



1 MS. AMY C. HOOGASIAN Hearing Officer  
 MS. CLAIRE A. MANNING Chairman  
 2 MS. MARILI McFAWN Board Member  
 MR. JOSEPH YI Board Member  
 3 MS. KATHLEEN HENNESSEY Board Member  
 DR. TANNER GIRARD Board Member  
 4 MR. CHARLES FEINEN Board Attorney  
 MS. AMY MURAN Board Attorney  
 5 MS. K.C. POULOS Board Attorney  
 MR. KEVIN DESHARNAIS Board Attorney  
 6 MR. ANAND RAO Technical Staff  
 MR. H. MARK WIGHT Attorney, IEPA  
 7 MR. GARY P. KING IEPA  
 MR. ROBERT O'HARA IEPA  
 8 MR. RICK LUCAS IEPA  
 MR. TODD RETTIG IEPA  
 9

10

INDEX

11	EXHIBITS:	IDENTIFIED	ADMITTED
12	Agency Exhibit 7	11	11
	Agency Exhibit 8	110	110
13	Agency Exhibit 9	116	117
	Agency Exhibit 10	120	121
14	Agency Exhibit 11	135	135
	Agency Exhibit 12	143	143
15	Agency Exhibit 13	163	164
	Agency Exhibit 14	182	182

16

17

18

19

20

21

22

23

24

CAPITOL REPORTING SERVICE, INC.  
 SPRINGFIELD, ILLINOIS 217-525-6167

1 HEARING OFFICER HOOGASIAN: Why don't we go  
 2 ahead and go on the record. Good morning, my name is

3 Amy Hoogasian and I'm the named Hearing Officer in  
4 this proceeding originally entitled: In the Matter of  
5 the Site Remediation Program 35 Illinois  
6 Administrative Code 740.

7 I would like to welcome everybody back to our  
8 second set of hearings today. And present with me on  
9 behalf of the Illinois Pollution Control Board are the  
10 presiding Board members on this rule making. To my  
11 left is Kathleen Hennessey.

12 MS. HENNESSEY: Good morning.

13 HEARING OFFICER HOOGASIAN: And to my right  
14 is Marili McFawn.

15 MS. McFAWN: Good morning.

16 HEARING OFFICER HOOGASIAN: And also to my  
17 right is Board Member Girard.

18 DR. GIRARD: Good morning.

19 HEARING OFFICER HOOGASIAN: Additionally we  
20 have two other Board members with us this morning. We  
21 have Chairman Claire Manning.

22 CHAIRMAN MANNING: Welcome, hi.

23 HEARING OFFICER HOOGASIAN: And also Board  
24 Member Joseph Yi.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

4

1 MR. YI: Good morning.

2 HEARING OFFICER HOOGASIAN: We also have  
3 other members of our staff present today. All the way  
4 to my left is Chuck Feinen, to his right is Kevin

5 Desharnais and to Kevin's right is Anand Rao, and he's  
6 part of our technical unit.

7 Additionally to my right is Amy Muran, she's our  
8 newest staff attorney at the Board. And I believe  
9 that's all the Board staff that's present here today.

10 This hearing is governed by the Board's procedural  
11 rules for regulatory proceedings. All information  
12 which is relevant and not repetitious or privileged  
13 will be admitted as required by Section 102.282 of the  
14 Board's procedural rules.

15 All witnesses will be sworn and subject to cross  
16 questioning.

17 As many of you know, this proposed rule making was  
18 filed on September 16th, 1996, by its proponents, the  
19 Illinois Environmental Protection Agency, pursuant to  
20 Public Act 89-431, which was effective December 15th,  
21 1995. Pursuant to that public act the Board must  
22 adopt a final rule on or before June 16th, 1997.

23 The purpose of today's hearing is to finish the  
24 questioning of the Agency on all remaining issues not

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

5

1 previously addressed at the first hearing which was  
2 held in Chicago at the James R. Thompson Center on  
3 November 25th and 26th, 1996.

4 Thereafter we will proceed with the testimony of  
5 the participants who prefiled their testimony on the  
6 due date December 6th, 1996.

7           The three groups of participants who prefiled  
8           their testimony was Frederick Feldman for the  
9           Metropolitan Water Reclamation District of Greater  
10          Chicago, John Watson for Gardner, Carton & Douglas,  
11          and also Linda Huff also representing Gardner, Carton  
12          & Douglas, and we also had Harry Walton and Randy  
13          Muller for the Site Remediation Committee.

14          We also had some prefiled testimony filed by  
15          Patricia Sharkey of Mayer, Brown & Platt. Miss  
16          Sharkey has informed me that she will not be present  
17          today and as a result the Board will accept Miss  
18          Sharkey's testimony as a public comment to this rule  
19          making.

20          Procedurally the format will be as follows: The  
21          Agency will resume answering all remaining issues from  
22          the first hearing, which includes any issues which  
23          needed further conferring by the Agency at the first  
24          hearing, and which also includes all unanswered

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

6

1          prefiled questions that were deferred to Gary King.

2           The Agency shall address these remaining issues  
3          according to how they have prepared, and I just want  
4          to remind each party to first read the prefiled  
5          question into the record and then allow for the Agency  
6          to answer the question.

7           After all the prefiled questions have been  
8          answered, we'll take the follow-up questions only as

9 they relate to the specific section referred to in the  
10 prefiled question.

11 We'll proceed with all questions which have not  
12 been prefiled as time permits.

13 That is if the questioning seems to become rather  
14 lengthy, we will proceed with the remaining business  
15 scheduled for today's hearing and resume questioning  
16 at the end of the hearing if we have time remaining at  
17 the end.

18 During the questioning period I would like all  
19 persons with questions to first raise their hand and  
20 wait for me to acknowledge you, and once I do please  
21 stand and state in a loud clear voice your name and  
22 the organization you represent, if any.

23 After the Agency is finished answering the  
24 remaining issues from the first hearing, we shall

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

7

1 proceed with the prefiled testimony. We will take  
2 each prefiled testimony in the order that it was  
3 filed, first the Metropolitan Water Reclamation  
4 District, second Gardner, Carton & Douglas, and  
5 finally the Site Remediation Advisory Committee.

6 Each participant who has prefiled testimony shall  
7 present each of the testimonies as if read and mark  
8 each as an exhibit. Thereafter the participant shall  
9 present a brief summary of the testimony.

10 We will then allow for questioning of the

11 participants who prefiled the testimony. I will allow  
12 for questions generally, as there have been no  
13 prefiled questions pertaining to any of the  
14 participants' prefiled testimony for this hearing.

15 Subsequently I believe the Agency has comments as  
16 rebuttal testimony on each of the prefiled testimony  
17 which I will then allow into the record.

18 Thereafter the Agency may be cross-questioned as  
19 to its comments. We also have a group of questions  
20 which were filed by Glenn Sechen for the Chicagoland  
21 Chamber of Commerce on December 5th, 1996.

22 These questions were addressed to the Agency, yet  
23 they were not timely filed in order to be addressed at  
24 the first hearing.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

8

1 As such we'll request the Agency to address these  
2 questions at the end of this hearing as time permits.  
3 And just as a side note, Mr. Sechen informed me he  
4 will not be present today, so I will ask his questions  
5 for him.

6 At this time I would just like the Board members  
7 -- I would want to ask the Board members if they have  
8 any comments that they would like to address?

9 (No response.)

10 HEARING OFFICER HOOGASIAN: Okay. Are there  
11 any questions by any of the participants or members of  
12 the public in the audience today?

13 (No response.)

14 HEARING OFFICER HOOGASIAN: All right, then I  
15 just want to remind everyone to speak loudly and  
16 clearly for our court reporter, and also for everyone  
17 sitting in the room, both in the front and back of  
18 this room.

19 Please remember to identify yourself before you  
20 speak on the record, and I believe we can start with  
21 the remaining issues from our first hearing. Mr.  
22 Wight.

23 MR. WIGHT: Okay, thank you. As the Hearing  
24 Officer said, we do have several items of unfinished

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

9

1 business.

2 Before I get to that, I'd like to introduce once  
3 again the people who are with me today. As the  
4 Hearing Officer said, my name is Mark Wight,  
5 W-i-g-h-t. To my right, far right is Todd Rettig,  
6 Associate Council with the Agency. To my immediate  
7 right is Gary King, with the Division of Remediation  
8 Management.

9 To my left is Robert O'Hara, with the Remedial  
10 Project Management Section of the Bureau of Land, and  
11 to his left is Rick Lucas, also with the Remedial  
12 Project Management Section of the Bureau of Land.

13 Two people absent today, Larry Eastep is in  
14 Chicago meeting with the USEPA and hopefully will be



15 able to join us this afternoon, and Shirley Baer is  
16 ill today, so those two are not with us of the group  
17 who were in Chicago.

18 But I think that we're fully prepared to continue  
19 with the responses that we owe from the last time, and  
20 so we'll get to that right now.

21 As the Hearing Officer said, we had some  
22 obligations to go back and reconsider some issues that  
23 were raised in prefiled questions to our testimony at  
24 the Chicago hearings. We've compiled a short list of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

10

1 those items along with those responses.

2 We have developed some proposals to revise some of  
3 the language from our original submittal. I have  
4 prepared a document that we would like to submit as an  
5 exhibit regarding those language changes. The  
6 language changes are in a draft form.

7 What we would like to do is reserve the right,  
8 although submitting this exhibit today, to at the  
9 close of all the hearings and the testimony submit a  
10 final errata sheet of the changes that the Agency  
11 would view as appropriate based on all the testimony.

12 But what we have today is a document that has kind  
13 of a long title, we've titled it Agency's Draft of  
14 Revisions to Proposed Part 740 in Response to Prefiled  
15 Questions from Pollution Control Board Hearings of  
16 November 25th and 26th, 1996.

17           And I have several copies of these.  If we could  
18 admit these as an exhibit, I think this would be  
19 Exhibit Number 7.

20                   HEARING OFFICER HOOGASIAN:  Are there any  
21 objections at this time to Mr. Wight's motion to admit  
22 the Agency's Draft of Revisions to Proposed Part 740  
23 in Response to Prefiled Questions from the Pollution  
24 Control Board Hearings of November 25th-26th, 1996, as

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

11

1 Exhibit Number 7?  Are there any objections at this  
2 time?

3                                   (No response.)

4                   HEARING OFFICER HOOGASIAN:  Fine, then I will  
5 mark it as if read.  Were you going to address these?

6                   MR. WIGHT:  Yes, we'll address these and Gary  
7 King will go through as we respond to each one of the  
8 obligations that we had to go back and reconsider  
9 language, Gary will talk a little bit about that and  
10 we will discuss the reasons for the suggested changes,  
11 so we'll just take them one by one.

12           The idea of the exhibit is that people would be  
13 much more easily able to follow along with Gary's  
14 explanation of why we made the changes.  So it's  
15 really a discussion aid more than anything at this  
16 point.

17                   HEARING OFFICER HOOGASIAN:  That's fine, this  
18 will be marked as Exhibit Number 7.

19 (Exhibit 7 was marked and admitted.)

20 MR. WIGHT: Okay, with that distributed we'll  
21 go back to our obligations. The first obligation that  
22 we identified where we owed a follow-up response based  
23 on initial prefiled questions was on the issue of the  
24 operation of permit waivers and how this would be

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

12

1 coordinated within the bureaus of the Agency.

2 And I think generally that you will find that  
3 exchange at page 73 of the first transcript from the  
4 initial hearing, and with that Gary King has some  
5 remarks on that issue.

6 HEARING OFFICER HOOGASIAN: And I would just  
7 like to remind Mr. King at this time that he is still  
8 under oath from the previous hearing.

9 MR. KING: Okay. Thank you. What we did was  
10 to discuss with the Agency's Bureau of Water and with  
11 the Bureau of Air relative to what permits would be  
12 subject to the waiver provision.

13 The key issue here is I think one of federal  
14 applicability, and where there is a federal  
15 requirement relative to a permitting function, both  
16 the proposed rule and following the statute says that  
17 that's not a type of permit that can be waived.

18 Our Bureau of Water, their analysis was that the  
19 permits that would be waived are sewer connection  
20 permits and construction permits for waste water

21 treatment units where that waste water treatment unit  
22 is not associated with an NPDES.

23 We would intend to -- where those situations do  
24 occur we will of course be communicating with them

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

13

1 relative to what the -- if it's a discharge into a  
2 sewer, then what kind of potential loading there is  
3 from that new discharge.

4 Relative to the Bureau of Air, their conclusion  
5 was that because of -- basically it was that all new  
6 sources are required to apply for and receive a  
7 construction permit under the state implementation  
8 plan, and that those permits are considered to be  
9 federal for purposes of Clean Air Act enforcement, and  
10 therefore those would not be subject to the waiver  
11 provisions of the proposed rules.

12 I guess that's pretty much where that one stands.  
13 So it turns out there's not much relief relative to  
14 air permits. But normally for the type of permits  
15 that are air related and in a remediation context,  
16 those are fairly simple and normally have been not as  
17 much of a delay as obtaining the water permits.  
18 Sometimes it's been a little bit more delay. So this  
19 should hopefully free up that situation for on-site  
20 remediations to go forth a little more smoothly.

21 That concludes my response on that item.

22 MR. WIGHT: Do you want to have follow-up

23 after each item then as we move along or how do you  
24 want to --

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

14

1 HEARING OFFICER HOOGASIAN: If there's quick  
2 follow-up on that we can take that at this time. Mr.  
3 Rieser.

4 MR. RIESER: Hopefully this will qualify as  
5 quick follow-up. David Rieser on behalf of the  
6 Illinois Steel Group, the Illinois Petroleum Council.  
7 With respect to the water permits, what will the  
8 process be for obtaining the waiver? Will the  
9 remediation applicant have to go to the Bureau of  
10 Water or will that be something that goes through  
11 their project manager for the state?

12 MR. KING: That would be coordinated through  
13 the project manager for the state.

14 MR. RIESER: So the applicant wouldn't have  
15 to communicate with the Bureau of Water, that would  
16 just go through the project manager?

17 MR. KING: That's correct.

18 MR. RIESER: Thank you.

19 HEARING OFFICER HOOGASIAN: Anything further  
20 on that?

21 (No response.)

22 HEARING OFFICER HOOGASIAN: All right,  
23 hearing nothing, Mr. Wight, you may proceed.

24 MR. WIGHT: The second obligation from the

1 first hearing was with regard to the language of the  
2 Board note following Section 740.210(b)(2)(E)(ii)  
3 regarding refund of application fees. And in response  
4 to that -- excuse me, that was an issue raised by Miss  
5 Tipsord. I think that's found at page 213 of the  
6 transcript.

7 In response to that we prepared some revised  
8 language for the Board note that hopefully would meet  
9 the Board obligation, the obligation, and that is the  
10 first item on Exhibit 7 that was just handed out.

11 I really don't have any additional comments. We  
12 were just trying to provide a little more  
13 clarification relative to that issue without ending up  
14 with a long treatise on how the state of Illinois  
15 handles requests, we do payments and appropriations  
16 and all that kind of thing.

17 HEARING OFFICER HOOGASIAN: Mr. Rieser.

18 MR. RIESER: Again this should be a quick  
19 follow-up. Is this a state of Illinois policy or an  
20 IEPA policy?

21 MR. KING: The statement we've got here is  
22 pretty clear. It just -- just it does -- the state of  
23 Illinois doesn't unless there's appropriation, there's  
24 -- you know, you've got to have appropriation

1 authority to pay refunds.

2 MR. RIESER: That's based on statements or  
3 policies by the Department of Revenue?

4 MR. KING: It's just based on state law.  
5 There has to be appropriation for -- to authorize a  
6 payment.

7 MR. RIESER: Was there a -- I believe Mr.  
8 Wight said that he was having trouble locating actual  
9 citation to a state law.

10 MR. KING: We were having trouble with  
11 respect to specifically, you know, there's nothing  
12 that you can find directly in Environmental Protection  
13 Act. It kind of is -- it really becomes a principle  
14 that's embedded into the Illinois Constitution that it  
15 has to be -- for state government to spend money there  
16 has to be appropriation to do that, authority to make  
17 those expenditures.

18 The one mechanism that may exist for people I  
19 suppose could be some kind of claim presented in a  
20 Court of Claims, you know, and again that's still  
21 subject to all the -- all their procedures and the  
22 statutory appropriation and authorization process  
23 relative to that as well.

24 MR. RIESER: Thank you.

1 HEARING OFFICER HOOGASIAN: Does anyone else  
2 have any further follow-up questions?

3 (No response.)

4 HEARING OFFICER HOOGASIAN: Seeing nothing,  
5 Mr. Wight, you may proceed.

6 MR. WIGHT: The third response obligation was  
7 to consider if inserting the word "shall" at Section  
8 740.230(b) with an exception for imminent and  
9 substantial threats at 740.230(a)(4). This was an  
10 issue that was raised by Mr. Rieser and Mr. Watson  
11 roughly at pages 238 and 239 of the initial  
12 transcripts.

13 And the general subject matter is with regard to  
14 the termination of agreements by the Agency. So in  
15 response to that, we have prepared a suggested  
16 language revision.

17 MR. KING: The only thing I would add to that  
18 is that that was also -- also Linda Huff proposed  
19 language relative to this same issue in her testimony.

20 HEARING OFFICER HOOGASIAN: Does anyone have  
21 any further follow-up questions, Mr. Rieser?

22 MR. RIESER: Even for terminations under  
23 Subsection(a)(4) will the Agency endeavor to give  
24 notice unless there is an imminent threat that

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

18

1 precludes on a timely basis that notice?

2 MR. KING: I think that's going to be the



3 typical course that we would proceed upon. We simply  
4 wanted to reserve this capability for those kind of  
5 situations, but I would expect we will attempt to  
6 provide that kind of notification and opportunity to  
7 occur even on those kind of situations.

8 HEARING OFFICER HOOGASIAN: Anything further  
9 on that point?

10 (No response.)

11 HEARING OFFICER HOOGASIAN: Mr. Wight, you  
12 may proceed.

13 MR. WIGHT: The fourth response obligation  
14 concerned inserting the word "geology" at Section  
15 740.425(b)(2)(C) and also at 740.435(b)(2)(B). This  
16 was an issue that was raised by Mr. Watson and Mr. Rao  
17 at page 333 of the initial transcript, and again we  
18 have suggested a language change, two language changes  
19 with regard to that issue.

20 MR. KING: I don't have anything further to  
21 add. We just put the word in that people suggested be  
22 put in.

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

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

19

1 (No response.)

2 HEARING OFFICER HOOGASIAN: Seeing nothing,  
3 then Mr. Wight, you may proceed on to your next point.

4 MR. WIGHT: The next response obligation, the

5 fifth response obligation was with regard to Sections  
6 740.425(b)(5)(D) and Section 740.435(b)(6)(D).  
7 Several participants were engaged in the discussion  
8 that occurred roughly on pages 366 to 77 of the first  
9 transcript.

10 As one reads back through that, there were several  
11 suggestions as to both the nature of the objections  
12 and also language changes that might resolve the  
13 objections. We have made one language change, I'm not  
14 sure that that addresses the more detailed issue of  
15 Mr. Watson who I think the general issue was with  
16 regard to as part of the site investigation report  
17 making the comparison of the values found at the site  
18 with the Tier 1 values.

19 I think Mr. Watson continues to object to the  
20 making of the comparison at all. But with regard to  
21 the -- and I'm sure he'll so state it if he feels at  
22 the appropriate time, but with regard to the suggested  
23 language change, we did make the language change there  
24 removing the word "applicable" in both sections and

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

20

1 replacing it with the word "corresponding".

2 So that change is also found in the Exhibit 7.

3 MR. KING: As we saw it, we thought perhaps  
4 that the word "applicable" was causing some confusion,  
5 because it perhaps was giving the connotation that  
6 just by making a comparison you were saying that the

7 Tier 1 remediation objectives were going to be the  
8 legally applicable requirement relative to this  
9 site.

10 So to alleviate that as an issue of confusion, we  
11 went to what we hoped is a more unusual word. We used  
12 the word "corresponding", so it's just that the issue  
13 here from our standpoint is -- was this is part of  
14 four requirements that are done as part of an  
15 endangerment assessment and, you know, this is  
16 information that will be collected by the remediation  
17 applicant.

18 And, you know, we feel that it's appropriate for  
19 the remediation applicant to go ahead and make that  
20 comparison as far as the document is submitted to us.  
21 It's pretty clear from our standpoint if they don't  
22 make that comparison, we're going to.

23 Because it's one of those things that's just --  
24 it's very helpful to understanding the magnitude of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

21

1 any kind of potential problem if you know kind of what  
2 the baseline numbers are comparing to the baseline  
3 numbers that are in the regulations in Tier 1.

4 HEARING OFFICER HOOGASIAN: Does anyone have  
5 any further follow-up on that? Mr. John Watson.

6 MR. WATSON: For the record my name is John  
7 Watson from Gardner, Carton & Douglas. Mr. Wight, I  
8 would agree with your characterization with respect to

9 our continuing objection to that.

10 I think that the change that is suggested helps  
11 move you towards an understanding that this comparison  
12 is not something that's relevant in terms of  
13 determining remediation objectives. I think we would  
14 continue to state our concerns with respect to if it's  
15 not a relevant determination for remediation  
16 objections, why are you forcing the remediation  
17 applicant to go through that process?

18 MR. KING: Can I answer that?

19 MR. WATSON: And I --

20 MR. KING: Can I answer that question?

21 MR. WATSON: Sure.

22 MR. KING: I think you're taking it out of  
23 context. Because it is relevant in the context of a  
24 site investigation to understanding the nature of any

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

22

1 potential danger that the site may pose, and  
2 understanding the background relative to what that  
3 site is all about. I mean that's -- we simply want to  
4 -- the information is going to be collected, and I  
5 guess we're having -- we're really having trouble  
6 understanding why a remediation applicant wouldn't  
7 want to present that comparison to us.

8 It would seem that it really is to their advantage  
9 to present that information in a light that creates  
10 the best impression relative to the site conditions.

11           As I was saying before, otherwise we're in a  
12 position where the Agency has to make that comparison  
13 without the advantage of having the remediation  
14 applicant's views up front as to what that data may  
15 be.

16                   MR. WATSON: I guess I would say that it's --  
17 I mean it's potentially irrelevant again in terms of  
18 defining remediation objectives. It may be also  
19 misleading in terms of, you know, you have a section  
20 that talks about endangerment assessment and then you  
21 have the comparisons, and it may be that the numbers  
22 that you're looking at would satisfy Tier 2  
23 remediation objectives. And to have that be something  
24 that is required from a remediation applicant, you

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

23

1 know, we believe is potentially problematic.

2                   MR. KING: See the other advantage of having  
3 this here is that it allows an immediate screening out  
4 relative to those contaminants where the Tier 1  
5 objectives have been met. During the course of the  
6 T.A.C.O. hearings we had a fairly lengthy explanation  
7 of how that whole system works between if you've  
8 eliminated -- excuse me, if you've excluded one  
9 pathway, how you go on to the next pathway.

10           And we think that by having this comparison up  
11 front it will tend to really have people focus on what  
12 the key concerns are relative to the site.

13 MR. WATSON: And I think with respect to a  
14 remediation applicant, they would want to do that  
15 where they are relying on the Tier 1 numbers to  
16 establish mediation objectives. But when it goes  
17 beyond that I just think that it's an initial  
18 comparison that may not have any relevance and could  
19 be potentially problematic.

20 HEARING OFFICER HOOGASIAN: Mr. Rieser, did  
21 you have a follow-up point on that?

22 MR. RIESER: No, I don't. Thank you.

23 HEARING OFFICER HOOGASIAN: Anyone further on  
24 that point?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

24

1 MS. McFAWN: I just would like to comment,  
2 Mr. Watson. What you have, the point you've been  
3 making on this, you might want to consider submitting  
4 testimony on that. That might be wise, because that  
5 way the Board lends a different weight to it than just  
6 your comment.

7 MR. WATSON: Okay.

8 MR. WIGHT: I think that issue may arise  
9 again in the context of Miss Huff's testimony. There  
10 was a language change suggested there, so we'll  
11 probably revisit it sometime this afternoon. But  
12 maybe that's sufficient for now.

