don't think it's quite as dire a
22 picture, you know, as is being presented. I think
23 most owners are extremely careful in regard to these
24 kinds of issues.

1 HEARING OFFICER HOOGASIAN: Dr. Girard?

2 DR. GIRARD: I do have a final statement in
3 that regard. I would not consider a disclosure
4 requirement up front as substituting for an owner's
5 signature at the end of the process. But I don't
6 think it should be something very complicated. Maybe
7 there's a way that to write in there some language
8 that if the RA is not the owner of the property, that
9 the RA must have an owner's affidavit which approves
10 filing the NFR with the deed.

11 I'm not looking for anything complicated, but I
12 think something simple would show that the owner is
13 signing off on something being filed on the deed for
14 the property at the end of the process.

15 MR. KING: Yeah, I think we really understood
16 the point you were making, and as we were saying
17 before, I think it's something we really -- it makes a
18 lot of sense to have that kind of way of closing the
19 loop on this.

20 DR. GIRARD: Thank you.

21 HEARING OFFICER HOOGASIAN: Anything further
22 on that point then?

23 MR. DUNHAM: There's one other point that
24 wasn't specifically mentioned, it was specifically

1 written into your comments but it wasn't specifically
2 mentioned this morning. That the Agency objects to
3 the language regarding changes in the remediation, in
4 the agreement, major modifications to the agreement.

5 Based on the fact that the Agency does not have
6 any idea of what the parties agreed to, don't you
7 believe that the original submission to the Agency
8 that is signed by the owner would be evidence of what
9 the parties agreed to initially?

10 MR. KING: If you look at 210(a)(3) where
11 there's a discussion of what happens where the
12 applicant is a person other than the owner of the
13 remediation site, it sets out what's required to be
14 submitted.

15 So based on this we wouldn't know all these other
16 issues based on that initial application. MR.

17 DUNHAM: So you're saying at no point is the owner
18 required to give permission to any remedial action
19 other than an investigation, an investigation into
20 remedial activities? The report shouldn't be
21 presented to the owner to determine what remedial
22 action is originally planned?

23 MR. KING: This is the initial application.

24 MR. DUNHAM: Exactly.

1 MR. KING: Well, I think what you're
2 suggesting is that with each step of the process the
3 rules should require the RA to go back to the site
4 owner and get a signoff for each plan and each report
5 that's being submitted I guess is what you're
6 suggesting.

7 MR. DUNHAM: No, that actually is not my
8 intent. What the intent of these language changes was
9 to the extent that the remediation applicant is
10 modifying the agreement to provide less to the owner
11 than the owner originally signed off on the original
12 plan, then the remediation applicant was required to
13 get the owner's permission to do less than he
14 originally promised to do.

15 MR. KING: But there's no way for us -- what
16 that really requires then for us to do is to accept a
17 copy of whatever agreement exists between the RA and
18 the owner and then be monitoring that agreement to see
19 whether the RA is doing things inconsistent with that
20 agreement.

21 MR. DUNHAM: That's one way to do it.
22 Another way to do it is to accept the original
23 application as to the -- as to be -- pardon me, accept
24 the original application as the intent of the owner to

1 the final product, what the owner expects as a final
2 product. And anything that modifies that to the
3 detriment of the owner needs to have the owner's
4 additional consent.

5 MR. KING: Well, if you look at I believe
6 it's (a)(6), there it's -- you know, there has to be a
7 statement by the RA as to the type of No Further
8 Remediation determination he's seeking. Excuse me,
9 it's under 5, (a)(5). The statement of the nature of
10 the No Further Remediation determination requested.

11 MR. DUNHAM: But that's subject to
12 modification through the process, is it not?

13 MR. KING: Well, yeah, but I would --

14 MR. DUNHAM: And those modifications could
15 provide for engineered barriers that were not provided
16 for in the original application, or could provide for
17 a change from a Tier 1 to a Tier 2 or Tier 3 approach?

18 MR. KING: The question is assuming I think a
19 level of knowledge that is not necessarily known at
20 the point that the person enters the process.

21 MR. DUNHAM: That is precisely the problem.
22 The owner signs off before the site contamination is
23 fully known, and he has no further attempt at input
24 into the process until the remediation is signed and

1 sealed, delivered and recorded, as these regulations
2 are now written as I read them. Do you read them
3 differently? If so could you tell me where the
4 owner's input comes in?

5 MR. KING: I guess your question is confusing
6 me. Maybe I'm not understanding your question. I
7 guess I'm getting confused because I just feel like
8 I'm covering the same ground over and over again and
9 I'm not coming up with anything -- I don't know if
10 you're asking the same question and I'm just missing
11 the point of it, or it's a different question and that
12 I'm not understanding.

13 It seems from my perspective I just keep coming
14 back to the same kind of concept, that we don't want
15 to be in the middle of that kind of -- a dispute
16 between the remediation applicant and the owner, and
17 that they need to decide, make those kind of decisions
18 up front before they come to the Agency as to the
19 nature of how they see this program going forward.

20 HEARING OFFICER HOOGASIAN: Mr. Feinen then
21 has a question.

22 MR. FEINEN: On the initial approval, Mr.
23 King, if the owner -- how is that brought to you, is
24 it the RA that says I have approval from the owner or

1 is it some kind of statement from the owner?

2 MR. KING: The way -- do we have an example
3 of a form?

4 MR. EASTEP: We'll have an application form,
5 and on it there will be blanks identifying the
6 remedial applicant, and there will be another space on
7 there identifying the owner if different than the
8 remedial applicant, and with a signature and title.

9 MR. FEINEN: I guess what I'm working towards
10 is if the owner has some way of contingent approval on
11 the application not changing, how would the Agency
12 handle that?

13 MR. EASTEP: When the original application
14 comes in, it doesn't have the level of detail that Mr.
15 Dunham is referring to.

16 MR. FEINEN: So basically the RA will fill
17 that out then?

18 MR. EASTEP: Arguably you wouldn't have any
19 clue as to what your remedial objectives are when you
20 first come in, and you'd have to figure out whether
21 they're Tier 1, 2 or 3 and whether you have an
22 engineering or need an engineering control, that
23 evolves during the process.

24 MR. FEINEN: Thank you.

1 HEARING OFFICER HOOGASIAN: Dr. Girard.

2 DR. GIRARD: Well, let me ask a question in
3 that regard. If you were -- if you require an owner's
4 signature at the end of the process before the NFR
5 letter can be recorded, and let's say you go through
6 the process and the NFR letter is based on an
7 engineered barrier, the owner does not sign that NFR
8 letter, what would the RA then have to do to get an
9 NFR letter that the owner would agree to? Would they
10 have to go back to the beginning of the process with
11 the Agency?

12 MR. KING: I guess it would depend on the
13 nature of the dispute they had. You know, if it
14 turned out that the owner wanted three feet of cover
15 instead of two feet of cover, and we said two feet was
16 okay, then I suppose that would be pretty simple as
17 far as a change.

18 I think it would depend upon the extent of the
19 change proposed as to how far back in the process
20 they'd have to go.

21 I mean if it turned out that the owner wanted a
22 comprehensive release as opposed to a focused release,
23 well, then again, you would have to go all the way
24 back to the start and start over.

1 DR. GIRARD: But still as long as the owner
2 has the final signoff, the owner can control what, you
3 know, what kind of remedial action actually takes
4 place on that property?

5 MR. KING: Right.

6 DR. GIRARD: Whether it's a focused or
7 comprehensive, whether you have two feet or three feet
8 of parking lot.

9 MR. KING: Right. We believed that was an
10 issue that was dealt with as a matter of civil law,
11 but I think you made the excellent point that maybe we
12 should go ahead and directly address that point in the
13 context of these rules.

14 DR. GIRARD: But if we have that final
15 signoff, it would take care of most of the scenarios
16 that the District is pointing out, is that correct?

