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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPOSED AMENDMENTS TO TIERED
APPROACH TO CORRECTIVE ACTION R00-19
OBJECTIVES (TACO) (35 ILL. ADM. (Rulemaking - Land)
CODE 742)

Proceedings held on September 11, 2000, at 10:30 a.m., at
the Illinois Pollution Control Board, 600 South Second Street,
Suite 402, Springfield, Illinois, before Amy Jackson, Hearing
Officer.

Reported by: Darlene M. Niemeyer, CSR, RPR
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A P P E A R A N C E S

Board Members present:
Chairman Claire A. Manning
Board Member Elena Kezelis
Board Member G. Tanner Girard
Board Member Nicholas Melas
Alisa Liu, Environmental Scientist

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
BY: Kimberly A. Geving
Assistant Counsel
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1021 North Grand Avenue East
Springfield, Illinois 62794-9276
On behalf of the Illinois EPA.

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1 P R O C E E D I N G S
2 (September 11, 2000; 10:30 a.m.)

3 HEARING OFFICER JACKSON: Good morning. I want to welcome
4 you all to this hearing held by the Illinois Pollution Control
5 Board, In the Matter of: Proposed Amendments to Tiered Approach
6 to Corrective Action Objectives, commonly referred to as TACO,
7 found at 35 Illinois Administrative Code 742. The Board refers
8 to this matter as Document Number R00-019.

9 My name is Amy Jackson. I am the Attorney Assistant for
10 Board Member Elena Kezelis, and I am the Hearing Officer for
11 these proceedings.

12 Present today on behalf of the Board are Board Members
13 Elena Kezelis.

14 BOARD MEMBER KEZELIS: Good morning.

15 HEARING OFFICER JACKSON: And Nicholas Melas.

16 BOARD MEMBER MELAS: Good morning.

17 HEARING OFFICER JACKSON: We have a three member panel
18 assigned to this rulemaking. Board Member Marili McFawn is also
19 assigned. Unfortunately, she was called out of town at the last
20 moment and is not able to be present today. She sends her
21 regrets.

22 Also present upon behalf of the Board, we have Board
23 Chairman, Claire Manning.

24 CHAIRMAN MANNING: Good morning.

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1 HEARING OFFICER JACKSON: And Board Member Dr. Tanner
2 Girard.

3 BOARD MEMBER GIRARD: Good morning.

4 HEARING OFFICER JACKSON: Present at the head table with
5 the Board Members and myself is Alisa Liu.

6 MS. LIU: Good morning.

7 HEARING OFFICER JACKSON: She is representing the Board's
8 technical unit.

9 We also have individual members of the Board's staff
10 present today. Bobb Beauchamp, who is the Attorney Assistant for
11 Marili McFawn, at the back of the room. Joel Sternstein, who is
12 the Attorney Assistant for Board Member Nicholas Melas. And Erin
13 Conley, who is the rules coordinator for the Board. I think that
14 is everybody.

15 As many of you know, on July 27th of this year the Board
16 adopted first notice opinions and orders in this matter that
17 effectively split this proceeding into two subparts, Subdocket A,
18 involving the institutional controls found at Subpart J,
19 basically the ELUC portion of this rulemaking, and subdocket B,
20 which basically involves everything else. As I indicated earlier
21 before we went on the record, we will begin with presentations
22 and questions regarding Subdocket A and then move on to Subdocket
23 B.

24 Today is the second scheduled hearing the Board is holding

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1 in this matter. The hearing will be governed by the Board's
2 procedural rules for regulatory proceedings. This means that
3 information which is relevant and not repetitive or privileged
4 will be admitted. All witnesses will be sworn and subject to
5 cross questioning. To begin, the court reporter will swear you
6 in and then you will make your presentation. Following your
7 testimony, we will take questions from Board Members and any
8 other interested members of the audience who are present today.

9 If you have a question that you would like to ask, please
10 raise your hand and wait for me to acknowledge you and then
11 please state your name and organization that you are representing
12 today for the court reporter to get that into the record.

13 Please note that any questions asked by Board Members or
14 Board staff are not intended to express any preconceived notions
15 or bias on the part of the Board. Questions are intended only to
16 build a complete record for review by other Board Members who may
17 not be present today.

18 Today's hearing is scheduled to continue tomorrow, if
19 necessary. In addition to these hearings this week we currently
20 have two other days of hearings scheduled. On Thursday,
21 September 21st at 12:00 noon the Board will hold a short hearing
22 in Chicago. We expect this hearing to be a very short
23 proceeding, as we will be taking testimony regarding the Board's

24 request, pursuant to Section 27 (b)(1) of the Act, that the

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1 Department of Commerce and Community Affairs conduct an Economic
2 Impact Study for this rulemaking.

3 At this time it appears that DCCA will not be conducting an
4 Economic Impact Study for this rulemaking. So our hearing will
5 address not only our request that an Economic Impact Study be
6 performed, but also DCCA's decision to not perform one. If any
7 additional substantive testimony is required following the
8 September 21st proceeding, we will continue on to Friday,
9 September 22nd, also in the Board's Chicago office.

10 On the table to my left are extra copies of some documents
11 that have been provided today by persons who will be testifying.
12 Those documents will be admitted, it is my understanding, during
13 the course of this proceeding and marked as exhibits. If you are
14 interested in getting copies of those documents, I believe there
15 are still some extra copies over there on the table.

16 There are also sign up sheets for the Board's notice and
17 service list for this matter. If you sign up for the Board's
18 notice list, you will receive copies of all Board opinions and
19 orders as well as all Hearing Officer orders. If you sign up for
20 the service list, in addition to Board documents, you will also
21 receive copies of documents filed by other persons on the service
22 list. If you are on the notice list, there is no requirement

23 that you file with anyone other than the Board. However, if you
24 are on the service list and you wish to file a written comment in

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1 this case, you must file with the Board and with everyone else on
2 the service list.

3 At this point I will ask Board Member Elena Kezelis if she
4 has any opening remarks that she would like to make.

5 BOARD MEMBER KEZELIS: No. Thank you very much all for
6 being here and let's begin.

7 HEARING OFFICER JACKSON: Very good. The first people we
8 have presenting today is the Department of Defense. Do you have
9 any opening remarks that you wish to make?

10 MR. ZOLYAK: Just a few opening remarks. My name is Gary
11 Zolyak. I am an attorney with the U.S. Army Environmental
12 Center. We wish to thank the Board for hearing us today.

13 At the August 25th meeting in Chicago --

14 HEARING OFFICER JACKSON: You need to use your microphone,
15 Mr. Zolyak.

16 MR. ZOLYAK: I am sorry.

17 HEARING OFFICER JACKSON: Thank you.

18 MR. ZOLYAK: My name is Gary Zolyak. I am an attorney with
19 the U.S. Army Environmental Center. At the August 25th meeting
20 of the Board, I and Ms. Georgia Vlahos, who is seated to my
21 right, presented some prefiled testimony that we had on behalf of
22 the Department of Defense on Section 742. At that time we raised

23 some issues. I think the Board had some interesting questions
24 that perhaps we had not fully considered. And at that time the

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1 Board asked us to come back today and answer -- actually, make a
2 few presentations and answer those questions. Consistent with
3 that request, I have three presenters today.

4 The first individual is Mr. Steve Beverly. He is with the
5 Navy and he will talk about the LUC agreement, the LUC MOA we
6 have been working on with the Illinois EPA.

7 The second presenter is Mr. Carl Smith. He is an attorney
8 with GSA in Chicago and he will outline GSA's policies and laws
9 on federal agency land holding and real estate issues.

10 Finally, Andrew Kendrick, who is seated to my left, is with
11 Tetra Tech and he will make the presentation on GIS and how that
12 differs with GPS.

13 Let me mention to the Board that we have two slide
14 presentations and logistically the best we can do is to have the
15 slide shown over here. And perhaps as a housekeeping matter, if
16 the Board would like to find another way to do that, certainly
17 let us know. We would be happy to accommodate.

18 Just a few other short items. I have provided to each
19 member of the Board two documents. One is the prefiled testimony
20 of Mr. Richard Butterworth. He is an attorney with GSA in
21 Washington, D.C. Mr. Butterworth regrets not being able to

22 attend today, but he and his wife are expecting their first child
23 and logistically it just was not going to work out for him to be
24 here today. Carl Smith, seated to my right, will be able to

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1 address those issues as well.

2 The second document is comments that we have and suggested
3 language for Section 742. I also do want to mention to the Board
4 that most of the people here up front did meet with the Illinois
5 EPA on August 31 to sit down and talk about progress on the MOA.
6 I do wish to report that that meeting went especially well and we
7 do wish to thank a number of people from the Illinois EPA,
8 including Kim Geving, who was very open and accommodating and
9 willing to hear our concerns and needs and suggesting language in
10 a way to proceed to try to get the MOA done.

11 That concludes my opening remarks and let me turn this over
12 to Steve Beverly.

13 HEARING OFFICER JACKSON: Thank you, Mr. Zolyak. Before we
14 do that, I will ask the court reporter to swear the witnesses in
15 and we can do it as a panel.

16 (Whereupon the witnesses were sworn by the Notary Public.)

17 HEARING OFFICER JACKSON: Thank you. Mr. Beverly, you may
18 proceed when you are ready.

19 MR. BEVERLY: Thank you.

20 MR. ZOLYAK: Ms. Jackson, not to interrupt Mr. Beverly, but
21 how would you like us to proceed, given the screen is over here

22 and it might be an awkward angle for the Board.

23 HEARING OFFICER JACKSON: I think -- what we have done is
24 we have set some chairs up over to the side for the Board Members

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1 to move around. So whenever you are ready to do the power point
2 presentation, the Board Members can move around and watch from
3 that angle if they need to.

4 MR. ZOLYAK: Fine. Thank you.

5 HEARING OFFICER JACKSON: Okay.

6 MR. BEVERLY: That is what we will be doing right now.

7 HEARING OFFICER JACKSON: Okay. Very good.

8 MR. BEVERLY: Good morning. As Gary pointed out, my name
9 is Steve Beverly. I work with the Navy at Southern Division
10 Naval Facilities, Engineering Command, in Charleston, South
11 Carolina. The Southern Division is in charge of the
12 installation-restoration program, which is essentially the Navy's
13 environmental cleanup program for our facilities in 26 states,
14 including the State of Illinois.

15 Gary asked me to come here today to talk a little bit about
16 the -- since I was involved in discussions that we had in
17 establishment of the Memorandum of Agreement in Florida, to come
18 here and give you an idea of what we are looking at in terms of
19 trying to set up with the IEPA and the U.S. EPA, Region 5, for
20 our bases in the State of Illinois.

21 When we talk about the tri-party memorandum, what we are
22 really talking about is the agreement between the individual
23 installation or facility that may have a Land Use Control or
24 institution control of some form on the installation and that

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1 would be signed by the commanding officer in the case of DoD
2 facilities, and then signed by the representatives of both the
3 U.S. EPA, Region 5, and the Illinois EPA. Now, when we say Land
4 Use Controls, the term we have defined specifically in the MOA
5 that we had in Florida, because it was a new term that had not
6 been used there before, or really up to that point in time within
7 Region 4 at all. Region 4 EPA subsequently adopted some guidance
8 that used that term as well. But it is a little bit broader than
9 just the term of institution control, as we normally think of it.
10 Because we realize that some of our facilities will have sites
11 that will actually have engineered controls in place as part of a
12 selective remedy.

13 So we wanted to make sure that when we were talking about
14 overseeing that and reporting upon whether or not we are
15 maintaining our sites and the remedies that we have implemented,
16 we want to make sure that we included engineered controls under
17 the definition of Land Use Control, as well as any kind of
18 administrative measures we may have in place, for example, a base
19 master plan restriction or some kind of dig permitting process
20 that the base may have in place as an institutional control. So

21 that we would be reporting on those together if we said, yes, we
22 are or are not complying with all of the restrictions and all of
23 the controls associated with a given site. So we have defined
24 that term very broadly.

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1 Now, the genesis of Land Use Control MOA in Florida in
2 Region 4, started out, of course, with the fact that DoD
3 facilities in Florida, as they are across the country, have now
4 moved from investigating, as it seems to have taken us years to
5 have done in some cases, or at least that is the criticism that
6 we have had, to actually cleaning up our sites and moving forward
7 to implementing individual remedies on our sites across the
8 programs, UST, RCRA, CERCLA, pretty much across the Board. And
9 combined with that during the same period of time, of course, we
10 have seen a shift in I guess regulatory acceptance of the notion
11 of risk-based cleanups in particular.

12 In the old days, of course, it was you will clean
13 everything to background, it has to be pristine, and now we are
14 seeing more and more acceptance by the regions and, of course,
15 individual states with the notion that we can clean to risk-based
16 standards assuming certain controls have been set in place to
17 ensure future protection of human health and the environment.

18 Another driver for MOA in Florida was the fact that, like
19 Illinois, Florida has a deed recordation requirement in the

20 statute that says once you implement a remedy, if you are going
21 to use an institution control, you will, in fact, deed record
22 that on your property. Carl Smith, of GSA, will talk a little
23 bit more about our legal limitation in that regard.

24 Finally, the need just to set up a workable process. As in

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1 Florida and in Illinois and other states, our DoD facilities vary
2 widely from small reserve centers to rather large industrial
3 facilities, which have a number of different sites on them. They
4 could be RCRA sites, could be a combination of RCRA or UST and
5 CERCLA sites with different authorities and different agencies
6 that may be controlling those cleanups that we are working with.

7 So the EPA and the Florida DEP folks and us decided, well,
8 we need to have a process that kind of crosses the bounds of all
9 of those different programs so that we have a very consistent
10 approach. If we have a RCRA site next to a CERCLA site, next to
11 a UST site, why should we have different inspection and reporting
12 requirements that make it very difficult for base personnel to
13 oversee Land Use Controls or any kind of institutional control on
14 those sites. It makes more sense to have a process in place with
15 a consistent approach across the board regardless really of
16 regulatory authorities.

17 Even though the EPA may have delegated their authority to
18 the state on the UST program, we felt it was appropriate to keep
19 both of the regulatory agencies involved and at least, if nothing

20 else, reporting to them that we are maintaining whatever Land Use
21 Controls we have agreed via our remedy documentation, whether it
22 be a ROD or a No Further Remediation letter from the state or
23 whatever it might be to implement at a given site. It would
24 certainly assist us tremendously in having a consistent approach.

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1 I would like to talk specifically a little bit about the
2 basics of the Florida MOA. Again, it was a tri-party agreement,
3 and the background is it came out of some party efforts, because
4 the parties saw that we needed, again, a consistent approach to
5 all of our sites that everybody could understand and apply and
6 implement and maintain in an effective manner. We recognize that
7 we need more than just another consent order or another RCRA
8 permit mod or something that would be potentially put on a shelf
9 and forgotten about down the road. We needed something that was
10 an active process that would keep all of the players involved on
11 all of our sites.

12 Now, as we notice on the next slide, we do say we cover all
13 sites, and that's -- there is -- just to let you know, there has
14 been some recent DoD guidance that just come out that expresses
15 some concerns about that, particularly in the context of us
16 maintaining our CERCLA authorities, as we are a lead agent on
17 many of our facilities to do CERCLA cleanups. So we are going to
18 be working with the IEPA to come up with some language that

19 maintains our CERCLA authorities but at the same time allows the
20 EPA and the state to participate in Land Use Control oversight on
21 all of our sites.

22 Now, the stated purposes -- and there are several -- I just
23 captured a few of them here in the slides. Essentially, again,
24 to implement the process. And to do that, of course, we are

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1 trying to facilitate risk-based cleanups because we felt
2 risk-based cleanups were an economical yet protective way of
3 cleaning up facilities across the country in many cases. In some
4 cases it is just not appropriate to do a risk-based cleanup, in
5 which case we would not have a Land Use Control or a need for a
6 Land Use Control.

7 Secondly, we wanted to elevate the level of awareness of
8 station personnel, and that included tenants on stations, and
9 there could be a number of different federal facilities on a
10 given DoD installation, as well as Army, Navy, and Air Force
11 folks all spread apart across on various installation control
12 just by one component. We wanted to make sure that all of the
13 tenants were aware of the restrictions and that the base
14 personnel had a process in place where they can keep these people
15 aware.

16 So we had seen in the past where we had instances where
17 someone would go out and award a contract and dig a utility
18 trench right through the middle of a CERCLA site or a UST site.

19 We wanted to put in a place a process to hopefully, to the
20 greatest extent possible, prevent future incidents of that kind.
21 So we wanted to essentially set up a process where the station
22 personnel could provide documentation in a rather simple format
23 and easily understandable format to all the tenants and have
24 meetings with those tenants and make sure they understood that if

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1 they are going to have a mil con project or construction project
2 or utility repair or installation project, they need to come to
3 the environmental office and make sure that they are not going to
4 run afoul of any of the sites that we have on our bases.

5 The MOA also set up a notification process both to advise
6 the regulators of the continued maintenance of the sites that we
7 had but also to tell them if we had any planned changes to the
8 facility that might affect any of those sites. We specifically
9 had some prenotice requirements built in to the Florida MOA that
10 says we will come to the regulators because we have a mil con
11 project that says we are going to build a new hangar or we have a
12 utility repair project out there that is pending that we know
13 about and we really need to run that utility line near or
14 adjacent to or maybe even into a site and how do we do that and
15 maintain the integrity of the site and the remedy that we had
16 previously implemented. So there are two notice aspects built
17 into the MOA.

18 We also wanted to provide reasonable assurances, which is
19 kind of the guts of the thing, that we have got control over what
20 we are doing, it is not a willy-nilly thing that we only look at
21 it once a year and everybody forgets about in the meantime. But
22 we can give you assurances that we are on top of it, essentially.
23 We are on top of controlling our sites. In the Florida case we
24 actually had an Admiral who had issued an instruction to the

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1 three bases, the Naval Air Station at Jacksonville, the Naval
2 Station Mayport, and the Naval Air Station Key West that fell
3 under his direct authority as a Regional Environmental
4 Coordinator. So he went ahead and issued an instruction that
5 said you will enter into MOAs with the FDEP and EPA Region 4.

6 Some of the basic requirements that are kind of the guts or
7 the nuts and bolts of our agreements, first of all, we set up a
8 site listing appendix, which specifically lists the sites that
9 are going to be included under the terms of the agreement. And
10 the MOA provides that that agreement site listing will be updated
11 periodically as appropriate to reflect the addition or deletion
12 of sites under terms of the agreement. So if we find additional
13 sites that need controls and remedies put into place with
14 controls or if we decide to go out and do an interim measure or
15 something and actually remove the soil at a contaminated site
16 that we had previously, to build a new building that we would
17 probably delete that site off the appendix.

18 The second thing that we set up was a LUCIP, what we refer
19 to as a LUCIP, which is a specific implementation plan for each
20 of those sites. Those would be appended to the MOA. They are
21 fairly short and concise. What we wanted to do was take all the
22 verbiage in the decision documents that may apply and boil it
23 down to what the nuts and bolts of the site are about. The ones
24 we had set up for Florida and we would also like to set up for

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1 Illinois, essentially, you only have about six or seven different
2 pertinent points, the site description, site location, the Land
3 Use Control objectives, the actual Land Use Controls that are
4 implemented to achieve those objectives, for example,
5 installation of a fence, something of that nature, the decision
6 documents that pertain to the site, whether it be a Record of
7 Decision or a No Further Remediation letter of some type, and
8 this other pertinent information that might apply.