13 HEARING OFFICER HOOGASIAN: All right. Does  
14 anyone have anything further to add on that at this

15 point? (No response.)

16 HEARING OFFICER HOOGASIAN: Mr. Wight, you  
17 may proceed.

18 MR. WIGHT: Our sixth response obligation is  
19 with regard to Section 740.440(a) on an issue  
20 initially raised by Miss Sharkey at page 378 of the  
21 transcripts from the first hearing. The suggestion  
22 was that we change the phrase "recognized  
23 environmental conditions" to "contaminants of  
24 concern", or at least add the concept of contaminants

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

25

1 of concern.

2 So with regard to that, we have suggested another  
3 language change that would incorporate that change. I  
4 think that also is a part of Miss Huff's testimony as  
5 well. So that change we would propose -- we would  
6 propose that that change be made at 740.440(a).

7 MR. KING: I have nothing further to add on  
8 that.

9 HEARING OFFICER HOOGASIAN: Miss Rosen?

10 MS. ROSEN: Could you explain the difference  
11 between remediation objectives versus remediation  
12 measures?

13 MR. KING: Yeah, what we were trying to do  
14 there is it was just add -- actually that's just kind  
15 of an oversight. The use of the term objectives there  
16 is really an oversight, and it's not consistent with

17 the overall structure the way we have them set up.

18 The context in which this provision is coming up  
19 is relative to remediation measures, and a type of  
20 remediation where you're not directly looking at the  
21 742 remediation objectives.

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

24 MS. HENNESSEY: I have a question. Can you

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

26

1 explain what you mean by that last phrase, or other --  
2 the end of the regulation states, "The RA shall  
3 develop remediation objections in accordance with 35  
4 Ill. Adm. Code 742 or other remediation measures as  
5 appropriate."

6 In what situation would someone be developing  
7 remediation objectives or measures apart from 742?

8 MR. KING: If you look closely at Part 742,  
9 what it's really focused on is what should be the  
10 remediation goals once there's been release of  
11 contamination in the environment. So it goes through  
12 a series of different levels and procedures as to how  
13 you make conclusions as to what potential threat to  
14 human health and environment may result relative to  
15 those contaminants being in the environment.

16 When we used the term remediation measures, we  
17 really are focused on the notion of a situation where  
18 remediation may be required before there's actually



19 been a release of contaminants into the environment.

20 For instance one of the examples that we have  
21 given has been a situation where you have drums stored  
22 at a site that may be in a corrosive condition and  
23 they haven't leaked into the environment yet, but  
24 that's something that needs to be addressed in the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

27

1 course of the remediation, that those things need to  
2 be removed from the location of where they're at.

3 So we'd use the term remediation measure to  
4 distinguish that type of situation from a remediation  
5 objective where it's already been released into the  
6 environment.

7 MS. HENNESSEY: Thank you.

8 HEARING OFFICER HOOGASIAN: Mr. Rieser?

9 MR. RIESER: Would it make sense to add here  
10 with respect to the remediation measures some type of  
11 -- you know, as you have done elsewhere as we will get  
12 to in this errata, some description of what would be  
13 appropriate remediation measures or some factors in  
14 terms of when they would be required? For example,  
15 remediation measures is necessary to respond to  
16 imminent health risks, something along those lines?  
17 Isn't that what you're talking about?

18 MR. KING: Yes, one of the things we have to  
19 be -- we can look at that a little further as to how  
20 this all fits together. We have to be a little

21 careful about not narrowing the scope of this so that  
22 you can't deal with situations which normally should  
23 be dealt with in this context.

24 If you make it too narrow, then you make the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

28

1 program more narrow, and I mean I think that works as  
2 a disadvantage. But we can take a look at that a  
3 little bit.

4 MR. RIESER: Thank you.

5 HEARING OFFICER HOOGASIAN: Mr. Watson.

6 MR. WATSON: Would the Agency be willing to  
7 consider attempting to draft a definition of  
8 remediation measures and put it in the definitions  
9 section?

10 MR. KING: We have a definition of  
11 remediation objective, and that's a more specific  
12 term. We had originally when we put together the  
13 draft had included the notion of remediation measure  
14 within the definition of remediation objective, but  
15 after -- as we consulted with -- as we consulted with  
16 the Site Remediation Advisory Committee their  
17 recommendation, which we concurred in, was that those  
18 concepts really needed to be separated out.

19 We really felt that the fundamental point was to  
20 make sure that we had a good definition of remediation  
21 objective. Remediation measures is really intended to  
22 be more of a catchall to include things that may have

23 gotten not directly addressed by the other term.

24 And so again I guess if somebody were willing to

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

29

1 pose some definition, we could consider it. But  
2 nobody's presented one to this point, and it certainly  
3 would have the potential of again as I was commenting  
4 before narrowing the scope of the program in a way  
5 that then you'd have things which are outside the  
6 scope of the program which really are not intended to  
7 be.

8 HEARING OFFICER HOOGASIAN: Does anyone have  
9 a further follow-up point they'd like to make at this  
10 point?

11 MR. RAO: Yeah, I have a follow-up question.

12 HEARING OFFICER HOOGASIAN: Go ahead.

13 MR. RAO: Are there any other requirements in  
14 the rules which sets forth how they get them and what  
15 other measures may be required at the site other than  
16 remediation objectives, or is that left open?

17 MR. KING: We have left that open because --  
18 just because we don't know all the context in which  
19 that term may become applicable at the site. We've  
20 given that one example, but we'll maybe have a  
21 situation where you have another type of threatened  
22 release from some other type of piece of equipment or  
23 relative to the site, so we just haven't attempted to  
24 enclose that.

1 MR. RAO: You know, these remediation  
2 measures in terms of how they are implemented and  
3 whether they're -- are they like some things that have  
4 to be maintained at the site, would they have any  
5 implications on the No Further Remediation Letter?

6 MR. KING: I would -- the types of issues  
7 that have caused us to think that we need this term  
8 would not lead to a problem with the NFR letter.  
9 We're really talking about situations where it's a  
10 removal situation, you're taking the potential threat  
11 off the site before it becomes an actual release.

12 MR. RAO: They're more of a temporary nature?

13 MR. KING: Yeah, you know, if you think about  
14 -- again going back to the example of a situation  
15 where you've got drums storing some kind of waste  
16 material on-site, and there's a concern that they need  
17 to be removed, well, the obvious remediation measure  
18 is remove them.

19 MR. RAO: Yes, okay.

20 HEARING OFFICER HOOGASIAN: Mr. Rieser.

21 MR. RIESER: Aren't you -- by remediation  
22 measure aren't one of the things that you're talking  
23 about is source removal or potential source removal?

24 MR. KING: I don't want to confuse that too

1 much with the notion of source removal once  
2 something's been released.

3 MR. RIESER: I see, okay.

4 MR. KING: So I don't want to -- I mean if we  
5 start making that direct comparison, then we're going  
6 to run into difficulties relative to what 742 is all  
7 about.

8 MR. RIESER: So you're better -- you want us  
9 to stay focused on the idea that something's still  
10 contained in the unit and that unit's being removed to  
11 prevent potential releases?

12 MR. KING: I think that's a good way to  
13 characterize it.

14 HEARING OFFICER HOOGASIAN: Does anyone have  
15 anything further at this time? Sir, please state your  
16 name for the record.

17 MR. GATES: Yes, Pete Gates with Mobil Oil. I  
18 would like to go back to Miss Hennessey's question to  
19 Mr. King. On reading this it says, "The RA shall  
20 develop remediation objectives in accordance with 35  
21 IAC 742 or other remediation measures as appropriate."  
22 It could be read basically one of two ways, her first  
23 one being the RA shall develop one, remediation  
24 objectives in accordance with 35 IAC 742, or two,

1 other remediation measures as appropriate.

2 Or it may be read the RA shall develop remediation  
3 objectives in accordance with one, 35 IAC 742 or two,  
4 remediation measures as appropriate.

5 Which of the two ways of reading it should that  
6 be?

7 MR. KING: The former.

8 HEARING OFFICER HOOGASIAN: Anything further  
9 at this time?

10 (No response.)

11 HEARING OFFICER HOOGASIAN: Seeing nothing  
12 further, Mr. Wight, you may proceed.

13 MR. WIGHT: The seventh response obligation  
14 concerns uncertainty regarding Section 740.440(b), and  
15 some questions raised by Mr. Rao and others at  
16 approximately 385 of the transcripts of the first  
17 hearing.

18 This is the section that deals with compliance  
19 obligations I believe, and Mr. King has some comments  
20 with regard to how that section works.

21 MR. KING: If you have a copy of 740, and  
22 I'll look at 440, it might be a little bit helpful.  
23 What we were trying to do here, and again the whole  
24 notion of 740 -- 740.440(b) and (c) is coming up with

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

33

1 the compliance point for determining whether the

2 remediation objectives have been met.

3 And what we were trying to do there with the  
4 introductory language on (b) talks about where  
5 exposure rights have not been excluded from  
6 consideration or where there's been no reliance on an  
7 engineered barrier, and then (c), (c) is where the  
8 same kind of introductory phrase, just the converse.

9 What we were trying to recognize is the fact that  
10 where for instance if you've got an engineered barrier  
11 you would not want to be monitoring the contaminant  
12 levels inside the barrier. You'd want to go past on  
13 the outside of the barrier to determine, to make your  
14 determinations of whether the barrier has been  
15 effective.

16 So in essence if we didn't have this concept here  
17 it would make the whole notion of an engineered  
18 barrier or an excluded exposure route meaningless,  
19 because you would end up -- you would end up  
20 monitoring for compliance at the same point.

21 So for instance if you had an engineered barrier  
22 that was a cap on a site, you wouldn't be taking your  
23 compliance sampling beneath that cap, because you know  
24 the contamination's there. The compliance is going to

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

34

1 be related to making sure that that barrier has been  
2 sufficiently designed and put in place, and then it  
3 will be effective relative to the exposure issue for

4 which it was installed.

5 Then under (b) it's basically saying in the  
6 situation where you don't have that physical barrier,  
7 how do you set up -- how do you set up your compliance  
8 determination relative to the sampling points.

9 HEARING OFFICER HOOGASIAN: Mr. Rieser?

10 MR. RIESER: But isn't 440(b)(1)(B) kind of  
11 inconsistent, because if you've got an institutional  
12 control prohibiting the use of groundwater, then  
13 you've got an exposure route which has been excluded.  
14 So it really doesn't meet that overall condition of  
15 (b), of 440(b). I mean I think it's an accurate  
16 statement it's kind of put in a place where I'm not  
17 sure it belongs. Do you see what I'm saying?

18 MR. RAO: I think that was the question that  
19 you were trying to address.

20 MR. KING: Yes. We struggled with how to  
21 make -- as far as trying to make this, you know,  
22 coherent and consistent. If you take (b)(1)(B) and  
23 you simply remove it, I'm not sure -- you can't just  
24 simply remove it. Because I mean in a sense an

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

35

1 institutional control is a little bit different  
2 because it's not a physical barrier there, it's --  
3 here with the notion of (b)(1)(B), you monitor at the  
4 remediation -- at the boundary of the remediation  
5 site.



6           You can't monitor on the other side of the  
7 boundary, because where's the other side of the  
8 boundary?

9           MR. RAO: But with an institutional control  
10 prohibiting the use of groundwater, haven't you  
11 already excluded the pathway?

12           MR. KING: There's two aspects, and I think  
13 this is important. There's two aspects relative to  
14 that exclusion of the pathway under Subpart C where  
15 you're talking about groundwater. Just having an  
16 institutional control doesn't mean you automatically  
17 exclude that pathway. There's several other criteria,  
18 and those other criteria are really focused on is  
19 there an impact on an existing well.

20           I mean if there's a legal existing well, that its  
21 use is permitted, the ordinance isn't going to impact  
22 that. That still has to be addressed relative to  
23 Subpart C.

24           So if you have an institutional control that's

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

36

1 going to prohibit further use of the groundwater  
2 during the -- relative to that institutional control,  
3 but there may be existing uses, and so you still have  
4 to monitor it at the boundary of the remediation site  
5 to make sure that you have not impacted that well.

6           I mean you're going to have modeled potential  
7 impact and back calculate it to the boundary of the

8 remediation site to develop a groundwater remediation  
9 number, and then you have to monitor to make sure  
10 you've achieved that.

11 So yeah, it seems goofy, but I mean we kind of  
12 struggled with how to put that together, and this was  
13 the -- I think it all fits together properly. But if  
14 there's -- if somebody has some other suggestions as  
15 to how to do it better, we'd certainly want to hear  
16 about it.

17 MS. HENNESSEY: I'm wondering if you have an  
18 institutional control that is not going to be  
19 effective as a well on some adjacent property, because  
20 that well has been grandfathered in and is not  
21 affected by an ordinance, why are you measuring at the  
22 remediation site boundary? Why is it for example if I  
23 have a source which is distant from the -- which is  
24 within the property and the contamination has not yet

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

37

1 reached the remediation site boundary, but over time  
2 it might reach that, is it appropriate to sample only  
3 at the remediation site boundary?

4 MR. KING: Just a second.

5 I don't have a good answer on that one. It's --  
6 you're right, I suppose there could be a situation  
7 where the modeling exercise indicates that the  
8 contamination may not be reaching an existing well for  
9 a long period of time, and so you may -- your

10 monitoring may show, initially show no contamination,  
11 and yet the modeling may show that some contamination  
12 is going to eventually get to that monitoring point.

13 We thought that this -- again the whole NFR  
14 concept does not eliminate the potential for where  
15 you've got concern like there for continuing  
16 monitoring to assure the effectiveness of the remedy,  
17 so I suppose there could have been a choice to move  
18 the sampling point closer to the contaminant source.  
19 We just made the -- made the judgment that we thought  
20 that this would be a better place to do the monitoring  
21 at.

22 Frequently, especially when you've got smaller  
23 site selecting, you know, then you get into a dispute  
24 as to well, how -- if you don't have it at the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

38

1 boundary, well, how close do you have it. And do you  
2 put it halfway to the source, do you put it at the  
3 contaminant source, you know, do you put it right next  
4 to it. And this seemed a way from an administrative  
5 standpoint it might be a little simpler for us to have  
6 fewer disputes relative to this issue.

7 HEARING OFFICER HOOGASIAN: Mr. Rieser?

8 MR. RIESER: The purpose of 440 is to  
9 establish compliance points under the Site Remediation  
10 Program, correct?

11 MR. KING: That's correct.

12 MR. RIESER: Okay. So the issue of sampling  
13 to verify the modeling as to the extent of -- as to  
14 the -- where the groundwater plume may end up is  
15 something that you would do under your program pretty  
16 much before you get to this point, is that correct?

17 MR. KING: Yes, much of it would be done  
18 already, that's correct.

19 MR. RIESER: And so that you would develop  
20 the information to support the modeling to verify that  
21 you believe you're entitled to the No Further  
22 Remediation Letter based upon what you've established  
23 regarding your site conditions?

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

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

39

1 MR. RIESER: The decision was made by the  
2 Agency in conjunction with the Site Remediation  
3 Advisory Committee that compliance points would be  
4 established under each separate program and not in  
5 Part 742, right?

6 MR. KING: That's correct.

7 MR. KING: And so for 740 here we're  
8 establishing a compliance point in this section?

9 MR. KING: That's correct.

10 MR. RIESER: I still think it's confusing,  
11 but maybe there's some proposal on where this could  
12 be, because I understand where you're coming from on  
13 this, but it just seems like an odd thing that you

14 would have an institutional control prohibiting --  
15 that you would establish an institutional control  
16 which is something that typically doesn't happen until  
17 late in the process, but that wouldn't have ruled out  
18 additional sources outside of your institutional  
19 control, which is the example you gave about why you  
20 wouldn't have excluded the pathway, even though you  
21 had an institutional control.

22 MR. KING: Well, like I said, if you can  
23 figure out a better way to do it --

24 MR. RIESER: Okay.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

40

1 HEARING OFFICER HOOGASIAN: Mr. Watson.

2 MR. WATSON: I've got a question. You talked  
3 about monitoring requirements, and my question is what  
4 sort of monitoring requirements would be imposed under  
5 440(b)(1)(B) subsequent to receiving a No Further  
6 Remediation Letter?

7 MR. KING: I think it's going to depend upon  
8 the nature of the site involved.

9 MR. WATSON: Would that be set forth in the  
10 No Further Remediation Letter?

11 MR. KING: That's correct. If you look at  
12 740.610(a)(6), we stuck in a little phrase "or  
13 monitoring" in addition to the statutory language.

14 MR. WATSON: Okay. Does the Agency have in  
15 mind what types of monitoring it will require for the

16 remediation applicants in these kinds of situations?

17 MR. KING: I'm not sure what kind of --  
18 rather than discuss some hypothetical, we don't have  
19 anything specifically in mind as we sit here right  
20 now. I mean there are certain things we've typically  
21 run into, but whether that's the only way to do  
22 things, I mean that's something that is to be  
23 approached as part of the mediation process.

24 MR. WATSON: Can you identify the factors

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

41

1 that the Agency will consider in determining what is  
2 appropriate monitoring?

3 MR. KING: We've looked at -- in the past  
4 we've looked at seasonal issues where that was a  
5 significant thing to be evaluated.

6 MR. WATSON: Things like the movement of the  
7 groundwater in terms of flow rates and things like  
8 that and distance from exposure pathways, are those --

9 MR. KING: Well, when I used the term  
10 seasonal, I was referencing the fact of groundwater  
11 elevations changing based on season of the year, and  
12 that can have certain impacts on what you actually  
13 monitor as having in the groundwater. So in certain  
14 situations in the past, and I'm sure we would in the  
15 future, we want to see monitoring that would go across  
16 an entire set of seasons.

17 The LUST rules for instance, though that's not

18 directly applicable here, the LUST rules have their  
19 own set of -- own monitoring scheme that's laid out in  
20 the regulations.

21 MR. WATSON: Is it fair to say then that you  
22 will be requiring quarterly sampling at sites to  
23 maintain No Further Remediation Letters where there's  
24 groundwater issues and institutional controls in

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

42

1 place?

2 MR. KING: You know I hate to prejudge that  
3 kind of issue at this point. I think to go down that  
4 path we end up locking everything in as to what's  
5 going to happen in the future on a fairly specific  
6 technical point. I don't think we really want to do  
7 that here.

8 MR. WATSON: Yeah, I mean obviously from the  
9 standpoint of a remediation applicant looking at the,  
10 you know, the costs of maintaining a No Further  
11 Remediation Letter would be a significant issue in  
12 terms of the ability to use the program in a  
13 meaningful way. And quarterly sampling can get  
14 expensive certainly.

15 MR. RAO: Excuse me, are we discussing the  
16 requirements of 740.440?

17 MR. KING: No, I think we jumped to the  
18 740.610.

19 MR. RAO: Okay, thank you.

20 HEARING OFFICER HOOGASIAN: Mr. Rieser.

21 MR. RIESER: If the Agency's already issued a  
22 No Further Remediation Letter saying there's no risk  
23 associated with the site based upon the site's uses,  
24 what is the purpose of requiring post remediation

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

43

1 monitoring?

2 MR. KING: If there's a -- if you have a  
3 context where for instance if you had an engineered  
4 barrier, there might need to be some monitoring to  
5 determine if that barrier was remaining in place,  
6 continuing to be effective.

7 MR. RIESER: Yeah, I think Larry Eastep gave  
8 the example if you have a slurry wall you want to do  
9 some monitoring to verify the slurry wall was  
10 precluding the continued spread of contamination, I  
11 think that was one example he gave. So that was using  
12 the post remediation monitoring to check the efficacy  
13 of a specific type of barrier. Are there other  
14 examples?

15 MR. KING: There may be situations, for  
16 instance we were just discussing if we had a situation  
17 where the modeling -- you were relying on a modeling  
18 presentation as far as showing no impact on the  
19 groundwater. Typically, you know, we'd want to see  
20 some groundwater data that confirms that that's going  
21 to be the case before the NFR letter is issued.



22 But you know, if that shows up, shows up okay,  
23 then we may want some confirmatory sample after the  
24 NFR letter is issued. But rather than delaying

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

44

1 issuing the NFR letter until you've got all the data  
2 in front of you, when it looks like that partial data  
3 is going to show everything's okay, then it may be the  
4 pragmatic thing to do is issue the NFR letter, do some  
5 additional confirmatory sampling, and then things  
6 would be done.

7 MR. RIESER: Would that be the choice of the  
8 remedial applicant to do additional sampling before  
9 receiving the NFR letter?

10 MR. KING: I think so. Usually the choice is  
11 they want the letter as quickly as they can get it, so  
12 I mean that's --

13 MR. RIESER: What would the basis for  
14 deciding that the data was not enough be?

15 MR. KING: Well, if the data doesn't confirm  
16 what the model said it would show, that would be  
17 indication that either some additional modeling work  
18 has to be done or some additional monitoring has to be  
19 done to figure out what -- why things aren't  
20 confirmed.

21 MR. RIESER: But if you had data that was  
22 consistent with the model, would the Agency -- that  
23 showed -- that's consistent with the model, would the

24 Agency require more data in that situation?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

45

1 MR. KING: You mean after the NFR letter is  
2 issued?

3 MR. RIESER: Yes.

4 MR. KING: It's a possibility. I mean again  
5 if you're talking -- one of the issues as we were  
6 talking before about the issue of seasonal variation.  
7 You know, a guy may want to get his NFR letter six  
8 months into the process, and we say yeah, okay, it  
9 looks like things are going to be okay so we'll issue  
10 the NFR letter now, but let's do the additional  
11 sampling to confirm that there isn't any problem.

12 MR. RIESER: So there would be an additional  
13 six months to show a year's worth of seasons?

14 MR. KING: Right, in the example I gave,  
15 that's right.

16 HEARING OFFICER HOOGASIAN: Sir, please state  
17 your name for the record.

18 MR. MULLER: Yes, my name's Randy Muller,  
19 representing the Site Remediation Advisory Committee  
20 and Illinois Bankers Association.

21 Is this sort of in contrast to what's now in the  
22 tank program, whereby you really don't get the No  
23 Further Action letter until such time as all the  
24 quarry sampling would be done, and B, if in the event

1 that this No Further Remediation Letter becomes  
2 conditional, what type of additional language will be  
3 drafted into the No Further Remediation Letter as far  
4 as reopeners and such go?

5 MR. KING: On the first question, that's  
6 correct.

7 MR. MULLER: Okay.

8 MR. KING: And the second issue as far as the  
9 additional language, I don't know that there's --  
10 there's a -- there's a requirement -- there's a  
11 requirement that says that if you fail to, you know,  
12 do the monitoring, that the letter could be voided.

13 If you do the monitoring and it shows that you've  
14 got a problem, then I think we'll probably -- we would  
15 probably -- I would assume that, you know, everybody  
16 would get together and try to figure out what the  
17 right response is.

18 If we had a situation where there was some  
19 recalcitrance situation, then I think we'd have to  
20 rely on some of the other language in the voidance  
21 section, which I'm not finding right off the top of my  
22 head.

23 MR. MULLER: So rather than a condition of  
24 the No Further Remediation Letter, it's more seen as

1 an engineering control, whereby a management control  
2 option as far as for the additional confirmatory  
3 testing?

4 MR. KING: I think that's a good way to look  
5 at it.

6 HEARING OFFICER HOOGASIAN: Mr. Watson.

7 MR. WATSON: With respect to the monitoring  
8 then that I was talking about, it's true that the  
9 Agency contemplates perhaps some monitoring, but it  
10 would be limited in duration, I mean you're not  
11 suggesting -- what I'm hearing is that you may require  
12 some additional monitoring to determine the  
13 appropriateness of seasonal variations on the modeling  
14 results and assumptions, but you do not anticipate  
15 requiring any long term monitoring over a number of  
16 years as part of the No Further Remediation Letter, is  
17 that correct?

18 MR. KING: I don't think I can make that  
19 decision as I sit here right now. I mean that really  
20 calls for a conclusion that really excludes all  
21 potentials, and I don't think I can do that.

22 MR. WATSON: Is it fair to say that that long  
23 term monitoring would be an exception rather than the  
24 rule under this program?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

1 MR. KING: I think that would be fair to say.

2           MR. WATSON: Can you identify again what kind  
3 of circumstances at least now in your mind would  
4 necessitate long term monitoring?