17 MR. KING: That was -- that would be my view.

18 DR. GIRARD: Thank you.

19 HEARING OFFICER HOOGASIAN: Let's go off the
20 record for one minute.

21 (Off the record discussion.)

22 HEARING OFFICER HOOGASIAN: Let's take a
23 break, we'll take lunch and resume at 1:00.

24 (A recess was taken for lunch.)

1 HEARING OFFICER HOOGASIAN: Why don't we go
2 back on the record. I believe we left off, I think we
3 were done wrapping up with the Agency's responses on
4 Fred Feldman's testimony. Mr. King.

5 MR. KING: One short comment. We were just
6 reviewing the suggestion that was made by Dr. Girard,
7 and I think we're going to end up addressing that in
8 some fashion.

9 We were discussing though that we may not address
10 that issue in the subpart that deals with the NFR
11 letters, that we may decide to put it in -- that it
12 might be more appropriate to include it in the section
13 that deals with remedial action completion reports.

14 That would be a place where an owner would know
15 that the remediation is complete, everything's done,
16 and now they're making that presentation to the Agency
17 for final signoff.

18 So at least -- we have to do some more work on
19 that to see how it all procedurally fits together, but
20 we may see that concept not quite at the place we
21 talked about before the lunch break.

22 HEARING OFFICER HOOGASIAN: Okay. Anything
23 further then?

24 MR. DUNHAM: Yeah, I have one very short

1 question then to ask. At that point all the remedies
2 and all the remediation has been completed to -- at
3 least to the point where the Agency is being asked to
4 approve what's been done?

5 MR. KING: That's correct.

6 MR. DUNHAM: Thank you.

7 HEARING OFFICER HOOGASIAN: All right then,
8 let's proceed to the last three questions that we have
9 remaining from the first hearing. And I believe the
10 first question, actually all three questions are the
11 Site Remediation Advisory Committee questions, and the
12 three questions are 59, 60 and 68. Those were all
13 referred to Gary King and they all pertain to Section
14 740.600 and subsections of that section.

15 MR. WIGHT: I'm not sure that we deferred
16 number 60. I don't have any note or recollection of
17 that. I guess if we did we could -- is that your
18 recollection, Mr. Rieser?

19 MR. RIESER: I'm not sure we were able to get
20 through those questions in a good way. I don't
21 remember 60 specifically one way or the other. But I
22 think a lot of these -- just a minute, please.

23 No, we did not cover that. We have confirmation
24 that we did not cover that.

1 MR. WIGHT: We did not cover 60?

2 MR. RIESER: No.

3 HEARING OFFICER HOOGASIAN: Miss Rosen.

4 MS. ROSEN: Yes. Mr. Wight, you might recall
5 that we started in this area and then stopped short of
6 completing discussion, and that's one reason why your
7 notes might not reflect whether or not that was
8 answered or not. But why don't we proceed with 59 and
9 then determine where we need to go from there.

10 HEARING OFFICER HOOGASIAN: Why don't you go
11 ahead and read 59 into the record, please.

12 MS. McFAWN: Before you do that, my notes
13 show that testimony about 59 was stricken, is that
14 correct? That we did have some testimony and that was
15 stricken?

16 MR. WIGHT: There was some testimony on that.

17 MS. ROSEN: Yes, you're right, you're right.

18 MS. McFAWN: I just wanted to confirm that.

19 MR. RIESER: And I think from that point it
20 seemed better that we defer the questions on that
21 issue, which included 59 and 60, until Mr. King could
22 be present.

23 HEARING OFFICER HOOGASIAN: That's correct.

24 MR. RIESER: Will the Agency state that it

1 will not require contaminants of concern remaining on
2 the site to be specifically identified in the NFR
3 letter?

4 MR. KING: Generally what we're going to be
5 doing is we're going to -- in the NFR letter we'll be
6 cross-referencing back to the completion report that
7 will be the general rule instead of putting specific
8 numbers in the NFR letter.

9 However, there will be some cases in which it will
10 be necessary to put specific numbers in there, and at
11 least two that came to mind were first if you had a
12 situation where post remediation monitoring was
13 necessary as a result of the -- what's dealt with in
14 the completion report and the NFR letter, and that
15 kind of issue is specifically provided for in
16 610(a)(6).

17 And then another situation would be -- it could be
18 that the remediation applicant has requested that
19 specific numbers be included, and that's something
20 that's allowed for as well under 610.

21 MR. RIESER: Thank you. With regard to 60,
22 will the Agency state that there will be no language
23 in an NFR letter issued following a comprehensive site
24 investigation which will limit the terms of the letter

1 to the environmental conditions identified at the
2 site?

3 And to give an example of this, it would be in a
4 situation where you had a comprehensive investigation
5 that identified say Tank A and Tank B, but it was a
6 comprehensive investigation that thoroughly evaluated
7 the site and demonstrated that those were the only two
8 recognized environmental conditions at the site, and
9 the question is would the letter say based on the
10 analysis of Tank A and Tank B we've resolved there's
11 no risk associated with Tank A or Tank B, or would the
12 letter say based upon the full investigation is the
13 site free of risk as appropriate for the uses being
14 made of the site?

15 MR. KING: I'm not sure that the language
16 entirely catches the concept, but it would be the
17 second option.

18 MR. RIESER: So it would be the broader
19 language and not speak specifying the recognized
20 environmental conditions that were identified, not
21 recognizing and limiting it to the environmental
22 conditions that were recognized?

23 MR. KING: Right. Of course that's
24 recognizing there might be other conditions relative

1 to the NFR.

2 MR. RIESER: Understood, understood. Thank
3 you.

4 HEARING OFFICER HOOGASIAN: Does anyone have
5 any follow-up at this point?

6 (No response.)

7 HEARING OFFICER HOOGASIAN: All right. Then
8 turning to number 68 I believe that was the next
9 question.

10 MR. RIESER: What impact will release of the
11 contaminant of concern subsequent to issuance of an
12 NFR letter have upon the existing NFR letter?

13 MR. KING: I think generally it will not have
14 an impact, but there will be some situations where I
15 think it could impact the existing NFR letter, and I
16 think that really the -- because this will be your
17 next question, the factors and criteria that would be
18 key in looking at that issue is whether the -- that
19 subsequent discovery tends to impact the nature of any
20 assumptions or conditions that went into the NFR
21 letter itself.

22 And to give you a couple of examples, under -- if
23 you're looking at for instance under the T.A.C.O.
24 process, if you had a Tier 2 calculation, it could be

1 based on certain assumptions relative to the
2 environmental media involved, and if you had a spill
3 of something like an acid waste, that could tend to --
4 that would be subsequently -- release would be
5 subsequent contaminants, but that could then tend to
6 impact the mobility of the other contaminants in the
7 environmental media, and thus it would -- you'd really
8 have to look at the entire nature of what has happened
9 at the site.

10 MR. RIESER: So the only situation that
11 you're envisioning that there would be a potential
12 where the Agency would seek to void the letter is if
13 this subsequent release created some impact on the
14 prior release that would either mobilize it in some
15 fashion or make it behave in some ways that wasn't
16 expected when the previous NFR letter was issued?

17 MR. KING: I think that's a fair
18 characterization.

19 MR. RIESER: Are there other examples of when
20 a subsequent release would result in a voiding of the
21 NFR letter?

22 MR. KING: Let me -- a second example would
23 be if you just take a site where the contaminant of
24 concern was benzene, and the determination relative to

1 the remediation objectives for benzene was based on a
2 certain level of contaminants in the soil, and so
3 that's okay. And you could have a second release, and
4 that second release could independently still be okay,
5 not violate -- not cause any problems in and of
6 itself, but the combination of the two releases
7 together might cause an exceedence of the criteria for
8 benzene.

9 MR. RIESER: So isn't it another way to say
10 that if the second release adds additional problems or
11 conditions to the site that really weren't dealt with
12 with respect to the first release, that in dealing
13 with the second release you'd have to cope with those
14 conditions as well in order to get a second NFR
15 letter?