9 We have a very concise document that would only be about a
10 page or a page and a half that we could have the base personnel
11 share with the tenants on the base so that if they are looking at
12 putting in a utility trench or putting in a new building, they
13 can get that information and say, oh, I understand there is a
14 site here. Here is where it is at. Here is the parameters of
15 it. Here are the restrictions on it. Maybe I need to reroute
16 that utility line or think about putting that building somewhere

17 else because of the site and the things that are involved with
18 that site. So we wanted something very -- I guess the KISS
19 principle, keep it simple stupid applies here. So all of the
20 tenants could understand the environmental nuances of these sites
21 that they are not normally involved with.

22 As part of the MOA we also had the base conduct periodic
23 inspections. One of the things we are talking with the IEPA
24 about is what is the best way to set that up. As I mentioned

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1 earlier, we have sites that are small reserve centers and may
2 only have one site with a Land Use Control to very large, you
3 know, multi-acre facilities which may have several sites with
4 Land Use Controls. And so how often do you need to inspect these
5 type of sites. One of the things we would like to do is set up
6 an agreement that is variable, even though it is a model, with
7 certain variables in it. And this would be one of them where for
8 one facility it might be appropriate to go out every quarter, at
9 least. If you have a lot of industrial activities out there and
10 you have a lot of mil con projects where things are being built
11 or repaired or renovated, it might be appropriate to go out at
12 least every quarter and look at these sites and make sure that
13 everything is okay. On other facilities, semiannual or annual
14 might be appropriate, depending on the level of activity, where
15 the facility is, where the site is on the facility and how large
16 the facility is and the number of sites that may be involved.

17 We also set up a process of quarterly reviews, by what we
18 refer to as our environmental compliance board and each of the
19 agencies have different names for it. But essentially it is a
20 board where the folks get together and usually have tenant
21 representatives as well as the environmental personnel on the
22 base come together every quarter and say, okay, where are we at
23 with these sites and is anybody aware of any planned changes to
24 any areas that may affect any of these sites, so that a tenant

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1 who has just got funding down from his headquarters at Louis Air
2 Force or NOAA or some other Agency and says, I know, I just got
3 money yesterday to build a new building over here and this is
4 where I would like to put it at. Those kind of issues can be
5 discussed on a quarterly basis and coordinated so that siting
6 interference or disruption can be avoided.

7 Finally, once a year the commanding officer, in the case of
8 DoD facilities, at least, would certify compliance with all of
9 the Land Use Controls. So he would send a letter to EPA and IEPA
10 that says, yes, in fact, we have maintained the Land Use Controls
11 that we agreed that we would maintain pursuant both to the MOA
12 and all of the No Further Remediation letters or Records of
13 Decision or whatever documents that we have out there that
14 reflect the decisions that relate to those individual sites. So
15 it is, again, another double-check process, another oversight

16 opportunity for the regulators to say, yes, the Navy is on top of
17 what they are doing or the DoD is on top of what they are doing.

18 Some of the other basic requirements, prior concurrence and
19 notice to EPA and the IEPA in connection with reevaluation of
20 selected site remedies. Again, these are for things that we have
21 termed as major land use change and that term major was actually
22 defined in the MOA that we have. We would be doing the same
23 thing here, essentially saying that if you are going to have a
24 land use change that is going to affect the integrity of the site

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1 remedy you have put in place then you need to notify EPA and the
2 state and get some coordination on how to minimize those affects,
3 what are you going to do to fix the situation after the fact or
4 whatever it might be. So if we have to run a utility line
5 somewhere, we have no other choice, what are we going to do to
6 put into place protective measures to ensure that that work can
7 be done safely, and then what do we do after the fact to
8 re-establish the remedy that we had put in place under that site.

9 Now, the MOA ties are substantial good faith compliance
10 with the MOA requirements to essentially continue validity of the
11 approved site remedies, which means there is some language in the
12 MOA that would say, hey, Navy or hey, DoD, if you don't comply
13 with the terms, if you don't do your periodic inspections and you
14 don't send us your certification, if you change land uses on us
15 and don't tell us about it, then all bets are off as respect to

16 one or more of the sites that you have done that at, and maybe
17 even multiple sites on a facility which, obviously, raises
18 tremendous questions for us.

19 Because for a commanding officer to have to explain to
20 someone up his chain why he has to get another \$100,000.00 to
21 clean up a site that he previously had a risk-base cleanup on
22 because the Agency took back their No Further Remediation letter
23 or the EPA said, well, we are going to have to go back and amend
24 the ROD and go through the whole process of amending the Record

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1 of Decision, that is not something that the commanding officer
2 would want to do. So we have basically said there has to be some
3 tie in or link between our compliance and good faith with the
4 terms of the MOA and the validity of the individual Records of
5 Decision and No Further Remediation letters out there that will
6 have Land Use Controls associated with those documents.

7 Other basic requirements, although the MOA was not
8 specifically built into Records of Decision or permits or No
9 Further Remediation letters, per se, as a requirement, again,
10 there is this link, and the MOA made it very clear. And we
11 actually drafted up some language that would be an appendix to
12 the MOA that made it clear the link between those decision
13 documents and those enforceable mechanisms that existed and our
14 compliance with the terms of the MOA. The EPA in the State of

15 Florida in particular, and we have found it with most of the
16 other states in Region 4 that we have dealt with, feel
17 comfortable that they already have a good enforcement mechanism
18 against us.

19 If we implement a site remedy and it is reflected in the
20 statement of bases or Record of Decision and we violate that
21 because we don't live up to the terms of the MOA, not only can
22 they pull out of the MOA and say sorry we are not going to play
23 anymore, but they also, of course, can enforce against us based
24 on that particular decision document, which can range anything

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1 from penalties to just saying well, okay, we are going to take
2 back our No Further Remediation letter and you are going to have
3 to start from scratch or at least go back out and look at the
4 site again. So there is a clear linkage there. We didn't make
5 specifically every requirement in the MOA a direct requirement
6 into the Record of Decision or permit.

7 The IEPA here, of course, is proposing a little bit
8 different approach than what we have seen in Florida, South
9 Carolina, and Georgia and a few other states, because essentially
10 we are looking at building the MOA process into the regulations
11 of the Agency. The other states we have dealt with pretty much
12 have said, well, we think we have -- we feel comfortable that we
13 have the inherent authority essentially to enter into this type
14 of agreement with the DoD facilities in the State of Florida, for

15 example, without having to build something specifically into
16 passing a regulation or a statute.

17 We have, of course, deferred to the IEPA and their
18 attorneys in that respect as to what is necessary to implement an
19 MOA similar to the Florida MOA in the State of Illinois. And so
20 that's why we are here today, was to express our concerns and
21 issues that we have relating to the regulatory process of putting
22 that MOA into place. We do have suggested revisions to Part 742
23 regulations that are before the Board currently.

24 So, in summary, we believe that the MOAs establish a

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1 workable, claims control, maintenance and oversight process that
2 is beneficial to all the parties to establish a very consistent
3 approach to all of our sites on a facility, and that we have
4 fully protected human health and the environment, and will act
5 essentially as a substitute for the requirement that we deed
6 record Land Use Controls on our facilities, which we have some
7 legal impediments to doing. I would be happy to answer any
8 questions that the Board Members may have.

9 BOARD MEMBER KEZELIS: Is this the conclusion of the power
10 point presentation?

11 MR. BEVERLY: For me. There is one more.

12 BOARD MEMBER KEZELIS: One more.

13 MR. BEVERLY: Just one more.

14 BOARD MEMBER KEZELIS: Okay. With another witness?

15 MR. BEVERLY: The GSA is in between.

16 HEARING OFFICER JACKSON: Okay. I think what we will do is
17 go ahead and have presentation from the entire group and then we
18 will take questions all at once of the entire panel.

19 MR. ZOLYAK: Sure. That's fine.

20 HEARING OFFICER JACKSON: Okay.

21 MR. ZOLYAK: Ms. Jackson, our next presenter is Carl Smith,
22 an attorney with GSA based in Chicago.

23 HEARING OFFICER JACKSON: Thank you. Whenever you are
24 ready, Mr. Smith.

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1 MR. SMITH: Thank you. My name is Carl E. Smith, Assistant
2 Regional Counsel for the U. S. General Services Administration,
3 Region 5, the Great Lakes Region, consisting of the States of
4 Illinois, Wisconsin, Michigan, Ohio, Indiana, and Minnesota.

5 The comments I will be making today are taken from the
6 prefiled comments of Richard Butterworth, who is in our central
7 office in Washington, D.C. Mr. Butterworth could not make it
8 today, as indicated, because his wife is expecting in the next
9 two or three days.

10 Good morning. Mr. Butterworth, by the way, who prepared
11 the prefiled comments, has been employed by GSA for 13 years and
12 has been in his current role for five years. He is serving as
13 Chief Counsel for the Office of Property Disposal within the

14 Public Building Service of the General Services Administration,
15 GSA. In that capacity he is responsible for policy development,
16 legislative initiatives, regulatory interpretation and adoption,
17 overall program legal review, and for individual real property
18 disposal actions.

19 I had many of those responsibilities in Region 5, and
20 Illinois in particular.

21 We appreciate the opportunity to address the Board
22 concerning, among other things, the legal limitations which exist
23 on the ability of federal agencies to deed record land use
24 revision on federal property. To understand the scope of federal

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1 agent real property management authority, it must first be
2 recognized that those real properties which the various federal
3 agencies occupy or otherwise control are not owned as such by
4 them, but rather by the United States as sovereign. This is
5 simply because the ultimate authority to manage all
6 federally-owned land rests with the Congress pursuant to the
7 Property Clause of the United States Constitution and Congress
8 has not chosen to assign ownership over federal lands to any
9 particular agency or agencies.

10 GSA derives its authority to manage and dispose of federal
11 lands from the Federal Property and Administrative Services Act
12 of 1949, the citation of which is in the prefiled comments. I

13 will refer to that as the Property Act. One of the principal
14 purposes of the Property Act was to provide economies of scale
15 and consolidation of resources and authorities within the Federal
16 Government. One of those key areas of consolidation was the
17 authority to manage and dispose of real property. Specifically,
18 GSA was authorized to ensure the effective utilization of excess
19 real property, and that's property which a landholding agency has
20 determined is no longer needed to accomplish its particular
21 mission, and the efficient disposals of surplus real property,
22 which is an excess property for which there is no other federal
23 agency need. GSA is authorized to provide these functions for
24 all federal executive agencies. Therefore, unless an agency has

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1 specific authority to dispose of real property, once a
2 landholding agency has determined that the property is excess to
3 its needs, it must turn the property over to the GSA for
4 disposition.

5 The Department of Defense, DoD, is in a unique situation in
6 the federal government in that it has specific delegation of the
7 same property and management functions as GSA but only with
8 regard to closing and realigning base properties identified under
9 one of the various Base Closure and Realignment, BRAC, statutes
10 passed by Congress in recent years. Therefore, in this limited
11 circumstance, DoD can act as both the landholding and disposal
12 agency, in effect, stepping into the shoes of GSA.

13 While it is true that Congress has chosen on other
14 occasions to grant certain specific property management
15 authorities to other federal agencies, including the DoD, the
16 scope of those authorizations have been very limited. For
17 example, federal agencies have the general authority to grant
18 utility easements or right-of-ways to third parties. However,
19 the Department of Justice has previously determined that the
20 authority that Congress provided to agencies to execute those
21 types of instruments does not extend to conservation easements or
22 other broader grantings of property rights. Thus, under the
23 above authority, federal agencies cannot circumvent the general
24 prohibition against disposition of property rights by granting

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1 IEPA an easement.

2 In carrying out its responsibility for effective and
3 efficient utilization of excess and disposal of surplus federal
4 property, the GSA has explored the use of institutional controls
5 on federal property. Like the proposed rules, GSA interprets
6 institutional controls to mean legal mechanisms for imposing
7 restrictions on future land usage. In recent years, the GSA has
8 worked with both public and private partners to examine many
9 types of institutional controls and the effectiveness of those
10 controls. As a result, GSA has found that the use of such
11 controls by federal agencies can be desirable under certain

12 circumstances.

13 For example, given budgetary realities, landholding federal
14 agencies often lack the necessary funding to remediate many of
15 the contaminated properties under their control to levels which
16 would allow for future unrestricted use. Furthermore, in many
17 instances unrestricted use is not necessary for the agencies to
18 effectively perform their essential missions. Therefore, to the
19 extent that the use of such controls will allow for the
20 implementation of adequately protective, yet cost-effective,
21 risk-based site cleanups, the interest of both federal agencies
22 and the public are served.

23 GSA is also mindful of the fact that many federal
24 properties, which are now being used in an industrial or

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1 commercial capacity, would likely continue to be used in that
2 capacity if the property was turned over to the private sector
3 for redevelopment. Consequently, GSA believes that to the extent
4 that the use of institutional controls can serve to promote the
5 rapid reuse of surplus federal property and facilities, they can
6 also serve as an effective property disposal tool beneficial to
7 both the Federal Government and those communities adversely
8 impacted by federal facility closures. Needless to say, one of
9 GSA's principal goals in the disposal of surplus property is to
10 ensure that those properties do not become undesirable
11 Brownfields.

12 Given the aforementioned, GSA is encouraged that the
13 Illinois Pollution Control Board and the IEPA are looking at
14 realistic ways to allow both federal agencies and the private
15 sector the opportunity to use institutional controls in the
16 context of implementing risk-based site remediation. GSA also
17 supports the effort to ensure that property owners seeking to
18 utilize such controls provide adequate notice of their existence
19 to interested third parties and ensure effective oversight and
20 maintenance.

21 Having said this, GSA is very concerned, however, with the
22 requirement that all institutional controls be recorded as
23 permanent restrictions on use, i.e., be made to run with the
24 land, at the time of remedy selection, even though the property

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1 upon which the control is being applied is not being conveyed to
2 any other party. The proposed rules refer to such controls as
3 Environmental Land Use Controls, or ELUCs.

4 GSA's concern with the ELUCs concept is twofold. First, as
5 previously mentioned, the landholding agencies generally do not
6 have the authority to record land use restrictions in local
7 county recorders' offices, and second, that this recordation
8 process will effectively negate the availability of other equally
9 effective options to ensure the protectiveness of the
10 institutional controls on those federal properties which will be

11 retained in the federal inventory.

12 At this juncture, I believe it is important to note that
13 the Property Act defines the term property to include any
14 interest in property. Accordingly, it is GSA's position that the
15 granting of a property right in perpetuity, such as a restriction
16 on the future use of the federal property as envisioned in the
17 proposed TACO regulations, is an interest in property as defined
18 by the Property Act. Thus, only GSA and not the landholding
19 agency can grant such an interest. The next logical question is
20 why GSA did not simply delegate to landholding agencies the
21 authority to convey these interests or convey the interests
22 itself.

23 GSA has specifically chosen not to delegate the authority
24 to landholding agencies to record land use restrictions that

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1 would run with the land in perpetuity for three principal
2 reasons. First, we believe it would be clearly contrary to
3 Congressional desires as to who should hold property disposal
4 authority. And in the case of DoD, the fact that Congress has
5 only chosen to expressly grant that agency full property disposal
6 authority in the context of BRAC real estate actions clearly
7 indicates that it was not their intent for DoD to have those same
8 authorities in the context of managing active base properties.

9 Secondly, GSA believes that recorded land use restrictions
10 should only be agreed to in the context of an actual property

11 disposal. In that manner, such restrictions can truly reflect
12 the risks associated with known site conditions in the context of
13 particular contemplated reuse of the property rather than some
14 hypothetical use down the road. At the time of the disposal, GSA
15 or any landholding agency with disposal authority could review
16 the institutional controls previously set in place during the
17 landholding agency's use of the property and determine, with
18 appropriate regulatory agency input, whether those controls
19 should remain and become permanent use restrictions or be
20 modified in order to be truly protective in the context of the
21 pending reuse.

22 Finally, as mentioned previously, GSA strongly believes
23 that there are other effective means to impose use restrictions
24 on federal property without requiring that those restrictions be

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1 recorded. For example, while federal landholding agencies may be
2 legally precluded from recording permanent use restrictions,
3 those agencies may enter into land use restriction agreements
4 that may run for the length of the agency's custody of the
5 property. Since many agencies retain their primary facilities
6 for many years, such agreements can implement Land Use Controls
7 practically in perpetuity.

8 Similarly, GSA, as a policy matter, does not convey these
9 property rights in perpetuity for federal property that is not

10 being prepared for further disposal actions. As explained in
11 points two and three above, GSA believes there are ample
12 opportunities to institute permanent restrictions at the time the
13 property will be conveyed from federal ownership, and there are
14 other effective means for restricting property that will be
15 retained by the federal ownership.

16 As we have seen from our review of executed Land Use
17 Control agreements within the U.S. EPA, Region 4, referred to in
18 Mr. Beverly's presentation, and from the draft agreement that DoD
19 has proposed entering into with the Illinois EPA and U.S. EPA,
20 Region 5, these types of agreements can establish various site
21 inspections and reporting procedures which will keep these
22 regulatory bodies involved in Land Use Control maintenance and
23 advised of any intended changes in land use which might affect
24 the continued viability of those controls.

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1 We believe it important to also point out to this Board
2 that in addition to those specific site inspection and reporting
3 requirements which the aforementioned agreements might encompass,
4 two federal laws, namely CERCLA and NEPA, independently impose
5 certain pre-property disposal related notice obligations on
6 federal landholding agencies. These obligations are of a kind
7 not similarly imposed on any private landholder. For example,
8 CERCLA, Section 120(h)(4) requires federal agencies disposing of
9 surplus properties to identify those that may be considered

10 uncontaminated. To make that determination, these agencies must
11 obtain the concurrence of either the U.S. EPA, for properties
12 that are on the National Priority Lists sites, or the cognizant
13 state agency, for instance, the IEPA, for those non-NPL sites.
14 Thus, IEPA would have the right to double-check any agency
15 determination that the particular piece of property being
16 disposed of has no residual contamination in need of some type of
17 institutional control.

18 Second, federal landholding agencies must comply with the
19 National Environmental Policy Act, NEPA, in the context of making
20 closure and excessing decisions. Under NEPA, federal agencies
21 are required to assess potential impacts to the quality of the
22 human environment from the proposed federal action. Thus, if any
23 institutional controls are affected by an agency's decision to
24 close a facility or declare property excess, the landholding must

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1 evaluate those impacts and allow public comment on that
2 evaluation. GSA must also comply with NEPA for our disposal
3 actions and if there is contamination in place on property GSA is
4 disposing, we routinely notify the appropriate State regulatory
5 agency to obtain their concurrence concerning the need for land
6 use restrictions on the property prior to disposal.

7 So in light of the foregoing, GSA urges the Board to modify
8 IEPA's proposed language regarding the use of ELUCs in the

9 current draft of the TACO regulations as suggested by the DoD
10 agencies. The DoD's proposal, as we understand it, permanent
11 land use restrictions would only be imposed at the time the
12 property is deeded from the Federal Government to any non-federal
13 entity. However, the landholding agency would still restrict use
14 of the property through a Land Use Control Memorandum of
15 Agreement with IEPA and the U.S. EPA, Region 5, for as long as
16 the federal agency controlled the property.

17 In conclusion, we at GSA support DoD's request that the
18 ELUCs portion of the proposed TACO regulations be modified to
19 take into account the unique authorities given to, and
20 responsibilities imposed on, federal agencies' management of
21 federal real property as well as the potential for significant
22 State involvement in the disposition of property in light of
23 CERCLA and NEPA requirements.