5           MR. KING: No.

6           MR. WATSON: Why not, just because it's a  
7 case by case?

8           MR. KING: That's right.

9           HEARING OFFICER HOOGASIAN: Why don't we move  
10 on then to the next section. Mr. Wight, you may  
11 proceed.

12           MR. WIGHT: Yes, the next response obligation  
13 was with regard to Section 740.445(a) and (e). Miss  
14 Sharkey had raised some issues with regard to the use  
15 of the term appropriateness as being vague and  
16 unclear, and this also turned into a fairly extensive  
17 discussion involving Dr. Girard and Ms. McFawn as  
18 well, primarily encompassed at pages 390 to 407 of the  
19 transcripts from the Chicago hearing.

20           With regard to that we have suggested some  
21 language changes that will be found on Exhibit 7.

22           MR. KING: As we were reviewing the  
23 transcripts of the hearing, and as I sat through the  
24 742 hearing as well, there was -- Board members Girard

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

49

1 and McFawn kept going over certain factors that we had  
2 included, so we tried to combine the Girard and the  
3 McFawn factors into these three items that we've set

4 out in (e).

5 So there may be some things that we missed, but we  
6 were trying to catch the -- they had a much longer  
7 list, but we were trying to catch the sense of what  
8 they were saying in these three items.

9 MS. McFAWN: Just for the record, was this  
10 the list that John Sherrill or yourself read off  
11 several times?

12 MR. KING: No, this was the list you guys  
13 were coming up with as we were talking.

14 MS. McFAWN: Okay.

15 HEARING OFFICER HOOGASIAN: Did you have any  
16 other further points on that then, Mr. King?

17 MR. KING: That summarizes it.

18 HEARING OFFICER HOOGASIAN: Okay. Anyone  
19 further? Mr. Rieser.

20 MR. RIESER: With respect to 440(a), 445(a),  
21 excuse me, you've got "demonstrating that the  
22 requirements for excluding an exposure route have been  
23 satisfied", would those be the requirements of 742  
24 Subpart C?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

50

1 MR. KING: That's correct.

2 MR. RIESER: Demonstrating that the  
3 requirements under 742 Subpart C have been satisfied  
4 for excluding an exposure route have been satisfied?

5 MR. KING: That's correct.

6 MR. RIESER: Would that be problematic to add  
7 that reference?

8 MR. KING: We can look at making additional  
9 clarification.

10 MR. RIESER: Thank you.

11 HEARING OFFICER HOOGASIAN: Does anyone else  
12 have any anything further at this time on this  
13 section?

14 (No response.)

15 HEARING OFFICER HOOGASIAN: Seeing nothing,  
16 then, Mr. Wight, you may proceed.

17 MR. WIGHT: The next item is a similar item  
18 concerning Section 740.510(b), the issue raised was  
19 that the --

20 MS. ROSEN: Excuse me, I'm sorry, could I --  
21 could we return to 740.445(e)? I have a question on  
22 that language.

23 HEARING OFFICER HOOGASIAN: Sure, go ahead,  
24 Miss Rosen.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

51

1 MS. ROSEN: Regarding (e)(1), what do you  
2 mean by the terms prevent or eliminate?

3 MR. KING: Again we're talking about this is  
4 in the context of remediation measures, and the notion  
5 there is again focusing back on the example where you  
6 have a containment unit that's holding contaminants  
7 and that's a threat of a release to the environment,

8 that you can -- you're going to prevent that threat by  
9 doing something specific with that unit.

10 MS. ROSEN: Thank you.

11 MS. HENNESSEY: I have one follow-up  
12 question. When you refer to threats in this question,  
13 do you mean material threats or are you concerned with  
14 any threat to human health or the environment?

15 MR. KING: We have not included the term  
16 material there just simply because it's almost an  
17 issue of professional judgment to begin with as to  
18 whether there's a threat, and if we put the term  
19 material in there, I'm not sure that that's adding a  
20 whole lot to the exercise of that professional  
21 judgment.

22 The other notion is where -- is to recognize the  
23 context in which this is appearing. There's already  
24 been an exercise of professional judgment in terms of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

52

1 having investigated the site and identifying problems  
2 related to it, so there's already been a threat  
3 identified as a result of the investigation process at  
4 the point we're discussing this provision here.

5 MS. HENNESSEY: Thank you.

6 HEARING OFFICER HOOGASIAN: Anything further  
7 then?

8 (No response.)

9 HEARING OFFICER HOOGASIAN: All right then,



10 Mr. Wight, you may proceed to 740.510(b).

11 MR. WIGHT: Okay, the issue at 740.510(b) was  
12 a similar issue with regard to the choice of  
13 terminology in the Agency's original proposal. We had  
14 used words "adequate" and "appropriate", these came  
15 from the statute as I recall.

16 Nevertheless we went back and we took another look  
17 at it and tried to be more specific and came up with  
18 alternative language for the subsections.

19 MR. KING: We really -- we had understood --  
20 we had used -- as Mr. Wight was saying, we had used  
21 the statutory language, and it became clear from the  
22 last set of hearings that just use of that language  
23 was not giving enough direction as to what was  
24 required. So we refocused that language into specific

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

53

1 sections of Part 740 to give clarification as to what  
2 was required.

3 HEARING OFFICER HOOGASIAN: Does anyone have  
4 anything further on that point?

5 (No response.)

6 HEARING OFFICER HOOGASIAN: Seeing nothing,  
7 let's proceed then. Mr. Wight.

8 MR. WIGHT: The last issue was also a similar  
9 issue again raised by Miss Sharkey at approximately  
10 page 439 of the transcript from the first hearing.  
11 The section in question is 740.515(b)(6). Again Miss

12 Sharkey objected to the use of the word "appropriate"  
13 and we returned to that section.

14 It again is in the context of remediation  
15 measures, and we added additional factors there  
16 similar to the Section 445(e).

17 HEARING OFFICER HOOGASIAN: Do you have  
18 anything to add, Mr. King?

19 MR. KING: I don't have nothing else to add.

20 HEARING OFFICER HOOGASIAN: Miss Rosen.

21 MS. ROSEN: Just one kind of question on  
22 this, and it relates back to Miss Hennessey's  
23 question. The identified threat which you're  
24 addressing in 740.515(b)(6)(A) and back in

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

54

1 740.445(e)(1) relates back to those recognized  
2 environmental conditions that you've either identified  
3 or you've chosen to address in the program, correct?

4 MR. KING: That's correct.

5 MS. ROSEN: Okay, thank you.

6 MR. RIESER: With respect to (A)(ii), what is  
7 the scope of the additional threats that we're  
8 concerned with here?

9 MR. KING: At the previous hearing one of the  
10 examples that Mr. Eastep had talked about is the  
11 context when you're -- for instance if you're removing  
12 drums that are corroding, you don't want to just take  
13 a big forklift and gouge them and spill them all over

14 the place and then throw them on some flatbed truck  
15 and have it leak all over the road and et cetera, et  
16 cetera.

17 I mean there's a prescribed notion that you go  
18 through. You overpack the drums to make sure that you  
19 don't cause some additional environmental problem.

20 So that's what we're trying to address there is  
21 the motion that you don't propose to prevent or  
22 eliminate the identified threat by doing something  
23 which is far worse.

24 MR. RIESER: And of course some of that would

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

55

1 be taken care of under the third clause, "consistent  
2 with the Act and applicable regulations", which I  
3 think preclude gouging something with a forklift and  
4 letting it spill out.

5 MR. KING: Well, you know, if you can find  
6 something in the regs that prevents gouging with a  
7 forklift, tell me. I'll be somewhat surprised.

8 MR. RIESER: All right, thank you.

9 HEARING OFFICER HOOGASIAN: Anything further  
10 than on this point?

11 (No response.)

12 HEARING OFFICER HOOGASIAN: Does anyone have  
13 anything further on anything the Agency has brought up  
14 to this point?

15 (No response.)

16 HEARING OFFICER HOOGASIAN: Okay, seeing  
17 nothing why don't we take a quick ten minute break and  
18 resume at 11:40.

19 (A recess was taken.)

20 HEARING OFFICER HOOGASIAN: Why don't we go  
21 back on the record. Mr. Rieser has one more point  
22 that he wanted to make on Section 740.515(b)(6)(A).

23 MR. RIESER: Yes, and this again goes to the  
24 issue of the creating additional -- can be implemented

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

56

1 without creating additional threats, (A)(ii). I mean  
2 the Agency would agree that doing a lot of removal  
3 activity such as moving contaminated material or  
4 discharge of contaminated water or soil vapor  
5 extraction technology all have the potential to create  
6 threats, correct?

7 MR. KING: Well, I don't know if I would  
8 necessarily agree with that. I mean if there -- if  
9 those things are done properly, I don't know that  
10 they're creating threats. I mean I guess there's a  
11 potential if they're not done properly.

12 MR. RIESER: But the Agency would view those  
13 activities as activities that have the potential for  
14 creating additional threats and thus be excluded under  
15 this proposal?

16 MR. KING: I guess I'm confused by that  
17 question. Maybe it's the first question that confused

18 me.

19 MR. RIESER: If you had a -- either for  
20 example soil vapor extraction technology, that has a  
21 release, correct?

22 MR. KING: That's correct.

23 MR. RIESER: So that release is adding  
24 additional -- has added something to additional media,

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

57

1 you're taking something away from the soil, now it's  
2 going into the air, correct?

3 MR. KING: That's correct.

4 MR. RIESER: Okay, would that be the type of  
5 thing that would be a -- considered an additional  
6 threat under this language and be subject to being  
7 excluded?

8 MR. KING: No.

9 MR. RIESER: Okay, thank you.

10 HEARING OFFICER HOOGASIAN: Anything further  
11 then on this section?

12 (No response.)

13 HEARING OFFICER HOOGASIAN: All right, then  
14 let's proceed to the questions that were deferred to  
15 Gary King at the last hearing. Mr. Wight, you can go  
16 ahead and proceed with your --

17 MR. WIGHT: We had several questions which  
18 were deferred because of Mr. King's unavoidable  
19 absence at the second day of the Chicago hearings.

20 We've made a listing of those questions.

21 I think we planned on taking them similar to what  
22 the Hearing Officer followed the first time, where we  
23 would just do the series from the Site Remediation  
24 Advisory Committee and then we would go to the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

58

1 questions of Gardner, Carton & Douglas, and then to  
2 Miss Sharkey's.

3 If that's acceptable, we would start with the  
4 questions from the Site Remediation Advisory  
5 Committee, and the ones that we had on our list that  
6 were deferred first were the series 51 through 57 on  
7 Groundwater Management Zones.

8 HEARING OFFICER HOOGASIAN: Before you go  
9 ahead on that, I just -- there was a question before  
10 that pertaining to Section 740.440(a) and it was the  
11 question by Gardner, Carton & Douglas. Question  
12 number 11. So do you feel that that has been  
13 adequately answered?

14 MR. WIGHT: Well, there's been a lot of  
15 discussion on that this morning.

16 HEARING OFFICER HOOGASIAN: Right.

17 MR. WIGHT: And Mr. Watson asked several  
18 questions with regard to that. If he feels it hasn't  
19 been answered, maybe he would like to repeat the  
20 question and we'll see whether we think it has.

21 MR. WATSON: With respect to 11, I guess I

22 would -- we have had a discussion about it earlier  
23 today, and I think that the question is a little bit  
24 confusing in terms of the wording that's used.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

59

1 I think that Section 740.440(a) relates to not  
2 monitoring but compliance sampling to determine the  
3 compliance with remediation objectives. And I do  
4 believe that the Agency has answered my question  
5 satisfactorily with respect to that.

6 HEARING OFFICER HOOGASIAN: All right then.  
7 And then did you want to proceed then, Mr. Wight, with  
8 530, or there were also some prefiled questions by  
9 Mayer, Brown & Platt on Section 740.515.

10 MR. WIGHT: I'm sorry, I probably wasn't  
11 clear. What I had hoped that we would do would cover  
12 all of the deferred questions for the Advisory  
13 Committee but in the order in which they were  
14 originally prefiled, and then all of the remaining  
15 questions for Gardner, Carton & Douglas, and then all  
16 the remaining questions from Miss Sharkey.

17 So I probably mislead you when I said in the same  
18 form that you did, because I guess that wasn't quite  
19 what we did before.

20 HEARING OFFICER HOOGASIAN: Right.

21 MR. WIGHT: So we would take them in that  
22 order.

23 HEARING OFFICER HOOGASIAN: Ideally we would

24 like to proceed through so we're in numerical fashion

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

60

1 and so proceed in the same context as we did at the  
2 first hearing, if that's -- if you're prepared to  
3 proceed in that manner.

4 MR. WIGHT: It will take me a few minutes to  
5 think about this and which one should come first.  
6 It's your opinion that the questions of Miss Sharkey  
7 were the next ones in order?

8 HEARING OFFICER HOOGASIAN: Yes, after the  
9 prefiled question of Gardner, Carton & Douglas,  
10 question number 11.

11 MR. WIGHT: Okay, we had two questions from  
12 Miss Sharkey. The ones I had were on page seven of  
13 her prefiled questions and under the heading of  
14 Section 740.515?

15 HEARING OFFICER HOOGASIAN: Right, and I  
16 believe there were three, first two paragraphs and the  
17 last paragraph under that question number 12.

18 MR. WIGHT: I would say that the last one has  
19 been answered, and that was addressed in the earlier  
20 portion of our presentation today.

21 HEARING OFFICER HOOGASIAN: Okay.

22 MR. WIGHT: But I do think that we do still  
23 owe answers with regard to the first two.

24 HEARING OFFICER HOOGASIAN: Okay. And let me



1 just read those two questions into the record, or I'll  
2 read the first one, and then proceed with the second  
3 one since Miss Sharkey is absent today.

4 This pertains to Section 740.515, the standards  
5 for review of remediation objectives reports. And  
6 Mayer, Brown & Platt's question asks: Regarding  
7 satisfying the Section 742.305 requirements for  
8 exclusion of exposure routes, would a remediation  
9 applicant performing a focused site remediation and  
10 requesting a focused NFR letter be required to sample  
11 for hazardous characteristics and in the soil in order  
12 to exclude an exposure route, if neither of these  
13 would be associated with the release at issue? And  
14 then she says, see Section 742.305(c) and (d).

15 MR. KING: I'm trying to remember which  
16 hearing we talked about this at. We spent -- I think  
17 it was the last T.A.C.O. hearing we spent quite a bit  
18 of time really talking about this issue. I'm a little  
19 hesitant to go into too much depth on the answer  
20 because it might confuse the record, but basically  
21 you're not required to sample in every instance.

22 What 305(c) and (d) require, which is really what  
23 this question's focused on, is a demonstration that  
24 those requirements have been met.

1 HEARING OFFICER HOOGASIAN: And then why  
2 don't we proceed then to her second question regarding  
3 area background, 740.515(b)(2)(1). Would these rules  
4 require a remediation applicant performing a focused  
5 site remediation to remediate to levels below area  
6 background levels?

7 MR. KING: Well, we did include in -- and  
8 looked at, for instance it could be a situation if you  
9 look at 740.515(b)(2)(D), that would be a situation  
10 where the remediation could be required to levels  
11 below the area background, where in that situation if  
12 you've got an acute threat.

13 HEARING OFFICER HOOGASIAN: And is that true  
14 only for contaminants of concern?

15 MR. KING: I'm not sure, because I really was  
16 confused with the context of what contaminants of  
17 concern meant there. So I mean my notes were just --  
18 we're really going to have to ask her to clarify that  
19 question further to be able to answer it.

20 HEARING OFFICER HOOGASIAN: Okay. Mr.  
21 Rieser?

22 MR. RIESER: Not to step in her shoes, but I  
23 would think that what she was talking about here would  
24 be that if you did a focused site investigation that

1 identified additional, additional substances at the  
2 site which weren't contaminants of concern under your  
3 focused site investigation, if they were exceeding  
4 area background levels such as to create an acute  
5 threat, would you still have to remediate them, even  
6 if they weren't part of the focused site evaluation?

7 MR. KING: The regulations here, the logic of  
8 the regulations would allow you to just address the  
9 focused site remediation and those contaminants of  
10 concern. However, if somebody's leaving an acute  
11 threat, there's obviously other reasons and other  
12 legal capabilities that could force that to be  
13 addressed because of the nature of the problem.

14 HEARING OFFICER HOOGASIAN: All right. Then  
15 does anyone have any further follow-up questions on  
16 that issue?

17 (No response.)

18 HEARING OFFICER HOOGASIAN: Then I believe  
19 the next prefiled question pertains to Section  
20 740.530, and that was question number 13 filed by  
21 Gardner, Carton & Douglas. Mr. Watson.

22 MR. WATSON: Number 13 states: Proposed  
23 Section 740.530 provides that Groundwater Management  
24 Zones are automatically established upon the Agency's

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

64

1 approval of a Remedial Action Plan. Question (a).  
2 What procedures must the remediation applicant follow

3 to request approval of a Groundwater Management Zone  
4 prior to approval of the Remedial Action Plan?

5 MR. KING: It doesn't appear that there are  
6 procedures that allow that.

7 MR. WATSON: Should there be in your view?

8 MR. KING: No.

9 MR. WATSON: Why not?

10 MR. KING: If you look back, we've tracked  
11 that, in our proposal we have tracked the concept as  
12 it has occurred under 620, and if you look at 620  
13 rules, 620 rules envision that there's a remediation,  
14 Remedial Action Plan that's been approved before the  
15 GMZ -- before the GMZ takes effect.

16 MR. WATSON: I'll ask my question (b) now,  
17 too. What safeguards are available to protect a  
18 remediation applicant from enforcement for before a  
19 Groundwater Management Zone is granted?

20 MR. KING: Well, I think, you know, if you're  
21 talking about a legal proceeding in a court of law or  
22 a proceeding before the Board, in both those forums  
23 you're entitled to due process of law, and they have  
24 procedures that safeguard enforcement cases. There's

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

65

1 all sorts of procedures that apply in enforcement  
2 cases.

3 MR. WATSON: Is the Agency willing to make  
4 any representations with respect to people that are --

5 that have submitted a remediation application  
6 regarding enforcement and Groundwater Management  
7 Zones?

8 MR. KING: Well, if they don't have a  
9 Groundwater Management Zone and they have contaminant  
10 levels that are in the groundwater that are in excess  
11 of Board standards under 620, then that could be  
12 considered as part of litigation against that company.

13 MR. WATSON: But if a remediation applicant  
14 is in the program and is intending to address the  
15 groundwater as part of the program, the Agency except  
16 in exceptional circumstances is going to allow the  
17 groundwater -- allow the remediation applicant to  
18 develop a plan with respect to the groundwater  
19 management issue, isn't that fair?

20 MR. KING: The rules provide a methodology  
21 which somebody can -- who is part of the program can  
22 bring forth various plans for investigation and  
23 remedial action, and the procedures are set forth for  
24 us to review those.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

66

1 MR. WATSON: Okay.

2 HEARING OFFICER HOOGASIAN: Do you have  
3 anything further on that question then, Mr. Watson?

4 MR. WATSON: No.

5 HEARING OFFICER HOOGASIAN: Let's proceed  
6 then to the Site Remediation Advisory Committee.

7 MS. ROSEN: Excuse me, could I ask a  
8 follow-up on that, please?

9 HEARING OFFICER HOOGASIAN: Sure.

10 MS. ROSEN: Just to further elaborate on what  
11 I think might be part of the point here, is it correct  
12 that it isn't the Agency's intentions to pursue  
13 enforcement in every circumstance where a remediation  
14 applicant has submitted information that shows that  
15 they might have contamination in the groundwater in  
16 excess of the Groundwater Quality Standards Part 620  
17 prior to getting the Remedial Action Plan approved and  
18 a GMZ granted?

19 MR. KING: I think as far as when we use our  
20 enforcement discretion in making decisions as to what  
21 cases to proceed on, we always look -- one of the  
22 factors that we look at is what level of cooperation  
23 is going on, what sense or what's the goal of the  
24 enforcement case, and so this will be a factor to be

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

67

1 evaluated in making that kind of discretionary  
2 decision.

3 MS. ROSEN: Okay, thank you.

4 HEARING OFFICER HOOGASIAN: Anything further  
5 at this time?

6 (No response.)

7 HEARING OFFICER HOOGASIAN: Let's proceed  
8 then to the Advisory Committee's prefiled questions

9 numbers 51 through 57, also pertaining to the same  
10 Section, 740.530(a). Mr. Rieser and Miss Rosen.

11 MR. RIESER: What type of remediation must be  
12 performed in order to qualify for an automatic GMZ?

13 MR. KING: I believe we made some suggested  
14 revisions to Section 530(a) as part of errata sheet  
15 number one.

16 MR. WIGHT: That would be Exhibit Number 6  
17 for the record.

18 HEARING OFFICER HOOGASIAN: There's also  
19 copies of the errata sheet on the table.

20 MR. RIESER: So that would be the revision to  
21 (a) that says "groundwater that is the subject of the  
22 Remedial Action Plan shall automatically be classified  
23 as a Groundwater Management Zone"?

24 MR. KING: That's correct.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

68

1 MR. RIESER: Is it sufficient that the active  
2 remediation which is occurring addresses the migration  
3 to groundwater portion of a groundwater ingestion  
4 pathway pursuant to 35 Illinois Administrative Code  
5 742?

6 MR. KING: That's generally correct. You  
7 still have to follow, you know, the procedures under  
8 740 and 742 when you get to that decision. And you  
9 also -- that's -- there may be other remediation  
10 elements addressing other pathways.

11 But if you're excluding the other pathways from  
12 consideration, and if you're only looking at the  
13 groundwater ingestion route, then that's correct.

14 MR. RIESER: So a Remediation Action Plan  
15 which addressed source removal that was approvable,  
16 that would qualify for a GMZ?

17 MR. KING: Well, you can't -- source removal  
18 may be only one part of addressing the migration to  
19 groundwater pathway. You may have to do source  
20 removal and then do some -- you may have to do then a  
21 -- like a Tier 2 calculation to see if the remaining  
22 material is not going to cause a problem relative to  
23 the groundwater issue.

24 So I think when you use the term source removal,

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

69

1 it's a little bit too narrow in the context of what  
2 the rest of 742 requires.

3 MR. RIESER: How about source removal and  
4 continued monitoring over time to verify the accuracy  
5 of the modeling effort?

6 MR. KING: What I'm quibbling about is the --  
7 where you've used the term source removal, because you  
8 can have contaminant levels that are not considered  
9 source under the T.A.C.O. procedure, but which need to  
10 be addressed if you're addressing the migration to  
11 groundwater portion of the groundwater ingestion  
12 route.



13 MR. RIESER: And I guess what I'm getting at  
14 is do you have to have a pump and treat groundwater  
15 system in order to get remedial action to have the  
16 plan approved for an automatic GMZ?

17 MR. KING: No, that's not required. You  
18 wouldn't need that to address the migration to  
19 groundwater portion of that route.

20 MR. RIESER: Why does the automatic GMZ --

21 MR. DUNHAM: I have a follow-up if I may to  
22 the last question. If you have institutional control.

23 HEARING OFFICER HOOGASIAN: Could you just  
24 state your name for the record?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

70

1 MR. DUNHAM: I'm Emmett Dunham, I'm  
2 representing the Metropolitan Water Reclamation  
3 District of Greater Chicago.

4 HEARING OFFICER HOOGASIAN: Thank you.

5 MR. DUNHAM: If you have an institutional  
6 control that eliminates the groundwater pathway, there  
7 would be no Groundwater Management Zone, is that  
8 correct?