16 MR. KING: I think that's true, and whether
17 we would necessarily go to voiding the first NFR
18 letter, I don't know that that would have to be the
19 case. But, you know, we were looking at it in terms
20 of the way the statutory provision was set up, that
21 that is a possibility.

22 MR. RIESER: Okay.

23 MR. KING: Could I give you a third example?

24 MR. RIESER: Sure.

1 MR. KING: A third example would be a
2 situation where relative to the first release or the
3 first set of circumstances you came up with an
4 engineered barrier, let's just say it was a soil cap
5 of some sort, the subsequent release occurred on top
6 of that soil cap, and to remediate that second release
7 you had to dig up the cap that was controlling the
8 situation on the first context, again that would open
9 up consideration of the first situation.

10 MR. RIESER: And if you didn't replace it
11 appropriately, that would open up the consideration of
12 the --

13 MR. KING: Right.

14 MR. RIESER: Thank you.

15 HEARING OFFICER HOOGASIAN: Are there any
16 further follow-up questions then?

17 (No response.)

18 HEARING OFFICER HOOGASIAN: Seeing none then
19 that would conclude the prefiled questions that we had
20 filed for the first hearing.

21 It's my understanding that there are some
22 remaining issues with regard to Section 740.530
23 remaining from yesterday.

24 MS. ROSEN: Yes, there are.

1 HEARING OFFICER HOOGASIAN: Why don't we go
2 ahead and take those issues right now.

3 MS. ROSEN: Okay. We have a series of four
4 questions we'd like to pose to the Agency.

5 HEARING OFFICER HOOGASIAN: Okay, why don't
6 you pose those questions.

7 MS. ROSEN: Okay. Question number one. Is
8 the Groundwater Management Zone established pursuant
9 to Section 740.530(a) applicable to contaminants of
10 concern for which the remediation applicant has
11 demonstrated that the groundwater pathway has been
12 excluded pursuant to Part 742 subpart (c) or subpart
13 (i)?

14 MR. KING: I think that is correct, and let
15 me give just a little bit of explanation with regards
16 to that.

17 The provision discusses, 530(a) discusses
18 groundwater that is the subject of the Remedial Action
19 Plan, and the whole concept under T.A.C.O. is that
20 there's various methodologies by which you can develop
21 a plan to be able to deal with contamination. And the
22 subpart (c) or subpart (i) which is Tier 3 have ways
23 of excluding that, and, you know, exclusion of a
24 pathway would be a way of addressing groundwater such

1 that it would qualify under this.

2 MS. ROSEN: Okay. Question number two:
3 Would the remediation applicant make this exclusion
4 demonstration in the remediation objectives report?

5 MR. KING: Yes.

6 MS. ROSEN: Would the approval of this
7 demonstration be included in the Remedial Action Plan?

8 MR. KING: That's correct, that would be --
9 the plan would be referencing the report, so it would
10 become part of that.

11 MS. ROSEN: Okay. Is the relief provided in
12 Section 740.530(d) also applicable to such
13 contaminants of concern?

14 MR. KING: That would be correct.

15 MS. ROSEN: Thank you.

16 HEARING OFFICER HOOGASIAN: Are there any
17 further follow-up questions then at this time?

18 (No response.)

19 HEARING OFFICER HOOGASIAN: Okay. Seeing
20 none why don't we go ahead then to -- we have the
21 prefiled questions of Glenn Sechen on behalf of the
22 Chicagoland Chamber of Commerce. I'm just going to go
23 ahead and read question number one into the record.

24 MS. McFAWN: Is that how you want to proceed?

1 Why don't we go off the record.

2 (Off the record discussion.)

3 HEARING OFFICER HOOGASIAN: We're back on the
4 record. There's three pages of prefiled questions, or
5 actually two and a half, and the Agency can answer
6 them as they feel appropriate. They knew they were
7 prefiled, and Mr. Sechen is unable to be here today.
8 I said I would read them into the record for him and
9 ascertain what answers we might be able to get from
10 the Agency on these, if they haven't already been
11 answered in either the first hearing or this hearing.

12 So question number one. We have reviewed and
13 agree with the concerns raised by the prefiled
14 questions of the Metropolitan Water Reclamation
15 District of Greater Chicago and in that regard ask the
16 following questions: A. In the circumstance where
17 the RA and the owner are different persons, and
18 recognizing that the vast majority of the Brownfield
19 sites in the Chicagoland area will redevelop one by
20 one in relatively small parcels and under a wide
21 variety of contractual relationships between owners
22 and developers, is it not preferable to permit a legal
23 or equitable owner to participate in the process and,
24 pursuant to Section 740.225, to allow said owner to

1 withdraw consent for participation?

2 MR. KING: We don't have anything to add
3 beyond what we said this morning on the subject.

4 HEARING OFFICER HOOGASIAN: Okay. And B. In
5 the circumstance in A above, and realizing that it may
6 not be desirable for the Agency to become entangled in
7 a relationship between owners and developers, is it
8 not sufficient for the Agency to be given authority to
9 stop or even terminate the process in the circumstance
10 where legal or equitable owners and the RA voice
11 disagreement rather than proceed to impact what are at
12 root primarily the rights of the owner?

13 MR. KING: Again we really don't have
14 anything to add to what was said this morning.

15 HEARING OFFICER HOOGASIAN: And C: In the
16 circumstance in A and B above, and realizing that the
17 owners sometimes have contractual disputes with
18 developers, should the owner have the right to all
19 information regarding the owner's property rather than
20 continue the Agency's current practice of permitting
21 the owner to obtain only that information which may be
22 subject to the Freedom of Information Act?

23 MR. KING: We didn't talk directly about the
24 Freedom of Information Act this morning, but again I

1 really think we discussed this issue.

2 HEARING OFFICER HOOGASIAN: Let's go to
3 question two.

4 DR. GIRARD: Could I just ask a clarifying
5 question?

6 HEARING OFFICER HOOGASIAN: Sure.

7 DR. GIRARD: Once a Remedial Action Plan is
8 filed with the Agency, is that public information?

9 MR. KING: Yes, sir.

10 DR. GIRARD: Thank you.

11 HEARING OFFICER HOOGASIAN: Number 2.

12 Realizing that a developers carrying costs for a
13 property or an option thereon can be significant, and
14 that such costs are frequently the cause of
15 redevelopment not proceeding, is the Agency able to
16 proceed with the process in all due haste and keep the
17 time limits proposed in Section 720.505 intact?

18 MR. KING: It's our intention to meet the
19 statutory and regulatory restrictions that we've set
20 forth.

21 HEARING OFFICER HOOGASIAN: And then number
22 3, Section --

23 MR. WIGHT: Could you hold on just a second,
24 please?

1 HEARING OFFICER HOOGASIAN: Oh, sure, go
2 ahead.

3 MR. KING: Can we go back and clarify? I
4 just want to make sure that -- Mr. Eastep was
5 indicating to me in response to Mr. Girard's question,
6 we don't want to go on and leave an issue hanging.

7 Sometimes a Remedial Action Plan will come -- will
8 be presented with proprietary information in there,
9 and that information would be subject to disclosure
10 only in the context of where it can be under the terms
11 of the Freedom of Information Act.

12 And we're not going to disclose proprietary
13 information which has been determined to be
14 confidential so --

15 DR. GIRARD: Is there a process in these
16 rules for how you declare something, certain aspects
17 of that to be proprietary information?

18 MR. KING: If you look at the Freedom of
19 Information Act, there's various criteria and
20 procedures for those things, and we would span it upon
21 those in our internal rules that we have, that explain
22 the procedures and the process by which somebody
23 requests something to be held confidential, and how we
24 would then make that determination.

1 MR. WIGHT: I just might just clarify when he
2 says our Agency internal rules, by that we mean
3 informal rules adopted by the statutory procedure for
4 public hearings and that sort of thing.