24 We appreciate the opportunity the Federal Government has

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1 had to work with the Board and IEPA and resolve this issue and I
2 thank you for the opportunity to present these comments to you
3 today.

4 HEARING OFFICER JACKSON: Thank you, Mr. Smith. Since this
5 testimony was not required to be prefiled, it was very helpful to
6 have you read it into the record this morning. Thank you.

7 I would ask do we have any other paper exhibits or can we
8 go ahead and move that the two be admitted at this time?

9 MR. ZOLYAK: I believe that is all we have.

10 HEARING OFFICER JACKSON: All right. We have a copy of Mr.
11 Beverly's power point presentation, and we would mark that as
12 Department of Defense Exhibit Number 2.

13 (Whereupon said document was duly marked for purposes of
14 identification as Department of Defense Exhibit 2 as of
15 this date.)

16 HEARING OFFICER JACKSON: Department of Defense Exhibit 1
17 was Mr. Zolyak's prefiled testimony from the August 25th hearing.

18 Then Mr. Butterworth's testimony would be Department of
19 Defense Exhibit Number 3.

20 (Whereupon said document was duly marked for purposes of
21 identification as Department of Defense Exhibit 3 as of
22 this date.)

23 HEARING OFFICER JACKSON: Are there any objections? Okay.
24 These documents are so entered into the record. Thank you.

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1 MR. ZOLYAK: Thank you.

2 (Whereupon said documents were admitted into evidence as
3 Department of Defense Exhibits 2 and 3 as of this date.)

4 MR. ZOLYAK: Our final presenter is Mr. Andrew Kendrick.
5 Mr. Kendrick is a hydrogeologist with Tetra Tech Nus. He has a
6 power point presentation on GIS. So if we could ask the Board
7 to move back to your seats. Thank you.

8 MR. KENDRICK: I was asked to give a presentation here
9 today on supporting Land Use Controls utilizing GIS and GPS.
10 Those acronyms, GIS is Geographic Information System and GPS is
11 Global Positioning System. They are basically two technologies
12 that work together to provide spatial information.

13 Briefly, my agenda for my talk here is first I will talk
14 about what is GIS and generally how it works, and accuracy and
15 precision of GIS and mapping in general, security and reliability
16 of GIS, as well as access and distribution options for GIS.

17 What is GIS? A Geographic Information System is, in
18 essence, a computer-based technology for compiling, storing,
19 analyzing and displaying geographically referenced information.
20 When I say geographically referenced information, what I mean is
21 physical entities, buildings, roads, streets, environmental
22 sites, as well as any data that describes all of those entities.
23 So it is not just a map. It is actually a database driving the
24 presentation of these entities.

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1 What is special about GIS? In essence, data is stored in
2 layers of spatial information, as you can see from this example.
3 That makes it possible to query the database and query, in
4 essence, the maps. This example has, you know, several different
5 layers, buildings, streets, customers, sites, etcetera, which
6 are, in essence, stacked upon each other and allows you to do, in
7 essence, three-dimensional querying of the database. So you are

8 not just looking at, again, the physical entities, but what data
9 supports that entity, what are descriptors, what is the item that
10 you are looking at.

11 The real power of GIS is the GIS links, like I said, the
12 spatial features to a relational database. So it is not just an
13 option of the GIS. That is, in essence, the foundation of GIS
14 design. This allows querying of the database to generate visual
15 and hard copy reports and provides rapid visual data analysis to
16 support enhanced decision making. In essence, GIS combines the
17 power of a database with the impact of a presentation or
18 real-time display.

19 What can you do with GIS? Not only does a GIS specialist
20 have all of the tools available of a database and, in essence, a
21 CAD environment, but pre-programmed queries, in other words,
22 pre-programmed questions can be built into the GIS to support
23 specific data users and decision makers who really don't need any
24 more experience, software or hardware other than what you might

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1 need to, for example, access a web site. Examples include
2 identify the location and attributes of Land Use Control sites,
3 display the history and the current status of the Land Use
4 Controls, identify the associated environmental concerns,
5 surrounding features and structures, etcetera. This is four of
6 however many questions you might want to ask.

7 Why is GIS technology potentially an option for supporting
8 Land Use Controls? As mentioned, it is -- the large relational
9 database can be queried to answer the questions at hand by the
10 decision makers, by the stakeholders. It increases accessibility
11 to that information, both internally within your organization or
12 externally to any other data user who you want to have access to
13 this information. Perhaps the most important for the discussion
14 at hand today is it, in essence, answers the questions of site
15 location, site history, limitations, current status, etcetera.

16 Additional justifications for GIS or additional support for
17 GIS is it increases the level of trust. We use it on many of our
18 environmental partnering committees because it has really built
19 trust in the organizations because it provides direct access to
20 the information. The actual stakeholders and data users see and
21 feel and can access that data.

22 Cost savings and value added. The utility of distributing
23 GIS, in other words, spatial information provided to users,
24 significantly outweighs -- typically outweighs the cost of

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1 generating the GIS. The data are updated and managed in a
2 central, secure repository. In other words, the GIS is created,
3 revised and updated once in a central facility and then served to
4 whoever the data uses are and the stakeholders.

5 With respect to accuracy and precision of GIS, GIS is as
6 accurate as the maps that are used to create the GIS. These are

7 three examples of very common maps used to create GIS. USGS,
8 United States Geological Survey, quad maps, they are what we call
9 a digital raster graphic and they are accurate to approximately
10 40 feet. Digital ortho photos are aerial photographs and they
11 are accurate anywhere in the range of ten to forty feet, and that
12 is based on the elevation that the aerial photos are flown.

13 Just as a matter of reference, the USGS quad maps are
14 actually created from digital ortho photos. Conventional
15 surveys, conventional land surveys and GPS, Global Positioning
16 System is accurate to -- is as accurate as you want it,
17 one-hundredth of a foot. Anywhere from that to 15 feet,
18 depending on the sensitivity and accuracy of the GPS units.

19 This next slide is just two typical examples. The blurry
20 picture on the left is a USGS quad map, a seven and a half minute
21 quad map. On the right is an example of a digital ortho photo.

22 A brief word about GPS. GPS is a world-wide radio
23 navigation system formed from a constellation of 24 satellites
24 and ground control systems around the country managed by the

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1 Department of Defense. GPS is very advantageous for remote sites
2 where control does not currently exist. When I say control, I
3 mean a known point, an XY point on the ground. Where there is no
4 control, a conventional survey may take quite a bit of time to
5 actually find where that site is. GPS allows you to generate

6 control wherever you are. Therefore, GPS can be a viable
7 alternative to efficiently survey and independently locate and
8 verify LUCs in the field.

9 Security and reliability of GIS. GIS is created and
10 maintained in a central secure place. It is created at one
11 place. It is managed and edited at one place. The controlled
12 editing capabilities are, like I said, centralized and you can --
13 you have the ability to open up editing to other data users. If
14 there is a particular data manager outside of where the GIS is
15 housed, they do have editing capabilities if they are allowed and
16 given that access. It is obviously reliable because of the
17 inherent redundancy in the Internet.

18 Access and distribution. GIS is commonly distributed over
19 the Internet, which allows version control from the central data
20 server, like I had mentioned previously, and distributed access
21 to users using a standard web browser. In addition, CDs are
22 oftentimes prepared and given to specific data users,
23 stakeholders, such as regulatory agencies, quarterly,
24 semi-annually, annually, or whatever the frequency is.

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1 Access and distribution. An additional advantage of GIS is
2 that many DoD facilities have existing GIS's established
3 typically for the Environmental Affairs Department and/or the
4 facilities management departments. Therefore, the addition of
5 LUC specific data is a relatively minor effort. For those

6 facilities without existing GIS, LUC specific projects can be
7 created rapidly using existing mapping which is now readily
8 available on the Internet and site specific data contained in the
9 implementation plans, the LUCIPs.

10 In summary, GIS and GPS, as a combined technology, is one
11 of several alternatives for securely and consistently
12 distributing spatial information and the supporting feature data
13 and the back up, the descriptive data of the actual map entities.
14 For this reason, the application of GIS may be ideal for the
15 challenge of documenting and distributing LUC information to the
16 decision makers.

17 With that, I will take any questions, or if we want to wait
18 until the end.

19 HEARING OFFICER JACKSON: All right. Thank you, Mr.
20 Kendrick.

21 MR. ZOLYAK: Ms. Jackson, I do wish to note that Mr.
22 Kendrick does have a few copies of his presentation that he can
23 provide to the Board if they would like.

24 HEARING OFFICER JACKSON: Very good. I was going to ask

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1 that. We will mark one as Department of Defense Exhibit Number
2 4.

3 (Whereupon said document was duly marked for purposes of
4 identification as Department of Defense Exhibit 4 as of

5 this date.)

6 HEARING OFFICER JACKSON: And then also the suggested
7 revisions that you submitted, may we mark that as an exhibit as
8 well?

9 MR. ZOLYAK: Sure.

10 HEARING OFFICER JACKSON: That will be marked as Department
11 of Defense Exhibit Number 5.

12 (Whereupon said document was duly marked for purposes of
13 identification as Department of Defense Exhibit 5 as of
14 this date.)

15 HEARING OFFICER JACKSON: Are there any objections to the
16 introduction of those two documents into the record? Okay.
17 Hearing none, then those two exhibits, Exhibits 4 and 5, will be
18 admitted into the record. Thank you.

19 (Whereupon said documents were admitted into evidence as
20 Department of Defense Exhibits 4 and 5 as of this date.)

21 MR. ZOLYAK: Ms. Jackson, that concludes our presentation
22 this morning. We are now open to any questions that you or any
23 member of the Board or the public, for that matter, might have.

24 HEARING OFFICER JACKSON: Thank you, Mr. Zolyak.

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1 BOARD MEMBER KEZELIS: Mr. Beverly, I have a question
2 concerning the MOAs that you testified about with respect to
3 Florida. Did you use one umbrella MOA or did you use one MOA for
4 each facility that was the subject of the agreement?

5 MR. BEVERLY: Each facility enters into their own separate
6 agreement. The commanding officer of that facility signs the
7 agreement on behalf of the installation. Each installation is a
8 little bit different. In the case of Florida, we had identical
9 models. They were all signed by the COs at one time individually
10 for the units. But, for example, DoD, as I mentioned, has so
11 many -- we have small reserve centers and huge facilities and
12 what needs to be built into each of those I guess needs to be
13 tailored to really fit the circumstances. So we really do make
14 them installation specific and not just a big umbrella version.

15 BOARD MEMBER KEZELIS: The parties to such an MOA in
16 Florida would be the installation commander?

17 MR. BEVERLY: Right, the commanding officer of the
18 installation. In this case it was the hazardous waste division
19 director of EPA, Region 4, and his equivalent at the Florida
20 Department of Environmental Protection.

21 BOARD MEMBER KEZELIS: Okay. Thank you. How long,
22 roughly, have these MOAs been in effect?

23 MR. BEVERLY: I believe it was August of -- let me see if I
24 can find that. I have a copy of the Florida one here. August

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1 31st of 1998 was the signature date for the first three in
2 Florida.

3 BOARD MEMBER KEZELIS: So just --

4 MR. BEVERLY: Fairly recently.

5 BOARD MEMBER KEZELIS: A little over two years that you
6 have been operating with the LUC?

7 MR. BEVERLY: (Nodded head up and down.)

8 BOARD MEMBER KEZELIS: Okay. Thank you. I have a question
9 regarding the global information and the Geographic Information
10 Systems as well. Given the flexibility of that type of a
11 database, is it fair to say that it would not be difficult to add
12 in a legal description as another overlay for a particular
13 geographic set of parameters?

14 MR. KENDRICK: Absolutely. In fact, you can, in essence,
15 overlay site photographs, legal descriptions, descriptions of the
16 site, Records of Decision, any digital format, a document, for
17 example, in a PDF format, if you clicked on a particular site, up
18 would come an actual description of that site, the signed
19 memorandum, the signed legal survey, site photos, whatever you
20 wanted.

21 BOARD MEMBER KEZELIS: Okay. Thank you.

22 BOARD MEMBER MELAS: Are there any such agreements in place
23 other than with the Florida in Region 4?

24 MR. BEVERLY: Yes. The last time I spoke to EPA region

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1 counsel there were roughly 20 agreements signed in Region 4 right
2 now. I don't believe there are any signed outside of Region 4.

3 BOARD MEMBER MELAS: Region 4 is the only one that has sort

4 of taken the lead on this?

5 MR. BEVERLY: Correct, and actually came up with some
6 guidance. Once we had pretty much negotiated the terms of the
7 MOA, they came up with some language control guidance that
8 basically says, okay, here is the kind of things that we want to
9 see come out of an agreement with federal facilities.

10 HEARING OFFICER JACKSON: For the record, Mr. Beverly, do
11 you know what states make up Region 4?

12 MR. BEVERLY: Basically the Southeast, extending -- Texas
13 is under Region 6, I know, but pretty much all of the Southeast.
14 Right now we have agreements that have been signed, to my
15 knowledge, and I have not kept up with them very much, Florida,
16 South Carolina, North Carolina, and I believe also Georgia. We
17 have been talking to the folks in Mississippi.

18 It really depends on which facility has I guess the point
19 of reaching Records of Decision or some final decision document.
20 Like at the Air Force, for example, in Mississippi has kind of
21 taken the initiative there because they have facilities where
22 they are reaching those documents. So occasionally we will have
23 an Army or Air Force facility take the lead at a given state
24 where they may not even really involve us, because we just don't

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1 have a facility there or we don't have one that has had a remedy
2 that has been put in place that might have those controls. There

3 may be other states, but those are the ones I am aware of.

4 May I clarify one thing with regard to Andy's testimony. I
5 guess what we are really asking the Board to consider here is not
6 a particular method like GIS or GPS, but rather to give IEPA some
7 latitude with us with federal facilities in particular and as
8 appropriate with the private industry as well as to what is
9 appropriate to come up with an adequate description of a given
10 site and, you know, how best can you maintain that and the
11 integrity of that information and share it with others, I guess.

12 So we have looked at -- you asked because GIS was mentioned
13 at the last hearing about GIS, so we came forward with GIS. But
14 whether it is GIS or GPS or just a plat map or legal survey or
15 some other descriptive method is appropriate for a given site
16 when really what we would like to see is the IEPA to have the
17 flexibility to work that out with the given installation
18 depending upon if you have a site out in the back 40 that there
19 is nothing around it or as opposed to a site in between two
20 buildings, where we could -- you know, pursuant to the MOA, for
21 example, if we have a building torn down and our LUCIP says the
22 site is between two buildings then, of course, we would have to
23 go back to the Agency and say, oh, by the way, we tore down that
24 building. We may need to get some other description put in here

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1 to make sure that nobody loses track of where the site is at kind
2 of thing. Of course, we are periodically inspecting the sites

3 anyway. But these kinds of changes can be built in the MOA
4 process as kind of a living document.

5 And it may be appropriate to start out with a GPS and
6 ultimately end up with a legal survey if things change, if the
7 site is moved or buildings or structures are changed or whatever
8 over time. I guess we just want the flexibility instead of
9 dictating to us that you will do a legal description when we are
10 not recording anything because of our limitations we just want
11 the flexibility to look at other options.

12 If the GIS system certainly is already in place that sounds
13 like an ideal option and approach, to build that into our master
14 plan and to provide that data to the Agency. Then the process
15 aspect of that, the legal survey recorded in the county clerk's
16 office doesn't do a whole lot for the environmental engineer who
17 has to oversee these sites. He needs a better way to know where
18 the sites are at and what they consist of. So that is why we are
19 looking at some of these other options.

20 If he can go out there with a GPS hand-held thing and say,
21 yes, the building used to be here and someone screwed up and
22 moved it on me, but, boy, I can find it now type thing, as
23 opposed to having to get a legal survey guy to come out and
24 resurvey the site. So we are just looking for flexibility just

1 based on the site conditions.

2 HEARING OFFICER JACKSON: Yes, Mr. Rieser. Could you
3 identify yourself for the record, please.

4 MR. RIESER: Yes. My name is David Rieser, with the law
5 firm of Ross & Hardies. Why is a survey not useful and why can't
6 surveys be used in this context? Because everybody would love to
7 have more flexibility. I am just wondering from the federal
8 government's perspective, the Department of Defense's perspective
9 what is it about these sites where a legal survey is not a tool
10 that should be used?

11 MR. BEVERLY: Well, again, there is a couple different
12 aspects. One is we have legal limitations on our ability to deed
13 record land use restrictions, which really fits into where the
14 legal survey fits into the process. You go out and you do a
15 legal survey and you then record that on the document which then
16 gets recorded and filed in the county records. What we are
17 trying to establish across the board for all of our sites and,
18 again, we have facilities with multiple authorities, UST, CERCLA,
19 RCRA, etcetera, is a common process for addressing and overseeing
20 all of our sites.

21 As a part of that process, we look at legal surveys as
22 being one tool, but not a particularly useful tool for the
23 typical property manager who has to deal with tenants and make
24 sure he does not dig a utility trench or build a building on top

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1 of a particular site. If he has got a GIS database or he has got

2 GPS coordinates or he has got plat site maps or something else
3 that he could use as a combined management tool, we feel that is
4 more effective than having just a legal survey that is dictated
5 to us that you will have a legal survey. To us, that is just an
6 additional cost factor and it may not really help the manager
7 control the site.

8 Now, in certain circumstances maybe it would. But for the
9 most part our guys would not go down to the county courthouse to
10 figure out where the sites are at anyway. So they are going to
11 have the database and they are going to have other means of
12 locating and controlling and maintaining their sites other than a
13 legal survey. So a legal survey added on top of that is just an
14 additional cost factor for us, which for a 1,600 square foot or a
15 1,600 acre facility with 20, 30 sites on it, it could be pretty
16 darn expensive adding legal surveys on top of everything,
17 especially if you have some sites on the back 40 and this type of
18 thing. So we are looking at it strictly from an effectiveness
19 and oversight process and cost effectiveness perspective, I guess.
20 That's where we are coming from.

21 CHAIRMAN MANNING: The state and various of our natural
22 resource agencies have been involved in the GIS -- sort of
23 looking at GIS for a number of years now and looking at the value
24 that GIS would have in the environmental process, the Department

1 of Natural Resources, the EPA, us, you know, those kinds of
2 things. But we have not gotten together, as all of the state
3 agencies, and done sort of the GIS program. Are you aware of
4 other states that are using GIS in their natural resources and
5 environmental picture from a state perspective where all of the
6 state data is being put into a GIS system?

7 MR. KENDRICK: Actually, yes. Two -- several states. Two
8 examples are Washington State. The Washington DNR has, in
9 essence, GIS enabled the entire Natural Resource Department and
10 that, obviously, would include forestry stands, beaver colonies,
11 etcetera. So the entire Washington state DNR, all of their data,
12 all of their information is in a GIS and is distributed to the
13 entire department. That is one of the sort of hallmark turn of
14 events with GIS in the state.

15 Currently Pennsylvania is in the process of -- and I am
16 working with Pennsylvania on this -- in standardizing the
17 coverages, the layers, the names, the naming conventions, the
18 file structure for a state-wide environmental GIS.

19 CHAIRMAN MANNING: Thank you. How would the GIS system
20 that a federal entity has or utilizes relate, then -- the
21 information contained in that GIS system, how will that relate to
22 the information that the EPA needs to assess in order to make
23 some of its decisions?