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

10 MR. DUNHAM: And what if a legitimate use of  
11 the property such as excavation for building  
12 construction encountered groundwater, would you then  
13 create a groundwater pathway and create a Groundwater  
14 Management Zone, or would the No Further Remediation

15 Letter prohibit construction as part of the  
16 institutional control?

17 MR. KING: What we were envisioning, we were  
18 envisioning the latter, that in essence the No Further  
19 Remediation Letter would restrict site activities  
20 relative to creating that additional pathway or --

21 MR. DUNHAM: Essentially prohibit anything  
22 that would encounter groundwater?

23 MR. KING: I think in the example you used  
24 that would be correct.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

71

1 MR. DUNHAM: Thank you.

2 HEARING OFFICER HOOGASIAN: Mr. Rieser.

3 MR. RIESER: I just want to follow up. If  
4 you had a -- if you were able to exclude the  
5 groundwater pathway as Mr. Dunham discussed, but you  
6 need to do further work on the property to address air  
7 pathways, wouldn't you still be entitled to a GMZ to  
8 deal with whatever groundwater issues might be there,  
9 but the pathways were excluded, so you didn't have to  
10 remediate them, if you follow that? So that you  
11 didn't have an NFR letter saying that those conditions  
12 were acceptable, but would you still need some  
13 protection that recognized that those -- that those  
14 groundwater conditions -- I'm sorry, you would need an  
15 NFR letter -- you wouldn't have an NFR letter to say  
16 that all site conditions were acceptable, but would

17 you still need some protection with respect to the  
18 groundwater issues which have been deemed acceptable  
19 by virtue of the exclusion of the pathway?

20 MR. KING: Well, you kind of lost me on that  
21 one.

22 MR. RIESER: I'm sorry.

23 MR. KING: But what -- but I think kind of  
24 the -- if you look at 530(a) and what really the focus

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

72

1 is if groundwater is the subject of the Remedial  
2 Action Plan, I think -- and I think you're trying to  
3 posit an example where that's the case, if that is the  
4 case, then that would apply.

5 MR. RIESER: I guess the example I'm trying  
6 to posit, if you had a -- if you had an active  
7 remediation on a site that was really designed to deal  
8 with the inhalation pathway, but you had been able to  
9 exclude the groundwater pathway through institutional  
10 controls or some other means so you weren't in a  
11 position to get your NFR letter, but you had already  
12 reached a decision with the Agency that the  
13 groundwater pathway had been excluded, wouldn't that  
14 site still be entitled to the protection of the  
15 Groundwater Management Zone as it applies to  
16 groundwater, so there wouldn't be a threat of  
17 potential enforcement regarding those groundwater  
18 levels?

19 MR. KING: The example that you gave, I don't  
20 think it fits within the context of what's laid out  
21 here. It may have fit within the context of the  
22 language that we excluded and we took out, but that  
23 was the discussion, that it seemed like people didn't  
24 want that language in there either so --

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

73

1 MS. ROSEN: Just a moment, please.

2 HEARING OFFICER HOOGASIAN: Okay.

3 MR. RIESER: Maybe this would be another way  
4 to ask the question, is that the pathway exclusion --  
5 would the pathway exclusion be a part of the approved  
6 Remedial Action Plan, in addition to the active  
7 remediation that was being applied to the other  
8 inhalation pathway?

9 MR. KING: I'm still lost. I'm sorry.

10 MR. RIESER: I guess this is -- I want to --  
11 we're going to have to come back to this, because if  
12 you look at 530(f) and (g), the scope of the No  
13 Further Remediation is tied to the Groundwater  
14 Management Zone. So I would think that if you had  
15 been able to exclude groundwater pathway, which I  
16 think you do in the context of the approved  
17 Remediation Action Plan, even if it addresses other  
18 pathway issues as well, you have to have a Groundwater  
19 Management Zone for that excluded pathway so that you  
20 get the full relief that's provided under (f) and (g)

21 and eventually under 740.105.

22 MR. KING: Is there a question there?

23 MR. RIESER: Well, I guess looking at (f) and  
24 (g), does that give any -- give you any further

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

74

1 thoughts on the answers that you gave earlier?

2 MR. KING: I don't think this is a -- we can  
3 give you any kind of coherent answer as we sit here.

4 MR. RIESER: I think this is something we'll  
5 have to revisit later on.

6 HEARING OFFICER HOOGASIAN: That's fine,  
7 you're specifically saying later on at what point?

8 MR. RIESER: Hopefully later on in this  
9 hearing, after we've had a chance to converse perhaps  
10 at a break.

11 HEARING OFFICER HOOGASIAN: That's fine. You  
12 can proceed with your questioning then.

13 MS. ROSEN: Question number 52. Why does the  
14 automatic Groundwater Management Zone not occur until  
15 the approval of a Remedial Action Plan? And I'll  
16 proceed with the next part. Would not the dimensions  
17 of the Groundwater Management Zone be identified after  
18 the investigation report or site investigation report?

19 MR. KING: I think it's -- answering the  
20 second question first, it is correct that the  
21 dimensions of the GMZ should be identified after the  
22 investigation report.

23           However, as we look at the notion of a Groundwater  
24 Management Zone, and this is carried through in the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

75

1   620 definition and in the definition we have in 740,  
2   is the notion of managing to mitigate the impairment.  
3   And it's not just an identification of the zone, but  
4   the notion that there is a management to mitigate the  
5   impairment.

6           We saw that the approval of Remedial Action Plan  
7   was really the first point from our standpoint where  
8   we knew there would be a firm commitment that the  
9   remedial action was going to occur to address the  
10  groundwater situation.

11           In addition, that's the way that 620 has set it  
12  up, that under 620 you do not get GMZ approval until  
13  you've got a Remedial Action Plan.

14           MS. ROSEN: Thank you.

15           MR. RIESER: Going on to 53. Will the RA be  
16  required to request a GMZ in its Remedial Action Plan  
17  and will this plan have to be approved by the Agency  
18  for the GMZ to take effect?

19           MR. KING: I think that's a compound  
20  question, and the answer to the first part of that  
21  question is no. And the answer to the second part of  
22  the question is yes.

23           MR. RIESER: If the Agency rejects a Remedial  
24  Action Plan which contains a GMZ, can it do so because

1 the GMZ is requested?

2 MR. KING: Is there a word missing in the  
3 question? Do you mean can it do so because the GMZ is  
4 not requested? Or have you asked the question that  
5 you want answered?

6 MR. RIESER: No, that's the question I want.

7 MR. KING: Okay, the answer's no.

8 MR. RIESER: So that takes care of the last  
9 question. With respect to 530(b), why is the GMZ  
10 required to be contiguous with the remediation site?

11 MR. KING: If you look at the errata sheet,  
12 we made a change in errata sheet one so that that's  
13 not a requirement.

14 MR. RIESER: It's still a requirement, is it  
15 not, that if the GMZ extends to an adjacent property  
16 that you need the permission of the adjacent property  
17 owner?

18 MR. KING: That's correct.

19 MR. RIESER: Okay. And what's the basis for  
20 that?

21 MR. KING: We've just -- we've always seen,  
22 and this goes back to the adoption of 620, although  
23 there's nothing that directly addresses this point in  
24 620 or the Board's opinion, we have -- in implementing

1 the 620 provision, we have just seen -- we have  
2 required that off-site approval, because we just have  
3 always considered that an issue of fairness if  
4 contamination is going to be off-site and someone  
5 wants to say that that's okay to be off-site, that  
6 there should be an opportunity for that off-site  
7 person as a matter of due process of law in this  
8 country to say hey, you can't just take this right to  
9 having a healthful environment away without my having  
10 any input into it.

11 MR. RIESER: Okay, just to finish up the  
12 questions, and then we'll go into that, you would --  
13 with respect to question number 5, I think you stated  
14 in your answer it's not stated anywhere in 35 Illinois  
15 Adm. Code 620 or the Board's opinions adopting the  
16 rule that an adjacent land owner must agree to a GMZ  
17 which extends on his or her property?

18 MR. KING: That's what I said before, that's  
19 correct.

20 MR. RIESER: All right. Then what specific  
21 rights would such a landowner forego if the GMZ  
22 extends under their property without their approval?

23 MR. KING: Well, I think it could have  
24 several impacts. One, it could affect their ability



1 to use the groundwater that's under their site. It  
2 could affect the ability to engage in a transaction  
3 which sells their property to somebody else.

4 It could impact their ability to assert a legal  
5 action either as a matter of common law or under the  
6 Environmental Protection Act. And we'd just -- it  
7 just seems that that bundle of rights is something  
8 that's been recognized under principles of American  
9 law for a long time, and that they just shouldn't be  
10 taken away without some -- without due process of law  
11 or assent by the landlord.

12 MR. RIESER: How would the existence of a GMZ  
13 preclude a common law right to sue for trespass or  
14 associated with any potential devaluing of the  
15 property associated with the presence of that type of  
16 groundwater?

17 MR. KING: I think in -- not to get engaged  
18 in too much legal debate on something that I think is  
19 really a legal issue, but if -- the notion of  
20 groundwater being in excess of a 620 standard, I think  
21 the Board has recognized that at a minimum that could  
22 be used as evidence of water pollution occurring at a  
23 site.

24 And if in fact there's -- somebody could assert

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

79

1 there's -- that there can be water pollution because  
2 that -- because, you know, the GMZ is in existence, I

3 think that could impact the ability of somebody to  
4 assert there's water pollution, and I think that then  
5 could end up being an acceptance of a devaluation  
6 relative to that property.

7 MS. HENNESSEY: I have a follow-up question.  
8 I don't want to interrupt you, Mr. --

9 MR. RIESER: No, go ahead.

10 MS. HENNESSEY: Would you consider the  
11 existence of a GMZ then a defense to a lawsuit for  
12 water pollution?

13 MR. KING: It would be a defense if there --  
14 if the assertion of an exceedence of the 620 standards  
15 is by itself a -- that's a violation of the -- in and  
16 of itself and there's an assertable thing, and I don't  
17 know that that's been entirely clarified. So I don't  
18 know if it is the notion of an absolute defense, but I  
19 think it certainly would -- as I was saying before, I  
20 think it would impact the ability to raise a piece of  
21 evidence of water pollution.

22 I don't know that the Board has had the question  
23 put before them as to whether an exceedence of 620 is  
24 directly enforceable without tying it to another

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

80

1 section of the Act, like Section 12(a) or Section  
2 12(d). I don't think the Board's answered that  
3 question.

4 MS. HENNESSEY: You may or may not know the

5 answer to this question. But under the law of  
6 Illinois, is groundwater considered property of the  
7 state?

8 MR. KING: I think that that issue is not --  
9 is not clear as a matter of law in Illinois. There  
10 are some bodies of water which clearly are the  
11 responsibility of the state, some of the major  
12 waterways. But I don't think Illinois has the kind of  
13 -- some doctrines that other states have where all  
14 groundwater is in essence held in a public domain. I  
15 don't think Illinois's law goes that far.

16 MS. HENNESSEY: Thank you.

17 HEARING OFFICER HOOGASIAN: Miss Rosen?

18 MS. ROSEN: This goes to the issue I thought  
19 I -- I think I've heard you state that the Groundwater  
20 Management Zone, one of the purposes of it is to  
21 provide relief from the alleged 620 violation, is that  
22 correct? Is that a proper characterization?

23 MR. KING: I think it has that effect.

24 MS. ROSEN: Okay. Then my question goes to

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

81

1 -- I'm reading somewhat of an inconsistency between  
2 what is proposed in (d) of this section as to it says  
3 while a Groundwater Management Zone is in effect the  
4 otherwise applicable standards of Part 620 shall not  
5 be applicable to the contaminants of concern for which  
6 groundwater remediation objectives have been approved

7 in the remediation objectives report.

8 So there it looks like you're only getting relief  
9 from Part 620 if you have a groundwater remediation  
10 objective that has been approved.

11 If you compare that to (a), it looks like it's  
12 broader in (a), and that the GMZ goes to all of the  
13 groundwater which might be the subject of the Remedial  
14 Action Plan for all of those contaminants of concern.

15 Is there an inconsistency there or am I -- and if  
16 there is an inconsistency, what do you propose the  
17 relief that the GMZ is supposed to provide go to?

18 MR. KING: I don't think there's an  
19 inconsistency here. If you look at the organization  
20 of this, the remediation objectives report is approved  
21 before the Remedial Action Plan. So you have a report  
22 that's approved and then the GMZ and the remediation  
23 objectives in that report are the ones that are going  
24 to apply. But the GMZ does not itself become

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

82

1 effective until the Remedial Action Plan is approved.

2 MS. ROSEN: So the remediation -- groundwater  
3 remediation objectives that are approved in my  
4 remediation objectives report are the ones that are  
5 pertaining to the specified contaminants of concern  
6 under (a)? Is that how it is tied?

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

8 MS. ROSEN: Okay. If I could this then kind

9 of becomes the issue that we were discussing earlier  
10 and want to revisit. So I'd like to revisit that  
11 later if I could. Thank you.

12 HEARING OFFICER HOOGASIAN: All right. Did  
13 you want to interject something at this point?

14 MR. MULLER: I just wanted to ask a further  
15 question if I could sort of from the uninformed banker  
16 perspective if you would.

17 If you were to say basically establish a  
18 Groundwater Management Zone that exceeded the property  
19 boundaries in issuance of No Further Remediation  
20 Letter, I've also always understood the Act to be  
21 protective of the health and environment. Once you've  
22 issued a No Further Remediation Letter you have in  
23 essence said that there is no impact to health and the  
24 environment.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

83

1 However, I sense that there is some concern  
2 relative to the issuance of that Groundwater  
3 Management Zone beyond the property boundary may go to  
4 impact the common law provisions of trespass and  
5 nuisance, whereby you've given a rebuttable  
6 presumption under the Act and therefore created a  
7 defense to those sort of common law provisions. I  
8 mean is that really the intent of the Act here?

9 MR. KING: Well, what I think we were really  
10 trying to do with the structure of all of this, and it

11 goes to the original notion that a person can do a  
12 remediation on just a piece of property without  
13 addressing all the contamination issues that may have  
14 occurred as a result of releases from that property.

15 And in structuring it that way, that's why we felt  
16 that you had to structure the GMZ so it's only  
17 reaching the limits either of the remediation site or  
18 there's approval from somebody else to say hey, it's  
19 okay if this GMZ extends onto my site.

20 So the NFR letter would be applicable if you came  
21 in and said I want an NFR letter for site A, then the  
22 NFR letter would apply to Site A, and for properties  
23 beyond Site A there would be no statement as to a  
24 liability or the -- whether areas beyond Site A are

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

84

1 protective of the public health and environment.

2 MR. MULLER: Now does this approval go, given  
3 his concession of his rights and responsibilities  
4 under the common law provision or basically, because  
5 beyond the fact that you're protecting his health and  
6 environment, his approval has to go to other stands as  
7 well, too. I mean if I have a contamination that  
8 exceeds my property boundary and I've got your  
9 complete and thorough expert opinion that I've taken  
10 into account my modeling, there are no potable wells  
11 by ordinance and all this sort of thing, there's no  
12 impact to health and environment, but now you're

13 telling me that I have to go and bring him in the  
14 equation to provide an ancillary opinion to yours, I  
15 mean isn't that really just all going to the common  
16 law provision of trespass and nuisance and diminution  
17 of property value?

18 MR. KING: I think that's a -- it's almost a  
19 site-specific kind of situation that you're talking  
20 about, because I think it's -- the decision's going to  
21 vary on the nature of -- you know, for instance if  
22 contamination has gone off-site, but if it's below the  
23 Tier 1 levels, you know, we're really saying that  
24 that's an acceptable level.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

85

1 Now, that's whether that still causes a problem  
2 for the person off-site, because of for instance some  
3 kind of construction activity, they may have to dig  
4 around under the site and, you know, encounter that  
5 material, that may have some impact on their ability  
6 to manage their site, which could result in some  
7 common law issue as to additional costs they might  
8 have.

9 MR. MULLER: And I guess that's my point,  
10 wouldn't his remedy be under common law provision as  
11 opposed to then going back and citing a problem with  
12 the statute?

13 MR. KING: In the example I gave you that  
14 would certainly be the case.

15 HEARING OFFICER HOOGASIAN: Did you want to  
16 proceed then with the next section of questions?

17 MR. RIESER: Yeah, I think with respect to  
18 57, the Agency's modified the language, but let me  
19 just confirm that. In their errata sheet the Agency  
20 has modified language that said that the GMZ  
21 terminated on the approval of the remediation action  
22 -- Remedial Action Completion Report. And so that the  
23 GMZ now terminates upon the issuance of the No Further  
24 Remediation Letter, I think that's stated in the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

86

1 revised 530(f), is that correct?

2 MR. KING: Actually it's in (c). And this --

3 MR. RIESER: Oh.

4 MR. KING: If you look at this, this will  
5 look a little strange, because we're talking about one  
6 of those changes that never occurred kind of things,  
7 and in essence we had -- we had drafted this provision  
8 and then put some additional language together which  
9 we had discussed with the Advisory Committee in I  
10 believe October of this year, and based on that  
11 discussion went back to the original language we had.

12 So that's why it's a change, there's a change but  
13 it doesn't look like there's any change in the  
14 regulation.

15 MR. RIESER: Is the No Further Remediation  
16 Letter intended to be as -- intended to give the same



17 types of legal protections with respect to groundwater  
18 levels that the GMZ does?

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

20 MR. RIESER: Thank you.

21 HEARING OFFICER HOOGASIAN: All right. Then  
22 I believe that was the end of the prefiled questions  
23 by the Site Remediation Advisory Committee.

24 And there were also questions submitted by Mayer,

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

87

1 Brown & Platt, question number 15 pertaining to the  
2 same section. Some of these I believe might have  
3 already been adequately answered, but I'll just read  
4 them into the record and the Agency can respond as  
5 they feel appropriate.

6 The first question is does the Remedial Action  
7 Plan have to contain provisions for active remediation  
8 in order for a GMZ to be established under this  
9 section?

10 MR. KING: I think we already answered that  
11 question.

12 HEARING OFFICER HOOGASIAN: I agree. Is the  
13 permission of --

14 MR. RIESER: I'm sorry, actually it was a  
15 slightly different question. I'd be interested in  
16 hearing this.

17 HEARING OFFICER HOOGASIAN: You want a  
18 further answer then?

19 MR. RIESER: Yeah, I think it was a slightly  
20 different question which was asked before.

21 MR. KING: The issue under -- in question in  
22 my mind becomes a discussion of active remediation,  
23 and that was what I thought we really had spent quite  
24 a bit of time talking about what an active remediation

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

88

1 was or wasn't, and we were asked questions about, you  
2 know, is this or that included. So I really didn't  
3 see this as covering any additional ground.

4 MR. RIESER: So is the answer to this no?

5 MR. KING: Well, the answer was yes.

6 MR. RIESER: Depending upon how you describe  
7 an active remediation?

8 MR. KING: Exactly.

9 MR. RIESER: And we talked about that  
10 previously.

11 MR. KING: That's right.

12 MR. RIESER: But it still might not have to  
13 be a pump and treat to be an active remediation?

14 MR. KING: That's correct.

15 MR. RIESER: Okay, thank you.

16 HEARING OFFICER HOOGASIAN: All right. Then  
17 the next question is is the permission of an affected  
18 property owner required even if no remedial activity  
19 will take place on his property?

20 MR. KING: Yes.

21 HEARING OFFICER HOOGASIAN: And can a GMZ  
22 become effective as to other properties even if one  
23 affected property owner refuses permission?

24 MR. KING: Yes.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

89

1 HEARING OFFICER HOOGASIAN: If monitoring  
2 under the Remedial Action Plan subsequently shows a  
3 broader area of contamination, is that broader area  
4 automatically included in the GMZ?

5 MR. KING: That would be correct if that  
6 additional area is part of the remediation site.

7 HEARING OFFICER HOOGASIAN: And if  
8 monitoring --

9 MS. ROSEN: Excuse me, can I follow up on  
10 that point?

11 HEARING OFFICER HOOGASIAN: Sure.

12 MS. ROSEN: If it was not included as part of  
13 the remediation site you would have the ability to go  
14 and seek the approval of the newly affected property  
15 owner?

16 MR. KING: That's correct.

17 MS. ROSEN: Okay, thank you.

18 HEARING OFFICER HOOGASIAN: As monitoring  
19 under the Remedial Action Plan shows a reduction in  
20 contaminants, for example as wells clean up, does the  
21 GMZ automatically shrink and eventually automatically  
22 terminate?

23 MR. KING: No.

24 HEARING OFFICER HOOGASIAN: And the last

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

90

1 question is can a GMZ remain in effect beyond issuance  
2 of an NFR letter?

3 MR. KING: No.

4 MS. ROSEN: May I ask a question?

5 HEARING OFFICER HOOGASIAN: Go ahead, Miss  
6 Rosen.

7 MS. ROSEN: Related to that point, your  
8 proposed language under (g), and this isn't  
9 necessarily a change, provides relief from the  
10 different 620 requirements only when the GMZ is in  
11 effect.

12 Should that also include the time after the No  
13 Further Remediation Letter is issued, or is that  
14 basically no longer -- will 620 no longer be  
15 applicable at all because of the provisions under  
16 Subsection (f)?

17 MR. KING: I think you need to look at -- let  
18 me find the reference here. This is Section  
19 742.105(g). I think that section answers the question  
20 there.

21 MS. ROSEN: Okay. Thank you. Could you  
22 maybe paraphrase that or just explain what that does,  
23 just for the record here in this proceeding?

24 MR. KING: How about if I read it?

1 MS. ROSEN: That would be nice.

2 MR. KING: This is Section 742.105(g). This  
3 is part of the Agency's proposal in R97-11 -- 12,  
4 excuse me, 12. And that provision states as follows:  
5 "The Agency's issuance of a No Further Remediation  
6 determination pursuant to the requirements applicable  
7 to the program under which the remediation is  
8 performed shall be considered, while the determination  
9 is in effect, prima facie evidence that the  
10 contaminants of concern at the site do not, relative  
11 to groundwater, cause or tend to cause water pollution  
12 under Section 12(a) of the Act or create a water  
13 pollution hazard under Section 12(d) of the Act." And  
14 that concludes the Subsection (g).

15 MS. ROSEN: How does that pertain to the  
16 requirements under Part 620 for the different review,  
17 reporting and listing?

18 MR. KING: For this one the language is  
19 included in 740.530(g).

20 MS. ROSEN: I was questioning you on 735 --  
21 740.530(g) as proposed in the errata sheet and maybe  
22 I'm --

23 MR. WIGHT: Is your question just generally  
24 with regard to how (g) is intended to operate with

1 regard to the 620 regulations, or is it something  
2 other than that?

3 MS. ROSEN: That's my question, yes.

4 MR. WIGHT: And specifically what?

5 MS. ROSEN: Well, it's only if -- this (g) is  
6 only relief as long as you have a Groundwater  
7 Management Zone in effect. Once you get your No  
8 Further Remediation Letter your Groundwater Management  
9 Zone is no longer in effect. So how does that -- is  
10 there any relief for the review, reporting and listing  
11 requirements under 620 for after your No Further  
12 Remediation Letter is in effect?

13 MR. KING: There are requirements as far as  
14 I'm looking -- for instance there's a provision in  
15 620.250, and that's the GMZ provision in 620. In  
16 there it talks about this review taking place every  
17 five years relative to a GMZ under 620. Well, this is  
18 not a GMZ under 620. So those 620 requirements would  
19 not apply.

20 MS. ROSEN: Okay, so all of the 620  
21 requirements for review, reporting and listing that  
22 you're referencing in (g) are no longer requirements  
23 unless a GMZ is in effect in the first place?

24 MR. KING: Right, and then just don't --

1 you're getting a little bit broad with the question  
2 there. I mean if you're talking just about the GMZ  
3 provision, yeah, that would still be true.

4 I mean because there are other -- you know, if you  
5 look at the Subpart C of 620 there's -- you know,  
6 there's still requirements on preventative  
7 notification and preventative responsibilities, and  
8 those could still apply on a site.

9 MS. ROSEN: So that the relief afforded under  
10 subsection (g) is only applicable to the provisions of  
11 620 that relate -- is limited in some way, it's not  
12 everything that's in 620 in regards to review,  
13 reporting and listing?

14 MR. KING: Right. If you get a chance to  
15 look at 620.250(c), I mean there it talks about  
16 specific things that have to occur relative to  
17 monitoring and reporting relative to a GMZ that's been  
18 approved under 620.250. Well, this would not be a GMZ  
19 approved under 620.250, so you wouldn't look at those  
20 provisions. They would not apply.

21 MS. ROSEN: Okay.

22 MR. RAO: So are you saying that the GMZ  
23 requirements under 740 has got nothing to do with 620?  
24 Because, you know, you use the term GMZ and it looks

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

1 like you got it from 620.