5 So they're not -- it's not just internal Agency
6 policy, they're actual rules. I don't have the
7 citation for you, but they do exist, they're Secretary
8 of State rules, Agency rules through the Secretary of
9 State procedures.

10 So it's a very formal process which we're bound to
11 uphold and follow.

12 DR. GIRARD: Thank you. If you could provide
13 those citations at some time.

14 MR. WIGHT: Sure. Would that be okay in the
15 context of our written comments?

16 DR. GIRARD: Yes, that would be very nice,
17 thanks.

18 HEARING OFFICER HOOGASIAN: Mr. Dunham?

19 MR. DUNHAM: I guess I need to ask would
20 there be any information that would affect the
21 fundamental property itself or any restrictions on use
22 of the property that would be withheld from the owner
23 under any circumstance that you can think of?

24 MR. EASTEP: Usually a lot of the stuff we

1 see has to deal with treatment technology, where
2 someone will come in and their particular process will
3 be proprietary on how they're going to treat the waste
4 or solidify it or whatever they do, and so we'll see
5 that information. But the part that's proprietary
6 would be withheld, and so I don't know of anything
7 like -- environmental data, that's all public
8 information.

9 MR. DUNHAM: Well, other proprietary
10 information I could think of would be the processes of
11 the person themselves, of the tenant perhaps, a
12 particular process within the tenant's plan that might
13 be proprietary, but that goes with the tenant. So
14 regarding the fundamental property itself, the
15 contaminants on the property, the restrictions on the
16 deed to the property, none of that information would
17 be kept secret under any circumstance?

18 MR. EASTEP: Not that I would be aware of.

19 HEARING OFFICER HOOGASIAN: Anything further
20 then at this point?

21 MR. WIGHT: Normally the way that works is
22 that the person submitting the document has to declare
23 that that information is proprietary and provide a
24 justification under the rules. So they initiate the

1 process.

2 It's not a situation where we look at it and make
3 some independent determination. They have to declare
4 to us that they believe it falls within that
5 privilege.

6 And then part of what our procedural rules do is
7 tell us how to make a determination as to whether
8 they've justified that claim or not. So I think, you
9 know, if somebody makes that claim, we have a duty to
10 look at it independently and see if we agree whether
11 or not the claim is justified. And if we disagree
12 with the individual that it is justified, there is an
13 appeal process. So that's the way that would run
14 itself out on a case by case basis.

15 MR. DUNHAM: Is that claim ever subject to
16 challenge by a third party?

17 MR. WIGHT: I can't tell you for sure, I
18 don't know.

19 MR. DUNHAM: I believe it is, too.

20 HEARING OFFICER HOOGASIAN: Anything further
21 then?

22 (No response.)

23 HEARING OFFICER HOOGASIAN: All right, I'll
24 proceed with question number three. Section

1 740.505(d) allows up to 90 days for Agency review of
2 any plan or report. Does this review period include
3 time allowed to the RELPE for review, Section 505(g),
4 or is the total time for review a sum of the RELPE
5 time, up to 45 days, plus the Agency time, up to 90
6 days? We are concerned that too long of a review
7 period may be negate the success of some property
8 transactions.

9 MR. EASTEP: It would include the time
10 allowed for the RELPE permit.

11 HEARING OFFICER HOOGASIAN: And number four.
12 Section 740.235(c) provides that the RELPE submit
13 plans directly to the Agency. This implies that the
14 contractual relationship between the RELPE and the RA
15 includes a close working relationship during the
16 development of plans and reports.

17 We support this working relationship as a means to
18 facilitate the progress of site remediation. Is this
19 a correct interpretation, or is the role of the RELPE
20 simply a review function as assigned by the Agency
21 after plans are submitted by the RA to the Agency?

22 MR. EASTEP: I don't believe that's a correct
23 interpretation. We perceive the RELPE's function
24 closer to the latter, it's a review function

1 supervised by the Agency.

2 HEARING OFFICER HOOGASIAN: Okay. Thank you.
3 Then -- oh, Mr. Rieser?

4 MR. RIESER: Yes. When you say you don't
5 agree, you're not saying that you don't expect the
6 RELPE and the RA to have a close working relationship,
7 do you?

8 MR. EASTEP: The close working relationship
9 referred to here talks about the relationship during
10 the development of plans and reports, and no, I don't
11 agree that -- that's not the RELPE's function, to help
12 develop plans and reports that the RELPE in turn will
13 be reviewing.

14 MR. RIESER: Okay, thank you.

15 HEARING OFFICER HOOGASIAN: Are there any
16 further points on that then?

17 (No response.)

18 HEARING OFFICER HOOGASIAN: All right. And
19 number five, does the Agency feel that it is
20 appropriate to require laboratories to meet minimum
21 standards, such as the accreditation by the American
22 Association of Laboratory Accreditation, and to be
23 required to carry a minimum level of errors and
24 omissions insurance?

1 MR. KING: I think the issues that are
2 presented in this question are really ones that go
3 beyond the scope of this regulatory proposal, and it's
4 really a totally independent thing.

5 MR. RIESER: I think actually this issue is
6 addressed in testimony, I'm not recalling whose
7 exactly, but there was a discussion of the need for
8 laboratory or usefulness of laboratory accreditation
9 in some of the testimony and that would play a role in
10 how these things would be developed. I mean I'm not
11 sure it's relevant either, but it certainly was part
12 of the testimony that the Agency provided.

13 MR. KING: It's useful, but the way the
14 question is phrased here is one of whether it's
15 appropriate to require laboratories in the context of
16 this proposal to meet minimum standards and, you know,
17 there is a process going on looking at these
18 accreditation issues as something that Bob O'Hara
19 discussed in his testimony. But it's not something
20 that, you know, we would be specifying here at this
21 point.

22 HEARING OFFICER HOOGASIAN: And then just as
23 a follow-up on this was question A, does the Agency
24 feel that such a requirement is appropriate under the

1 current legislation.

2 MR. KING: Not under Title XVII.

3 HEARING OFFICER HOOGASIAN: Okay. That was
4 all the prefiled questions then on behalf of
5 Chicagoland Chamber of Commerce.

6 And we just have a couple remaining questions I
7 believe that Board Member Hennessey has to ask, so why
8 don't we proceed ahead to those.

9 Mr. Rieser, did you have a question?

10 MR. RIESER: One additional question also,
11 but I'm willing to wait until after Miss Hennessey is
12 done.

13 MS. HENNESSEY: If it -- does it relate to
14 something we were just talking about, and if so if it
15 makes more sense to --

16 MR. RIESER: It does not relate to what he
17 was talking about.

18 MS. HENNESSEY: Okay, I have a couple
19 follow-up questions that I had and that other people
20 on the Board have asked me to ask. First of all on
21 740.215 there's a discussion of procedures for
22 approving or denying the application and agreement.
23 What happens if the Agency fails to approve or deny an
24 application within 30 days?

1 MR. KING: 215, 740.215 does not appear to
2 provide an answer to the question you've raised. It's
3 clear it's not approved automatically. We were just
4 conferring, I think we may have a similar type of
5 issue under the new proposed LUST regulations, because
6 there's a situation as well where the Agency if we
7 miss a deadline then it's not an automatic approval
8 there either.

9 What happens at that point, and I don't recall as
10 we sit here exactly how we handled that in the context
11 of those rules, but that's something we could go back
12 and look at and see if that gives us any additional
13 guidance as to how to handle that issue here.

14 MS. HENNESSEY: Okay, so it is your intention
15 if the -- in your next round of errata sheets to make
16 that clear one way or the other where it's an
17 automatic approval or automatic denial?

18 MR. KING: Or something.

19 MS. HENNESSEY: Okay. Obviously you wouldn't
20 want to have an applicant hanging out there and not
21 hearing one way or the other and also not having any
22 appeal rights as a result.

23 MR. KING: That's correct.

24 HEARING OFFICER HOOGASIAN: Mr. Rieser has a

1 point.