24 MR. BEVERLY: Do you want to give Mayport as an example?

1 MR. KENDRICK: Yes. For example, Naval Station Mayport. I
2 don't want to turn this back on again and have you all move back
3 over.

4 CHAIRMAN MANNING: Go ahead.

5 MR. KENDRICK: At Naval Station Mayport the GIS is
6 currently used to manage the environmental restoration, the
7 entire environmental restoration work at Mayport. So all of the
8 sites, all of the environmental sites, no matter what stage they
9 are in, are contained within the GIS. Contained within the
10 GIS -- this answers a previous question -- are the photographs,
11 the site descriptions. You can have links to the actual
12 documents. So all of the sites are in Naval Station Mayport's
13 GIS.

14 In addition in that GIS are all of the sites that are --
15 that have Land Use Controls and those that don't have Land Use
16 Controls. So that allows, for example, the EPA, the state, the
17 facility, the water management district people, to find out where
18 is a Land Use Control, what is that Land Use Control, what are
19 the limitations to that property in a GIS format, in a point and
20 click web-enabled format. Does that answer your question?

21 CHAIRMAN MANNING: Yes.

22 BOARD MEMBER MELAS: Mayport, is that in Illinois?

23 MR. KENDRICK: That is Florida.

24 BOARD MEMBER MELAS: Oh, that is in Florida?

1 MR. KENDRICK: Yes, Naval Station Mayport in Florida.

2 CHAIRMAN MANNING: Are there any such GIS systems going on
3 in the Illinois federal properties?

4 MR. KENDRICK: I am trying to think. We have several GIS's
5 in Region 5. I can't think of any -- Crane, Indiana; Naval Air
6 Weapon Center, Indianapolis; Louisville, Kentucky. So there are
7 many GIS's similar to the Mayport example in Region 5. I can't
8 think of any that I am currently working on in Illinois.

9 BOARD MEMBER MELAS: Specific to Illinois, how many
10 sites -- whoever wants to answer this, would come under this --
11 would it be primarily the Department of Defense that we are
12 talking about or are there other federal agencies that would have
13 a significant impact here in the State of Illinois?

14 MR. BEVERLY: Well, we had, in working with GSA and we are
15 encouraging IEPA, of course, to get other agencies involved. So
16 far it has been pretty much limited to the DoD, it has been DoD
17 initiative. Based on the fact that we have UST sites and RCRA
18 sites where we can't really get a No Further Remediation letter
19 because of the deed recordation limitation, so we are trying to
20 move forward and get those resolved and that's why we proposed
21 the MOA approach.

22 We will -- in fact, I think Georgia sits on the executive
23 committee that spans other agencies into it. We would like to
24 get them pulled into the process as well. I think what the IEPA

1 would like to see is a model agreement with, again, some variable
2 things built in for site specific situations, but essentially
3 that would be federal facility wide. And I can't speak to how
4 many that is.

5 BOARD MEMBER MELAS: Those meetings with the IEPA are still
6 ongoing, I take it?

7 MR. BEVERLY: Yes.

8 MS. VLAHOS: I would say that --

9 HEARING OFFICER JACKSON: Ms. Vlahos, if you could identify
10 yourself for the record.

11 MS. VLAHOS: Sure. I am Georgia Vlahos and I am Counsel
12 for the Naval Training Center, Great Lakes. I think that IEPA
13 would have -- and federal facilities both would be in the best
14 section, Mr. Melas, to really respond to that question.

15 BOARD MEMBER MELAS: Thanks.

16 MS. VLAHOS: Sure.

17 HEARING OFFICER JACKSON: Yes, Joel.

18 MR. STERNSTEIN: I am Joel Sternstein with the Pollution
19 Control Board. Mr. Kendrick, you had said that the federal
20 facilities that are -- the federal DoD facilities that are in
21 Illinois right now do not have GIS descriptions?

22 MR. KENDRICK: No, I did not say that. I said I am
23 personally not working on in Illinois that have GIS. I am not
24 sure what other, for example, contractors may be working in

1 Illinois that have GIS's.

2 MR. STERNSTEIN: Do any of the representatives from the
3 Department of Defense know if Illinois Department of Defense
4 facilities have GIS descriptions or you don't know that?

5 MR. ZOLYAK: We can get back to the Board if you would like
6 that question answered. For the Army I am not aware of any, but
7 there might be some that I am not aware of.

8 MR. STERNSTEIN: Mr. Kendrick, do you know if it is easier
9 for federal facilities to -- that, say, aren't described at all,
10 is it easier for a GIS description to be developed than for a
11 legal description to be developed for a certain parcel of
12 property?

13 MR. KENDRICK: Well, I don't -- I am not sure easier is the
14 best word. It is probably -- it may or may not be appropriate to
15 use GIS as one of the tools or GPS. As mentioned earlier, a
16 legal survey may, for a particular site, be required and may be
17 integrated with the GIS. So it is really based on, obviously,
18 the size of the facility, the type of agreement that is set up,
19 the type of site, where is the site located, that kind of thing,
20 that would determine whether GIS were appropriate or not.

21 MR. STERNSTEIN: Thank you.

22 HEARING OFFICER JACKSON: Someone else at the back of the
23 room had a question earlier. Has it been answered, I guess?

24 MR. ELVERT: I had my hand up. Bob Elvert with Exxon

1 Mobile. I just want to comment on the fact that the State of
2 Wisconsin has just proposed, and it is before the Board, a GIS
3 registry for their groundwater and soil sites, remediation sites.

4 HEARING OFFICER JACKSON: Thank you.

5 THE COURT REPORTER: Sir, could you spell your last name
6 for me, please.

7 MR. ELVERT: E-L, V, as in Victor, E-R-T.

8 HEARING OFFICER JACKSON: I had a question of clarification
9 for Mr. Beverly. In your presentation you referred to the
10 Environmental Compliance Board as a group that would meet
11 quarterly to discuss the ongoing status of a site. Who all would
12 sit on that Board?

13 MR. BEVERLY: Typically that would be the environmental
14 personnel at a base and representatives from each of the tenant
15 activities. We may have, for example, a navy base with Air
16 Force, NOAA, border patrol, all kinds of federal entities
17 involved, and they would each have an environmental
18 representative who would sit on the Board. So essentially the
19 personnel at the -- the environmental manager, essentially, for
20 the whole base could relay information pertaining to impacts to
21 tenants in terms of upcoming cleanups and things of that nature,
22 as well as the tenants being able to say, oh, by the way, I am
23 getting ready to build a building over here, and I will be
24 submitting to you next week a dig permit to go in and start my

1 foundation or whatever. So it is kind of good way to interface
2 and keep folks on track.

3 Because what we have found is really things that have
4 violated sites in the past have been strictly inadvertent, oh,
5 gee, I didn't know that I couldn't dig here and that type of
6 situation. The contractor comes on board and he is just told to
7 fix the utility line or he has a leaking pipe or whatever. He
8 goes in and starts digging and the environmental guy drives by
9 and says what is this guy digging in my site for. He didn't know
10 the site was there. So this is a type of way to prevent, as best
11 we can, for the facilities and the environmental people getting
12 all together and saying what is going on out there and
13 coordinating that information.

14 HEARING OFFICER JACKSON: Okay. So it is more of an
15 on-site coordination rather than involving state agencies or the
16 U.S. EPA?

17 MR. BEVERLY: Correct. It is strictly an on facility kind
18 of double-check and communication tool.

19 HEARING OFFICER JACKSON: Thank you.

20 BOARD MEMBER KEZELIS: Mr. Zolyak, I am going to change the
21 topic for a moment.

22 MR. ZOLYAK: Okay.

23 BOARD MEMBER KEZELIS: And I believe this is properly
24 directed to you. The document captioned, "Suggested Revisions

1 Submitted by the United States Department of Defense," and
2 specifically my question is with respect to Section 742.1010
3 (e)(2)(e). For your convenience, it is on the last page of the
4 submission, page eight. That provision provides, as proposed by
5 the Department of Defense, that if the Federal Landholding Entity
6 plans on conveying any site with a land use limitation or
7 requirement to any entity that will not thereby remain or become
8 a Federal Landholding Entity, that the Agency be notified in
9 advance.

10 Had you had discussions with the Agency with respect to the
11 amount of time that would be of benefit to the Agency and
12 amenable to you or your department with respect to advance
13 notification?

14 MR. ZOLYAK: To be frank with you, we have had a great deal
15 of discussion with Kim Geving and others, and I cannot recall
16 specifically that we have asked them about the number of days,
17 but certainly we are open to that.

18 MR. BEVERLY: I think the MOA in Florida had a 60 day
19 notice requirement.

20 BOARD MEMBER KEZELIS: A 60 day notice? Okay. That is
21 very helpful. Thank you.

22 CHAIRMAN MANNING: The language in this document, this
23 proposed amendments to the rules, would not only apply to DoD but
24 would apply to any Federal Landholding Entity?

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1 MR. ZOLYAK: Yes.

2 CHAIRMAN MANNING: Which basically is Federal Government
3 owning land in Illinois, right?

4 MR. ZOLYAK: That is correct.

5 CHAIRMAN MANNING: So but for the DoD involvement all of
6 the other non DoD federal properties, am I understanding then,
7 from your testimony, I think, Mr. Smith, is that GAS needs to be
8 involved in each and every -- GSA. I am sorry. GSA needs to be
9 involved before a Memorandum of Understanding would be reached?

10 MR. SMITH: No, that is not what we are saying. We are
11 just commenting on our position with respect to if there was
12 attempts to put restrictions on the land that would run with the
13 land involving a landholding agency that did not have disposal
14 authority.

15 CHAIRMAN MANNING: So you are basically saying, though,
16 that -- that it seems to me that you saying that the GSA needs to
17 be involved, then, before a restriction is put on a federal land?

18 MR. SMITH: Yes. If we are talking about deed recordation,
19 yes, GSA would have to be involved. Again, unless the
20 landholding agency had specific authority.

21 BOARD MEMBER MELAS: And the only one that really has that,
22 so far as I know, is the DoD in the Base Closing Act, right?

23 MR. SMITH: Correct.

24 MR. ZOLYAK: Right.

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1 CHAIRMAN MANNING: Is GSA equipped to work with the
2 Illinois EPA and all of these -- I am not sure how many sites we
3 are talking about in Illinois that -- maybe the Illinois EPA
4 needs to talk a little bit more about this to us in terms of
5 whether there is a concern with the level of involvement and
6 whether the right people will be involved all the time to make
7 the decisions in the time frames that they need to be made.

8 MR. BEVERLY: Just to kind of clarify, what would happen in
9 the situation where the landholding agency did not have the
10 authority to dispose or to deed record a restriction is they
11 would have to go to GSA to do that. And I think that's where the
12 point made by GSA is that we don't feel it is appropriate -- they
13 don't feel it is appropriate, given congressional concerns about
14 delegating authority.

15 So if you are talking about an agency that is getting ready
16 to dispose of property, if they don't have a disposal authority
17 they would go and refer that property to GSA. GSA would then, as
18 part of the transaction, deed restrict it as appropriate at that
19 point. If they have, for example, the DoD in the BRAC context
20 the authority to dispose and as part of that the authority to
21 deed restrict, we would then do that at that time as we do for
22 BRAC facilities, and GSA would not be involved at all.

23 So it is really just a situation where if they have excess
24 property and they are saying we don't need this anymore, and GSA,

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1 please handle this for us, they would turn the property to GSA,
2 and had a Land Use Control that would need to be maintained, that
3 would then be deed recorded by GSA who would handle all of the
4 paper work and the Agency would basically just step back and GSA
5 would be their agent for disposing of that piece of property.

6 Does that help clarify? So GSA would not be involved
7 extensively throughout Illinois I guess in multiple properties
8 being disposed of. I mean, potentially, I guess, if we had a
9 massive government reduction I guess you could say that and I
10 guess that would happen. But otherwise, we would handle our BRAC
11 situation and then facilities would go to GSA that didn't have
12 BRAC authority to dispose of their properties.

13 CHAIRMAN MANNING: Well, with a non DoD property cleanup,
14 you had mentioned as well, I think, that generally the federal
15 entity holding the land or the tenant, the federal tenant, would
16 not necessarily have the money or the appropriation to do the
17 cleanup once they are finished with the property. Could you
18 explain to me a little bit how the federal appropriation process
19 works, too, then, in terms of appropriating money for a cleanup
20 of a Brownfields site?

21 MR. BEVERLY: Well, I think we can speak generally to what
22 DoD does. Of course, every year we program in for the Navy -- I
23 shouldn't say the Navy -- the Navy installation-restoration
24 program programs money based on the sites that fall under the

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1 Navy that we know the cleanup needs to be done. So we go through
2 and based on schedules that we have for our facilities and based
3 on RCRA permits or whatever documents may be driving a cleanup
4 schedule, our remedial program managers for each of the
5 individual facilities has to submit budget to our folks that gets
6 sent ultimately up to Congress reflecting what our requirements
7 are for the future investigation and/or remediation of these
8 sites. And that is done every year and the budgets are generated
9 every year.

10 Now, some of the monies carry over. If someone says I need
11 \$300,000.00 to conduct an RAFS, he does not have to go back once
12 he gets that money every year and get it. He has already
13 essentially got it. I think the point that was made by GSA is
14 you have got a number of facilities owned by a particular agency
15 throughout the country and that the reality is we will only get
16 so much money out of Congress. Congress will give us
17 specifically what we -- sometimes not even what we ask for to
18 clean up our sites. We have to budget every year to get that
19 money as best we can get it. Congress will set the amount to
20 which we get. Many times our requirements are above and beyond
21 what Congress is willing to give us. That is just kind of
22 reality, given the budget circumstances and that type of thing.

23 So, obviously, we are looking more and more to risk-based

24 cleanups to try to make the biggest bang out of our buck,

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1 essentially. That is true, I think, for all federal agencies who
2 are trying to get efficient cost-effective cleanups the best we
3 can get them within, of course, the regulations that those
4 remedies will be protected, so we can tackle as many sites with
5 the limited dollars that we get and clean them up as quickly as
6 we can.

7 BOARD MEMBER KEZELIS: I think that is true for state
8 agencies, too.

9 MR. BEVERLY: Yes.

10 CHAIRMAN MANNING: It is a way of doing business in
11 government, I think.

12 MR. SMITH: With GSA before the property is turned over
13 after being declared excess of surplus, it would be the
14 landholding agency's responsibility, through their budget, to
15 clean up the site.

16 BOARD MEMBER MELAS: Just let me follow through and see if
17 I completely understand the way GSA works. Let's say, for
18 example, the U.S. Customs Service owns a facility. They find it
19 is surplus. It goes back to GSA. At that point GSA has to offer
20 it to any other federal agency and if there is no other federal
21 agency that wants it, then you may dispose of it into the private
22 sector; is that correct?

23 MR. SMITH: That's correct, but depending on the type of

24 site, there are others that we may have to offer it to, as well.

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1 BOARD MEMBER MELAS: Oh, you mean other than federal
2 agencies?

3 MR. SMITH: Other than federal agencies. To the homeless
4 and to other state agencies to see if there is any interest and
5 that sort of thing. And then when we talk about controls and
6 what are the highest and best use for a property, if we
7 determine, for example, that the highest and best use for the
8 property may be residential, and it is agreed upon with the
9 landholding agency, then we would work with the state
10 environmental agency and come up with a Land Use Control and,
11 again, the responsibility is to get it to that level out of the
12 landholding agency's budget.

13 BOARD MEMBER KEZELIS: I have another question about your
14 experience in Florida, Mr. Beverly. I understand that the
15 mechanism for the Land Use Control is different there, that it
16 was not driven through a regulatory process, as this proposal
17 would be here in Illinois, or rather something through the
18 Memorandum of Understanding; is that correct?

19 MR. BEVERLY: Correct. They did not have specifically a
20 regulation that was either proposed or already in effect that
21 would say you shall enter into this type of agreement. But they
22 did have a deed recordation requirement, as many states do,

23 associated with the RCRA site or whatever it might be. So we
24 were still kind of running up against that same issue, of how do

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1 we address that when we have a legal limitation that really
2 precludes us from doing that. So that is one of the drivers,
3 although it certainly was not -- I would not say the main driver.

4 The main driver was, you know, we had installations out
5 here that were very large and had a number of different sites on
6 it and controlled by both maybe the EPA or the state and we
7 needed to come up with a consistent process. That was our
8 biggest concern, because the environmental folks needed to know
9 how to do this. So that really drove the establishment of the
10 MOA to set up that consistent process.

11 BOARD MEMBER KEZELIS: Did the Florida EPA utilize the GIS
12 system?

13 MR. BEVERLY: I don't believe they did. I don't think
14 really any state that we have dealt with has --

15 BOARD MEMBER KEZELIS: Has been able to?

16 MR. BEVERLY: Right. So far.

17 BOARD MEMBER KEZELIS: Okay. Thank you.

18 HEARING OFFICER JACKSON: Yes, Ms. Geving.

19 MS. GEVING: The importance of the recording requirement is
20 really twofold. One is that it ensures that the property
21 restrictions, requirements or whatever is in the institutional
22 control runs with the land. The secondary tier, I believe, is to

23 put prospective purchasers of that property on notice that there
24 are requirements or limitations that are on that property.

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1 Because, Mr. Smith, you have testified on behalf of Mr.
2 Butterworth that GSA does not feel it is important to record
3 those things on the chain of title until such time as a property
4 transfers, what does GSA see that is in the Memorandum of
5 Agreement to ensure that prospective purchasers are going to be
6 put on notice?

7 MR. SMITH: Well, first of all, we have to talk about the
8 context of the Memorandum of Agreement. We are talking about
9 sites which remain under the custody and control of the
10 landholding agency that are not up for disposal. And at that
11 time through the process of working with the local environmental
12 agency, the notices that are -- the quarterly inspections and the
13 annual inspections, certainly working hand-in-hand, they know
14 what plan reuses may be occurring and what remediation is
15 occurring on an ongoing basis.

16 When we get to the point where -- which may be many, many
17 years down the road -- where we are actually considering disposal
18 of the property from a federal ownership to non-federal
19 ownership, then we would be getting into those types of
20 restrictions that would be recorded with the land where you would
21 have Land Use Controls in place on a permanent basis implemented

22 at the time where the parties will actually know what the
23 intended reuse of the property will be. So it is not that we
24 don't consider the recordation requirements important. We do.

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1 But it is just that the timing would be more appropriate when the
2 property is about to actually be disposed of.

3 MS. GEVING: Is there a particular document that members of
4 the public, for instance, would be able to come and look at that
5 would tell them what type of restrictions are going to be on that
6 property once it changes hands and what the reporting will
7 actually look like?

8 MR. SMITH: Well, let's talk in the DoD context, and
9 perhaps Steve Beverly could address the type of documents.

10 MR. BEVERLY: One thing that we do and I didn't have it in
11 my presentation, but it is important. It is not something that
12 is I guess something that we look at in terms of our DoD policy.
13 It really is a DoD policy issue. When we get ready to dispose of
14 property, the Department of Defense, they have very specific
15 guidelines and policy on procedures that we go through to
16 establish the suitability of that property for transfer to a
17 third party.