2 MR. KING: That would be one way to look at  
3 it, but in essence the -- we used the term GMZ because  
4 I believe that's what's actually in Title XVII. If  
5 you look at -- it's 57.6, they actually use the term  
6 Groundwater Management Zone there, so that's why we  
7 followed with the use of that term here.

8 MR. RAO: But wasn't that term used in  
9 Section 58 because it was already used in the 620  
10 rules, or is it something that --

11 MR. KING: No, that's true, I believe that's  
12 true.

13 MR. RAO: You know in this proposed  
14 subsection (f).

15 MR. KING: But what we were trying to do,  
16 although they used the -- they do have the same name,  
17 what -- they're different in terms of under 740 it's  
18 an automatic thing once the Remedial Action Plan has  
19 been approved, and so we saw this as being different  
20 than the procedure called for under 620.250.

21 MR. RAO: I realize that, you know, the way  
22 you get into this GMZ is different here. It's an  
23 automatic elimination.

24 But in terms of the requirements of the GMZ

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

95

1 itself, now like what the requirements that are  
2 applicable to 620, but you say do not apply to the GMZ  
3 under 740, like the five year review the Agency's



4 supposed to do, once a GMZ terminates or, you know,  
5 expires, does the Agency have the obligation to do the  
6 review?

7 MR. KING: No. Not under 740.

8 MR. RAO: Under subsection (f) where you say  
9 "Upon the issuance of the No Further Remediation  
10 Letter the applicable groundwater standards for the  
11 specified contaminants of concern within the area  
12 encompassed by the GMZ are the groundwater  
13 objectives." Are these applicable groundwater  
14 standards are the same as the groundwater restoration  
15 standards under 620?

16 MR. KING: There are -- you know, there's a  
17 little bit of a difference between the two in the way  
18 that the GMZ is envisioned to operate under 620. For  
19 instance if you look at 620 for 450, the notion of the  
20 restoration standards --

21 MR. RAO: Yes, I was looking at that.

22 MR. KING: Really the notion there is  
23 envisioned that, you know, you set this -- you set the  
24 groundwater objective at the same place as the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

96

1 groundwater standard, then you try to get there, and  
2 if you can't get there, then you come up with a  
3 different number that applies at the site.

4 We haven't taken that approach in 740, 742 for  
5 that matter. It really is a -- it really is you can

6 start off looking at reaching a different number.

7 MR. RAO: But if you look at Section 58.5  
8 where it allows groundwater objectives to be set at or  
9 above the groundwater quality standards, it's Section  
10 58.5(d)(4). It sets out conditions under which you  
11 can have groundwater objectives which can be above the  
12 groundwater quality standards, and essentially says  
13 the RA shall demonstrate to the extent practical the  
14 exceedence of groundwater quality standards has been  
15 minimized and beneficial use appropriate to the  
16 groundwater that was impacted has been returned and  
17 any threat to human health or the environment has been  
18 minimized.

19 So that's basically what you have in 620.450,  
20 which to me seems like they're all pretty much  
21 consistent with each other.

22 MR. KING: When we were going through the  
23 process of developing the whole risk based approach  
24 under 742, we believed that's what -- that that was

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

97

1 addressing this criteria.

2 MR. RAO: Now the reason I ask is I'm not  
3 saying that I have a problem with what you have done.  
4 It's just that under 620.450 there was a mechanism  
5 where if you approved alternate standards, you know,  
6 those standards would be listed in an amendment to the  
7 register.

8           And that's why I wanted to know if these  
9 requirements also applied, because then there would be  
10 a record of, you know, if there are certain  
11 groundwater which have been defined and which have  
12 been assigned alternate standards, you know, there  
13 will be a record of what those standards are.

14           MR. KING: Well, I don't think we ever  
15 published any. I don't think any of those ever  
16 appeared. So it's one of those provisions that went  
17 in the rules and never got much use.

18           I mean the whole notion of making this independent  
19 GMZ decision in the context of an ongoing remediation  
20 has been a difficult one, and it really has not had as  
21 much use as I think either the Board or the Agency  
22 envisioned when this was, you know, proposed as part  
23 of --

24           MR. RAO: I guess one of the reasons it was

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

98

1 put in there, it was -- you know, now there's this  
2 shift where we are talking about setting up different  
3 quality groundwater standards, and it's in the  
4 statutes, and maybe before when things were done the  
5 way the Agency did it, groundwater objectives were  
6 pretty much groundwater quality standards.

7           So, you know, the concern was not there. And now  
8 since you know there will be a large number of sites  
9 where we'll be taking advantage of these new programs,

10 you know, it may make sense for us to identify these  
11 groundwaters where they have alternate standards.

12 MR. KING: You know we have not made any  
13 final decision as to how we're going to handle data  
14 relative to those issues, but that's -- that's  
15 something we've been looking into just as a way of  
16 making sure that we're managing all these issues  
17 properly and insuring consistency relative to them.

18 So, you know, we really haven't decided what we're  
19 going to do as far as that type of issue.

20 MR. RAO: Okay.

21 HEARING OFFICER HOOGASIAN: Mr. Rieser.

22 MR. RIESER: The Site Remediation Act  
23 specifically provides that through the -- what's now  
24 sort of segregated as a 742 process, the remedial

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

99

1 applicant can pose and the Agency can approve  
2 remediation objectives for groundwater which are  
3 different than those provided for under the  
4 Groundwater Quality Standards of 620, correct?

5 MR. KING: That's correct.

6 MR. RIESER: Okay. And that that's -- that  
7 approval is kind of incorporated in the No Further  
8 Remediation Letter which provides certain protections  
9 which have been identified under 742.105, correct?

10 MR. KING: That's correct.

11 MR. RIESER: So the purpose of the

12 Groundwater Management Zone in this context is to  
13 provide the protection of a Groundwater Management  
14 Zone during the process while the remediation is  
15 occurring with respect -- occurring?

16 MR. KING: That's correct.

17 MR. RIESER: And the requirements of what the  
18 remedial applicant must do are embodied in the  
19 approved remedial -- Remediation Action Plan that's  
20 approved by the Agency?

21 MR. KING: That's correct.

22 MR. RIESER: Are there other requirements  
23 associated with the way a GMZ is defined under 620  
24 that the Agency believes will be applied to these

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

100

1 automatic GMZ's under 740?

2 MR. KING: No. We -- when we constructed the  
3 GMZ provision in 530 it was with the intent that you  
4 would not have to cross-reference back to 620 to find  
5 additional things you had to do. It was all to be  
6 laid out in 740.

7 MR. RIESER: But this GMZ under 740 isn't a  
8 situation where the remedial applicant has submitted a  
9 site investigation report which is intended to  
10 delineate the nature and extent of the contamination  
11 at this remediation site, correct?

12 MR. KING: That's right.

13 MR. RIESER: And has already submitted a

14 remediation -- remedial objectives report and  
15 remediation --

16 MR. KING: Remedial Action Plan.

17 MR. RIESER: Thank you, which identifies  
18 exactly how that -- how those issues at that property  
19 is going to be handled?

20 MR. KING: That's correct.

21 MR. RIESER: And then under I think it's  
22 742.105(f), once the No Further Remediation Letter has  
23 been issued, and that also provides -- that also  
24 identifies that the levels, the groundwater

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

101

1 remediation objectives which have been approved may  
2 exceed the Part 620 standards?

3 MR. KING: That's what we've proposed in 742.

4 MR. RIESER: And in that context, the  
5 remediation applicant with an NFR letter allowing  
6 these groundwater remediation objectives would not  
7 have to comply with the 620 requirements that would  
8 otherwise apply to areas where the 620 standards are  
9 exceeded?

10 MR. KING: Yes, that's right.

11 HEARING OFFICER HOOGASIAN: Do you want to  
12 continue?

13 MR. RIESER: No.

14 MR. RAO: I have a follow-up question. You  
15 just said in response to Mr. Rieser's question, you

16 said the groundwater objective is proposed and  
17 approved by the Agency which is above the Groundwater  
18 Quality Standards, that the requirements of 620 will  
19 not apply. Why?

20 MR. KING: Now, I think he added into that  
21 that question, at least as I heard it was related to  
22 the area of the contamination and the contaminants of  
23 concern. And if we're talking about in the area  
24 outside of that contamination area that's not being

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

102

1 addressed by the Remedial Action Plan, then that would  
2 be different.

3 MR. RAO: And when you say the requirements  
4 of 620 do not apply, are you saying the whole Part 620  
5 will not apply like the restoration standards, or is  
6 it just the numerical standards themselves?

7 MR. KING: In the context of the question he  
8 was asking, I wouldn't see -- I was not seeing any of  
9 620 being applicable.

10 MR. RAO: Okay.

11 MS. HENNESSEY: Can I just clarify to make  
12 sure I've understood your testimony. It is in the  
13 remedial objectives report that a remedial applicant  
14 will demonstrate that if a groundwater standards which  
15 is above the Part 620 standards is proposed, the  
16 exceedence has been minimized, the beneficial use  
17 appropriate to the groundwater has been returned, and

18 any threat to human health or the environment has been  
19 minimized, is that correct?

20 MR. KING: They will not be making a  
21 demonstration specifically on those three points.  
22 They will be making a demonstration relative to  
23 potential impacts on human health relative to, you  
24 know, groundwater consumption under the whole T.A.C.O.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

103

1 procedure.

2 We didn't see that this provision in the statute  
3 mandated that these three or four things, whatever,  
4 two things, be specifically set forth in the statute  
5 or in the regulations, if there was an appropriate  
6 methodology that was addressing these concerns. And  
7 that's what we think that the whole T.A.C.O. process  
8 is doing.

9 And again, this kind of -- thinking back through  
10 the T.A.C.O. process, you know, Tier 1 is the  
11 groundwater numbers out of 620, that's where they were  
12 taken from.

13 If you step up and you go to Tier 2, you know, if  
14 you look at 742.805, there's a list of seven things  
15 that you have to accomplish before you get that higher  
16 number. And again, you know, you can't look at these  
17 seven and say well, where does this exactly correspond  
18 to these two? It doesn't.

19 But the sum of them I think is addressing concerns



20 that were really envisioned by the legislature under  
21 4(a). You know, and again looking at the context of  
22 the legislation, you know, this appears in a section  
23 that's entitled risk based remediation objectives.  
24 That was really, you know, the intent of the title was

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

104

1 establishing a risk based system of remediation.

2 You know, we really have focused on developing a  
3 -- this risk based system and, you know, so these  
4 words are appearing, so we kind of have to kind of  
5 figure out what's the real sense of what the  
6 legislature wanted to have happen.

7 So that's kind of where we ended up.

8 MS. HENNESSEY: The statute does use the term  
9 "shall make this demonstration", which is generally  
10 interpreted to mean mandatory language. Is there  
11 anything in 472 that explicitly states that if you  
12 meet these requirements you are in fact demonstrating  
13 what's required under 585(d)(4)?

14 MR. KING: I don't think there's anything  
15 that specifically says that, not to my recollection.  
16 I was going to refer back to testimony I put together  
17 in 742 which I had talked about this issue, but I  
18 don't have it here.

19 MS. HENNESSEY: Okay, I think I understand.

20 MR. RAO: I just have one final  
21 clarification. Under Section 740.530(f) when you talk

22 about groundwater standards, you say the applicable  
23 groundwater standards are, under what program will  
24 they fall under? Are they under IGPA, the Groundwater

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

105

1 Protection Act?

2 MR. KING: What we were trying to do is  
3 specifically link the nature of the remediation  
4 requirements to what has developed under this program.  
5 And we used the term groundwater standards there so  
6 that, you know, that is the term that's used in 620.  
7 But we wanted to distinguish and say hey, if you're  
8 under this program, you're going to use the  
9 groundwater objectives that are developed under 742,  
10 instead of what's appearing in 620.

11 MR. RAO: So it's not related to the 620  
12 standards? See the reason I'm asking this, you know,  
13 when we went through the 620 I think there was a lot  
14 of testimony that was given about how the -- why we  
15 need those restoration standards, because I think the  
16 Agency had envisioned that these kinds of things would  
17 come up where you have standards, and they were  
18 different numerical standards. And I just wanted to  
19 know if you think there would be a problem if we say  
20 -- would be the applicable grounds with the  
21 restoration standards in 620?

22 MR. KING: What's causing us to try to  
23 carefully reflect on this is we don't want to -- we

24 don't want to end up with some kind of disconnect on

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

106

1 all this. We want to make sure that as best as  
2 possible when we make this this is a seamless kind of  
3 activity.

4 And if you put in applicable -- if you put in the  
5 word restoration between groundwater standards, we  
6 were trying to figure out what that then means for the  
7 other parts of 620. Does that mean there's some left  
8 over issue that has not been addressed?

9 MR. RAO: Can you take a look at it, and you  
10 don't have to --

11 MR. KING: Yeah, we can take a look at that.

12 MR. RAO: Thank you.

13 HEARING OFFICER HOOGASIAN: Dr. Girard.

14 DR. GIRARD: Mr. King, I have a question on  
15 740.530(g). Briefly could you tell me what the  
16 review, reporting and listing requirements which will  
17 not apply to a GMZ would be relative to 620?

18 MR. KING: Yeah, if you look -- what was  
19 causing us to look at this issue was the requirements  
20 in 620.250(c) where the most regimented requirement  
21 there is the notion of doing a review every five  
22 years, and the results being presented to the Agency  
23 in a written report. That's a specific reporting  
24 requirement there. And there are -- in the context of

1 that subsection there's some other review issues.

2 Also the other provision as to listing is what --  
3 is in 620.450(a)(5), we were just talking about that  
4 before, where it talked about a list of sites where  
5 you had groundwater restoration standards applicable  
6 to. So those would be the key provisions we were  
7 looking at in the context of this proposal.

8 DR. GIRARD: Thank you. One other question.  
9 Do you consider the designation of a GMZ to be public  
10 information or is it somehow privileged?

11 MR. KING: That would be public information.

12 DR. GIRARD: Thank you.

13 HEARING OFFICER HOOGASIAN: Anything further  
14 then? Mr. Dunham?

15 MR. DUNHAM: Mr. King, considering that  
16 Groundwater Management Zones under Part 740 are  
17 constituent specific or at least for a set of  
18 constituents, wouldn't it be possible to have multiple  
19 Groundwater Management Zones for perhaps widely  
20 disparate types of contaminants being cleaned up by  
21 one or multiple remedial applicants, maybe even  
22 simultaneously?

23 MR. KING: That's possible.

24 MR. DUNHAM: So one Groundwater Management

1 Zone might be closed out and another stay active  
2 within the same or overlapping space?

3 MR. KING: I think that's possible.

4 MR. DUNHAM: Thank you.

5 HEARING OFFICER HOOGASIAN: All right, then  
6 let's go off the record for a minute, please.

7 (Off the record discussion.)

8 HEARING OFFICER HOOGASIAN: Let's resume at  
9 2:15.

10 (A recess was taken for lunch.)

11 HEARING OFFICER HOOGASIAN: Why don't we get  
12 started. Why don't we go back on the record. Due to  
13 several comments that have been made to me about  
14 proceeding ahead with the prefiled testimony at this  
15 time, if no one has any objections I think we'll  
16 proceed with the prefiled testimony at this point and  
17 then we'll return to the three prefiled questions from  
18 the first hearing after we hear the prefiled  
19 testimony.

20 Does anyone have any objections at this time if we  
21 go ahead with that?

22 (No response.)

23 HEARING OFFICER HOOGASIAN: All right. Then  
24 why don't we proceed with the Metropolitan Water

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167



4 MR. DUNHAM: Then I would introduce Frederick  
5 Feldman and ask that he be sworn in.

6 (The witness was sworn.)

7 MR. DUNHAM: I ask that his testimony be  
8 admitted as if read. And did you want to make a brief  
9 statement?

10 MR. FELDMAN: Just very briefly in summary of  
11 the prefiled testimony, my name is Frederick Feldman,  
12 I am Head Assistant Attorney for the Metropolitan  
13 Water Reclamation District of Greater Chicago. I'm in  
14 charge of the Real Estate Division of the Law  
15 Department of the District. I have been such for 13  
16 years.

17 Our job is to manage all of the vacant real estate  
18 of Metropolitan Water Reclamation District. We  
19 administer all of the leases, easements and permits  
20 which the District issues with respect to lands that  
21 are not presently needed for its corporate purposes.

22 As such we're appearing before the Board today not  
23 so much as an enforcement agency. We're actively  
24 engaged in water pollution enforcement in the Chicago

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

111

1 area.

2 But we're coming to you today as a landlord and  
3 landowner and we believe that there is one interest  
4 that has not yet been addressed in the proposed  
5 regulations before this Board now, and that interest

6 is the interest of a property owner who is not a  
7 remediation applicant.

8 In fact we've already encountered one such  
9 situation which has created some problems for us, but  
10 we're working those out.

11 But as a solution to this absence, we have  
12 proposed three changes to the regulations which are  
13 noted in the attachment to my prefiled testimony.

14 The first change would add a subparagraph (d) to  
15 Section 740.220 which would define major modifications  
16 to a remediation plan, such major modifications being  
17 a triggering event which in our second change which is  
18 proposed for Section 740.225 would give the  
19 nonremediation applicant owner an opportunity to  
20 terminate the remediation agreement if major  
21 modifications were made to the remediation agreement  
22 after the owner had signed off initially.

23 Finally, we have also proposed that the non -- the  
24 nonremediation applicant property owner be provided

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

112

1 with a copy of the No Further Remediation Letter once  
2 it's ready to be issued. And then additionally to  
3 further protect the interests of the property owner,  
4 give that property owner the opportunity to appeal to  
5 the Board the issuance of that No Further Remediation  
6 Letter within 35 days of its issuance.

7 Basically that's the substance of our proposal to



8 the Board.

9 HEARING OFFICER HOOGASIAN: Does anyone have  
10 any brief questions for Mr. Feldman at this time? Mr.  
11 Rieser?

12 MR. RIESER: Mr. Feldman, would it not be  
13 possible for an owner in a situation of the District  
14 to come to some agreement with the remediation  
15 applicant at the time that you signed off on the  
16 remediation application as to how the remediation  
17 would go and what the discussions and relationship  
18 would be between the parties?

19 MR. FELDMAN: It's possible to do so, but I'm  
20 advised that there can be changes made in the  
21 remediation plan during the pendency of the  
22 remediation program, and it's my understanding that  
23 the way the regulations are worded now, the  
24 nonremediation applicant landowner would not be

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

113

1 apprised of any of those changes or those intervening  
2 changes.

3 MR. RIESER: And you feel that those changes,  
4 you wouldn't be able to have a contract that would  
5 allow you to become aware of those changes and put the  
6 responsibility on the remediation applicant to deal  
7 with you as an owner directly?

8 MR. FELDMAN: In an ideal situation, yes, you  
9 can contract and everything would be fine and

10 everybody would abide by their agreements and the  
11 remediation plan that was implemented would be the  
12 remediation plan that was agreed to.

13       However, in the event of a change, where a  
14 disagreement might arise enforcing a contractual  
15 obligation for example after the No Further  
16 Remediation Letter has issued, could present  
17 significant legal problems, and perhaps might create  
18 an estoppel if you were to try and enforce by contract  
19 the property owner's objections to the remediation  
20 agreement after the No Further Remediation Letter is  
21 issued.

22               MR. RIESER: Thank you.

23               HEARING OFFICER HOOGASIAN: Anything further  
24 than at this time?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS       217-525-6167

114

1               MR. RAO: Could I just have a clarification?

2               HEARING OFFICER HOOGASIAN: Sure, please go  
3 ahead.

4               MR. RAO: Mr. Feldman, in your proposed  
5 language you say that, you know, there has to be some  
6 communication to the owner when the RA and owner are  
7 different parties.

8               Whose responsibility is it to communicate with the  
9 owner, is it the Agency or is it the RA?

10               MR. FELDMAN: I would say it's the Agency.  
11 The Agency is administering the program, they're the

12 ones -- it is the one that is issuing all of the  
13 documentation, so therefore I would say it's the  
14 Agency's responsibility.

15 MR. RAO: Thank you.

16 HEARING OFFICER HOOGASIAN: Anything further  
17 at this time?

18 (No response.)

19 HEARING OFFICER HOOGASIAN: All right. Then  
20 I know that the Agency has commentary on this, but I  
21 believe it was previously agreed that we would take  
22 that commentary at the end of everyone's prefiled  
23 testimony if that's fine. Does anyone have any  
24 objection to that?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

115

1 (No response.)

2 HEARING OFFICER HOOGASIAN: All right, then  
3 let's proceed. Mr. Dunham --

4 MR. DUNHAM: Mr. Feldman would like to not  
5 stay till tomorrow, so if he could be excused I'd  
6 appreciate that.

7 HEARING OFFICER HOOGASIAN: That's fine. As  
8 long as is it possible that you, Mr. Dunham, will be  
9 here tomorrow in order to question the Agency on any  
10 commentary they might have on Mr. Feldman's testimony?

11 MR. DUNHAM: Yes, I will be here.

12 MR. FELDMAN: Thank you.

13 HEARING OFFICER HOOGASIAN: All right, we

14 have no problem with that. Thank you for your  
15 testimony.

16 Let's proceed then to Gardner, Carton & Douglas's  
17 prefiled testimony. Mr. Watson.

18 MR. WATSON: Thank you. My name is John  
19 Watson, I'm an attorney at Gardner, Carton & Douglas.  
20 I'm here on behalf of a number of parties, including  
21 B.F. Goodrich Company, Commonwealth Edison Company,  
22 Hydrosol, Inc., INX International Ink Company,  
23 Northern Illinois Gas Company, William Wrigley, Jr.  
24 Company, and Woodward Governor Company.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

116

1 Today we're going to be presenting the testimony  
2 of two witnesses, one being myself, and the other  
3 being Linda Huff, president of Huff & Huff. I think I  
4 will begin with my testimony.

5 Let me represent to the Board that Exhibit Number  
6 9 is a copy of my testimony. It includes six pages  
7 including an Attachment 1, Attachment Number 1 being  
8 the Addendum Number 1 to the Superfund Memorandum of  
9 Agreement between the Illinois Environmental  
10 Protection Agency and the United States Environmental  
11 Protection Agency Region V.

12 I would like to represent for the Board that this  
13 is a true and accurate copy of the testimony that I  
14 prepared for this proceeding and I'd like to ask that  
15 it be admitted into the record.

16 HEARING OFFICER HOOGASIAN: If there are no  
17 objections at this time I will enter the testimony of  
18 Gardner, Carton & Douglas into the record as Exhibit  
19 Number 9. Are there any objections?

20 (No response.)

21 HEARING OFFICER HOOGASIAN: All right. Then  
22 this exhibit has been marked as Exhibit Number 9 and  
23 has been admitted.

24 (Agency Exhibit 9 was admitted.)

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

117

1 HEARING OFFICER HOOGASIAN: Mr. Watson, could  
2 you please be sworn in by the court reporter.

3 (The witness was sworn.)

4 MR. WATSON: I would just like to take a  
5 couple minutes and summarize briefly in general terms  
6 the testimony. I guess I would like to start off by  
7 saying that we certainly appreciate the opportunity to  
8 participate in these proceedings. We would like to  
9 acknowledge the tremendous efforts of both Illinois  
10 EPA and the Site Remediation Advisory Committee in  
11 developing these regulations.

12 It's certainly a significant undertaking and in  
13 general terms we certainly support the program, the  
14 intent behind the program, and the way in which we  
15 believe the regulations have been drafted to implement  
16 the legislative intent.

17 As we understand it what the Site Remediation

18 Program rules do is to establish a risk based system  
19 for the cleanup of contaminated properties in the  
20 state of Illinois and, you know, we believe that it is  
21 critical for cleanups of contaminated property to be  
22 remediated or the cleanup of contaminated properties  
23 to be addressed consistent with the risk posed by the  
24 uses of that property.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

118

1 We also think that in this case the success of  
2 this program is really dependent upon the broad  
3 application of the program to sites in Illinois.

4 We believe that it is critically important for  
5 participants in this program to be assured that the  
6 cleanups that they do undertake are consistent with  
7 the requirements of the Illinois Environmental  
8 Protection Agency and, you know, specifically, you  
9 know, not only generally in terms of addressing  
10 voluntary cleanups, but also that the cleanups be  
11 deemed by the Illinois Environmental Protection Agency  
12 to be consistent with what is required for the  
13 remediation of property under the -- in the  
14 enforcement context and specifically under the  
15 Illinois Superfund Program.