2 MR. RIESER: Isn't there language in the
3 statute that says that a remedial applicant can appeal
4 a nondecision by the Agency or a denial, and that
5 that's how these things are handled, that we did not
6 have default approvals or default denials under this
7 title, but we provided that a denial could be appealed
8 or a nonaction within the timeframe could be appealed,
9 and so that that would be the choice of the remedial
10 applicant? I'm trying to find language here to --

11 MR. WIGHT: I don't recall the language with
12 regard to nonaction. Did you find something?

13 MR. EASTEP: No, I can't find it.

14 MR. WIGHT: There isn't in the specific case
15 of the issuance of the NFR letter, for example it
16 issues by operation of law if the Agency doesn't issue
17 the NFR letter, but I don't recall anything like that
18 with regard to the plans and reports.

19 MR. RIESER: If you look at 58.7(d)(5) it
20 states that all reviews undertaken, I'm not -- I'll
21 read it and we're going to have to wonder whether this
22 applies to this specific question that Miss Hennessey
23 is asking. All reviews --

24 MR. KING: Did you say (e)(5)?

1 MR. RIESER: (d)(5). All reviews undertaken
2 by the Agency or RELPE shall be completed and the
3 decisions communicated to RA within 60 days of the
4 request for a review or approval. The RA may waive
5 the deadline upon request from the Agency. If the
6 Agency disapproves or approves with conditions the
7 plan or report, or fails to issue a final decision
8 within the 60 day period, and the RA has not agreed to
9 a waiver of the deadline, the RA may within 35 days
10 file an appeal to the Board.

11 MS. HENNESSEY: What was the citation on
12 that?

13 MR. RIESER: 58.7(d)(5).

14 MS. HENNESSEY: One question I would have
15 about that is that this refers to a plan or report, it
16 doesn't refer specifically to an application, which is
17 the subject of 740.215.

18 MR. WIGHT: Well, I think we will take
19 another look at it as Gary said, but I think we would
20 be inclined to just handle it that if we failed to
21 meet the deadline, it would be deemed a denial and an
22 appealable issue. And I guess the outcome of that
23 appeal would be that the Board would order us to take
24 action on the application.

1 But it would seem like the primary circumstance
2 when that might happen might be just some sort of an
3 oversight, and once it was called to our attention I
4 would think that we would move quickly to rectify the
5 situation and it would never reach the appeal stage.

6 So, you know, I agree with you it's probably a
7 good idea to put some language in there just in case
8 it does. But, you know, I can't imagine it being a
9 common occurrence.

10 MS. HENNESSEY: Thank you. And I also -- I
11 think it would be helpful to the Board in your written
12 comments if you would just give us a list of all the
13 appeal points under the regulations.

14 MR. WIGHT: That is in statement of reasons,
15 there's a footnote in the statement of reasons,
16 somewhere in the first portion of the statement of
17 reasons that sets forth the appeal points.

18 MS. HENNESSEY: Okay. But obviously you
19 might need to modify that if you modify 215.

20 MR. WIGHT: Yeah, unless I put the
21 modification in (d) which is the appeal point already.

22 MS. HENNESSEY: Okay. I had another question
23 on RELPE. In 740.235 the regulation adopts the
24 language of the statute, and I'm referring

1 specifically to 235(d), which generally states that a
2 RELPE cannot be an employee of the remedial applicant,
3 the owner or operator of the site, and there are some
4 other categories.

5 Could a RELPE be a consultant that a remedial
6 applicant uses regularly on other projects and other
7 sites outside of this program?

8 MR. EASTEP: Yes.

9 MS. HENNESSEY: Another follow-up on the
10 question I asked earlier on 740.420, we talked a
11 little bit about receptor, and I neglected to follow
12 up on sensitive habitats, a term which also is not
13 defined in the regulation.

14 Can you tell me what is meant by the term
15 sensitive habitats as it's used in 740.420?

16 MR. KING: I hate to do this, but I think it
17 would be better for us to defer that to our comment,
18 to comments, because the person that we would -- at
19 the Agency who could best -- would be a much better
20 person to explain that has not been on the panel.
21 He's been part of the panel on the T.A.C.O. hearings,
22 and I just don't want to be inconsistent.

23 MS. HENNESSEY: That's fine. And one thing
24 that I was wondering is if by sensitive habitats the

1 Agency means a habitat that is actually being used by
2 a particular species, or whether the term is intended
3 to encompass an area that could be used by a
4 particular species.

5 MR. KING: Like I say, I don't really feel
6 comfortable answering that.

7 MS. HENNESSEY: Okay. USEPA's recently
8 issued new criteria for under which they will approve
9 voluntary cleanup programs. I'd like to ask first if
10 the Agency believes that those new federal criteria
11 will be applied to this program?

12 MR. EASTEP: I don't think those criteria --
13 I'm not -- my understanding is I'm not sure they're
14 final. I'm not sure we've actually seen them, but at
15 any rate that's part of what I was doing yesterday.

16 My understanding from USEPA is that the existing
17 agreements with states would not be affected by the
18 memorandum that EPA put out recently. It would
19 hopefully encompass the Superfund memorandum of
20 agreement which we had.

21 MS. HENNESSEY: Thank you.

22 HEARING OFFICER HOOGASIAN: Mr. Watson?

23 MR. WATSON: Are you proposing to modify that
24 addendum in any way? I mean that it talks about the

1 voluntary cleanup program in terms of the prenotice
2 program definition, and I'm wondering whether or not
3 that needs to be clarified or modified in some way to
4 recognize the new Site Remediation Program?

5 MR. EASTEP: We haven't -- currently EPA's
6 aware of what's -- I mean they have been monitoring to
7 a certain extent what's been going on here in the
8 state and we haven't seen any need to do anything of
9 this nature now.

10 Perhaps, you know, a more appropriate time would
11 be after the final rules or after the proposed rules
12 are finalized and after EPA if they do come out with
13 any formal procedure states would be relegated by and
14 -- another issue might be if we decided to expand it,
15 the scope of it to be able to deal with other issues,
16 that might be a more appropriate time.

17 But so far we haven't felt the need to initiate
18 any changes.

19 MR. WATSON: You stated that the memorandum
20 of agreement that exists currently is applicable
21 without revision to this program. Is that -- has the
22 Agency made any written statements with respect to
23 that, or what's the basis for your understanding that
24 that applies without revision?

1 MR. EASTEP: We have talked, I've talked with
2 my counterparts at USEPA, we work with them on a
3 routine basis, many projects of mutual concern, and we
4 have discussions sometimes on which way projects
5 should go perhaps.

6 MR. KING: I was just at a conference last
7 week in which one of -- there was a representative
8 from USEPA there, and she was talking about our
9 memorandum of agreement, giving this as a wonderful
10 example of state-federal cooperation, so I don't see
11 them coming back and disrupting that.

12 MR. WATSON: So there's a general
13 understanding between the agencies?

14 MR. KING: Yes.

15 MS. McFAWN: Can I ask is it just the general
16 understanding, I'm looking at what was attached to
17 someone's testimony, the Addendum Number 1 to your
18 memorandum of agreement with the Agency, I forget
19 whose testimony that was.

20 MR. EASTEP: That was Glenn Sechen's.

21 MR. WATSON: No, that was mine.

22 MR. WIGHT: We also submitted that as an
23 attachment to Mr. Eastep's testimony I think.

24 HEARING OFFICER HOOGASIAN: Right, it was an

1 attachment to Mr. Eastep's testimony in Subpart A.

2 MS. McFAWN: The last line of the second full
3 paragraph says, "As a result of the success of these
4 two programs", referencing the prenotice program and
5 the CERCLA list, at least I think that's what it's
6 referencing, "IEPA and Region V have concluded that
7 the principles and procedures set forth in this
8 addendum will meaningfully assist in the remediation
9 and development and of Brownfield sites."