18 The MOA that we are going to envision having and the one
19 that we do have with Florida spells out how we will follow those
20 procedures including the term, a finding of suitability to
21 transfer, which is a document in the case of the Navy that, for

22 example, my commanding officer would sign, as we go through the
23 property disposal process. First of all, what we normally do is
24 an environmental baseline survey for our properties, both the

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1 properties we acquire as well as properties that we dispose of.
2 What the environmental baseline survey is, essentially, is a
3 survey of all the environmental issues associated with the
4 property. It could be anything from asbestos and radon to
5 Underground Storage Tanks to whatever it might be that might
6 impact the suitability of that property to be deed transferred to
7 a third party.

8 Under CERCLA we have certain obligations to give covenants
9 in our deeds which say that all remedial action, for example, has
10 been taken on the property. In order to be able to do that we
11 have to know, obviously, if that is the case. So we do our
12 environmental baseline surveys, which identify all of the issues
13 and make sure that we have, in fact, addressed all of the sites
14 that need be to addressed and gotten regulatory buy-ins for those
15 sites. If we haven't, then legally we are precluded from
16 transferring that property to the third party because we cannot
17 give the deed covenant, i.e., we can't say in our deed that all
18 remedial action necessary to protect human health and the
19 environment has been completed which is a specific CERCLA
20 requirement, which applies to all our sites, not just the CERCLA

21 sites.

22 So the law is very clear on that and Congress makes it very
23 clear that we have to give a covenant and to do that we have to
24 go through the process of establishing that to be the case. Now,

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1 we can go through a process called early transfer, but we have to
2 go to either the EPA or the governor of the state and get him or
3 her to approve the early transfer of that property, which
4 means -- early meaning that we have not completed all of the
5 remedial actions yet. But that the governor essentially gets to
6 set down some stipulations and conditions under which we may
7 transfer the property by deed, not having yet completely cleaned
8 it up.

9 But our MOA, and we envision the same MOA that we have with
10 the Illinois EPA, would say that we would commit to give them
11 notice, usually some period of time, 60 days or whatever, in
12 advance of any conveyance. We would also incorporate into our
13 finding of suitability transfer, which is a document we put out
14 for public comment, and our environmental baseline surveys all of
15 the requirements to meet that CERCLA covenant which essentially
16 means we have identified all of the issues associated with the
17 base and we are in a position to find the base suitable for
18 transfer because we can give the covenant.

19 So there are some documents, including the FOST and the
20 environmental baseline survey which we give to prospective

21 purchasers of the property which basically many times they will
22 go out and do -- request to do their own due diligence searches
23 as well, and we even have people come on board and do sampling as
24 well. We have not found that to be unusual because of the

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1 liability concerns. But we are obligated in the MOAs to provide
2 these documents, which we do as part of our CERCLA disposal
3 process anyway, but we are committing to provide those to each of
4 our prospective buyers.

5 MS. GEVING: At the last hearing you made reference to a
6 base master plan. Does that have any provisions in it that might
7 also put prospective purchasers on notice of restrictions or
8 requirements?

9 MR. BEVERLY: Yes and no. I don't think we would normally
10 rely on a base master plan to hand it out to the public. It is
11 really an internal document for use by our tenants and our
12 environmental facility people. Now, if we have a GIS system in
13 which the base master plan is incorporated into that system, we
14 can produce maps and all kinds of things that we would normally
15 potentially, for example, put into the finding of suitability to
16 transfer documentation that would be provided then to the public.

17 So if we have a system in place and it has good maps and if
18 people -- or if people just want to say, well, I am thinking
19 about buying this property over here that you told me is excess.

20 Is there anything -- I have read the EVS and it talks about site
21 five. Could you show me a map that has site five on it, and they
22 submit a request to us, and if we have a GIS system or something
23 similar in place, we can produce a map for them and certainly
24 provide that map to them.

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1 But normally we have maps included in our environmental
2 baseline survey which indicates where the sites are. The finding
3 of suitability would say these are the sites on the base. They
4 are all cleaned up. They have been addressed and they have these
5 kind of controls on it and the deed needs to say these type of
6 things to ensure protection of the health, in terms of
7 restricting, say, for example, future residential use of that
8 property.

9 So we feel it is a very adequate means for prospective
10 purchasers to ensure they understand all of the environmental
11 aspects, including things that are not driven by the typical
12 cleanup. It could be asbestos in the building or a radon concern
13 or something like that. All of these things are addressed in the
14 documents that we produce before we transfer property pursuant to
15 the DoD policy.

16 MS. GEVING: Thank you.

17 HEARING OFFICER JACKSON: I would like to clarify, just for
18 the record, for the court reporter, that this line of questioning
19 was by Kim Geving, an attorney with the Illinois Environmental

20 Protection Agency.

21 MS. GEVING: Sorry.

22 BOARD MEMBER GIRARD: I have a question for Mr. Smith about
23 the status of the United States Postal Service. Does the GSA
24 have the authority to manage and dispose of postal service lands?

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1 MR. SMITH: There is a Memorandum of Agreement between the
2 GSA and the U.S. Postal Service. Basically parties -- the Postal
3 Service would have to ask the GSA to handle the disposal for it,
4 but it has its own independent authority.

5 BOARD MEMBER GIRARD: So the Postal Service property, would
6 it fit under the definition of federally-owned property or is it
7 owned by the Postal Service independently?

8 MR. SMITH: It is -- to my limited knowledge, the property
9 is owned by the United States. I mean, I just had a recent
10 property that was -- where they requested us to transfer -- they
11 transferred custody and control of a postal property to us. It
12 was -- the deed was in the United States of America and we were
13 given authorization to handle the transaction. I really can't
14 say whether that is the case with all properties. The U.S.
15 Postal Service is somewhat unique because it is a quasi-public
16 corporation. That is something that I would prefer to get back
17 to you on more details rather than shoot from the hip.

18 BOARD MEMBER GIRARD: Okay. Thank you. Well, that brings

19 up another question. Are there any other entities operating in
20 the State of Illinois that we sometimes think of as being a
21 federal entity but may be autonomous or semi-autonomous and may
22 have property ownership that does not fall clearly into the
23 federally-owned property category? Maybe you can get back to us
24 on that also.

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1 MR. SMITH: I think I would like to get back to you on that
2 one, because the federal government is just so big.

3 (Laughter.)

4 BOARD MEMBER GIRARD: Thank you.

5 HEARING OFFICER JACKSON: Mr. Zolyak, as you know, the ELUC
6 portion of this rulemaking is subject to a statutory deadline for
7 adoption by the Board. We have until January 6th to adopt
8 regulations implementing the ELUC statute that was signed into
9 law by Governor Ryan.

10 MR. ZOLYAK: Right. We are aware of it.

11 HEARING OFFICER JACKSON: Okay. We were wondering about
12 the time frame for the negotiation of the Memorandum of Agreement
13 with the Illinois EPA and whether you think you will have that
14 agreement to us in time for us to examine before we need to go to
15 second notice on this.

16 MR. ZOLYAK: Well, the tentative schedule that we
17 established back on August 31st -- and I will ask Kim and others
18 to correct me if I misspeak -- is that we hope to have everything

19 complete by September 28th. We are going to be receiving some
20 comments from Ms. Geving. We have some comments that we need to
21 make to her. There will be a conference call on September 21st,
22 and then hopefully at that point we will know on September 21st
23 just how close we are. I think all parties have committed to be
24 done by no later than September 28th. Is that accurate?

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1 MS. GEVING: That's accurate.

2 HEARING OFFICER JACKSON: And you do plan on submitting
3 that Memorandum of Agreement to the Board once it is completed,
4 correct?

5 MR. ZOLYAK: That will be our plan.

6 MS. GEVING: I would say that that would be for the limited
7 purpose of being an exhibit to give you some understanding,
8 because you are not a party, so I don't anticipate you are going
9 to want to give feedback; is that right?

10 HEARING OFFICER JACKSON: That's exactly right. Just as an
11 exhibit.

12 MS. GEVING: All right.

13 HEARING OFFICER JACKSON: Thank you. Yes, Ms. Vlahos.

14 MS. VLAHOS: Ms. Jackson, I don't know if there are any
15 other questions, but I do have a housekeeping item concerning the
16 suggested revisions that we submitted to you, and I believe it is
17 Exhibit Number 5. There are some typographical and one slight

18 clarifying change, if I could read that into the record. Would
19 this be the appropriate time?

20 HEARING OFFICER JACKSON: Certainly.

21 MS. VLAHOS: All right. The first corrective change would
22 be on page five of that exhibit. In the first paragraph
23 designated as capital B, about halfway down the page, the
24 underlining is in error. That is not new material.

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1 The second change is on page seven. It would be Subpart
2 1010(e)(2), a rather long paragraph, the fourth line from the
3 bottom which begins, "each MOA shall," please insert after shall
4 a comma and the phrase "at a minimum" and then another comma.

5 The third change is in paragraph capital A, which
6 immediately follows that paragraph, in the next to the last line
7 the word "identifies" is misspelled. It should be
8 I-D-E-N-T-I-F-I-E-S.

9 The final set of changes is on page eight, in the paragraph
10 designated capital D, in which in the third line from the bottom
11 the next to last word please make "which" to read "that." And
12 the final change is please add "and" at the very end of that
13 paragraph. That's all.

14 HEARING OFFICER JACKSON: Thank you.

15 BOARD MEMBER MELAS: If I may, Ms. Vlahos, my editing
16 background is coming out. On page seven of Mr. Henderson's
17 comments, Mr. Smith --

18 HEARING OFFICER JACKSON: Mr. Butterworth's comments?

19 BOARD MEMBER MELAS: Yes, Mr. Butterworth. I will address
20 this to Mr. Smith. In Mr. Butterworth's comments on page seven,
21 the fifth line up, after the word "landholding" the word "agency"
22 is missing. I think you caught it, Mr. Smith. I noticed it in
23 your voice as you were reading it.

24 MR. SMITH: Thank you.

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1 HEARING OFFICER JACKSON: Are there any other questions or
2 comments at this time?

3 MR. ZOLYAK: Ms. Jackson, if there aren't any other
4 questions or comments, we do want to express our appreciation and
5 thanks for this Board not only taking the time out to hear us but
6 also being a very active participant. Both in our meeting on
7 August 25th and today, I mentioned to Ms. Vlahos that I can't
8 remember going before a Board that was so active and interested
9 and it is really, quite frankly, a pleasure. Because we know
10 what your concerns are and it clearly came across today as well.
11 I think we really appreciate that sort of input from all of you.

12 HEARING OFFICER JACKSON: Thank you very much. We
13 appreciate you taking the time to come and make this presentation
14 today. Thank you.

15 Excuse me. Hang on just one second. Okay. Thank you.

16 I know it is after noon, but unless anybody has an

17 objection I would like to try and go ahead and finish up with
18 Subdocket A before we break. So that would mean Harry Walton is
19 next.

20 MR. ZOLYAK: Ms. Jackson, just as a housekeeping matter,
21 could we just take a short break? Because we are going to have
22 to pack up a few things, and we hate to disturb the next --

23 HEARING OFFICER JACKSON: Absolutely. Good idea. Let's go
24 off the record for just a minute. Thank you.

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1 (Whereupon a short recess was taken.)

2 HEARING OFFICER JACKSON: We are back on the record.
3 Please state your name and then we will take your comments.

4 MR. WALTON: My name is Harry R. Walton. I am Chairman of
5 the Site Remediation Advisory Committee on behalf of the Illinois
6 State Chamber. What else did you need?

7 HEARING OFFICER JACKSON: Just your comments. You may
8 proceed.

9 MR. WALTON: All right. I am here today to --

10 HEARING OFFICER JACKSON: Excuse me. We need to swear you
11 in. Please swear in the witness.

12 (Whereupon the witness was sworn by the Notary Public.)

13 MR. WALTON: I am here today to offer comments on
14 implementation issues. These are germane to Docket A and B.

15 A little background. SRAC was established by the Act at
16 58.11. SRAC was very active in the development of the TACO

17 regulations and the companion SRP, or Site Remediation Program,
18 regulations. Subsequent to the adoption of those, SRAC has had
19 an ongoing dialogue with the Agency, and during that time a lot
20 of different issues and experiences came to rise.

21 In early 1999 we started the regulatory development process
22 with the Agency. In that process we have addressed not only 742,
23 TACO, we also addressed the implementation regulations, 740. We
24 also looked at 732, which SRAC is not authorized to interact and

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1 work with the Agency on, but since the demise of the Leaking
2 Underground Storage Tank Advisory Committee, which basically
3 ended its function with the appointment of SRAC, and many of the
4 members of SRAC were also members of the Leaking Underground
5 Storage Tank Advisory Committee. So during the last year, year
6 and a half, SRAC was very active and had many meetings with the
7 Agency on 742, 740, and 732, as well as indirectly 620, the
8 groundwater standards, since the changes of 742 do affect 620,
9 the groundwater standards.

10 Many of the questions that came to light in the last
11 hearing in Chicago in regard to the implementation of ELUC and
12 the other changes to 742 were discussed by SRAC extensively. And
13 SRAC and the Agency had come to a consensus on many of these
14 implementation issues. Late 1999, we, in our opinion, pretty
15 much had finalized the regulatory proposals that we thought would

16 go to the Board. Our expectations were that amendments to 740 --
17 732 would be submitted concurrently with 742 to the Board,
18 because they are companion regulations. TACO is the process by
19 which you develop remedial objectives. 740 and 732, as well as
20 724 and 725, are the processes by which they are implemented.

21 We, during the last nine months, have queried the Agency
22 frequently to determine the status of the amendments to those
23 regulations, and there is basically no outcry of any action
24 occurring on those. There is a very key provision under 740 that

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1 is very critical to some major Brownfields remediations that are
2 now about to start. And it is called a soil management zone.
3 Because it is so critical, SRAC, on August 23rd, submitted a
4 letter to Director Skinner to request feedback on the status of
5 the 740 regulations.

6 As of today we have not received any response on our
7 request to get those proposed regulations to the Board. Again,
8 740 does provide a lot of information on implementation of these
9 regulatory changes, and 732 also provides a lot of information
10 and guidance on implementation of these changes. I would like to
11 offer a copy of the letter that we -- that SRAC sent to Director
12 Skinner.

13 MS. BERNOTEIT: Karen Bernoteit, in-house Counsel with the
14 Illinois Environmental Regulatory Group. We would like to enter
15 this letter to Thomas Skinner, dated August 23rd, as an exhibit.

16 HEARING OFFICER JACKSON: Would you like that marked as an
17 IERG Exhibit?

18 MR. WALTON: SRAC.

19 MS. BERNOTEIT: SRAC.

20 HEARING OFFICER JACKSON: Okay. We will mark that as SRAC
21 Exhibit 1.

22 (Whereupon said document was duly marked for purposes of
23 identification as SRAC Exhibit 1 as of this date.)

24 HEARING OFFICER JACKSON: Are there any objections to the

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1 introduction of this document? All right. It will be so
2 admitted.

3 (Whereupon said document was admitted into evidence as SRAC
4 Exhibit 1 as of this date.)

5 HEARING OFFICER JACKSON: Let me just clarify, too. You
6 were referring to Part 740 and 732. 740 is the SRP?

7 MR. WALTON: Yes.

8 HEARING OFFICER JACKSON: And then Part 732 deals with
9 LUST?

10 MR. WALTON: Yes, Leaking Underground Storage Tank Program.

11 HEARING OFFICER JACKSON: Thank you.

12 MR. WALTON: I will be happy to answer any questions.

13 Thank you.

14 HEARING OFFICER JACKSON: Thank you. Ms. Bernoteit, did

15 you have other comments at this time?

16 MS. BERNOTEIT: We will have our questions later.

17 HEARING OFFICER JACKSON: Okay. Thank you. Next on our
18 list for Subdocket A presentation is Randy Schick from the
19 Illinois Department of Transportation. Good morning.

20 MR. SCHICK: Hello. My name is J. R., Randle, R-A-N-D-L-E,
21 Schick, S-C-H-I-C-K. I am an Assistant Chief Counsel at the
22 Illinois Department of Transportation.

23 HEARING OFFICER JACKSON: We will let the court reporter
24 swear you in.

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1 (Whereupon the witness was sworn by the Notary Public.)

2 MR. SCHICK: We just wanted to go on the record to say that
3 we support the changes that deal with things that we at DOT deal
4 with, and that has to do with the highway authority agreement
5 section. There are several changes there that we supported and
6 that are incorporated into the proposal. The two substantive
7 ones there have to do with the agreement being with the
8 owner-operator of the underground storage tank as opposed to,
9 say, the real estate property owner in those situations, whether
10 it is an Underground Storage Tank problem, which is easily more
11 than 99 percent of the kind of sites that we see.

12 We have about 300 highway authority agreements either
13 signed or, you know, in the works towards being signed. And the
14 other major changes that the agreement should be -- there should

15 be a reference in the instrument that is recorded in the chain of
16 title that references the highway authority agreement. That is a
17 provision that has been in the agreements from the beginning and
18 it is just something that should be in the rule as well that says
19 that there should be some mention of the agreement, say, in the
20 No Further Remediation letter. By reference, we don't mean that
21 really the agreement needs to be recorded with the NFR letter on
22 the property, but it just should be referenced. There is really
23 no reason to record the agreement along with the NFR letter on
24 the property, because it does not apply to the site, the real

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1 estate.

2 Then the other, we just had a lengthy discussion on the
3 federal agencies Memoranda of Understanding provisions and we
4 have similar sort of provisions that mirror what we have already
5 worked out with the Illinois EPA. We have a Memorandum of
6 Agreement with them for over a year and it really addresses many
7 of the same issues that we just had a discussion on. We have --
8 in the last two years we have had two sites that that memorandum
9 has applied to. One has to do with a former Amoco gas station
10 site in Peoria that we had acquired the entire parcel, and then
11 they were in the process of remediating the site. So we had the
12 site so they needed to -- and we couldn't record the NFR on the
13 right-of-way. We often can't because we don't often have title

14 to the right-of-way. That's the main reason we have this
15 Memorandum of Understanding and why we have these highway
16 authority agreement provisions is because oftentimes we don't
17 have title, but we have jurisdiction of the road, which is really
18 the party in the highway setting that controls access to the
19 groundwater and land and soil.

20 So anyway, we applied the NFR to that site and we built a
21 bridge there, the McCluggage (spelled phonetically) bridge. The
22 reconstruction project incorporated that land. And we had
23 studied it and really had not found anything to deal with anyway
24 at that site, fortunately. Then we had another site where we

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1 removed some heating oil tanks from a site where we had a pumping
2 station in the right-of-way. So we applied that there, too. So
3 just for your information, those were the kinds of things that we
4 see in that area.

5 But really our Memorandum of Understanding, it is -- you
6 know, it will apply to a few sites, you know, maybe every year
7 kind of problem. And then we end up having to track those sites
8 through our different bureaus. So we have worked that out with
9 them and it seems to be working out all right. So that's
10 basically all I wanted to say at this point.

11 HEARING OFFICER JACKSON: Any questions? Thank you, Mr.
12 Schick.

13 MR. SCHICK: Thank you.

14 HEARING OFFICER JACKSON: Next on our list we have the
15 Illinois Petroleum Council. I realize that you had some comments
16 on MTBE and you had some witnesses that may need to get out of
17 town. If you want them to go ahead and make those comments now
18 we can take them now.

19 MR. SYKUTA: Even on Subpart B?

20 HEARING OFFICER JACKSON: Let's go off the record for a
21 second.

22 (Discussion off the record.)

23 HEARING OFFICER JACKSON: All right. We are back on the
24 record.

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1 MR. SYKUTA: My name is David Sykuta. I am Executive
2 Director of the Illinois Petroleum Council. My oral comments are
3 mostly geared towards Subdocket B. We did have a brief comment
4 from one of my members on A, and we just wanted to get that in
5 the record very briefly.