16 While we also understand that there are certain  
17 limits associated with having some assurance that  
18 these remediation projects will be approved by the  
19 federal government, we also believe that that is a

20 critical element of this program as well, and that we  
21 need to -- the Site Remediation Program to the extent  
22 that it can needs to provide assurances that parties  
23 that are remediating sites can take comfort in the  
24 fact that USEPA has recognized the appropriateness and

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

119

1 sufficiency of the regulations and the adequacy of the  
2 risk based remedies that are allowed under the  
3 program.

4 And we believe, I mean we believe that the  
5 existence of the memorandum of agreement with Illinois  
6 EPA and USEPA acknowledges that. We understand that  
7 that MOA applies in this program without revisions,  
8 similarly as it had to the previous prenotice program.

9 I believe through the hearing and the questioning  
10 from Illinois EPA that we are comfortable with the  
11 representations that the state has made with respect  
12 to the -- both the intent of the program being focused  
13 on risks and reasonably anticipated uses of property,  
14 and with respect to the Agency's representations  
15 regarding the consistency of the cleanups with the  
16 Illinois Superfund Program, that this Site Remediation  
17 Program does in fact accomplish the goals of the  
18 legislation and the concerns that private parties have  
19 with respect to proceeding in the program.

20 And while we have some specific comments to  
21 specific provisions that we believe need further

22 revision to clarify the program and make the  
23 provisions more manageable, we certainly support the  
24 legislation, and I will get into now if there are --

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

120

1 well, perhaps let me ask before I ask Linda Huff to  
2 talk in more specifics about her testimony, I would be  
3 willing to accept some questions or comments if that's  
4 appropriate.

5 HEARING OFFICER HOOGASIAN: Does anyone have  
6 any questions at this time?

7 (No response.)

8 HEARING OFFICER HOOGASIAN: Seeing none, you  
9 may proceed. Miss Huff.

10 (The witness was sworn.)

11 MR. WATSON: Miss Huff, I'm handing you what  
12 has been marked as Exhibit Number 10 in the R97-11  
13 proceedings. Would you take a look at that, please?

14 Let me just state for the record that the document  
15 is entitled Testimony of Linda Huff. It includes  
16 pages 1 through 17 of testimony, and it also includes  
17 Attachment 1 which is the curriculum vitae of Linda L.  
18 Huff, and Attachment 2 which summarizes Miss Huff's  
19 risk assessment experience.

20 Miss Huff, let me ask you to review that if you  
21 would. Is this a true and correct copy of the  
22 testimony that was prepared for the R97-11  
23 proceedings?



24 MS. HUFF: Yes, it is.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

121

1 MR. WATSON: And with that I would ask that  
2 this be admitted into evidence.

3 HEARING OFFICER HOOGASIAN: Does anyone have  
4 any objection to admitting testimony of Linda L. Huff  
5 into evidence as Exhibit Number 10?

6 (No response.)

7 HEARING OFFICER HOOGASIAN: Seeing that there  
8 are no objections, this will be admitted as Exhibit  
9 Number 10.

10 (Agency Exhibit 10 was admitted.)

11 HEARING OFFICER HOOGASIAN: Please proceed.

12 MS. HUFF: Good afternoon. My name's Linda  
13 Huff and I'm currently president of Huff & Huff, and  
14 it is a pleasure to be here today and to provide some  
15 comments on the general rule making before the Board.

16 Again I'd just like to reiterate the efforts that  
17 have gone into this rule making by the Agency and by  
18 all parties has really been very exceptional, and what  
19 we're trying to do is to provide some particular areas  
20 where maybe clarification or enhancement would be  
21 beneficial.

22 So what I'd like to do is just point out a couple  
23 of the issues that are important for review and where  
24 perhaps we haven't reached consensus based on some of

1 the comments from the Agency or testimony that's been  
2 given.

3 I think that there were three definitions that we  
4 looked at. Recognized environmental condition is the  
5 first definition, and the reason that we provided a  
6 proposed change to this is to make it consistent with  
7 ASTM. ASTM has been incorporated by reference into  
8 this proceeding, and in fact the definition that we  
9 prepared is one that is consistent with that document.

10 As you will have people using that particular  
11 document in preparing Phase I's, it does have a  
12 specific connotation that goes with that, and  
13 recognizing that that definition has certain things  
14 that go with it, it's important that the people who  
15 were using those terms know that it is consistent with  
16 ASTM.

17 And the Agency's definition is slightly different,  
18 and granted they have reasons for that variance, but I  
19 think it's important that either -- and the use of  
20 that term in the rule making should be looked at  
21 carefully to be sure that you want the ASTM definition  
22 or that you're actually going to go with the EPA, the  
23 Agency version. Because they do offer different  
24 things.

1 I think the -- from an environmental professional  
2 point of view, the main difference comes in the fact  
3 that it's a broader definition as the Agency has  
4 proposed it, because it takes away some of the ability  
5 to eliminate chemicals that would not be necessarily  
6 related to a particular necessarily threat of release  
7 at some level that would be required to be evaluated  
8 under a Tier 1 analysis. That's what my thinking  
9 would be in terms of the de minimis approach.

10 So that's one of the definitions that I think is  
11 still an important definition in the rule making.

12 The Agency had already commented on remediation  
13 site, which was the second definition, and the third  
14 one was residential property.

15 And yes, there was a word that was -- playgrounds  
16 is supposed to be in this definition on page six, and  
17 it was an -- it was inadvertently omitted, so I did  
18 want to make that correction.

19 MR. WATSON: Yes, just let me make it clear  
20 for the record that in reviewing -- well, in reviewing  
21 the draft of this originally or the final copy we did  
22 notice that playgrounds had been inadvertently  
23 omitted. It was not our intent to do that. Certainly  
24 the intent is to include that word in the definition.

1           And I think the Agency has recognized that, but,  
2   you know, for purposes of this proceeding we certainly  
3   meant to include the word playground in this -- in our  
4   proposal.

5           MS. HUFF: Now the actual intent was to make  
6   this definition clearer, but I don't know that it  
7   achieved that purpose. So I think that that's why the  
8   wording change in here was proposed as something to  
9   become more specific.

10          There are other sections that -- where some  
11   proposed language was included, and I think that the  
12   Agency has responded to a couple of those changes as  
13   well.

14          So the next one that I would just mention in terms  
15   of highlight would be Section 740.310 under request  
16   for payment. I think that the modification that was  
17   proposed was really simply to just -- not to require  
18   an onerous burden upon the Agency, but to provide  
19   maybe a little bit of additional information, such as  
20   names, or a little bit more of an itemization of  
21   expenses that incurred while the bills were submitted,  
22   kind of like a consultant.

23          MR. WATSON: And again for purposes of the  
24   record again what we're talking about here is the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

125

1   proposal requiring the Agency to submit documentation  
2   of costs associated with their oversight and other

3 services along with their written request for payment.

4 MS. HUFF: In Section 740.415, the site  
5 investigation section, there had been discussion about  
6 sampling methods, and the proposed rules basically  
7 acknowledge sampling activities but there's really no  
8 guidance provided as to what might be an acceptable  
9 methodology.

10 And we have proposed some background documents  
11 from the U.S. Environmental Protection Agency that we  
12 thought might be helpful as guidance.

13 I would not like to see them incorporated by  
14 reference because of the concern I have is that  
15 sampling methods are always changing, and in fact  
16 there are several statements even in the document I  
17 referenced that suggested these methods are being  
18 constantly updated and they expected more information  
19 on the accuracy of some of these methods to be  
20 available shortly.

21 And if we incorporate it by reference, then we  
22 take away from that ability to add to a continuing  
23 base of sampling methodologies. So it was offered as  
24 something that would show that the -- that this broad

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

126

1 range of sampling methods would be approved by the  
2 Agency, and I think that they offered some additional  
3 information on this section which did include one  
4 other phrase which would have required their approval

5 of a method.

6 And I think that maybe the point would be is that  
7 you want a method that is technologically acceptable  
8 for the site conditions, and maybe there needs to be  
9 some qualification like that which is actually built  
10 into some of the documents that I referenced where  
11 they talk about the kinds of limitations and methods  
12 based on site geology and what you're using a  
13 methodology for, and that's why I included them as a  
14 good source document. But I think that that would be  
15 -- that idea of technically acceptable is an important  
16 idea, too.

17 Then in the 740.420 under comprehensive site  
18 investigation, there had been some discussion as to  
19 the use of a Phase I report and for determining the  
20 parameters that should be analyzed for in Phase II and  
21 in subsequent site characterization work.

22 And our proposal had been to add some language  
23 referring back to that Phase I report, recognizing  
24 that the first foundation, it's the first document

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

127

1 that you would have that really describes the site,  
2 and from that you build to identify parameters of  
3 concern in Phase II.

4 So that was our purpose behind including it was  
5 that to us that's the first document that you would be  
6 using in developing your site characterization.

7           And I think that on -- the next section there  
8 maybe has been some confusion in 740.425 and 435,  
9 which also relates to site investigation reports.  
10 This is one where we had actually proposed adding some  
11 information about not just comparing concentrations of  
12 contaminants of concern with Tier 1 objectives, but  
13 also maybe providing a statement that would allow --  
14 which would mention Tier 2 or Tier 3.

15           And really the rationale behind it is that I think  
16 the mind set of the regulations is really important,  
17 and that is that Tier 1 is a basic screening tool,  
18 it's your most conservative level, it's a good tool to  
19 be used to identify problems that need to be carried  
20 into a more sophisticated or detailed analysis.

21           But always our goal is to maintain and protect  
22 human health and the environment, and to set the same  
23 risk levels so that Tier 2 gives us the same  
24 assurances that a Tier 1 number would.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

128

1           And the concern is that the people that -- who  
2 come to these regulations and pull something out of  
3 them get this mind set that Tier 1 is the best. And I  
4 think it's to offset that kind of mentality, that Tier  
5 1 is a beginning point, but it's not an end point.  
6 And I think that that's the -- that's what we were  
7 trying to develop in this particular section was some  
8 of that idea.

9 Not to say that Tier 1 is wrong or you're not  
10 going to do that, but it's a first step, and I think  
11 that's what we were trying to accomplish, but with the  
12 addition in this particular section. So it's more  
13 from a philosophy point of view in the sense of where  
14 this whole program is going. Maybe that makes more  
15 sense now.

16 I think the last section that I would just mention  
17 is 740.625, the voidance of the No Further Remediation  
18 Letter. And in this particular section there is  
19 discussion as to what it would take to void the NFR  
20 letter.

21 And one of the additions that we wanted to make  
22 was to say that -- to add to the section where it  
23 talks about posing a threat to human health or the  
24 environment was really to identify it as determined

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

129

1 under 35 Illinois Administrative Code 742. So that if  
2 we're going to void our letter we will use the same  
3 process that we used to first get to that point.

4 And it would seem to me that 742 has everything  
5 built into it that we would want to use to evaluate  
6 whether that letter should -- whether a threat exists.  
7 And it just seemed from a consistency point of view  
8 that this would be a natural addition, because 742 has  
9 been based on protecting human health and the  
10 environment.



11           So to us that was just a clarification that that's  
12 indeed the appropriate level that we would want to go  
13 through, especially at an important time where we  
14 would be talking about voiding a No Further Action  
15 Letter.

16           So those are the highlights of my comments today.  
17 Thank you.

18                   HEARING OFFICER HOOGASIAN: Does anyone have  
19 any questions at this time?

20                   MR. RIESER: I have a couple.

21                   HEARING OFFICER HOOGASIAN: Mr. Rieser.

22                   MR. RIESER: With respect to your change to  
23 740.120, the addition of the de minimis conditions,  
24 what type of factors would a consultant use in making

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

130

1 this type of determination?

2                   MS. HUFF: For a de minimis condition?

3                   MR. RIESER: Yes.

4                   MS. HUFF: You would look at the -- for  
5 example the quantity of a chemical that was used,  
6 where it was stored, the history of the storage on the  
7 site in a virgin or a waste condition, was there a  
8 point where there could be a release.

9                   So you're taking into account factors that show  
10 you that this does not have the potential to be a  
11 release to the groundwater or the soil.

12                   MR. RIESER: Okay, thank you.

13 My other question was on 740.120, and I think the  
14 concern -- is it your position that this language is  
15 not intended to expand the definition of residential  
16 property?

17 MS. HUFF: No, it's not to expand the  
18 definition. It was to narrow it actually.

19 MR. RIESER: Why was there an exclusion of  
20 children, which I guess it was testified to were a  
21 special category of risk that that item was focused  
22 on?

23 MS. HUFF: Well, I think that it wasn't that  
24 it was to eliminate children, but actually to look at

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

131

1 the facilities themselves where these children would  
2 be playing, dwelling, using facilities.

3 MR. WATSON: Yeah, I mean to clarify I will  
4 say that that probably -- that is a mistake as well  
5 with respect to this is that there was never -- it was  
6 always the intention to maintain the focus on or the  
7 concept of risk to children in this definition. But  
8 that was -- so that was erroneously omitted as well  
9 from this provision.

10 MR. RIESER: So by using language you chose  
11 you were getting away from the opportunity to be  
12 exposed language more to the pathway language which  
13 the rest of the regulation tends to use.

14 MS. HUFF: Correct.

15 MR. RIESER: On 740.425 would it fairly  
16 summarize your testimony by saying there's no question  
17 that analytically you have to compare what you find to  
18 the Tier 1 values, but you just don't want it in the  
19 report because that would focus everybody's efforts on  
20 whether Tier 1 values were achieved at that site?

21 MS. HUFF: I think you would have to have  
22 Tier 1 in the report, but as I said, it would not be  
23 the end point necessarily, that you would go on to  
24 evaluate. So I think you would have to have it in

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

132

1 there, it's just that in addition to that, you would  
2 go farther.

3 MR. RIESER: On 620(c), this was not one of  
4 the items that you talked about, this is on page 15 of  
5 your testimony, what's the purpose of the addition  
6 that is proposed?

7 MS. HUFF: That relates to the current owner,  
8 and this obviously -- that addition was based on  
9 testimony that was presented in the first hearing by  
10 the Agency. But it did not appear in that form  
11 anywhere in the regulations. So we're basically  
12 adding it as a confirmation in our further detailing  
13 that particular requirement.

14 MR. RIESER: Okay, and the requirement is  
15 that the responsibilities under a -- responsibilities  
16 to use a property consistent with the terms of an NFR

17 letter can be transferred to subsequent landowners, is  
18 that correct?

19 MS. HUFF: Correct.

20 MR. RIESER: Okay, and it wasn't your intent  
21 to say that the owner now as opposed to a tenant or  
22 the current owner as opposed to the -- the current  
23 owner as opposed to future owners. Would maintain  
24 that responsibility, is that correct?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

133

1 MS. HUFF: Correct.

2 MR. RIESER: Thank you, I have nothing  
3 further.

4 HEARING OFFICER HOOGASIAN: Does anyone else  
5 have anything further?

6 (No response.)

7 HEARING OFFICER HOOGASIAN: I just have a  
8 quick question. On page four of your testimony, Miss  
9 Huff, in the new language that you have added in, I  
10 believe there's a small typo where you wrote "the term  
11 and not intended", I think it's supposed to be "is not  
12 intended"?

13 MS. HUFF: Oh, the term is not intended, yes.

14 HEARING OFFICER HOOGASIAN: Okay, I just  
15 wanted to make that correction.

16 MS. HUFF: Thank you.

17 HEARING OFFICER HOOGASIAN: Are there any  
18 further points?

19 (No response.)

20 HEARING OFFICER HOOGASIAN: All right, then  
21 thank you very much for your testimony.

22 MR. WATSON: Thank you.

23 MS. HUFF: Thanks.

24 HEARING OFFICER HOOGASIAN: Let's proceed

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

134

1 with the third prefiled testimony, the Site  
2 Remediation Advisory Committee. Mr. Muller and Mr.  
3 Walton.

4 MS. ROSEN: Could we have these marked as  
5 exhibits?

6 HEARING OFFICER HOOGASIAN: Sure.

7 MS. ROSEN: Good afternoon, I'm Whitney Rosen  
8 from the Illinois Environmental Regulatory Group.  
9 With me today are Randy Muller and Harry Walton who  
10 will be presenting testimony on behalf of the Site  
11 Remediation Advisory Committee.

12 I think that we'll begin with Mr. Muller.

13 (The witnesses were sworn.)

14 MS. ROSEN: Mr. Muller, I'm going to hand you  
15 a document which has been marked as Exhibit Number 11.  
16 Are you familiar with that document?

17 MR. MULLER: Yes, I am.

18 MS. ROSEN: Could you identify it for the  
19 record, please?

20 MR. MULLER: Basically this is a written

21 transcript of my testimony that I'm going to provide  
22 to the Board.

23 MS. ROSEN: And it's a true and accurate copy  
24 of that which was submitted?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

135

1 MR. MULLER: Yes, sir, it is.

2 MS. ROSEN: Thank you. This can be entered  
3 as Exhibit Number 11, correct?

4 HEARING OFFICER HOOGASIAN: Are there any  
5 objections to admitting the testimony of Randy Muller  
6 as Exhibit Number 11?

7 (No response.)

8 HEARING OFFICER HOOGASIAN: Seeing none, I  
9 will enter this as Exhibit Number 11 and you may  
10 proceed.

11 (Agency Exhibit Number 11 was admitted.)

12 MR. MULLER: As note mid name's Randy Muller,  
13 I'm vice president of Environmental Services for the  
14 Bank of America, also here as an Illinois Bankers  
15 Association representative to the Site Remediation  
16 Advisory Committee.

17 I think the intent of having me here today is to  
18 clarify the issue as to whether or not the lending  
19 community is going to come to rely on No Further  
20 Remediation Letters as a means of absorbing all  
21 concerns we may have with all Phase I's, not only  
22 those with concerns but those with either no concerns

23 or fairly insignificant concerns.

24 There's actually a number of issues to discourage

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

136

1 lenders towards that practice. The first is  
2 liability. Liability has long been a question with  
3 lenders going back to Fleet Factors, U.S. versus  
4 Mirably, and a number of other cases.

5 However, just given changes in business practices  
6 over a number of years, we've modified our procedures  
7 and policies as an industry to really prohibit  
8 liability in many instances.

9 The real aspects of environmental due diligence  
10 for a bank or any lending institution or secured  
11 creditor goes to valuation. So that aspect of my  
12 participation in the Site Remediation Advisory  
13 Committee has indicated that No Further Remediation  
14 Letter really offers us no benefit to this. The  
15 letter is meant to provide a release from liability  
16 and really gives us no provision as to further  
17 understand the valuation of the property.

18 The other aspect is -- or one of the other aspects  
19 is that liability is not really a concern to a bank on  
20 a prelending aspect. We really don't get into  
21 possible liability until such time as we consider  
22 foreclosure on a property. Much of this has been  
23 resolved in the recent passage on federal legislation  
24 of the Asset Conservation Lender Liability and Deposit

1 Insurance Protection Act of 1996. Gary, you will  
2 provide an acronym for that, correct?

3 But therefore, the thing that really prohibits us  
4 most wholeheartedly is the simple nature of a private  
5 business transaction. Given the increasing  
6 competitive nature and the availability of funds in  
7 many instances I'm forced to opine on environmental  
8 issues often in as little as two weeks.

9 You know, as much as on a number of more  
10 significant issues I've dealt with folks like Gary and  
11 Bill Childs and folks at the Agency for me to contact  
12 them whenever every Phase I comes across my desk  
13 whereby they have up to 60 days to give me an opinion,  
14 simply would kill the real estate market.

15 We don't have the opportunity to do that, and if  
16 we wished to participate in the advancement of capital  
17 in this economy, it's nothing we can really consider.

18 Some other things that I think that have a need to  
19 be brought up, too, is to the extent that we can rely  
20 on No Further Remediation Letters going forward. You  
21 know, will we wholeheartedly accept them as  
22 alleviation of our concerns.

23 I think a lot of that goes to both the currency of  
24 the letter and the use of the property. If I'm given



1 a No Further Remediation Letter that's basically three  
2 months old and in my professional opinion addresses  
3 the concerns consistent with the usage of that  
4 property, I may well rely on it.

5       However, if the letter is two, three, four years  
6 old, there's been what we would designate an  
7 environment sense of usage of the property continuing  
8 beyond that point, chances are we're going to require  
9 further remediation.

10       You know the one thing here that you know as I  
11 alluded to earlier, sort of being the lack of the true  
12 environmental professional here in a gathering today,  
13 is there's no real substitute for an informed  
14 consumer.

15       It's my obligation and my recognized obligation on  
16 behalf of the lending community to recognize that a No  
17 Further Remediation Letter only goes to a particular  
18 scope, a portion of the property, or particular  
19 constituents, and so therefore I basically accept the  
20 burden of understanding that as far as my lending  
21 process going forwards.

22       And essentially that's simply about what all I  
23 have to say today. You know, essentially I guess what  
24 I'm saying is that closure has to be evaluated in any

1 sense, whether it be a no further remediation letter  
2 or Form Y letter. And to further sort of conclude the  
3 aspect of the concern whether or not these things are  
4 going to come forward, there are a lot of deals right  
5 now that transact without any type of Illinois  
6 Environmental Protection Agency involvement. Fuel oil  
7 tanks being large, unregulated tanks that are on a  
8 property, that we simply have to make an informed  
9 business decision every day as to what the potential  
10 impact may be to the property value and help the  
11 environment and make the transaction or choose to do  
12 the transaction on that basis.

13 HEARING OFFICER HOOGASIAN: Does anyone have  
14 any questions for Mr. Muller at this time? Mr.  
15 Feinen.

16 MR. FEINEN: Those opinions that you just  
17 stated about the No Further Remediation Letter, do  
18 they differ when you're talking about a focused No  
19 Further Remediation Letter and a general No Further  
20 Remediation Letter?

21 MR. MULLER: The aspects of my ability to  
22 rely on them?

23 MR. FEINEN: Yes.

24 MR. MULLER: Well, once it goes to usage, for

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

140

1 instance I often see particularly in the Chicago area  
2 a lot of change of usage whereby a property at one

3 time was a foundry and now maybe is going to be used  
4 for something else. If I have a No Further  
5 Remediation Letter that basically addresses heavy  
6 metals and other aspects, I'm going to feel  
7 comfortable to rely on that, but I know it's not going  
8 to give me any assurance relative to chlorinated  
9 solvents on the property.

10 So I know one aspect of it's been addressed, but I  
11 have to look for the further usage of that particular  
12 constituent after that date and what other additional  
13 concerns may have been introduced subsequent to that.

14 MR. WIGHT: I have a question, if you're  
15 satisfied with that answer. In the preloading  
16 scenario, which it was my understanding was the  
17 concern of Board Member Meyer in the first hearing,  
18 where I'll try to paraphrase at least what I  
19 understood his concern to be, was that lenders would  
20 want to rely on NFR letters prior to making loans.

21 And what I understood you to say, is it correct  
22 that in the preloading scenario you would not be  
23 relying on the NFR letter issued by this program to  
24 help you make that decision?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

141

1 MR. MULLER: In all instances or just simply  
2 in instances of -- I think my understanding was where  
3 there are basically insignificant or no issues on the  
4 property. I mean that's the point of differentiation.

5 MR. WIGHT: Yes.

6 MR. MULLER: To the extent that there are  
7 still deals that come across my desk, you know, things  
8 that I know should be in a voluntary cleanup program,  
9 or otherwise are in a voluntarily cleanup program I  
10 mean I defer to your opinion as to telling me the  
11 extent of impact to help the health and environment.

12 However, if I'm looking at de minimis property  
13 that's never been developed, I have a Phase I on my  
14 desk that shows no historic use of the property, I  
15 really find no need to go for No Further Remediation  
16 Letter on that piece of property.

17 MR. WIGHT: Even if it's a property that has  
18 been developed but simply hasn't become involved in  
19 this program, and yet you're in a situation where  
20 you're being asked to make a decision whether we go  
21 forward with the loan, would you then rely on an  
22 independent Phase I and Phase II type assessment, or  
23 would you prefer that that property make contact with  
24 the Agency and go through this program before you made

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

142

1 your decision on the loan?