10 So does this Addendum Number 1 encompass the
11 Brownfield sites or what we're now calling the Site
12 Remediation Program or is that yet to come, to be
13 addressed formally in writing by the USEPA?

14 MR. EASTEP: Well, these are -- these
15 procedures for conducting site remediation are
16 certainly applicable to many of the Brownfield sites
17 that we have dealt with, although --

18 MS. McFAWN: It might just be limited to
19 Brownfield? So this memorandum, so this addendum to
20 the memorandum might be just limited to Brownfields,
21 not to voluntary actions taken under the Site
22 Remediation Program that don't qualify as a Brownfield
23 per se?

24 MR. EASTEP: No, that is applicable

1 across-the-board, and it certainly is meant to be an
2 aid to dealing with -- and this is very instrumental
3 in being able to deal with remediating Brownfield, but
4 it's not limited to that.

5 MS. McFAWN: So the USEPA has entered into an
6 agreement with Illinois EPA about the very program
7 we're talking about today or not?

8 MR. KING: Yes, that's true.

9 MS. McFAWN: And it would be this Addendum
10 Number 1?

11 MR. KING: That's true. Now when we say
12 program, I mean program, they -- there's not a
13 separate document that has blessed this as a rule
14 making proposal. But there is -- as Larry was saying,
15 we have kept our counterparts informed every step of
16 the way as to the activities we've been engaged in and
17 there's never been any indication that other than this
18 is a great thing to be doing.

19 So as we're saying, once we've got a final rule
20 and USEPA's finally issued their voluntary completion
21 procedures and they've said some conclusion as to
22 where this RCRA program is going to be included in
23 this memorandum of agreement, we'll go back and try to
24 have a little more wrap up on the whole thing.

1 But it's applicable right now, and even if we
2 don't change the -- change it once these rules are
3 finalized, we don't see any real -- we don't see any
4 real issue. It's not a legally binding document on
5 the federal government. They've made that clear.

6 It's a statement of intent and policy, and it's
7 been very useful as a statement of intent and policy,
8 and I think they'll continue to proceed with it in
9 that light.

10 MS. McFAWN: Thank you.

11 MS. HENNESSEY: I wanted to ask a question on
12 4Y and NFR letters and how they relate. As I
13 understand it the Agency believes that you may still
14 obtain a release of the 4Y, notwithstanding the
15 existence of the Site Remediation Program, is that
16 correct?

17 MR. KING: Correct.

18 MS. HENNESSEY: Okay. I wanted to confirm
19 though that it is an either/or situation, you could
20 not in the same condition at a site obtain both an NFR
21 letter and a 4Y release, is that correct?

22 MR. EASTEP: Well, we have never intended it
23 that way. I never even evaluated it. I would think,
24 yeah, I would think that if you had one it would seem

1 to preclude the other, but I'm not sure that's clear
2 anywhere.

3 MR. KING: I think you could, you could get a
4 4Y and then proceed sometime later and get an NFR
5 letter, that might -- somebody might have some reason
6 to do that. I don't know why you'd go the other
7 direction. I mean if you had the NFR direction there
8 would not be a reason to get a 4Y letter.

9 MS. HENNESSEY: So if you have a 4Y release
10 to cover the condition at the particular site, that
11 doesn't preclude you from also getting an NFR letter?

12 MR. KING: I think that's correct, yes.

13 MS. HENNESSEY: Okay. The statute contains a
14 reference to public participation in 58.7(h). And the
15 -- but the regulation does not contain any discussion
16 of public participation. Could you comment on that?

17 MR. EASTEP: We've prepared -- I think the
18 statute asks the Agency to prepare --

19 MR. KING: A set of guidelines.

20 MR. EASTEP: -- a set of guidelines or
21 guidance document.

22 MR. KING: I'm not sure, I was trying to
23 remember whether I talked about that in the context of
24 the T.A.C.O. rules. We did prepare a guidance

1 document to provide this kind of assistance. We did
2 not include it as part of the rules because it's not a
3 mandatory activity.

4 MS. HENNESSEY: Okay. So you don't view
5 requiring some kind of public participation as
6 necessary to obtaining an NFR letter, is that correct?

7 MR. KING: There's no requirement. We think
8 we strongly encourage it -- and Larry has talked about
9 this on numerous occasions in forums outside the Board
10 about the importance of having a workable community
11 relations effort in the context of making the project
12 move more quickly.

13 If you don't have a good community relations
14 effort it ends up slowing the process down as opposed
15 to speeding it up. I don't know if you want to
16 amplify on that.

17 MR. EASTEP: We have tried to impress
18 internally on our project managers the need to
19 recommend to community relations and at least at the
20 onset to try to encourage applicants to look at the
21 need for community relations, and not every site needs
22 any kind of program, but certainly if you evaluate it
23 from the very beginning at the inception and then you
24 can identify any problems, that's when people ought to

1 be out doing it.

2 And that we tried to instill that in our staff
3 internally, as well as all of the talks that I've
4 given to various trade groups and community groups and
5 things like that, we tried to instill that.

6 But it's -- it's not a formal requirement, and
7 most of the formal public participation requirements
8 that I've seen, probably the formality of them
9 probably wouldn't work the way they have. I mean if
10 you tried to take a Part B requirement or something
11 like that and put that in there, it probably wouldn't
12 do any good.

13 HEARING OFFICER HOOGASIAN: Miss Rosen?

14 MS. ROSEN: Just to follow up on that issue,
15 isn't it true that due to the wide diversity of the
16 different types of sites that are going to be enrolled
17 in the program, and the fact that you could be
18 entering the program to address one very limited,
19 limited situation, that to mandate public
20 participation in all instances wouldn't really be
21 appropriate?

22 MR. EASTEP: Well, Miss Rosen, I think that's
23 what I was getting to. The formal mandated
24 requirements per se, they don't seem to work very well

1 and have an effective -- to have an effective
2 community relations program you need somebody with
3 experience in that field working very, very early on
4 in the process or dealing with the local community.

5 And so I don't think we've -- I haven't figured a
6 good way to kind of require that. It just takes
7 people with some, you know, a little bit of faith in
8 the system or at least that part of the system and a
9 desire to make it work.

10 MS. HENNESSEY: One other question I had is
11 on indirect costs. The Agency's going to be billing
12 applicants for some indirect costs. Could you just
13 briefly describe for the record how those are
14 calculated?

15 MR. KING: What we do as far as our indirect
16 costs, we establish those, typically those are done
17 within each bureau of the Agency, because each has a
18 slightly different program. And that indirect cost
19 evaluation is done by an Agency at the federal
20 government.

21 The way normally that's set up is that the -- that
22 review is done, and this is done across for all state
23 agencies that are involved with federal programs.
24 They do a review -- there's an Agency that doesn't

1 directly deal with the state agency who is actually
2 reviewing relative to the indirect costs, and so
3 that's a procedure we go through on an annual basis.

4 And normally we don't see too much change from
5 that from year to year, and it's a fairly routine
6 process now. We just provide the documentation to
7 allow that to be established. And that's about it.

8 It's a lot of providing a lot of detailed
9 accounting type information as to the various
10 categories of costs that the Agency's involved with.

11 MS. HENNESSEY: And will that information be
12 available to an applicant on request?

13 MR. KING: We would tell them what the
14 indirect rate is. We'd probably tell them the process
15 for providing how we come up with that number, but we
16 really would discourage trying -- that the effort to
17 provide all the documentation relative to indirect
18 costs, it's just not very -- it's not going to be very
19 meaningful to anybody.

20 I'm not sure why anybody would really want all
21 that kind of information. They get the rate. Usually
22 what happens is people want to know what the indirect
23 rate is, and they can see what they're getting charged
24 as far as an indirect rate based on what the

1 consultants there doing work and usually they're
2 pretty happy with the kind of rate they get from us.