6 I would like to introduce, on my left, Harold Primack, who
7 is the Environmental Business Manager for BP Amoco, and he has a
8 question specifically on the environmental land use planning
9 section.

10 HEARING OFFICER JACKSON: Okay. Before we continue, we
11 will have the court reporter swear all of you in.

12 (Whereupon the witnesses were sworn by the Notary Public.)

13 THE COURT REPORTER: Could you spell your last name,
14 please.

15 MR. PRIMACK: It is Primack. It is P, as in Peter,
16 R-I-M-A-C-K. The first name is Harold. I am a Registered
17 Professional Engineer in the State of Illinois. Not an attorney.

18 MR. SYKUTA: I am David Sykuta, S-Y-K-U-T-A, Executive
19 Director of the Illinois Petroleum Council, based in Springfield,
20 Illinois.

21 MR. ELVERT: And you have my name from before?

22 THE COURT REPORTER: Yes.

23 MR. PRIMACK: First I would like to thank the Board for the
24 opportunity to present testimony on the proposed amendments. The

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1 testimony I am going to present is based on a few comments
2 presented to me by Jodi Jung, J-U-N-G, who is a real estate
3 attorney at Amoco Oil. First I would like to commend the
4 Illinois EPA for what I thought were very well written amendments
5 of the 742 Rules. The ELUC process should make it easier to
6 obtain institutional controls on off-site properties and,
7 thereby, facilitate the TACO process.

8 There is just one issue that I did have some concern with
9 and that's what I wanted to bring to your attention. Section
10 742.1010(b)(1) states that ELUCs must be approved by the Agency
11 and must be recorded and is not effective until it is officially
12 recorded in the chain of title. And the concern is a concern of

13 timing. If we, for instance, were to approach a neighboring
14 property owner and negotiate an ELUC with them, do the parties
15 need to wait until Agency approval before the ELUC can be
16 recorded? If so, there could be a waiting period of 90 days or
17 even greater for this approval and various things could happen to
18 the property during that interim.

19 For instance, the property could be sold or otherwise
20 conveyed during this period. A new purchaser takes the property
21 without the notice of the ELUC and then there is the time for
22 approval by the Agency and where the parties may no longer be in
23 the same position. We, speaking as industry, have the concern
24 that to get a third party to accept an ELUC, we may have tendered

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1 some consideration and the net result is receive nothing for it.

2 By way of background, it is common practice in real estate
3 transactions to record any document encumbering the property,
4 such as deed easements, restrictions, to record this against the
5 property immediately upon execution. And it is certainly done
6 for the purpose of notifying the world of the incumbrance and
7 assure that the guarantees, the property interest is preserved
8 against the existing and future interest holders.

9 So one solution and maybe the easiest solution is to allow
10 for the ELUC to be recorded upon execution and then be able to
11 later release it or modify it depending on the Agency's approval.

12 Other possibilities might be to put in the rule some sort of a
13 time period required for approval from the Agency, such as a 30
14 day period or so or possibly -- and now it is more thinking out
15 loud there -- it might be possible if there is an agreed upon
16 format or form that constitute the ELUC that industry would know
17 would be acceptable to the Agency, possibly a solution like that
18 could be workable.

19 Anyway, again, I appreciate the Board hearing our concerns
20 and I thank you.

21 HEARING OFFICER JACKSON: Thank you. Is that it for now?

22 MR. SYKUTA: Yes.

23 HEARING OFFICER JACKSON: The Agency is coming forward next
24 and we hope that maybe they will address those questions. Thank

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1 you.

2 MS. GEVING: I don't know how we are all going to fit up
3 here, but we will try.

4 HEARING OFFICER JACKSON: Ms. Geving, why don't we go ahead
5 with just the Subdocket A substantive questions or testimony that
6 we might have for the Agency, and then we will get the transcript
7 corrections when we come back after lunch.

8 MS. GEVING: Okay. That's fine.

9 HEARING OFFICER JACKSON: Before we get started, we will
10 have the court reporter swear you in. If there are other -- is
11 Mr. King the only one that will be testifying?

12 MS. GEVING: I believe so.

13 (Whereupon the witness was sworn by the Notary Public.)

14 MS. GEVING: May we have just a moment?

15 HEARING OFFICER JACKSON: Sure.

16 MS. GEVING: Okay. Thank you. We are ready to proceed.

17 HEARING OFFICER JACKSON: Do you have a statement at this
18 time or do you just wish to answer questions that the Board or
19 members of the audience might have?

20 MR. GARY KING: I think we were here to answer questions.

21 HEARING OFFICER JACKSON: Very good.

22 BOARD MEMBER KEZELIS: I have a question. I believe you
23 were present during the course of Mr. Walton's testimony and
24 observations concerning the status of other rulemaking proposals

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1 that the Agency might have in the works. Can either Mr. King or
2 Ms. Geving give us a status report about those or some further
3 discussion, perhaps, of the implementation schedules the Agency
4 would contemplate with respect to the TACO rulemaking that we
5 have in place, generally?

6 MR. GARY KING: In response to Mr. Walton's statement, the
7 only thing I am really authorized to say is that those proposals
8 are under review within the Agency. I don't have a schedule as
9 to when they will be proposed to the Board.

10 BOARD MEMBER KEZELIS: Okay. We will discuss that at

11 greater length, then, in Subdocket B. I just wanted to see if
12 there was anything else that I needed to be aware of for purposes
13 of Subdocket A.

14 I also have a question with respect to the suggestions of
15 the Department of Defense with respect to ELUCs on
16 federally-owned property. And that is the last page of the
17 submission of Mr. Zolyak, Subparagraph A, with respect to
18 notification of the Agency in advance. Do you have anything you
19 wish to say about that?

20 MS. GEVING: Is this today's submittal?

21 BOARD MEMBER KEZELIS: Yes, today's submittal.

22 MS. GEVING: Did you say it was on page eight?

23 BOARD MEMBER KEZELIS: Yes, the last page of his testimony.

24 HEARING OFFICER JACKSON: Department of Defense Exhibit

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1 Number 5.

2 BOARD MEMBER KEZELIS: The amount of time that the Agency
3 would think it would need for notification.

4 MS. GEVING: I believe when we were negotiating the MOA we
5 had 60 days in there. I don't think it is addressed here.

6 BOARD MEMBER KEZELIS: It is not. That is why I wanted a
7 clarification since it is an exhibit here today.

8 MS. GEVING: I believe it is 60 days.

9 BOARD MEMBER KEZELIS: Okay. Thank you.

10 MS. LIU: Mr. King, last month the National Academy of

11 Sciences issued a report for the Department of Energy evaluating
12 their institutional controls for use on hazardous waste and
13 radioactive waste sites. I was wondering if the Agency was
14 familiar with that report?

15 MR. GARY KING: I am not familiar with that report.

16 MS. LIU: Okay. The reason I bring it up is because their
17 conclusion was that institutional controls alone were not
18 effective. There are instances where institutional controls may
19 fail when you have changes in management or organizations and
20 engineering barriers that are not maintained or monitored. When
21 you speak of DoE, you are talking about radioactive waste sites
22 that may be around for hundreds or thousands of years, much
23 longer than probably we will be.

24 I was wondering if the Agency would be willing to review

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1 that report in the context of the ELUCs or perhaps considering
2 redundant controls, not only just institutional controls, but
3 institutional controls and a combination of engineered barriers
4 or zoning changes, things along those lines. Would that be
5 possible?

6 MR. GARY KING: Well, let me -- rather than just offering
7 to review that report, let me, at least from my perspective, give
8 you some thoughts on this issue. The issue of institutional
9 controls at federal facilities is a major issue and it is an

10 issue that does not just apply at DoE sites. It applies at DoD
11 sites as well. It is an issue that is being debated nationwide.
12 The concern has been, you know, as we move to risk-based systems
13 of identifying cleanup objectives, how are we long-term going to
14 make sure that those institutional controls remain in place. I
15 personally am very pleased with DoD's efforts in developing and
16 working towards developing a system that is regimented, has some
17 thought behind it, and I think it is really the way to go. DoE
18 has not come forward, certainly to us, in this kind of forum
19 looking at that kind of issue.

20 The process that we are putting in place relative to MOAs
21 with DoD facilities should have a good deal of transfer to DoE
22 facilities. It does -- it, however, does -- it is impacted by
23 two major things. One, is the facility going to be managed in a
24 way that they are going to be cognizant of those institutional

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1 controls, cognizant of those engineered barriers. It is kind of
2 hard to foretell what kind of management commitment is going to
3 occur in that area.

4 The second problem and somewhat related to that, and that
5 is, is the funding going to be available long-term relative to
6 these engineered barriers and institutional controls. There was
7 a discussion earlier from the federal panel about the issue of
8 appropriations. It is something that we are certainly concerned
9 with. We get involved with working with the Defense Department

10 to try to see that funding levels are appropriate for cleanup of
11 sites that are in Illinois. Sometimes we are successful.
12 Sometimes we are not.

13 Hopefully we are not going to be in a position where
14 long-term the commitment to institutional controls is going to
15 evaporate as a funding issue. It is something that we intend to
16 monitor and stay on top of for those projects that we have
17 approved Records of Decisions or NFR letters or whatever the kind
18 of facility closure document is in place.

19 MS. LIU: For private landowners, would there be a benefit
20 of establishing some kind of trust fund for long-term care and
21 maintenance for the engineered barriers?

22 MR. GARY KING: For private ownership?

23 MS. LIU: Yes.

24 MR. GARY KING: That was something when we debated the

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1 whole notion -- when we were preparing the TACO rules back in
2 1996, we debated the issue of should there be some kind of
3 financial backing to make sure that these institutional controls
4 would stay in place, similar to what occurs under other
5 regulatory programs, whether it is a letter of credit or
6 whatever. Some states have gone that route. We concluded that
7 at least for the first part, you know, as we see how this program
8 goes forward, that we would not go that way.

9 I mean, I suppose if we get into a situation where we find
10 that we have had, you know, massive failure of institutional
11 controls and engineered barriers that are causing future
12 problems, that the whole system would have to be overhauled. At
13 this point we have not seen that type of problem occur. So
14 having a financial instrument backing things up has not seemed to
15 be necessary at this point.

16 MS. LIU: Thank you.

17 MS. GEVING: May I ask Mr. King a question? Mr. King, does
18 the Agency have any type of institutional control tracking in
19 place in the Agency to ensure that certain sites are continuing
20 with their responsibilities?

21 MR. GARY KING: We have gone through a preliminary process
22 of developing a tracking methodology. I won't say it is as
23 complete as perhaps we would want it to be at this point. We are
24 tracking to make sure that the sites that would pose the greatest

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1 risk, if the institutional control fails, are tracked most
2 closely. In the other -- in a lot of the other ones we are
3 really dependent on market forces relative to the transfer of
4 property, and so far that works pretty effectively. If a private
5 owner just wants to maintain the value of a piece of property as
6 far as further resale or reuse, then they will want to maintain
7 those barriers and institutional controls.

8 HEARING OFFICER JACKSON: Are there any other questions for

9 Mr. King?

10 MS. BERNOTEIT: We have some questions for the Agency.

11 CHAIRMAN MANNING: Does the Agency have any comment before
12 we go with the audience questioning, though, on BP Amoco's
13 concerns that were raised from the prior speaker? Particularly,
14 I think he was concerned about an anticipated time frame for
15 decision making on ELUCs. He was also concerned, I think,
16 whether the Agency has or anticipates an anticipated form or a --
17 I think that is kind of what he was asking. Do you have a form
18 in mind or a model or a standard ELUC document that you are
19 looking at or working with?

20 MR. GARY KING: Well, we have not developed a model ELUC
21 yet. We kind of wanted to wait and see what the hearing process
22 would develop before we did that. But just as an example, when
23 the rules created the concept of a groundwater ordinance, we
24 developed a model groundwater ordinance which made it a fairly

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1 simple process for community -- at least as far as their
2 interaction with us, to develop that ordinance and lay out what
3 we needed. I would anticipate that we will do that and that will
4 shorten the time frame on review of those things. Again, as I
5 was talking about at the last hearing, the difficulty -- the
6 difficulties that we have had with the common-law instruments,
7 because those were common-law instruments, we did not really have

8 the freedom to create a model document that I think we will have
9 with the ELUC.

10 Just as a further comment, there has to be an approved ELUC
11 for us to approve a No Further Remediation document. I don't
12 think -- I certainly would not read this as saying that if a
13 company wanted to do -- record an ELUC that they had first
14 developed and then get Agency approval then if it has been
15 modified because of that approval to re-record it as a new
16 document. I don't see that the rules would prohibit that type of
17 process from occurring. So I think that in the case of BP Amoco
18 I think it would be an option for them to, after they have
19 completed their transaction, record what ELUC they have developed
20 and submit it to the Agency if it needed to be amended and then
21 it could be, if there was something else, that was included as
22 part of the ELUC. But I think -- as I was saying before, I think
23 as we develop this model document I think that will tend to ease
24 difficulties of review and preparation for those who would

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1 otherwise be involved.

2 MS. GEVING: I think any parties that are going to use the
3 ELUC and record it before it has been approved by the Agency need
4 to be made aware that it is just like the deed restriction
5 provisions now. If they do that, they take the chance that it is
6 not going to be approved in its current form by the Agency and
7 they may not get their NFR letter until such time as they submit

8 one to the Agency that is approvable. So that does not change
9 from the way things are now, that they take that chance if they
10 record it beforehand, there is no guarantee that it is going to
11 be approvable.

12 BOARD MEMBER KEZELIS: But it does satisfy at least one
13 component of this process, which is to notify the public, notify
14 the world at large by recording an instrument that there is the
15 restriction pending for environmental purposes.

16 MS. GEVING: That's true, but you take the chance if you
17 record something and you have a property transaction where
18 consideration has been given based upon that ELUC that has been
19 filed that they may have to go back and change it. And you have
20 a deal that has already taken place. That could cause some third
21 party problems.

22 BOARD MEMBER KEZELIS: Well, under this -- under some
23 scenarios an ELUC could be recorded even though a transfer has
24 not taken place?

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1 MS. GEVING: That's true. Mr. Primack, I would ask you
2 that question. Jodi Jung did call me and ask me the same
3 question, but she said that there were going to be instances
4 where the deal would have already taken place at the time that
5 they were filing their ELUC. So do you understand that there
6 could be a problem where they would have to come back and amend?

7 MR. PRIMACK: And that would remain a major concern, if
8 there had been any compensation of the property owner.

9 MS. GEVING: That's all I have.

10 HEARING OFFICER JACKSON: Okay. Would the Environmental
11 Regulatory Group like to ask questions now?

12 MS. BERNOTEIT: Yes. My name is Karen Bernoteit. I am
13 in-house Counsel for the Illinois Environmental Regulatory Group
14 or IERG. On behalf of IERG and its members I would like to ask
15 the Agency a few questions in an attempt to clarify how the ELUC
16 will operate. Some of these questions grew out of the last
17 hearing and as such might be directed at Agency witnesses that
18 testified in that hearing that are here today.

19 HEARING OFFICER JACKSON: Okay. We would simply -- if we
20 do call in other witnesses that are not up front, we would swear
21 them in before they would give their answers.

22 MS. BERNOTEIT: Okay. We realize that these are detailed
23 questions. If the Agency is unable to answer them today, we
24 would appreciate that the Agency make written answers available

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1 at the next hearing.

2 The first set of questions I would like to ask the Agency
3 pertain to the application of the ELUC regulations to different
4 types of sites. The first question is how would the ELUC
5 regulations apply to sites that are currently participating in an
6 Agency program, such as the LUST program, under Part 732, or the

7 Site Remediation Program, under Part 740?

8 MS. GEVING: Is your question a transition type of question
9 or --

10 MS. BERNOTEIT: Yes. How will that transition to the ELUC
11 be accomplished for current -- for sites that are currently
12 enrolled in either of those programs and may or may not have
13 requested an NFR letter up until this point?

14 MR. GARY KING: Well, the simple answer is that we are
15 going to use what is on the books at the time of the decision
16 and, you know, until that changes and then we will use the new
17 procedure.

18 MS. BERNOTEIT: Is the Agency intending to reopen or take
19 any other action as to cases in which NFR letters have been
20 issued in the past that contained restrictive covenants, deed
21 restrictions, or negative easements that the Agency now believes
22 may not be enforceable under Illinois common-law?

23 MR. GARY KING: No.

24 MS. BERNOTEIT: The last question I have relating to this

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1 issue is, is the Agency planning on proposing any revisions to
2 Part 732 or 740 that may make clear how the ELUC regulations
3 would apply to sites depending on whether or not they have as of
4 the time requested an NFR letter?

5 MR. GARY KING: I don't recall what those proposed

6 documents say with regards to ELUC at this time.

7 MS. GEVING: I think, Ms. Bernoteit, that the same answer
8 would also apply here. That if the ELUC are adopted the law then
9 becomes effective on the adoption date and we would not use that
10 until such time as it has been adopted by the Pollution Control
11 Board. And any decision documents that come in after the
12 adoption date we would be using the ELUC as opposed to the
13 restrictive covenant or other types of deed restrictions.

14 MS. BERNOTEIT: Has the Agency been currently issuing NFR
15 letters that are based on restrictive covenants or deed
16 restrictions? Is that something that the Agency is currently
17 doing?

18 MR. GARY KING: Well, we are currently reviewing those
19 types of common-law instruments when they come in. Those are
20 certainly diminished in the number of requests based on the fact
21 that not very many of them have gotten through the approval
22 process.

23 MS. GEVING: Have they gone through the approval process
24 but been denied?

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1 MR. GARY KING: Yes. There have been some that have been
2 denied.

3 MS. BERNOTEIT: There are those that are pending that have
4 not had any action taken?

5 MS. GEVING: To my knowledge, I don't have any on my desk

6 right now for review, but I cannot speak for Kyle Roaming
7 (spelled phonetically) or Mark White. They may have one or two,
8 but I have not heard them talk about those.

9 MS. BERNOTEIT: The next set of questions I would like to
10 ask the Agency have to do with the interrelation between the
11 proposed ELUC regulation and Part 731, Part 732 and 740 of the
12 Illinois Administrative Code.

13 First, the proposed Section 742.1010(a) states that ELUC
14 may be used in the following circumstances. The first
15 circumstance is when a No Further Remediation letters are
16 available, for example, when contamination has migrated off-site
17 or outside a defined area. The second circumstance is when No
18 Further Remediation letters are not issued under the program for
19 which a person is undergoing remediation.

20 At the last hearing on this Agency's proposal, Mr. King had
21 stated that these are two -- these two circumstances are the
22 major situations where ELUCs are going to be applied. We would
23 like to have clarified whether there may be any other situations
24 where ELUCs could be applied.

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1 (Ms. Geving and Mr. King confer briefly.)

2 MS. GEVING: If you will hold on one minute. I am trying
3 to find the errata sheet.

4 HEARING OFFICER JACKSON: I have it.

5 MS. GEVING: I have it now. Thanks. Could you read the
6 question back, please.

7 (Whereupon the requested portion of the record was read
8 back by the Reporter.)

9 MR. GARY KING: Well, there may be.

10 (Ms. Geving and Mr. King confer briefly.)