2 MR. MULLER: Well, typically at the basis of  
3 the Phase I we would take a look at to what the  
4 potential concerns are, and if there are identifiable  
5 particular concerns, you know, albeit recognizable  
6 environment conditions under the ASTM conditions, soil

7 stress, what have you, we would probably require Phase  
8 II at that point, and on the basis of that rely on the  
9 Phase II as to determine whether or not there was  
10 regulatory reporting obligation, you know, 620 funds  
11 from water standards and therefore should be placed in  
12 the program.

13 If there really was an indication of that, of such  
14 a project I dealt with the other day involved removal  
15 of a tank, they had done sampling in accordance with  
16 that that demonstrated all levels of benzene were  
17 below reporting requirements, we chose to do the loan,  
18 and there really wasn't any need for IEPA involvement  
19 at that point.

20 MR. WIGHT: Okay.

21 HEARING OFFICER HOOGASIAN: Are there any  
22 further questions for Mr. Muller?

23 (No response.)

24 HEARING OFFICER HOOGASIAN: Seeing none then

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

143

1 you may proceed.

2 MS. ROSEN: Okay. Mr. Walton, I'm handing  
3 you a document which has been marked as Exhibit Number  
4 12 in the R97-11 proceeding. Are you familiar with  
5 that document?

6 MR. WALTON: Yes.

7 MS. ROSEN: And could you identify it to the  
8 Board.

9 MR. WALTON: Yes, this is my prefiled  
10 testimony in regards to 97-11.

11 MS. ROSEN: Is it a true and accurate copy of  
12 what was submitted for the Board in this proceeding?

13 MR. WALTON: Yes, it is.

14 MS. ROSEN: Okay, I'll ask that this be  
15 admitted as Exhibit 12.

16 HEARING OFFICER HOOGASIAN: Are there any  
17 objections to the testimony of Harry R. Walton being  
18 admitted as Exhibit Number 12?

19 (No response.)

20 HEARING OFFICER HOOGASIAN: Seeing none this  
21 will be admitted.

22 (Agency Exhibit Number 12 was admitted.)

23 HEARING OFFICER HOOGASIAN: Please proceed.

24 MS. ROSEN: Thank you.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

144

1 MR. WALTON: I'd like to take this  
2 opportunity to present somewhat of a capsule view of  
3 what occurred in the last 18, 19 months. Many of the  
4 issues that have been developed in this hearing were  
5 challenged significantly in our interaction with the  
6 Advisory Committee and the Agency, and we also had the  
7 opportunity to -- at the Advisory Committee to bring  
8 more people involved in the process in to take their  
9 counsel, their experience, their insight, and try to  
10 develop an approach that is a consensus with an

11 understanding that we're all embarking on new ground,  
12 we're trying to change the remedial culture in  
13 Illinois.

14 The Brownfield legislation goes much further than  
15 Brownfield. It's the process is to fix problems that  
16 are identified under other programs. The 740 is a  
17 program in itself that used to be prenotice or  
18 voluntary programs.

19 We have a lot of history out there of good and bad  
20 experiences. We try to bring these together in a  
21 consensus position.

22 During this activity we went from very  
23 prescriptive standards, and the one we've dealt with a  
24 lot today and previous hearings is the term recognized

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

145

1 environmental conditions. And the -- the engineering  
2 council that are members of our group, that was a term  
3 that they were comfortable with. That was a term that  
4 they had an acceptance of, they thought that they  
5 could make the determinations, and provide the best  
6 professional judgments.

7 The main changes of this philosophy is use. We go  
8 back to an earlier time in the development of the  
9 groundwater standards, and I was involved in that, and  
10 in that regard groundwater standards were developed  
11 that all groundwater was to be used and had to be  
12 protected for use.

13           And it was stated in that rule making that they  
14 were now remedial objectives. Now we have a program  
15 that develops standards based upon more appropriate  
16 definition of the site based on the use at that site.

17           In some cases the product of the 740 and 742  
18 process not only offer a more equivalent level of  
19 protection in regard to 620, but they can be more  
20 protective in some cases.

21           The Advisory Committee are the same members and  
22 same group of people that were involved in the 732  
23 remedial programs and developed remedial objectives in  
24 that program. And we had a clear understanding of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

146

1    where the issues that must be addressed, and some of  
2    those are the level of protection, where do you  
3    measure this level of protection, and the ability to  
4    move that point.

5           We offered many views from the regulatory, our  
6    group that we thought were fair and equitable, the  
7    Agency did the same. We came back and we challenged  
8    those from 360, and we made many compromises.

9           We attempted to make very prescriptive regulations  
10   and then we tested these regulations time and time  
11   again. We found many cases where they wouldn't work  
12   and we came back to a general type of criteria.

13           We had -- the more prescriptive we tried to make  
14   the regulations, the less understanding and the more



15 controversy there was.

16       Throughout this process there's also a clear  
17 message that the remedial applicant is in control at  
18 his destiny. You have the focused investigation, and  
19 the focused investigation you don't go to the ASTM  
20 methodology. You define what the nature of your  
21 release is. The nature of the release also dictates  
22 the nature of your investigation, the breadth of your  
23 investigation, what constituents you look at, what  
24 pathways you look at.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS       217-525-6167

147

1       Now, that was for the focus. We've had a lot of  
2 discussion on the comprehensive release. In this case  
3 there it could be very prescriptive. You're going to  
4 have to go through a lot of activities to answer a lot  
5 of questions.

6       A recognized environmental condition is a term,  
7 it's not something that anybody's really thinking  
8 about in the right context. When I look at a  
9 recognized environmental condition I have a site, it's  
10 got a gas manufacturing plant on it. That's a  
11 recognized environmental condition. I may also have  
12 storage of PCB's. That's a recognized environmental  
13 condition.

14       When I go through my process, I'm doing  
15 elimination, I'll come down to understand what that  
16 type presents, and based upon that I'll know what kind

17 of constituents I need to look at. As a remedial  
18 applicant I'll control what I want through the nature  
19 of my investigation, the scope of my analysis, and  
20 such as that.

21 We keep coming back to the 620 standards. The  
22 legislative intent was very clear that we're going to  
23 have standards for groundwater that are different from  
24 620, that are equally protective based upon the use of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

148

1 the groundwater.

2 The protection afforded to these groundwaters is  
3 based upon better information than one would utilize  
4 in 620. You use site conditions, you analyze the  
5 receptors at risk, and the standards are in a sense  
6 more appropriate. In many regards the groundwater  
7 will not be used or is not used.

8 On behalf of Illinois Power, and there again we've  
9 been involved in many cleanup processes and many  
10 programs under federal, state, what we have here is a  
11 program that will address problems, not perceptual  
12 problems. And one of my favorites, we're not going  
13 down to the last molecule. Typically in groundwater  
14 if you can detect it it shouldn't there be.

15 If one had a coal tar site under the property and  
16 there are benzene concerns, that would be a big  
17 problem in your mind. But if you had raw petroleum  
18 products there from a natural situation, the same

19 place, the same constituents of concern, it wouldn't  
20 be a problem.

21 So what I'm offering is if something's there, the  
22 mere presence of it is not a problem unless there's a  
23 complete risk of pathway. You've got a source, a  
24 pathway and a receptor.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

149

1 What we're trying to do is change the remedial  
2 culture in Illinois to understand this. There has to  
3 be a problem that has to be fixed, and you only fix  
4 problems.

5 HEARING OFFICER HOOGASIAN: Is there anything  
6 further, any questions anyone has for Mr. Walton?

7 MS. HENNESSEY: I have just one quick  
8 question. You discussed, Mr. Walton, how the Site  
9 Remediation Advisory Committee attempted to develop a  
10 prescriptive approach and then found that that did not  
11 work.

12 I just wondered if you had any problems with the  
13 revisions that the Agency has set forth today on  
14 740.510(b) and 515(b) in which they've attempted to  
15 define what they mean by the word appropriate or  
16 adequate. In effect they are selecting a somewhat  
17 more prescriptive approach to try to provide more  
18 guidance to the regulated community.

19 MS. ROSEN: What were the sections again, I'm  
20 sorry?

21 MS. HENNESSEY: 510(b) and then 515(b)(6)(A).  
22 I can -- if you would like to borrow my copy, that  
23 would be the easiest thing.  
24 MR. WALTON: Generally we really haven't

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

150

1 looked, but I think these changes provide more of a  
2 clear road map where you need to go to address these  
3 issues.

4 MS. HENNESSEY: Okay. So you at least -- I  
5 know I'm catching you cold with this, but at least as  
6 you sit here today you don't see any problem with  
7 these particular changes?

8 MR. WALTON: No.

9 MS. HENNESSEY: Thank you.

10 MS. ROSEN: I just wanted to clarify, did I  
11 have these, their testimony admitted as if read into  
12 the record? If not I would like to do so.

13 HEARING OFFICER HOOGASIAN: That's fine, yes.

14 MS. ROSEN: Thank you, I didn't know if --

15 HEARING OFFICER HOOGASIAN: As if read. Does  
16 anyone have anything further then at this time? Mr.  
17 King.

18 MR. KING: Mr. Walton, you made the statement  
19 in your written testimony that it says historically  
20 corrective action in Illinois focused on removing the  
21 last molecule of contamination regardless of risk and  
22 regardless of cost.

23 Did you mean that was in terms of more of a --  
24 that was a perception or that's a little bit of

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

151

1 hyperbole there or --

2 MR. WALTON: In many communities within  
3 Illinois that is what was and still is required for  
4 remediation, that no molecules can exist, and that's  
5 -- that focus is primarily on groundwater issues,  
6 because many of the standards are detection and it's  
7 perceptions.

8 MR. KING: That's all I have.

9 HEARING OFFICER HOOGASIAN: Anything further?

10 MS. McFAWN: I have a question. Mr. Walton,  
11 Miss Huff discussed proposed changes in recognized  
12 environmental condition. You also discussed that term  
13 in your testimony.

14 What did you think of her proposed language  
15 concerning the de minimis exception?

16 MR. WALTON: I view that the term  
17 environmental recognized condition in the context of  
18 the whole methodology. You just have to -- you have  
19 to look at the entire ASTM methodologies for the  
20 definition of that term.

21 If you look at the entire methodology, it's a  
22 relevant term. So you just can't take that term  
23 without the total use of the methodology. Because it  
24 is -- there's very prescriptive steps that an

1 individual has to go through to complete an ASTM Phase  
2 I assessment. And you do make these determinations.

3 And many of these things are an opinion of the  
4 assessor. And it's an opinion of the assessor, I  
5 think that there needs to be some presentation of that  
6 information, and the Agency has to have some  
7 opportunity to look at that information.

8 MS. McFAWN: Okay, but again do you think  
9 that the definition is better or worse if we were to  
10 include the language she proposes concerning the  
11 de minimis exception?

12 MR. WALTON: I would say you include the  
13 entire methodology.

14 MR. MULLER: If I could just say something  
15 briefly on that. As part of the aspect I think is  
16 that the ASTM and having served on it from an earlier  
17 time, to determine de minimis you have to have the  
18 entire broad copy of the ASTM (e)1527. I think in a  
19 lot of aspects which ultimately leads to constituents  
20 of concern is necessarily going to be an ASTM (e)1527,  
21 it can be 1528 to transaction screen or simply the  
22 knowledge of a release on the property and therefore  
23 in that context a de minimis I don't think is  
24 necessarily applicable unless you have the whole broad

1 scope of an ASTM 1527 to support that conclusion.

2 MS. McFAWN: Thank you.

3 MS. HENNESSEY: But if I may go back then,  
4 one other question for Mr. Muller, just a point of  
5 clarification. I understand that your testimony to be  
6 to be that in situations in which we have a clean  
7 Phase I, you do not believe the lending communities  
8 will be interested in having those properties enrolled  
9 in this program, is that correct?

10 MR. MULLER: Correct.

11 MS. HENNESSEY: Okay. I would want to just  
12 make clear for the record though there are situations  
13 in which having these programs, this program available  
14 is going to actually be a benefit to the lending  
15 community, is that correct as well?

16 MR. MULLER: Oh, absolutely. I mean as part  
17 of the business decision we ultimately have to value  
18 to what extent the health and the environment might be  
19 impacted, which actually is an extension of the  
20 business decision ultimately, because it really does  
21 go to the business decision and our ability to be  
22 repaid.

23 And to that aspect, you know, there is no -- you  
24 know, my argument there is no more definitive opinion

1 than the IEPA has to rely on, if they've created a  
2 defensible condition for me, and that's the highest I  
3 can hold to as far as an opinion.

4 MS. HENNESSEY: Okay, thank you.

5 MS. POULOS: Another clarification question  
6 along that line. Would you consider then an NFR  
7 letter to be helpful as a valuation tool, would that  
8 be a correct statement?

9 MR. MULLER: No.

10 MS. POULOS: Okay.

11 MR. MULLER: They're two different separate  
12 issues relative to a bank. We look at valuation, we  
13 look at liability of our borrowers, okay? And the  
14 liability once again for the borrower goes to the  
15 ability to impact his cash flow or collateral value.

16 So for us an NFR letter in that secondary sense  
17 goes to a valuation issue, but it doesn't really  
18 provide valuation to us as a lender. I mean we don't  
19 look for the NFR letter in that aspect.

20 MS. POULOS: Right, okay.

21 HEARING OFFICER HOOGASIAN: Anything further  
22 then? Mr. Watson.

23 MR. WATSON: What I hear, what I heard Mr.  
24 Walton say is that he believes that the de minimis

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

155

1 condition exemption provision in the ASTM definition



2 of recognized environmental condition is important to  
3 the process because it is a part and parcel of the  
4 ASTM methodology, is that right?

5 MR. WALTON: I think you have to view  
6 de minimis in the total concept of the methodology.

7 MR. WATSON: And I guess I didn't understand  
8 the follow-up that was given by Mr. Muller in terms of  
9 why that isn't important.

10 MR. MULLER: Well, you know, what -- I think  
11 we're consistent in what Harry's saying is that if  
12 you've chosen a comprehensive site evaluation in that  
13 context the de minimis condition is supported by  
14 historic documentation, regulatory -- I think another  
15 aspect where he's choosing not to go to the ASTM route  
16 which is provided for, and I mean I've seen somebody  
17 kick over and say no, I've got a release, I don't  
18 think it's necessarily applicable in that.

19 MR. WATSON: So there are situations where  
20 it's obvious that --

21 MR. MULLER: Right.

22 MR. WATSON: And there would be no  
23 application, but in the overall context the  
24 examination of the de minimis exemption as part of an

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

156

1 ASTM methodology is important to this process and  
2 consistent with a lender's activities as well in terms  
3 of evaluating properly?

4 MR. MULLER: No, I don't think that's  
5 necessarily true. I think one needs to recognize that  
6 as banks are becoming more sophisticated in their  
7 ability to value properties and, you know, we've  
8 recently raised our limit to five million dollars  
9 where we no longer do Phase I, we have such pools of  
10 transaction screens and stuff, which I think provide  
11 prudent information within a specific region.

12 I mean Chicago for instance there are recognized  
13 environmental conditions that are a matter of public  
14 record, so I don't need redundancy there. But I can  
15 use a lesser document to sort of subscribe these  
16 things and often don't use a Phase I.

17 MR. WATSON: Okay.

18 HEARING OFFICER HOOGASIAN: Are there any  
19 further questions then at this time for either of  
20 these witnesses?

21 MS. McFAWN: I have one more. Mr. Walton, I  
22 don't know if you can speak to this as being chairman  
23 of the committee on behalf of your company. But Miss  
24 Huff also in her testimony suggested that the burden

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

157

1 for the remediation in the NFR or as recorded in the  
2 deed fall to the current owner of the property.

3 Have you had any experience with that in your  
4 discussions as part of the committee or on behalf of  
5 Illinois Power? Do you know which one I'm speaking

6 to, is the proposed revisions at 740.620.

7 MR. WALTON: Are you talking over time or at  
8 a point in time?

9 MS. McFAWN: The language actually that she  
10 proposes at 740.620 which is a duty to record a No  
11 Further Remediation, if I understand this correctly  
12 she suggests language that says "The current owner of  
13 the remediation site shall be responsible for the  
14 maintenance of any land use limitations required by a  
15 recorded No Further Remediation Letter."

16 In that she's proposing that by regulation we've  
17 put the burden on the current site owner for  
18 maintenance, which might be required under the NFR  
19 letter.

20 And I just was wondering if the committee  
21 discussed this and could you speak to it, or on behalf  
22 of the company that owns property or owns sites, has  
23 done remediation at sites possibly owned now by  
24 different owners, what do you think about shifting

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

158

1 this burden, not shifting it so much but by doing it  
2 by regulation?

3 MR. RIESER: Miss McFawn, I think her  
4 testimony was in response to a question I had that the  
5 purpose of her thing was to make it transferable.

6 MS. McFAWN: I did understand your question  
7 to -- questions to her about that, but that's not

8 what's actually in the proposed language, so I --

9 MR. WALTON: I can speak in regards to  
10 Illinois Power Company. It depends who's the remedial  
11 applicant and the nature of the business relationship  
12 between Illinois Power Company and the property owner.  
13 That's our burden to take care of that.

14 And that's in regard to Illinois Power Company.

15 MS. McFAWN: And on behalf of the committee  
16 this wasn't really discussed?

17 MR. WALTON: Our understanding and our goal  
18 was that --

19 MS. McFAWN: You're speaking on behalf of the  
20 committee now?

21 MR. WALTON: I think so. They'll tell me if  
22 I'm not.

23 MS. McFAWN: Okay, fair enough.

24 MR. WALTON: Our intent was that the

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

159

1 responsibility can be transferred to subsequent  
2 owners.

3 MS. McFAWN: It may be transferred. What do  
4 you think about the Board adopting language that said  
5 it is transferred?

6 MR. WALTON: Well, there are certain business  
7 relationships that may dictate another scenario.

8 MS. McFAWN: Thank you.

9 HEARING OFFICER HOOGASIAN: Mr. Watson?

10                   MR. WATSON: I've got a -- I mean certainly  
11 it is important that they be transferable, and at the  
12 same time I think it's also fair that parties ought to  
13 be free to contract that obligation as they deem fit.  
14 But, you know, in the absence of an expressed  
15 contractual relationship or other agreement to the  
16 contrary, who other than the current owner or operator  
17 at the site would be the most appropriate party to  
18 insure that the site is being used consistent with the  
19 requirements of the No Further Remediation Letter?

20                   MR. WALTON: I think you'd have to go -- this  
21 is my own opinion. I think you go to the remedial  
22 applicant and any relationships they had to the  
23 tenants, leases, such as that. But again it would go  
24 to the business relationship that would dictate that

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

160

1 relationship, but this would have to be an established  
2 by contract or some other rule that relationship.

3                   MR. MULLER: Speaking to sort of the real  
4 estate community, what we often see is that I think  
5 it's against the Board's best wishes to basically make  
6 that a requirement, because often under normal course  
7 of real estate transaction that's one of the financial  
8 obligations that's bartered like any other aspect of  
9 the deal. If you were to basically have that  
10 transferred as a possible obligation, you may actually  
11 transfer it to a party not financially viable to

12 uphold it.

13 MR. WALTON: Under 742.1100(d) we -- there's  
14 some language offered to that issue about it transfers  
15 with the property. But again there's -- there's got  
16 to be a relationship with the responsibility.

17 And I think that goes to that, that it's  
18 acknowledged, you know, the subsequent buyer is aware  
19 of this and has the ability to stand behind it, and  
20 that's part of the contract. There may be situations  
21 where you need some flexibility in this by the nature  
22 of the business transaction you're involved in. It  
23 can't be prescriptive.

24 MS. McFAWN: What was that site to 742?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

161

1 MR. RIESER: 742.1100(d).

2 MS. McFAWN: Thank you.

3 MR. KING: 1100?

4 MR. WALTON: Yes.

5 MR. RIESER: It's the engineered barriers.

6 MR. WATSON: 742.

7 MR. KING: 1100(d), the engineered barriers.

8 MR. WALTON: Right, yes.

9 MR. KING: All right, I was looking at 1105,  
10 sorry.

11 HEARING OFFICER HOOGASIAN: Anything further  
12 at this time?

13 (No response.)

14 HEARING OFFICER HOOGASIAN: All right, thank  
15 you very much for your testimony.

16 At this time we're just going to take a quick  
17 break. It's about quarter to 4 right now, five  
18 minutes. We'll meet at ten till 4.

19 (A recess was taken.)

20 HEARING OFFICER HOOGASIAN: At this point I  
21 do want to just to make the record consistent proceed  
22 with the Agency's comments on the testimony that we've  
23 heard today, rather than go back to the prefiled  
24 questions, the three that we were waiting with. So if

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

162

1 that's okay with you --

2 MR. WIGHT: Let me reshuffle the paper files  
3 here.

4 HEARING OFFICER HOOGASIAN: Thank you.

5 MR. WIGHT: Well, we do have some responses  
6 to some of the testimony we just heard. Primarily  
7 we'd like to focus our responses on the testimony that  
8 suggested changes in language.

9 The fact that we don't discuss other issues that  
10 may have been raised by the testimony doesn't mean  
11 that we concur or disagree. We'd simply like to  
12 reserve the right to further revise and extend our  
13 remarks in written comments that's appropriate.

14 But we thought it might be helpful at least to  
15 provide a summary action to the language changes that

16 were suggested and perhaps focus the debate a little  
17 more than it already has been, and I know we've  
18 touched on some of those issues already.

19 Again we have what I would call simply a  
20 discussion aid to help people follow along with our  
21 comments and to consider perhaps after the hearing for  
22 their own written comments, and at this time I'd like  
23 to have that marked I think as Exhibit 12 and admit it  
24 to the record.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

163

1 HEARING OFFICER HOOGASIAN: It's actually  
2 Exhibit Number 13.

3 MR. WIGHT: Exhibit 13, and this document is  
4 entitled Agency's Responses Regarding Certain  
5 Revisions to Proposed Part 740 Suggested in Testimony  
6 of Miss Linda L. Huff and Mr. Frederick M. Feldman,  
7 and it's dated 12-17-96.

8 HEARING OFFICER HOOGASIAN: Does anyone have  
9 any objections to entering this exhibit as Exhibit 13?

10 MR. WATSON: I don't object to the entry of  
11 the exhibit. I just would like to state for the  
12 record that this was made available to us for the  
13 first time this morning, so we really haven't had an  
14 opportunity to evaluate the issues raised in it very  
15 carefully, and I say that only to the extent that, you  
16 know, that I guess the questions that we're going to  
17 -- that I would have today are going to be made, you



18 know, in that light.

19 But I don't have any objection to the entry of the  
20 exhibit or discussing it at this point.

21 HEARING OFFICER HOOGASIAN: Okay.

22 MR. DUNHAM: I would make the same objection,  
23 except that I don't think you're going to get to my  
24 witness's information by 4:30.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

164

1 HEARING OFFICER HOOGASIAN: Well, we'll just  
2 proceed with that tomorrow.

3 MR. DUNHAM: To the extent that you do, I  
4 make the same comment.

5 HEARING OFFICER HOOGASIAN: That's fine. I  
6 mean as long as these are not objections, we'll  
7 proceed, and I will enter this as Exhibit Number 13.

8 (Agency Exhibit Number 13 was admitted.)

9 HEARING OFFICER HOOGASIAN: And Mr. Wight,  
10 you may proceed with this.

11 MR. WIGHT: I'd also like to comment before  
12 we begin that in some of the testimony, the Agency's  
13 testimony was characterized, Agency's testimony from  
14 the first hearing was characterized. Again some of  
15 that was accurate, some of it we thought perhaps  
16 overstated our conclusions or wasn't fully consistent  
17 with how we testified.

18 Again we don't plan to wade into those areas  
19 today, but in that regard we would say that the record

20 does speak for itself and we may correct some of those  
21 characterizations at a later time in written comments.

22 With that I think what we'd like to do is have  
23 Gary go to Exhibit -- that was 13?

24 HEARING OFFICER HOOGASIAN: Correct, that's

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

165

1 correct.