3 MS. HENNESSEY: So you will give them both
4 the rate and the description of the methodology?

5 MR. KING: Yes.

6 MS. HENNESSEY: I have one question, I guess
7 it may be considered quibble, on the definition of
8 duly authorized agent in the regulations. Duly
9 authorized agent is currently defined as a person
10 who's authorized by written consent or by law to act
11 on behalf of an owner, operator or mediation
12 applicant, including but not limited to number one,
13 for corporations the principal executive officer of at
14 least the level of vice president.

15 My question is if corporations bylaws allow
16 someone else to act as a duly authorized agent, you
17 would accept that person as a duly authorized agent?

18 MR. KING: Yes.

19 MS. HENNESSEY: So the examples that are --
20 the persons that are specified in 1, 2 and 3 within
21 this definition of duly authorized agents are just
22 intended to be examples?

23 MR. KING: I think that the question was
24 related if the bylaws authorized some other person.

1 We -- and I think if the bylaws will authorize
2 somebody else, I think that's okay. We don't want to
3 -- we won't want to take this, you know, too far,
4 because I mean if somebody's going to say it's okay
5 for the janitor to sign these, then maybe that's not
6 such a good idea. But we basically took this language
7 from our permitting programs and it's the same
8 concepts that appears there.

9 DR. GIRARD: Well, may I ask a question? It
10 does say a person who is authorized by written
11 consent. So if an RA brings in an affidavit which
12 says that their janitor is authorized to act, the
13 Agency would have to approve that, is that correct?

14 MR. KING: That's true. We might look at it
15 a little more closely.

16 DR. GIRARD: Thank you.

17 MS. HENNESSEY: I don't have any other
18 questions.

19 HEARING OFFICER HOOGASIAN: Okay, then Mr.
20 Rieser, I believe you had a question.

21 MR. RIESER: Yes, I just had one hopefully
22 brief one. With respect to 505(e), 740.505(e) has to
23 do with what information the Agency has in their
24 response to a plan of report. Again I noticed that

1 there are differences between what's in here and the
2 statutory language.

3 For example -- I'm sorry, this is 505(e) -- excuse
4 me, 505(e)(4), (e)(2), I'm sorry, a listing of the
5 sections, the regulations that calls for a listing of
6 the sections of Title VII of the Act, whereas the
7 statute talks about an explanation of the sections.

8 And with respect to (4), it calls for a statement
9 of the reasons for conditions if conditions are
10 required, and the statute calls for an explanation
11 rather than a statement.

12 And this is one of the few times where the Agency
13 uses something from the statute but doesn't quote the
14 statute pretty directly.

15 MR. KING: I don't know that there's a very
16 complex answer to this other than it seemed like if
17 you look at (2) where it says a listing of the
18 sections and the statute says an explanation, I mean
19 if you read the statutory term literally it says an
20 explanation of the sections of this Act which may be
21 violated.

22 Well, I mean we'd be explaining the section of the
23 Act or the section of the regulation which doesn't
24 seem like that's all that meaningful. What it seemed

1 like really the intent was, you list the sections that
2 are the sections of concern and then you state why
3 those provisions may be violated if there's an
4 approval granted.

5 So it just -- we used the term listing as opposed
6 to explanation because if we'd used explanation it
7 wouldn't have made sense from our standpoint.

8 MR. RIESER: Does the Agency agree that when
9 it responds to plan of report with some type of
10 negative response, it's required to explain the basis
11 for its response, not just list potential, list
12 sections of the statute or the regulation that are
13 potentially violated?

14 MR. KING: That's what (e)(3) specifies.

15 MR. RIESER: And that if conditions are going
16 to be added, the reasons for those conditions have to
17 be explained?

18 MR. KING: Right, that's there.

19 MR. RIESER: Okay.

20 MR. KING: So there's a typographical error.

21 HEARING OFFICER HOOGASIAN: Does anyone have
22 any further questions? Miss Poulos.

23 MS. POULOS: I have one question about
24 dispute resolution, alternative dispute resolution.

1 Was that ever discussed in terms of when an RA and the
2 Agency may have difficulties during the modification
3 process or anything like that?

4 MR. KING: No. We just -- the way the
5 statute worked it really seemed to compel the Board as
6 the arbiter of those kind of disputes.

7 MS. POULOS: Thank you.

8 HEARING OFFICER HOOGASIAN: Does anyone else
9 have anything further at this time on anything?

10 (No response.)

11 HEARING OFFICER HOOGASIAN: All right, seeing
12 nothing then --

13 MR. WIGHT: Could I hold on just a second,
14 please? There might be one more thing.

15 HEARING OFFICER HOOGASIAN: All right.

16 MR. WIGHT: There is one more thing at the
17 risk of consuming more time. There was an issue that
18 was raised yesterday that we felt probably wasn't
19 expressed as clearly as it could have been with regard
20 to the relationship between 620 Groundwater Management
21 Zones and 740 Groundwater Management Zones, and I
22 think that we would like to take a little more time to
23 try and clarify the relationship between those two
24 procedures.

1 MR. KING: The way we left things yesterday
2 afternoon, the discussion as I was thinking about it
3 further, I was a little concerned that the Board may
4 have been left with a somewhat incomplete response
5 relative to those issues, so I wanted to just take a
6 few minutes and provide a little bit of background
7 perhaps and maybe focus on it a little more clearly
8 than we did yesterday.

9 The GMZ thing revision 740, that was one of the
10 last things that we got to as far as developing our
11 proposal, and when we got to it, one of the things
12 that we really would have preferred to do would have
13 been just to simply cross-reference into 620 and say
14 well, we're going to use the 620 procedure and that
15 will work out fine, and then we don't have to write a
16 bunch of other stuff, it will just be automatically
17 granted.

18 But as we kind of waded into the looking at 620
19 GMZ procedure, although it ended up with a lot of
20 similarity to where we ended up on 740, it was just
21 too many procedural differences, so it meant there was
22 really -- we had to strike a different approach to
23 GMZ's in a context of 740.

24 And so it's really been our intent that for

1 somebody that's in the site remediation program under
2 740, they look to the provisions of 740 and 742 in
3 determining the remediation concepts and the GMZ
4 concepts without cross-referencing back to 620.

5 One of the things that just -- kind of why there's
6 these procedural differences, I wanted to just focus
7 on one of those provisions so you can get a feel for
8 why it was difficult to just cross-reference back.

9 If you look at, and this was a section we talked a
10 little bit about yesterday, if you look at 620.250(c),
11 in that provision it talks about -- 620 talks about
12 the fact that if an owner has received an alternative
13 groundwater restoration standard under 620.450, then
14 there's a requirement for the owner to conduct ongoing
15 reviews and evaluation of groundwater issues, and
16 there has to be a report prepared every five years and
17 that has to be presented to the Agency.

18 Well, as we went through the concepts of what we
19 have under 740, that just doesn't work properly,
20 because the notion of the legislation under Title
21 XVII, and as we followed that along in 740, that you
22 have a No Further Remediation Letter which is a very
23 significant step of finality relative to remediation
24 at a site, and the concept of continuing to look at

1 this issue once every five years or on some kind of
2 methodology like that just didn't fit within that
3 concept of the NFR letter.

4 So that's one of the examples why we really
5 thought that we needed to -- we couldn't just
6 cross-reference, we had to have this separate
7 procedure there.

8 The other issue I was a little bit concerned about
9 being incomplete on the answer was the applicability
10 -- the continued applicability of 620 in reference to
11 740 and 742. Again as I was saying, where you've got
12 a program under site -- on the site remediation
13 program site, you are going to look to 740 and 742 as
14 to how you do that remediation.

15 But that doesn't make 620 irrelevant, because you
16 could have areas of a site that are not governed by
17 the remedial activities under 620 and still going to
18 be applicable. The nondegradation principles of
19 Subpart C are still going to apply with regards to any
20 further releases to the groundwater.

21 So I just wanted to make an attempt to kind of
22 complete the answers that we had given yesterday, and
23 if there's any further follow-up on that I'd be happy
24 to try to explain.