11 MS. BERNOTEIT: Do you have any specific circumstances that
12 may be --

13 MR. GARY KING: I was just looking back at the first draft
14 that we had prepared that didn't have either (a)(1) or (a)(2) in
15 it. When we had met with the Site Remediation Advisory
16 Committee, one of the requests, as we were discussing this
17 provision, was that we put a couple of examples -- put the
18 examples where we thought it was going to be used, and we
19 discussed these as being the two situations where we thought this
20 would apply. There may be some other contacts, but that is what
21 we were envisioning at that point.

22 MS. GEVING: The Agency intends to use the No Further
23 Remediation letter where that is applicable and available; isn't
24 that true?

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1 MR. GARY KING: Yes, that's true.

2 MS. BERNOTEIT: We would like if the Agency would maybe
3 clarify, after having a chance to think about that more, in
4 writing or at the next hearing, at what other circumstances the

5 ELUC may be applicable beyond those two situations.

6 MR. GARY KING: Well, I hesitate to do that because, I
7 mean, that is something that we went back and did this
8 specifically in response to a request, tried to define things
9 where we thought it would apply and we did that to our ability.
10 I am not sure that we have another situation in mind where this
11 was specifically applied.

12 MS. BERNOTEIT: My next question has to do with the second
13 circumstance that is listed in proposed Section 742.1010(a)(2),
14 and that is when No Further Remediation letters are not issued
15 under the programs for which a person is undergoing remediation.
16 Now, technically, the existing Part 731 does not provide for the
17 issuance of a No Further Remediation letter, but we have noted
18 that the Agency's proposed Section 742.1010(b)(2)(a) implies that
19 the ELUC regulations apply to 731 in relevant part. This section
20 states for Leaking Underground Storage Tank under 35 Illinois
21 Administrative Code 731, an ELUC may be released or modified only
22 if the NFR letter is modified under the Site Remediation Program
23 to reflect that change.

24 We would like to have the Agency clarify whether the ELUC

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1 regulations do apply to Part 731 sites.

2 MR. GARY KING: I would like to answer that one after lunch
3 if I could. I would like to confer with somebody.

4 HEARING OFFICER JACKSON: That's fine.

5 MS. BERNOTEIT: The third question I have in this category
6 is does the Agency intend to propose any revisions to Part 732 or
7 740 to reflect the shift from using restrictive covenants, deed
8 restrictions, and negative easements to using ELUC?

9 MR. GARY KING: I think there was a similar question
10 earlier. As I am sitting here, I am not sure what those
11 proposals will contain relative to this cross-over.

12 MS. BERNOTEIT: That was my next question, is whether you
13 could provide a description of what the revisions might contain.

14 MS. GEVING: First of all, I don't think we can provide a
15 description until they are proposed to the Board. Second of all,
16 I think that the old rules currently on the books in 732 and 740
17 don't make reference to specific types of institutional controls.
18 I may be wrong, but I think that those go through the recording
19 requirements and procedural requirements for institutional
20 controls, but I don't think they list out the different kinds. I
21 think that is left to TACO alone.

22 MS. BERNOTEIT: All right. The last related question in
23 this category, the regulations in Part 732 and 740, which deal
24 with No Further Remediation letters refer to the term land use

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1 limitations. Sections 58.8 and 58.10 of the Environmental
2 Protection Act use this term as well. However, the term land use
3 limitation is not defined anywhere in the Board's regulations or

4 in the Environmental Protection Act. The current section,
5 Section 742.1010(e) implies that that term, land use limitation,
6 means or at least includes restrictive covenants, deed
7 restrictions and negative easements.

8 Also Section 732.702, which outlines what an NFR letter for
9 a LUST site must contain, uses not only the term land use
10 limitation, but also the term institutional controls. And
11 Section 732.704(a)(1), instead of using the term land use
12 limitation, uses the term land use restriction and further
13 distinguishes between institutional controls and land use
14 restrictions.

15 We would like to have clarified where the ELUC fits into
16 these different terms and which of these terms it might replace.

17 MR. GARY KING: To me those sound like good comments as to
18 things we should address as part of Part 732 and Part 740. But
19 at this point I wouldn't really have an ability to comment
20 further on that at this time.

21 MS. BERNOTEIT: One last question I have relating to that
22 is whether the Agency believes some of these terms may need to be
23 defined in light of the switch to ELUC.

24 MR. GARY KING: Like I said before, I think those are good

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1 comments and we do need to make sure that our terminology is
2 consistent across the proposals.

3 MS. BERNOTEIT: The last set of questions that I have for
4 the Agency have to do with the procedures by which the Agency
5 would approve ELUC. At the last hearing on this regulatory
6 proposal it was stated that an ELUC could be available for a site
7 that was not enrolled in a remediation program but rather was
8 being overseen by the Office of Chemical Safety. However, it was
9 not clear under what circumstances this would occur. This gives
10 rise to the broader question regarding the relationship of the
11 use of the ELUC and the various programs that are administered by
12 the IEPA.

13 MS. GEVING: Mr. O'Brien has come up to answer these
14 questions. Would you please swear him in.

15 (Whereupon the witness was sworn by the Notary Public.)

16 MS. BERNOTEIT: To help our members in their future
17 compliance efforts we would like to ask the following questions.
18 When an ELUC is put into place for a site that is not enrolled in
19 a remediation program, but is only being overseen by the Office
20 of Chemical Safety, under what regulations is that ELUC reviewed
21 and approved?

22 MR. O'BRIEN: It would be reviewed under 742, under TACO.

23 MS. BERNOTEIT: Okay. Then as far as what program
24 regulations, such as LUST or the Site Remediation Program, which

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1 of those regulations would pertain to that type of cleanup?

2 MR. O'BRIEN: That type of cleanup is usually done in

3 response to an action taken under Section 31(a) of the Act, which
4 is a violation notice. When a spill occurs it is almost always a
5 violation of Section 9.12 or 21 of the Act. The violation notice
6 would be issued. The Section 31(a) requires that the Agency
7 specify what a party needs to do to return to compliance and if
8 there were environmental contamination that needed to be
9 remediated, the Agency often suggests using the 740 regulations,
10 which include the gamut of options available to the party to
11 remedy the contamination.

12 MS. BERNOTEIT: Are you saying, then, that the Part 740
13 regulations would govern that particular site's remediation that
14 had received a violation notice from OCS?

15 MR. O'BRIEN: If the party elects to do that, that is what
16 the applicability section at 742.105 says, is any person required
17 to perform an investigation pursuant to the Environmental
18 Protection Act may elect to proceed under this part. So this is
19 one of the options. There are -- sometimes spills involve
20 strange circumstances, so parties may also propose to resolve
21 noncompliance in other ways, but if they had proposed to use 740,
22 we would allow them to do that.

23 MS. BERNOTEIT: In a circumstance -- and this is, once
24 again, a site that is strictly being overseen by OCS and not

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1 enrolled in another program. What happens in a situation where

2 that site owner is not opting into that Part 740 program that you
3 are talking about? What regulations would govern that
4 remediation if it is strictly being overseen by OCS?

5 MR. O'BRIEN: I guess it would depend on what we would
6 negotiate in terms of the compliance commitment agreement under
7 Section 31.

8 MS. BERNOTEIT: As that remediation effort is being
9 conducted, what procedures would the Office of Chemical Safety
10 utilize in order to review and approve the remedial efforts as
11 those are ongoing?

12 MR. O'BRIEN: Well, we use -- we review the remediation
13 objectives proposed against Section 740. 742. I am sorry.

14 MS. BERNOTEIT: 742. What if the owner, though, is not
15 opting into that program?

16 MR. O'BRIEN: Well, that may -- we may come to an agreement
17 to resolve a noncompliance or if we don't then the Agency may
18 decide to refer the matter to the prosecutor, and then how it is
19 cleaned up is -- you know, it eventually could be determined by a
20 court.

21 MS. GEVING: I would like to just clarify, too, that Part
22 742 is not a program. It is a methodology for determining
23 remediation objectives.

24 MS. BERNOTEIT: The point that we would like to clarify is

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1 that the regulations, the TACO regulations or revisions that we

2 are discussing today, those regulations continually reference an
3 Agency program in a site that is currently involved in an Agency
4 program and that type of site being able to get an ELUC.

5 The last question I would like to ask relating to the OCS
6 authority that we are discussing, that authority to approve ELUC,
7 under the proposed Section 742.1010(d)(3), requires that an ELUC
8 must contain a reference to a Bureau of Land LPC number or a ten
9 digit identification number under which the remediation was
10 conducted.

11 What we would like to ask is if a site is not enrolled in a
12 remediation program with the Bureau of Land, but is only being
13 overseen by the Office of Chemical Safety and, thus, does not
14 have an LPC number or a ten digit identification number, how will
15 this requirement of Section 742.1010(d)(3) be satisfied in cases
16 where OCS approves an ELUC?

17 MR. O'BRIEN: I don't know if I can answer that today. The
18 Office of Chemical Safety files its incidents using the Illinois
19 Emergency Management Agency's incident numbering system. Prior
20 to January 1st of this year they used a six digit numbering
21 system and currently they use an eight digit numbering system.
22 That is what we would generally use to identify a site.

23 MS. BERNOTEIT: We would request that the Agency respond in
24 writing as to how a site would satisfy this requirement of having

1 to provide the ten digit land pollution control site ID number.

2 HEARING OFFICER JACKSON: I think that can either be
3 addressed in writing or if we do go to another hearing on this on
4 the 22nd, we can address it at that time.

5 MS. BERNOTEIT: Okay. That's all of our questions. Thank
6 you.

7 HEARING OFFICER JACKSON: Any other questions at this time
8 on our Subdocket A? Mr. Zolyak?

9 MR. ZOLYAK: Ms. Jackson, this is not on the subdocket, but
10 one of the members of my group lost a pair a sunglasses, so if
11 anyone finds one if they could see me. I appreciate it. Thank
12 you.

13 HEARING OFFICER JACKSON: Okay. At this point, then, we
14 will break for lunch. It is a little after 1:15. Would it
15 create a huge problem for anyone if we started back up at about
16 five after 2:00, in about 45 minutes?

17 Okay. Let's do that, then. We are adjourned for now and
18 we will reconvene at 2:05. We will resume with Subdocket B
19 discussions and we will start with the Illinois Petroleum Council
20 first since they need to leave to catch a plane. Thank you.

21 (Whereupon a lunch recess was taken from approximately 1:15
22 p.m. to 2:10 p.m.)

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A F T E R N O O N S E S S I O N

(September 11, 2000; 2:10 p.m.)

HEARING OFFICER JACKSON: We are back on the record now and we are going to start with our discussion of Subdocket B. That basically involves all the proposed amendments other than the institutional control referred to as the ELUC.

Starting off our presentation this afternoon is the Illinois Petroleum Council. And if you would just -- I think you have all been sworn in. I would just remind you that you have been sworn in and you are still under oath on the comments that you make from this point on. So whenever you are ready, please begin your presentation.

MR. SYKUTA: Hello again. My name is still David Sykuta. I am the Executive Director of the Illinois Petroleum Council. I want to thank you for affording us this opportunity to comment on the proposed rulemaking that we have seen thus far. Due to the fact that this is, in effect, half of the rulemaking, you know, the rest of the MTBE rule is yet to come before the Board, we are going to be reserving our written comments for when the rule in totality is there.

What we thought we would do at this time is to just briefly give some verbal comments regarding how we see the rule generally and just some of what we think we have come to some agreements with the Illinois Environmental Protection Agency and where

1 perhaps there could be a little bit of unfinished business yet.

2 The Illinois Petroleum Council representing the oil
3 industry has spent a great amount of time in probably the last
4 three years working with the Agency in coming up with what you
5 see before you now. I think it is important to note as you
6 consider these rules, that this MTBE issue, methyl tertiary-butyl
7 ether, is certainly -- it certainly is a problem. It is a
8 problem that has to be addressed and our agency is working very
9 close with the Agency to come up with a protocol that we think
10 would be effective in addressing this.

11 I think it is also important to note that when it comes to
12 the larger issue of why are we using MTBE to begin with, that our
13 industry is basically obeying the federal law as delegated by the
14 U.S. EPA that we have to use an oxygenated fuel. So by saying
15 that I am not trying to in any way minimize the impact of MTBE or
16 to suggest that I guess when blame is apportioned that there will
17 be any blame.

18 My point is that as you all know, that the Clean Air Act is
19 just an impossibly complex document. And what sometimes seems
20 clear and what probably seemed clear to Administrator Browner in
21 1992, when she came up with the oxygenate mandate in fuel, over
22 our objection, what seemed very clear then perhaps does not seem
23 so clear eight years later.

24 So all we are cautioning the Board and what we have

1 attempted to caution the Agency as we come up with this protocol
2 on MTBE remediation is, once again, what seems so clear in the
3 year 2000 may look a little different a couple years down the
4 line. In fact, if you look at the longer history of the Clean
5 Air Act I think you will find in most cases that -- I think in
6 football they call it an instant replay. I think we have had
7 more than a few cases in the Clean Air Act where we had some
8 instances that could best be referred to as upon further review.

9 So as we go about doing these regulations, we have -- we
10 feel we have cooperated very closely with the Agency. In fact, I
11 think both BP and Mobile, along with two of my other clients,
12 initially voluntarily gave over random samples at some of our
13 retail stations that helped the Agency come up with their initial
14 screen of where they thought this -- you know, what they thought
15 the level of the problem would be.

16 That being said, I guess our concerns are in several areas
17 and I will just lay them out very briefly and then I will be
18 happy to answer any questions. The docket you have before you
19 lays out a 70 parts per billion cleanup standard when MTBE is
20 detected, and we would support that number. There is also some
21 mention although, once again, it is -- most of the basis for it
22 is in the part of the statute that you have not received yet, but
23 there also seems to be some kind of what I would refer to as a
24 trip wire number for public water supplies that is less than the

1 70 parts per billion. It is something on the order of 20 parts
2 per billion.

3 There is some concern on our part that I guess, how would
4 you say, that the numbers remain that. That there is, indeed, a
5 cleanup standard of this, if they want to have some kind of a sub
6 70 part number for something else, you know, we don't object to
7 that. But I guess there is a concern that when you just look at
8 the two and you kind of look at how this issue has proceeded it
9 is not hard to see how some might try to make the 70 part 20 part
10 sometime in the near future. What we are suggesting here is that
11 we need -- we are going to need enough lead time to deal with the
12 70.

13 Our other consideration here, and I think one that we would
14 hope the Board would take into account as they consider this
15 regulation, is the fact that Illinois and, of course, I am bias,
16 but Illinois probably has one of the most successful Underground
17 Storage Tank remediation programs of any state in the Nation. In
18 essence, the response to MTBE problems in water is being
19 addressed through the Underground Storage Tank program in these
20 regulations. And we would just caution that, once again, the --
21 I think the hallmark of the success of the Illinois program is
22 two things.

23 Number one, the Illinois program had enough money behind it
24 to where the sites, when found, could actually be remediated, as

1 opposed to other states where I think there is still some number
2 of states that never had any kind of an actual funding source for
3 the cleanups. So we have a program that has been financially
4 viable, and we would just hope that when the cleanup protocol for
5 MTBE is completed that those standards recognize the fact that
6 the financial viability of the program is a key factor. I mean,
7 if we have a zero tolerance MTBE and every cleanup is going to
8 cost infinity, if there is no money to do the cleanups, then what
9 have we accomplished.

10 I think the second thing that we would caution is that,
11 once again, you are dealing with something that was mandated by
12 the U.S. EPA. And if we get into what I would call a punitive
13 rulemaking, one that would, in effect, penalize people for
14 obeying the law as it existed at that time, that one of the other
15 hallmarks of the underground tank program, that being the
16 voluntary nature, voluntarily making known that you have
17 problems, could well become much more adversarial and that could
18 also impact the eventual effectiveness of the program.

19 So these are two of our larger concerns. One of the other
20 ones, the environmental land use part has already been brought
21 up. We had some initial concerns about -- I know there was some
22 discussion at the first hearing about this degradation number.
23 That is a blank space at this time, as I understand it. The
24 Agency has left it to the Board, would that be accurate, to come

1 up with the degradation number. And I think this is -- I don't
2 know how else to say it. I think it is a very key part of the
3 Act and we would like to hear -- when you come up with something,
4 we would like the chance to comment on whatever you come up with
5 also.

6 Other than that, we look forward to working with the Board
7 and continuing to work with the Agency in developing these rules.
8 We hope that it continues to be a partnership and not
9 adversarial. It is -- as you know, there are many political
10 implications of this whole MTBE oxygenate thing. We are glad
11 that at least thus far that the rule has stayed on the scientific
12 side and not on the more less scientific side, shall we say.

13 BOARD MEMBER MELAS: Emotions.

14 MR. SYKUTA: So that being said, Bob, do you have anything
15 to add on degradation?

16 MR. ELVERT: No. I think just the one point I would like
17 to point out is that, yes, there are -- there have been a lot of
18 studies on MTBE. It has been short-term all over the board. We
19 would ask that when a decision is made that you do look at the
20 scientific part of the studies and you look across the board.
21 The zero number, it may be fine in some states. It may not be
22 fine here.

23 I know from industry perspective we are still looking at
24 what is the best for industry. Since the August 25th meeting, or

1 the hearing, we are trying to put our notes together to propose
2 something to you from our perspective to help you out as to what
3 we would like to see. We will get something to you before the
4 written comments are due. But that is where we would like you to
5 review that with an open mind and see the points that David has
6 come up with on that. If you have any questions during that
7 period of time, please don't hesitate to give us a call.

8 MR. SYKUTA: Yes. I guess the final point, as I conclude,
9 the other hallmark of the whole Underground Storage Tank program
10 was -- and I am speaking here as much for the petroleum marketers
11 as I am for my own group. Certainly, we are impacted by this as
12 are many other groups. But as we see the philosophy of it, the
13 idea of the program was to eventually be able to actually declare
14 sites -- you know, get a letter and be able to sell the property.

15 And there is a concern on our part that depending on how
16 these regulations are eventually implemented, that if at some
17 point in time this becomes an issue of let's reopen all these
18 closed sites and check them for MTBE then, in effect, you have
19 taken all of these sites with letters and kind of taken them back
20 out of circulation and back into some kind of a black hole of,
21 you know, never being able to sell them and no one will ever take
22 liability for them.

23 So we would hope that as we clean up what is a legitimate
24 problem, MTBE mixing in water and moving very quickly into the

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1 groundwater, that we also bear in mind that the program is based
2 on eventually getting the sites into the situation where they can
3 be productive again. That having been said, thank you very much.

4 BOARD MEMBER MELAS: Excuse my nonfamiliarity with your
5 association, but the Petroleum Council, you represent producers,
6 wholesalers and/or retailers?

7 MR. SYKUTA: We represent -- the Illinois Petroleum Council
8 represents what we call the large integrated oil industry. So we
9 have -- my companies have some production. Primarily in Illinois
10 we are refining and marketing. But there are -- there is a
11 separate association that would be the association that would
12 represent more dealers. We represent the large, integrated
13 refiner marketers themselves.

14 BOARD MEMBER MELAS: And do you have some retail outlets as
15 well?

16 MR. SYKUTA: There is some retail outlets and we also have
17 some pipeline. You know, there are -- depending on the company,
18 they are in all four facets of the business.

19 BOARD MEMBER MELAS: Okay. Thank you.

20 MR. SYKUTA: Some are only in one or two.

21 BOARD MEMBER MELAS: Thank you.

22 HEARING OFFICER JACKSON: Just to clarify further, the
23 Illinois Petroleum Marketers Association would be the
24 organization basically representing the retailers?