2 MR. WIGHT: Exhibit 13 and perhaps just run  
3 down through some of our comments. First of all with  
4 regard to the testimony of Miss Huff, and we would  
5 just take it in the same order that it was presented  
6 in her testimony, I'm not sure how you want to handle  
7 this. Do you want us to just do one section at a time  
8 and then have comments on each section, or do you want  
9 us to go through all of the comments and then come  
10 back to questions, all the questions following all of  
11 the comments?

12 HEARING OFFICER HOOGASIAN: Let's take it a  
13 section and then comments right after that.

14 MR. KING: Okay.

15 MR. WATSON: I've got a question with respect  
16 to your statement, Mr. Wight, regarding the Agency's  
17 position on the testimony that has been provided. Is  
18 that limited to the -- your comments here in terms of  
19 the accuracy of the testimony and the Agency's  
20 contention with any of the testimony that's been  
21 provided, or is that a general statement relating to

22 all testimony?

23 MR. WIGHT: That's a general statement  
24 related to all the testimony.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

166

1 MR. WATSON: And to the extent that you have  
2 issues or concerns with respect to the testimony, do  
3 you intend to raise that at what point in the  
4 proceeding?

5 MR. WIGHT: I think if we felt that the  
6 mischaracterizations were significant enough that we  
7 would try and correct it in written comments. We  
8 would try to do that in written comments. We felt  
9 that it probably wouldn't be productive today to go  
10 back and discuss what was or what was not meant in  
11 testimony that was given at the first hearing, that  
12 that would be a distraction from the main point today.

13 The fact that we do or don't respond even in  
14 written comments doesn't necessarily mean that we  
15 agree with all the characterizations of our testimony,  
16 however, and again in that regard I would say that the  
17 record speaks for itself.

18 MR. WATSON: Okay.

19 MR. WIGHT: With that, Gary, if you'd like to  
20 start with the definition of recognized environmental  
21 condition.

22 MR. KING: Yes, let me just give a couple of  
23 introductory points. The first point being that I

24 thought the testimony of Miss Huff and Mr. Feldman was

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

167

1 really good in the sense of laying out specific  
2 approaches to various issues, and it really helps us  
3 as far as focusing our efforts on a specific set of  
4 issues and how that would work and how that would  
5 interplay within the context of the proposal put  
6 forth. So in that sense we really -- we appreciate  
7 the approach that, you know, the testimony proceeded  
8 upon.

9 The other point I wanted to make in general is  
10 that I think the Board has seen in this testimony some  
11 quite different points of view. I don't know, I think  
12 it's also true the comments of Pat Sharkey, there's  
13 almost like a tension between various groups relative  
14 to certain of these issues.

15 And that's -- what we did with our proposal,  
16 because that's something we've been in essence living  
17 with that issue for the last year, and we tried to  
18 take an approach that was already what I would call  
19 walking the midpoint.

20 A lot of the discussions that we've heard come up  
21 through the course of the hearing are really similar  
22 to discussions that we had with the Advisory Committee  
23 and, you know, obviously not on the record setting  
24 where we really -- we reached some conclusions,

1 evaluating a number of these issues already.

2 With that let me talk about for the first one  
3 recognized environmental condition. We had -- Mr.  
4 Eastep talked about at the first hearing that the  
5 issue could come into play but we really -- and Mr.  
6 Muller and Mr. Walton also talked about that, the  
7 de minimis issue as well, and that in recognizing that  
8 under ASTM there's a process which you can go by and  
9 conclude, make certain conclusions as to whether the  
10 conditions are de minimis or not.

11 We really thought that the language added here for  
12 the purposes of putting into a definition that's going  
13 into a state rule making, is really -- it's not  
14 appropriate. And I think if you look at it, for  
15 instance you look at it because part of it is in  
16 essence there's a reliance on whether an enforcement  
17 action would be -- would be brought -- would be  
18 brought by a government agency.

19 Well, I mean that's a very complex decision and is  
20 dependent upon the resources that the Agency might  
21 have, or any specific entity might have, and how is an  
22 engineer in the field supposed to be able to figure  
23 out whether something would be the subject of an  
24 enforcement action if you brought it to the attention

1 of governmental agencies.

2 And so we -- I think that that kind of notion  
3 isn't -- doesn't give much help as far as guidance to  
4 somebody who is really looking at this issue in terms  
5 of evaluation process.

6 So I guess we concluded that the way this -- that  
7 this additional language is set up, that it really  
8 wasn't going to clarify anything and was going to make  
9 it less clear and had a -- had a -- what I would -- a  
10 concept that doesn't work very well within the context  
11 of a state definition. And I'll leave it at that.

12 HEARING OFFICER HOOGASIAN: Does anyone have  
13 any comments? Mr. Watson.

14 MR. WATSON: I guess my comment and question  
15 would be, you know, Mr. Walton I think has testified  
16 clearly that he believes that the ASTM methodology  
17 which incorporates this concept as part of the site  
18 investigation is important to the overall process of  
19 identifying recognized environmental conditions.

20 I would also go back to Mr. Eastep's testimony I  
21 believe at the first hearing where he stated that  
22 really it becomes a question of getting and relying on  
23 competent environmental engineers who understand the  
24 ASTM process to make these kinds of determinations,

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

170

1 and given that this is part and parcel of the ASTM

2 Phase I assessment.

3 My question to you is how can you ensure that  
4 there's a consistency of application by environmental  
5 engineers by taking this out of the definition?

6 MR. KING: Well, I mean one of the things you  
7 have to look at there in the context of how the words  
8 are used here. This is -- when it says this term did  
9 -- is not intended to include, this is more of an  
10 application principle in my mind than really defining  
11 what an environmental condition is.

12 And so in the -- and so when you're looking at any  
13 given instance with regards to what constitutes an  
14 environmental condition, you're looking at it within  
15 the totality of the ASTM document.

16 This seems to pick out that issue and look at it  
17 not in the context of the overall ASTM process, which  
18 you know, we obviously recognize we've included it,  
19 but gives it a special emphasis that to me doesn't  
20 seem -- doesn't appear to be appropriate to the  
21 context in which it would be used.

22 MR. WATSON: I guess I would say that it is  
23 part and parcel of a -- the task of identifying  
24 recognized environmental conditions that will become

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

171

1 the subject of this site remediation process, and  
2 therefore is a critical step in the implementation of  
3 the program.

4           And I guess a follow-up question that I would have  
5   is by taking it out, don't you potentially broaden the  
6   scope of the review beyond that which is reasonable?  
7   I mean if you take it out and then you are obligated  
8   again, and I think some of your other comments as we  
9   get at this thing recognize that perhaps a broader  
10   examination of targeted compounds, the compounds that  
11   we think is appropriate, aren't you by taking it out  
12   really broadening the requirements of a Phase I  
13   assessment beyond that which is contemplated by ASTM?

14           MR. KING: I don't think so, no.

15           HEARING OFFICER HOOGASIAN: Mr. Rieser.

16           MR. RIESER: By not agreeing to the  
17   additional change that's been proposed by the -- by  
18   Mr. Watson and Miss Huff, it's not the Agency's intent  
19   to exclude the concept of de minimis conditions from  
20   the definition of recognized environmental conditions,  
21   correct?

22           MR. KING: That's correct.

23           MR. RIESER: Okay, so a PE, even if the  
24   language was not adopted by the Board, the Agency

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

172

1   would still recognize that under the ASTM methodology  
2   there are things which are designated as de minimis  
3   conditions, and based on an appropriate demonstration  
4   based on the ASTM methodology would accept the same  
5   properly documented?



6 MR. KING: That's right. I think, Mr.  
7 Walton, as I say, Mr. Walton and Mr. Muller really  
8 gave a good discussion about the totality of those  
9 ASTM Phase I documents and how you look at the de  
10 minimis issue in the context of the whole Phase I  
11 valuation. And I think that's where that issue needs  
12 to be embedded.

13 MR. RIESER: Thank you.

14 HEARING OFFICER HOOGASIAN: Anything further  
15 then?

16 (No response.)

17 HEARING OFFICER HOOGASIAN: Okay, why don't  
18 you go ahead with the remediation site.

19 MR. KING: Okay, the first -- as we talked  
20 about earlier, maybe we didn't talk about this  
21 earlier, but as far as remediation site, the first  
22 change about "or portion of any parcel", we thought  
23 that was a good change, and it was something that we  
24 had not included previously, and that's something that

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

173

1 we would see included in a further errata sheet to  
2 propose to the hearing process.

3 The second change we didn't -- we thought first  
4 that one was redundant with language that appears  
5 later in the definition. And also it -- where we use  
6 that phrase later on in the definition where it talks  
7 about has been requested by the remediation applicant,

8 we put it in its context of being in the application  
9 for review and evaluation services.

10 Where it was suggested to be included earlier in  
11 the definition, there's no -- there's no -- there's no  
12 indication of where that comes in the process.  
13 Whereas we tried to -- at the point where we included  
14 it, it was clear that here's the point in the process  
15 where the remediation applicant is setting that up as  
16 to what the remediation site is. This other  
17 additional language is not making that a little less  
18 clear.

19 HEARING OFFICER HOOGASIAN: Mr. Watson.

20 MR. WATSON: I guess what I would say that  
21 having reviewed this, I think that we would concur  
22 with the Agency's position on this.

23 HEARING OFFICER HOOGASIAN: Any further  
24 follow-up?

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

174

1 (No response.)

2 HEARING OFFICER HOOGASIAN: Hearing none,  
3 let's proceed then to the residential property issue.

4 MR. KING: Two real points on this. And the  
5 first point is that residential property definition  
6 that is adopted in 740 has to be consistent with what  
7 is in 742 from our perspective, because if you don't  
8 then you really have an opportunity for some confusion  
9 as to this issue. So that's the first concept.

10           The second concept, and I think this was something  
11 that was -- Mr. Rieser was discussing earlier with  
12 Miss Huff as far as where the second part of this was  
13 going. We had a concern that the way this was set up,  
14 this in essence became a broader concept than what we  
15 had intended in terms of the types of facilities to  
16 which it could apply.

17           Because in the language that's been included here,  
18 there's not a concept of completing the pathway. In  
19 any situation with any facility that would come before  
20 us, again there's going to be some kind of pathway,  
21 and there are going to be contaminants of concern that  
22 would transform all of these facilities into  
23 residential property, regardless of whether there was  
24 that opportunity for exposure. And we thought that

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS           217-525-6167

175

1 that opportunity for exposure is a critical point of  
2 the risk based methodology.

3           HEARING OFFICER HOOGASIAN: Mr. Watson.

4           MR. WATSON: Unartful as it is, what we were  
5 trying to do was exactly that, and that is make sure  
6 that this was tied to the existence of a complete  
7 pathway.

8           I guess the concern that we would have is that you  
9 have a number of situations where you have commercial  
10 property, whether they're hotels or other sort of --  
11 and fast food restaurants with playgrounds on them and

12 those kind of -- you know, the many instances where  
13 you've got the existence of, and I think it's broadest  
14 in the sense of the definition of the concept of  
15 playgrounds where you have something that, you know,  
16 is a swing set or a slide or something that's somehow  
17 attached to a commercial enterprise.

18 And the concern is that you're significantly  
19 expanding the definition of residential property.

20 And what we're trying to do is tie those two  
21 together and say you've got the existence of the  
22 facilities themselves, plus the existence of the  
23 complete pathway, and that's where we're going with  
24 respect to that.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

176

1 HEARING OFFICER HOOGASIAN: Are there any  
2 further follow-up questions or comments?

3 (No response.)

4 HEARING OFFICER HOOGASIAN: Hearing none,  
5 let's proceed to Section 740.220.

6 MR. KING: This is one we did not agree that  
7 this was a good change. One of the things that Harry  
8 Walton spoke about, and it's really something that he  
9 has emphasized throughout the discussions that we've  
10 had relative to these proposed rules going back many  
11 months, and that is the nature of a new culture in  
12 dealing with remedial activities, and the emphasis on  
13 having an interactive approach. We saw this provision

14 as really a step backwards from that notion.

15       And to give you an example, we have for instance  
16 with Illinois Power and some of the other utilities,  
17 we have what I would call a master site agreement  
18 which really allows us -- allows us and the mediation  
19 applicant to manage resources, address the most  
20 difficult problems in the best kind of order. And it  
21 seemed like what this would allow somebody to do is to  
22 enter an agreement with the Agency and then to propose  
23 something to the Agency inconsistent with that  
24 agreement. We wouldn't accept the agreement and then

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS       217-525-6167

177

1 they would appeal to the Board.

2       And to me that's -- that really strikes of  
3 somebody just unilaterally refuting an agreement  
4 they've made, and that just doesn't seem fair.

5       And it doesn't seem consistent with the notion of  
6 having -- of a new way of approaching this type of  
7 remediation in an interactive way.

8               HEARING OFFICER HOOGASIAN: Mr. Watson.

9               MR. WATSON: This is probably an issue where  
10 some further thought would be useful in terms of  
11 trying to understand the objections that the Agency --

12               HEARING OFFICER HOOGASIAN: Can you just  
13 speak up a little bit, please.

14               MR. WATSON: Sorry. Trying to understand the  
15 objections the Agency is making and whether or not

16 there are significant concerns with respect to the  
17 scope of the proposed change.

18 I guess I would say that we believe there that  
19 it's important to have a procedure for appealing  
20 decisions before you get kicked out of the program,  
21 and that seems to be an important point in the  
22 process, and we think that there ought to be an  
23 appropriate appeal here.

24 MR. KING: There is a provision that if we

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

178

1 terminate somebody from the program, we terminate an  
2 agreement, they can appeal in that situation, that's  
3 already provided for.

4 HEARING OFFICER HOOGASIAN: Anything further  
5 on that?

6 MS. POULOS: Just -- but you're talking about  
7 a possibility of discussing or dispute resolution  
8 maybe before a termination from the program, is that  
9 what you were looking for?

10 MR. WIGHT: Actually this section addresses  
11 modification of agreements rather than terminations.

12 MS. POULOS: Okay.

13 MR. WATSON: It seems to me that there are  
14 going to be many instances where these agreements will  
15 need to be modified based on the scope of and results  
16 of site investigation activities. So I mean I think  
17 it's at that point where you've made the commitment of

18 resources to get to the point of understanding your  
19 site, and you've already committed though to a certain  
20 schedule for your activities, and there's a concern on  
21 our part that there could be resources that are wasted  
22 by virtue of the inability of the party to make the  
23 appropriate modifications.

24 HEARING OFFICER HOOGASIAN: Are there any

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

179

1 further points on that then?

2 (No response.)

3 HEARING OFFICER HOOGASIAN: And let's take  
4 Section 740.230.

5 MR. KING: This was a section we discussed  
6 earlier today, and this was a modification we thought  
7 was -- made some sense, and it was something that had  
8 been discussed in previous question in testimony, so  
9 we would include that in a subsequent errata sheet.

10 HEARING OFFICER HOOGASIAN: Does anyone have  
11 any comments on that?

12 (No response.)

13 HEARING OFFICER HOOGASIAN: All right, let's  
14 proceed then to Section 740.310, and this is the last  
15 one we'll take today, did request for payments  
16 section.

17 MR. KING: On both of these proposals we  
18 didn't -- we don't think they're good ideas. On the  
19 first one we had set up a system which is the way we

20 have operated things for the last six years, and it  
21 hasn't seemed to cause anybody any problems. A system  
22 whereby we would send out an invoice and it would have  
23 a specified set of line items on that invoice  
24 delineating what the Agency costs were relative to

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

180

1 each of those items. And that's what we've requested  
2 payment for.

3 Providing the documentation relative to all these  
4 items from our standpoint, we're willing to do that  
5 where it's requested, but to do that in every case on  
6 a routine basis would really be an enormous amount of  
7 resources.

8 We do our cost identification process in a way  
9 that allows us if we're in a federal Superfund case,  
10 that that documentation can be provided. It goes  
11 through all the quality assurance checks needed so  
12 that it can be provided in a federal district court to  
13 support a legal action for cost recovery.

14 So I mean it's not a question of confidence in the  
15 accuracy of the data we've put together. It's just  
16 that once it comes down to an issue of retrieving that  
17 data, and getting down to the -- really a lot of the  
18 very basic fundamentals of it, it's a lot of work, and  
19 it's a lot of data to provide.

20 And we certainly did that when there's a Superfund  
21 cases where you have millions of dollars at stake.



22 But it certainly would be a -- we think not a good use  
23 of state resources when we're asking for payment of a  
24 thousand dollars.

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

181

1 We have an example of -- we just pulled one out of  
2 our files from a billing that went out earlier this  
3 year and --

4 MR. WIGHT: Yeah, we have an exhibit that we  
5 think maybe will at least illustrate how we handle  
6 things now. I think we'll do a brief foundation for  
7 this, but we would like to have it admitted as Exhibit  
8 14 then.

9 Gary, would you please take a look at this  
10 document, and do you recognize the document?

11 MR. KING: Yes, I do.

12 MR. WIGHT: Could you please tell us what it  
13 is.

14 MR. KING: This is a billing statement that  
15 was sent out for a project. The project is identified  
16 by a notation IDOT Route 83 and it has a ten digit LPC  
17 number, which is our site identification code.

18 On this it doesn't say who it's expressly been  
19 sent to, that would be included in the cover letter.  
20 It would -- it's not being sent to IDOT, so let's make  
21 that clear.

22 It identifies several categories of cost  
23 identification. It indicates who the project manager

24 is. That question should be directed to him, and how

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

182

1 to provide the proper remittance relative to the bill.

2 MR. WIGHT: And is that an example of the  
3 standard billing sheet that we would send to all  
4 participants in the Site Remediation Program or the  
5 prenotice program?

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

7 MR. WIGHT: Thank you. I would move that  
8 this be marked as Exhibit 14 and admitted to the  
9 record.

10 HEARING OFFICER HOOGASIAN: Does anyone have  
11 any objections to this statement of IDPA costs  
12 incurred and paid?

13 (No response.)

14 HEARING OFFICER HOOGASIAN: Seeing none, it  
15 will be admitted as Exhibit Number 14.

16 (Agency Exhibit Number 14 was admitted.)

17 HEARING OFFICER HOOGASIAN: You may proceed,  
18 Mr. King.

19 MR. KING: The second thing we were -- the  
20 second item that was put forward as far as a proposal  
21 was in subsection (c), which really greatly broadened  
22 the nature of an appeal relative to Agency decisions  
23 on what should be paid.

24 We had in our proposal, this was something again

1 that as I was talking about before, walking midpoint,  
2 this is something that we had considerable discussion  
3 with the Advisory Committee over the summer, and they  
4 had initially taken the kind of position that Linda  
5 Huff's testimony takes. And we countered with our  
6 arguments relative to difficulties we would have with  
7 respect to this kind of provision.

8 I think it's important for the Board to recognize  
9 that this type of review, this is a unique thing. I'm  
10 not aware of any other Agency program where we're  
11 routinely billing persons on the outside as a  
12 consulting engineer would. Because that's a lot of  
13 what -- it's almost kind of the function we're doing  
14 here.

15 You know, so it's not like a permit function, it's  
16 not like billing for a permit fee. These are specific  
17 services that are performed at the request of someone  
18 and we perform them. And how we go about deciding  
19 what we include as far as billing is highly controlled  
20 by state regulations.

21 For instance, you just saw in this -- this Exhibit  
22 14, travel. Well, you know, there's rules that say  
23 how much we get paid for travel. Automotive, there's  
24 rules how much we get paid and can charge against

1 automotive. Personal services, I mean that's a -- the  
2 whole notion of personal services, fringe benefits and  
3 indirect, Todd Gross on this example is one of our  
4 project managers. He's a member of the AFSCME union  
5 and there's a union contract which determines what his  
6 salary is.

7       You know, really the only thing that we have much  
8 discretion on relative to these issues is how many  
9 hours is a person going to spend relative to a  
10 project. And that -- in our mind that's really a  
11 management decision that we really need to be making  
12 as would an LPE or LP or anybody else, you have to  
13 make a decision as to how much effort you put into a  
14 project.

15       And most of the time, you know, you put in more  
16 hours up front in order to get a project done more  
17 quickly. That works to the advantage of the person  
18 who has come into the program.

19       We think it is appropriate for the opportunity for  
20 appeal if there is a situation determined where costs  
21 have not been incurred as is represented here, and we  
22 certainly from a management standpoint want to know  
23 that. There should never be an appeal relative to  
24 that situation if that's brought forward to us,

1 because from our standpoint, you're probably looking  
2 at a discipline situation, not a situation where we're  
3 going to be trying to overbill someone.

4 So this is a provision that's really important to  
5 us, and again it is a signal towards the new remedial  
6 culture that, you know, everybody's going to be kind  
7 of working on an equal footing on these kind of  
8 issues.

9 HEARING OFFICER HOOGASIAN: Mr. Watson, if  
10 you have a quick follow-up.

11 MR. WATSON: Shouldn't you at least know who  
12 is working on your project, the names of the people  
13 working on the project in order to at least even to be  
14 able to appeal a payment or request for payment based  
15 on the fact that the work was not even performed?

16 MR. KING: Sure, you could request that. If  
17 you want to know who was on the project and what hours  
18 were being put on, you could specifically ask that.

19 MR. WATSON: Okay, so you don't think that  
20 ought to be included in your invoice?

21 MR. KING: No, because the way we do this, as  
22 we set up a unique identifier code for each specific  
23 project and the project manager, and if there's any --  
24 for instance we might have a situation where you could

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

186

1 have a community relations consultant who is actually  
2 directly billing against that project code. All of

3 those hours will be accumulated on one employee  
4 services document, and it doesn't automatically get  
5 broken out.

6 MR. WATSON: I've got one final question, and  
7 that is do you have any data on what your costs will  
8 be at these sites? I know that there's been testimony  
9 that your average cost is a thousand dollars. Have  
10 you been keeping track of the costs incurred at these  
11 sites?

12 MR. KING: Yeah, we keep a lot of data on  
13 that. I don't know if we've got any right with us. I  
14 think we were saying that -- I don't know if we said  
15 the -- yeah, it wasn't so much that the total average  
16 was a thousand dollars, but that would be most -- I  
17 think it was most of the sites come in around that  
18 range.

19 MR. WATSON: Were there sites that get into  
20 the 10,000, 20,000, 30,000 range?

21 MR. KING: I think we once had a site about  
22 eight years ago that was like 50,000 dollars. But  
23 that was certainly agreeable to them to pay that  
24 because of the extent of the services we were

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

187

1 providing and what they were requesting.

2 But that was -- you know, obviously you have to  
3 have an average where we have it down now, you don't  
4 have very many of those sites occurring.

5 MR. WATSON: Okay.

6 HEARING OFFICER HOOGASIAN: Okay.

7 Unfortunately we have to stop at this point. Tomorrow  
8 we will resume at 10:00 and the hearing resumes at a  
9 different location. It's at 201 Municipal Center  
10 West, which is located at Seventh and Monroe Streets  
11 in the council chambers on the third floor. Mr.  
12 Rieser, do you have a question?

13 MR. RIESER: Is there any chance we could  
14 start earlier, 9, 9:30, or something like that?

15 HEARING OFFICER HOOGASIAN: One minute on  
16 that.

17 MR. RIESER: I'm sorry, I'm going to withdraw  
18 that request. It turns out we need a little time in  
19 the morning.

20 HEARING OFFICER HOOGASIAN: The issue on our  
21 end is that it's been posted for 10:00 and anyone who  
22 is not here at this point didn't know about it.

23 (The hearing was in recess until  
24 December 18, 1996, at 10:00 a.m.)

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167

188

1 STATE OF ILLINOIS )  
2 ) SS  
3 COUNTY OF SANGAMON )

4 CERTIFICATE

5 I, Susan Freeman, affiliated with Capitol  
6 Reporting Service, Inc., do hereby certify that I  
reported in shorthand the foregoing proceedings; and

7 that the foregoing is a true and correct transcript of  
8 my shorthand notes so taken as aforesaid.

9 I further certify that I am in no way  
10 associated with or related to any of the parties or  
11 attorneys involved herein, nor am I financially  
12 interested in the action.

13

14

15

---

Certified Shorthand Reporter  
License No. 084-001342  
Registered Professional Reporter  
and Notary Public

18

19 Dated this 26th day of  
20 December, A.D., 1996,  
21 at Springfield, Illinois.

22

23

24

CAPITOL REPORTING SERVICE, INC.  
SPRINGFIELD, ILLINOIS 217-525-6167