1 HEARING OFFICER HOOGASIAN: Mr. Desharnais?

2 MR. DESHARNAIS: Just a clarification now.
3 When you talk about the GMZ and the five year review
4 and the issuance of the NFR letter, wouldn't the GMZ
5 terminate upon issuance of the NFR letter?

6 MR. KING: Right, and that's why we had to
7 have it different under 740 than 620.

8 MR. DESHARNAIS: So then isn't it true that
9 there's no conflict then between a review that would
10 be ongoing during the existence of the GMZ and the
11 issuance of an NFR letter?

12 MR. KING: But see the way 620 works is that
13 it's -- you wouldn't have that kind of finality up
14 front that you have with the NFR letter. 620 was more
15 envisioning a situation where your cleanup objective
16 is the Tier 1 number, and then you have a corrective
17 action plan to try to achieve meeting that number, and
18 then if you can't reach that number then you come back
19 and have a readjusted situation.

20 And so then -- and in some situations we
21 envisioned, you know, we've seen sites where the
22 projection -- that could take a hundred years for that
23 to happen.

24 Well, what we've done with 740 and 742 is to make

1 a decision up front that's still protective of the
2 receptors, but so that then you don't have to have
3 that continuing ongoing activity out.

4 MR. DESHARNAIS: What I'm trying to
5 understand is the conflict between the requirements of
6 620 and the 740. If the GMZ terminates, there's no
7 conflict with the issuance of an NFR letter. So any
8 obligations that would pertain to the existence of the
9 GMZ would be terminated.

10 MR. KING: You're right about the GMZ
11 terminating. The issue we were pointing out is this
12 procedural issue of the continued five year review,
13 which would still -- if you're using the 620 approach
14 would still be there.

15 And really that kind of notion appears to fly in
16 the face of what the legislature was intending with
17 the notion of an NFR letter with the finality to it.

18 MR. DESHARNAIS: Well, since the Brownfield
19 rules or the 740 rules state that standards can be
20 established which are different than the 620
21 standards, once that standard was established,
22 wouldn't that mean that there's -- the standards that
23 are established in the NFR letter would become the
24 standards for the site and the continued review would

1 no longer apply as long as those standards were
2 maintained?

3 MR. KING: Yes, under what we've proposed,
4 that's correct.

5 MR. DESHARNAIS: So then I don't see how
6 there's a conflict between 620 and 740.

7 MR. KING: Well, what I was pointing out was
8 the difficulty of just wholesale incorporating those
9 GMZ provisions from 620 directly into 740. We'd end
10 up with a situation where then a site that has an NFR
11 letter because we approved a higher remediation
12 objective based on a -- for instance on a Tier 2
13 calculation, they would still have to do this
14 continuing review.

15 MR. DESHARNAIS: But actually they wouldn't,
16 since under the 740 rules it says those would be
17 applicable standards for the site. So what I'm trying
18 to understand is since the two are actually
19 consistent, why is there the belief that they're in
20 conflict?

21 MR. KING: I think the way we've set it up
22 there's no conflict.

23 MR. DESHARNAIS: Okay, so then why are we
24 defining GMZ differently under the 740 rules than in

1 the 620 rules?

2 MR. KING: If we didn't there would be a
3 conflict, that's what I guess we're -- if we didn't
4 set it up this way, what we've -- we've set it up so
5 that there's not a conflict. If we didn't do it this
6 way we think there would be a conflict.

7 HEARING OFFICER HOOGASIAN: Mr. Rieser.

8 MR. RIESER: Looking at 250(c), it's your
9 understanding of this rule that even after the
10 expiration of the Groundwater Monitoring Zone, once
11 the Groundwater Monitoring Zone has been established
12 at the site, even after it expires, by whatever
13 mechanisms, there's still an ongoing monitoring
14 requirement, and this is what of 620.250(c) says?

15 MR. KING: Right, if you've got a level
16 that's approved above the --

17 MR. RIESER: Right. So that the one area of
18 conflict is that under 620 once the Groundwater
19 Monitoring Zone is approved, even after it expires,
20 620 requires there to be monitoring for that area?

21 MR. KING: That's right, and under the way we
22 proposed it under 740 it would not be required.

23 MR. RIESER: Okay.

24 MR. RAO: I have a question. Under

1 740.530(f) you say the -- once the remediation is
2 complete the groundwater remediation objective will
3 become the groundwater standard. Does that standard
4 supersede all 620 standards, applicable 620 standards?

5 MR. KING: Relative to that remediation
6 activity, yes.

7 MR. RAO: Okay. Can you say it in the rules?

8 MR. KING: I thought that's what we were
9 saying. Maybe this --

10 MR. RAO: Because you talk about the review
11 and reporting and listing requirements. You don't
12 talk about the numerical standards.

13 MR. KING: If I catch your point, you're
14 looking at (g) where it stated requirements for
15 review, reporting and listing relative to groundwater
16 remediation that may otherwise be applicable are not
17 going to apply, and so you ask well, why don't you say
18 something about the actual standards themselves?

19 MR. RAO: Yes.

20 MR. KING: I think that's something we should
21 look at.

22 MR. RIESER: Isn't that in both in 530(f) as
23 well as in 742.105, the statement that the approved
24 groundwater quality -- the approved groundwater

1 mediation objectives under 740 now stand as the
2 groundwater quality standards for the site, for that
3 remediation objective?

4 MR. KING: Yeah, I think it's stated just a
5 little bit differently there.

6 MR. RAO: I think the statutes say you can
7 have groundwater objectives above the level of
8 groundwater quality standards.

9 MR. RIESER: Right.

10 MR. RAO: But what I was asking Gary was here
11 they make a statement that those objectives will be
12 the applicable groundwater standards, just to clarify
13 that these kind of supersede 620 standards. So there
14 would be no confusion, you know.

15 MR. KING: Yes, I understand, yes. Why don't
16 we -- we can review that and suggest some language
17 relative to that.

18 HEARING OFFICER HOOGASIAN: Is there anything
19 further at this time then?

20 (No response.)

21 HEARING OFFICER HOOGASIAN: Okay, seeing that
22 we don't have anything further, I just wanted to note
23 that the public comment period for first notice will
24 close approximately -- well, it will close 14 days

1 after receipt of the transcript, which should be
2 available approximately January 2nd, 1997. Therefore
3 the comment period will tentatively close on
4 approximately January 16th, 1997.

5 And please note that the mailbox rule does not
6 apply in this matter. And the Board anticipates going
7 first notice no later than February 6th, 1997.

8 And as a side note, I just want to point out that
9 the transcript can be accessed and downloaded from our
10 WEB site, and the address is
11 <http://www.state.il.us/pcb/>, and then you can just
12 press the button for transcripts. Miss Rosen.

13 MS. ROSEN: Just a question on that point.
14 When will it be available?

15 HEARING OFFICER HOOGASIAN: The transcript?

16 MS. ROSEN: Yes, because --

17 HEARING OFFICER HOOGASIAN: It's really hard
18 to say. Let's just go off the record for one minute.

19 (Off the record discussion.)

20 HEARING OFFICER HOOGASIAN: We can go back on
21 the record. And if anyone -- does anyone have
22 anything further at this point then?

23 MS. HENNESSEY: I'd just like to thank the
24 Agency and everyone who participated for being so

1 generous with their time and thoughts, and we
2 appreciate your participation.

3 HEARING OFFICER HOOGASIAN: Thank you all
4 very much. And this will conclude the hearing for
5 Part 740. This matter is adjourned.

6 (The hearing was adjourned.)

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1 STATE OF ILLINOIS)
) SS
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3 CERTIFICATE

4 I, Susan Freeman, affiliated with Capitol
 5 Reporting Service, Inc., do hereby certify that I
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9 I further certify that I am in no way
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Dated this 26th day of
 December, A.D., 1996,
 at Springfield, Illinois.