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1 MR. SYKUTA: They represent what historically in the oil
2 business has been referred to as jobbers, which would be
3 wholesalers. But most -- in today's market environment most
4 wholesalers are also dealers. I don't know if there really is an
5 Illinois Gasoline Dealers Association. There used to be, but I
6 haven't heard from them in many years. The Petroleum Marketers
7 Association would be more of a middle level and dealer
8 organization. I think they will be testifying at subsequent
9 hearings.

10 BOARD MEMBER KEZELIS: Mr. Sykuta, at the last hearing we
11 did have some testimony from the Agency with respect to the
12 methods by which one can clean up sites that have MTBE. Carbon
13 was one. Air stripping was another. But the examples were in
14 pretty general detail and not very specific. I don't expect any
15 information on that today, but before the close of the comment
16 period, it would be helpful to close the loop of the evidence we
17 have in this record and --

18 MR. SYKUTA: On the remediation techniques?

19 BOARD MEMBER KEZELIS: -- amplify the discussion. Yes.

20 MR. ELVERT: That would be part of what some of the
21 scientific studies at the various companies are working on with
22 their own consultants trying to put that together as to the
23 benefit of the carbon, bugs, whatever it may be, what we see as
24 the most beneficial and, you know, the least beneficial.

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1 BOARD MEMBER KEZELIS: And the efficacy with respect to the
2 70 threshold that the Agency has proposed in the rule would help
3 for purposes of the record. Thank you.

4 MR. SYKUTA: Sure. That's all we have.

5 HEARING OFFICER JACKSON: Are there any other questions?

6 MR. SYKUTA: Thank you very much.

7 HEARING OFFICER JACKSON: Thank you.

8 MR. ELVERT: Thank you very much.

9 MR. PRIMACK: Thank you.

10 HEARING OFFICER JACKSON: The only other organization I
11 have listed to speak to Subdocket B this afternoon is the
12 Environmental Protection Agency.

13 Is there anyone else present who wishes to comment on any
14 of the matters contained in R00-19, Subdocket B?

15 Okay. Then it looks like we will have Ms. Geving and the
16 rest of the Agency witnesses come forward at this time. If you
17 need to bring chairs up with you, please feel free to scoot them
18 up or sit at the table that we have set up back there, too.

19 I will just mention that the acoustics in this room are not
20 very good. So the people sitting in the back of the room may
21 have difficulty hearing some of the witnesses testify. If you
22 are not sitting by a microphone please try to keep your voice up
23 for both the court reporter and other persons sitting toward the
24 back of the room. Thank you.

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1 MS. GEVING: I believe the first thing that the Agency
2 would like to do is a follow-up on the question from IERG or SRAC
3 on the 731 question, and Mr. King is going to give some follow-up
4 on that.

5 MR. GARY KING: I just wanted to confirm, after having the
6 discussion over the lunch hour, that the ELUC is intended to also
7 apply to Leaking Underground Storage Tank sites that are
8 undergoing remediation under Part 731, as well as Part 732.

9 BOARD MEMBER KEZELIS: I would like to follow-up on that.
10 The suggested revisions submitted by the United States Department
11 of Defense for that section actually do specifically include
12 LUST. I don't know if you have had a chance to look at that. I
13 assume that they assumed that there was a typographical error,
14 but that is just my assumption.

15 MS. GEVING: It is not a typo. That was also in our
16 proposal.

17 BOARD MEMBER KEZELIS: Okay. I am looking at a different
18 copy. Okay.

19 HEARING OFFICER JACKSON: Okay. Does that follow-up
20 satisfy the Environmental Regulatory Group?

21 MS. BERNOTEIT: Yes. We have one additional follow-up
22 question that came out of the line of questioning from this
23 morning.

24

HEARING OFFICER JACKSON: Go ahead, please.

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1 MS. BERNOTEIT: This is for Mr. O'Brien. We understand
2 that as you testified this morning that the OCS would utilize
3 ELUC pursuant to authority granted by Section 31(a) of the
4 Illinois Environmental Protection Act.

5 Our question is if the Agency remediation programs that we
6 have referenced earlier, including Parts 732, 740, 724 and 725,
7 provide procedural mechanisms for appeal of Agency decisions,
8 what appeal mechanism would be available to a site owner if OCS
9 does not approve an ELUC?

10 MR. O'BRIEN: Well, the Agency's action in that case would
11 be to refer the matter to a prosecutor, so you would be in a
12 position to negotiate with the prosecutor and eventually be in
13 court, I guess, as to where your appeal would be.

14 MS. BERNOTEIT: That's all we had. Thank you.

15 HEARING OFFICER JACKSON: Okay. Thank you. Ms. Geving, do
16 you have a presentation or are you just ready to field questions
17 this afternoon?

18 MS. GEVING: I believe Mr. Cobb is going to do some
19 follow-up based on IPC's comments.

20 HEARING OFFICER JACKSON: Very good. Mr. Cobb, whenever
21 you are ready. We do need to swear the rest of the panel in, so
22 why don't we go ahead and do that at this point.

23 (Whereupon the witnesses were sworn by the Notary Public.)

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1 MR. COBB: Good afternoon. My name is Rick Cobb, and I am
2 Manager of the Groundwater Section in the Bureau of Water of the
3 Illinois EPA. I just have a follow-up to some of the issues that
4 Mr. Sykuta raised. First off, several of these questions really
5 kind of fall in the realm of the Board's Groundwater Quality
6 Standard Regulation, 35 Illinois Administrative Code, Part 620.
7 I believe probably week before last I think we filed an amended
8 proposal to the Board. Essentially, I wanted to follow-up on the
9 questions in regard to the preventive notice and the response
10 levels for methyl tertiary-butyl ether. Essentially prior to
11 1991 or the adoption of the groundwater quality standards by the
12 Board, a preventive response type of level was required under
13 Section 8 of the Illinois Groundwater Protection Act. And that
14 is still essentially the means by which we are proposing a
15 preventive response level for MTBE.

16 The groundwater standards that exist already incorporate a
17 preventive response level for ethyl benzene, toluylene and
18 xylene. These existing preventive response levels are based on
19 the taste and odor levels for these common gasoline constituents.
20 For example, xylene, in the Board's regulations, the preventive
21 response level is 0.03 milligrams per liter versus the class one
22 groundwater standard of 0.7 milligrams per liter. Toluylene is

23 0.04. And these are all in milligrams per liter. Preventive
24 response level versus one for a class one standard. Xylene, .02

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1 preventive responsive level, groundwater standard ten. So a 500
2 difference. Thus, the concept is certainly not new. Further,
3 the preventive response levels are intended -- are not intended
4 or to be used as de facto cleanup objectives.

5 So there are really four reasons why a preventive response
6 level is appropriate. First, a taste and odor level issued by
7 the United States Environmental Protection Agency is below the
8 proposed groundwater quality standard that we have proposed
9 before the Board. Second, the preventive response level is
10 required by statute. Thirdly, there is existing regulatory
11 authority and precedence in the Board's existing Groundwater
12 Quality Standard Regulations. And fourth, there is no history of
13 applying the existing preventive response levels to Leaking
14 Underground Storage Tanks as a cleanup objective. I think that
15 was really what I thought I heard that the Petroleum Marketers
16 Council was concerned about.

17 So first let me talk briefly about the taste and odor
18 threshold for MTBE. In 1997 the U.S. Environmental Protection
19 Agency published a drinking water advisory. It was also referred
20 to as consumer acceptability advice and health affect analysis on
21 methyl tertiary-butyl ether. The U.S. EPA recommended a level of
22 0.02 milligrams per liter for MTBE as the taste and odor

23 threshold. Preventive response levels for other petro chemicals,
24 as I said earlier, have been established on the same basis.

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1 Thus, it is wholly appropriate to use the 0.02 as a preventive
2 response level for MTBE. Further, as a way of comparison, the
3 State of Wisconsin, for example, adopted a preventive action
4 limit in their regulations of 0.012 milligrams per liter for MTBE
5 in 1994.

6 The statutory basis for a preventive response level, as I
7 indicated earlier, Section 8 of the Illinois Groundwater
8 Protection Act require the establishment of preventive response
9 levels and essentially at Section 8, Subsection (8)(a)(4) calls
10 for the application of nondegradation provisions for appropriate
11 groundwaters, including notification limits that trigger
12 preventive response activities. That's a direct quotation from
13 Section 8 of the Illinois Groundwater Protection Act.

14 Thirdly, let me add some additional detail to the Pollution
15 Control Board's existing authority for preventive response
16 levels. On November 7th, 1991, the Illinois Pollution Control
17 Board issued their final order and opinion in the matter of
18 Groundwater Quality Standards. Underground storage tanks
19 typically use secondary containment with leak detection
20 monitoring devices to prevent contamination of groundwater and
21 as such are not generally subject to groundwater monitoring

22 requirements.

23 This is one of the large discussions under the Groundwater
24 Quality Standards when we were discussing preventive response

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1 levels, was there new authority in place to establish new
2 monitoring requirements. In the Board's opinion it is pretty
3 clear that there was not. That these only plug in to programs
4 that have existing authority for monitoring. As I just
5 described, Leaking Underground Storage Tanks, the preventive
6 monitoring is typically with leak detection devices and not as
7 such with groundwater monitoring wells, as with some other
8 activities.

9 Lastly -- well, not lastly, but also within the Board's
10 opinion it was pretty clear that the program that was adopted by
11 the Board did not establish any new corrective action levels. In
12 fact, in the Board's opinion on preventive response activities
13 and levels at Section 620.310, the Board indicated in either case
14 the purpose of this section is to provide a nexus between the
15 body of today's rules and existing and future regulatory programs
16 that need triggers for corrective action. No new corrective
17 action program is today adopted.

18 In addition, under the applicability of preventive notice
19 and preventive response activities, under Section 620.302, it
20 also clearly states that if you exceed a groundwater standard
21 that the cleanup or corrective action objective is the applicable

22 groundwater standard and not the preventive response level.

23 Lastly, through implementation history in terms of
24 application of preventive response levels, I am certainly not

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1 aware of applicability of the existing preventive response levels
2 for the other typical gasoline constituents, benzene -- or ethyl
3 benzene, toluylene and xylene. That concludes my comments.

4 HEARING OFFICER JACKSON: Okay. Before we go on, I just
5 want to -- this is somewhat of a housekeeping matter, but with
6 the rulemaking that was just filed that Mr. Cobb referred to as
7 R01-14, In the Matter of: Groundwater Quality Standards
8 Amendments, 35 Illinois Administrative Code 620, there were a
9 number of attachments to that document that dealt with MTBE. One
10 of them specifically, the December of 1997 drinking water
11 advisory that Mr. Cobb just referred to. Would the Agency have
12 any objection to supplementing the record in this matter with
13 those attachments to that rulemaking proposal?

14 MS. GEVING: No objection.

15 HEARING OFFICER JACKSON: Okay. With that, then, we will
16 take notice of the fact that we already have those documents in
17 our file, and it won't be necessary for you to file additional
18 copies.

19 MS. GEVING: Okay. Thank you.

20 HEARING OFFICER JACKSON: Thank you. Do you have any other

21 statements from any other witnesses right now or should we
22 proceed with questions?

23 MS. GEVING: Just one short matter. He has the summary
24 that he has put together but he wants to take one last review

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1 before we admit it as an exhibit if that is okay. Can I come
2 back to that later?

3 HEARING OFFICER JACKSON: Yes, that's fine.

4 MS. GEVING: We can move on.

5 HEARING OFFICER JACKSON: Okay. You did mention earlier
6 that you had some corrections to the transcript from August 25th.
7 Do you want to address those right now?

8 MS. GEVING: Sure. I have about 20 pages left of the
9 transcript still to read, but there are only eight changes and
10 they are pretty minor.

11 The first one was on page 29, line two. It references the
12 Illinois Core Group. I think that was supposed to be the
13 Illinois Steel Group. I double-checked that with Mr. Rieser this
14 morning.

15 The second one is on page 31, line 14, with reference to
16 who was speaking, that was actually Mr. O'Brien and not Mr. Clay.

17 Then page 47, line seven, the word assessed, I believe,
18 should be excessed, E-X-C-E-S-S-E-D.

19 Then page 50, line 11. I think the phrase "planned
20 surveys" should be "land surveyors."

21 Page 64, line 16, "sealing" should actually have been
22 "ceiling" spelled, C-E-I-L-I-N-G.

23 Then on page 65, line 12, it is the same change as on page
24 64.

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1 Page 80, line 19, there was a reference to Part 720, I
2 believe, and it should have been Part 620.

3 The last one is page 139, line six, there was reference to
4 "leaky" underground storage tanks and I think that should have
5 been "leaking." That's all I have.

6 HEARING OFFICER JACKSON: Thank you. Are we ready to take
7 questions then?

8 MS. GEVING: Yes.

9 HEARING OFFICER JACKSON: Okay. We will start with any
10 Board Members that have any questions regarding any Subdocket B
11 matters.

12 All right. Anyone else? Mr. Rieser.

13 MR. RIESER: Yes. There was some -- I had asked a series
14 of questions at the last hearing about sort of the effective date
15 of -- not the effective date which, of course, is the date the
16 rule is adopted, but the implementation date for many of the
17 changes to the numerical values in the Subdocket B. And I know
18 Board Member Kezelis followed up with a question asking that that
19 be clarified as well.

20 I was wondering if there was any clarification that the
21 Agency has available for us today or if that is something that
22 will be addressed at a future hearing?

23 MS. GEVING: At this point I don't have anything prepared
24 in writing, as the Board had requested, on that implementation

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1 issue. I need to do some further research with the Agency and
2 possibly provide a transcript of today's hearing to some
3 individuals to see if I can put together a written response to
4 you in the near future.

5 MR. RIESER: Okay. Thank you.

6 BOARD MEMBER KEZELIS: Thank you for that, Mr. Rieser. It
7 seems that to some extent we have a little bit of a cart before
8 the horse problem, and it puts me, as one of the Board Members,
9 speaking for myself, at a disadvantage in determining how best to
10 address the situation that we have. At least as to Subdocket A
11 we are on some strict deadlines. We have split these dockets up
12 with Subdocket A, ELUC statutory deadlines, in mind. But,
13 nonetheless, we would love to have this cart before the horse
14 problem resolved sooner rather than later.

15 Site remediation and Leaking Underground Storage Tanks and
16 MTBE are all very important issues, but here in this docket all
17 we are addressing is TACO and MTBE when we do not have parameters
18 in place elsewhere. So, yes, if the Agency could in its entirety
19 recognize the fact that this does put TACO in some difficulty,

20 that would be very helpful for all of us and for the state as a
21 whole, not only the regulators but the regulated industry as
22 well. Thank you.

23 MS. GEVING: It is my impression that the biggest
24 implementation problem that we have is with regard to the MTBE

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1 proposed amendments. I think the rest of it is okay. Is there
2 an understanding by the Board that we have problems with other
3 issues as well?

4 BOARD MEMBER KEZELIS: No. It is really MTBE.

5 MS. GEVING: Okay.

6 MS. LIU: Mr. O'Brien, in your testimony on August 25th,
7 and as Member Kezelis mentioned, there are some technologies
8 feasible for remediating MTBE, including carbon absorption, air
9 stripping and bio remediation. As Member Kezelis had requested,
10 the Illinois Petroleum Council and the Petroleum Marketers
11 Association are hopefully going to be providing some information
12 on the efficacy of those techniques.

13 Does the Agency have any information on the cost of say a
14 typical LUST remediation MTBE site or perhaps a duration of
15 remediation? Or could you provide that?

16 MR. O'BRIEN: Mr. Clay is the Manager of the LUST Program,
17 so I will let him address that.

18 MS. LIU: Okay.

19 MR. CLAY: We really don't have much experience in that.
20 We only have a couple of sites that have actually been doing
21 remediation from MTBE and that goes back to the implementation
22 issue. Right now we don't require that MTBE be sampled, and that
23 will be part of the 732 amendments. So there may be some
24 literature from other states or from the U.S. EPA on the cost,

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1 and I can do a web search on that to see if there is anything
2 there, but we don't have any cost data specifically for Illinois.

3 MS. LIU: It would be very helpful, any information that
4 you could provide. Thank you.

5 MR. CLAY: Okay. If --

6 HEARING OFFICER JACKSON: Is there anything -- oh, go
7 ahead.

8 MR. CLAY: If I may, Mr. Sykuta asked a question about
9 reopening old sites that had received NFR letters. One of the
10 things that we are proposing in the 732 Rules is to -- I think
11 Mr. Sykuta's concern was that there may be sites that have an NFR
12 letter and may not be able to have money lent against it or may
13 have problems with a property transfer. We do not plan on
14 reopening those.

15 However, what we will be proposing, or I should say what is
16 currently drafted, is that we will allow people that are above
17 the 70 parts per billion MTBE going off-site back into the
18 program and back into the UST fund if they are eligible to

19 address their MTBE contamination. So that is just to address one
20 of Mr. Sykuta's comments and concerns. That will likely be part
21 of the 732 amendments.

22 BOARD MEMBER KEZELIS: Will you explain for the record,
23 please, how one would become cognizant of the fact that one is in
24 excess of the 70?

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1 MR. CLAY: It would likely be because there was a
2 contamination of potable water supply. As I think we testified
3 to at the last hearing, there have been four community water
4 supply wells that have discontinued use because of the high
5 levels. One of those we did track to two gas stations that were
6 already undergoing remediation. But had they been closed and
7 received an NFR letter that would be a candidate to reopen those
8 sites.

9 MS. GEVING: But we are not going to require that sites
10 that have already been closed go back and do further
11 investigation; is that correct?

12 MR. CLAY: That is correct.

13 BOARD MEMBER KEZELIS: Okay. So your expectations, then,
14 is only in situations where MTBE has clearly been identified
15 because of drinking water supplies, for example, that you would
16 then undergo further testing at a site that has already been
17 completed? You would not go back and retest for MTBE anew?

18 MR. CLAY: That's correct.

19 BOARD MEMBER KEZELIS: Okay. Thank you. I just wanted
20 that clarification for the record. Thank you.

21 HEARING OFFICER JACKSON: Anything else for Mr. Clay? Why
22 don't we take a short --

23 CHAIRMAN MANNING: Before we do that, could I just examine.
24 Mr. Walton earlier testified and I think Mr. King also alluded to

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1 a further regulatory proposal that involves TACO. Is there any
2 more information that you can give us on a regulatory proposal
3 that we will be getting?

4 MS. GEVING: On TACO or 732 and 740?

5 CHAIRMAN MANNING: Is it 732 and 740 that we are getting
6 the regulatory proposal?

7 MS. GEVING: Right.

8 CHAIRMAN MANNING: Okay.

9 MS. GEVING: Two separate proposals will be coming in.

10 CHAIRMAN MANNING: As of today you don't know what date we
11 will be getting those?

12 MS. GEVING: I do not.

13 CHAIRMAN MANNING: I think, Mr. King, you testified that
14 they are sort of through a specific process and have yet a
15 process to go through?

16 MR. GARY KING: I don't think I -- I am not sure I said
17 where it was at in the process.

18 MS. GEVING: The two proposals have gone through the
19 majority of the sign-up process with the exception of a couple of
20 outstanding issues, one issue in particular in each rulemaking,
21 that are currently before our Director for decision. Once those
22 issues are decided upon, I believe it will be very soon
23 thereafter that the Board will see those two proposals. But I
24 can't speak for the Director and as far as the time line goes and

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1 when that might occur, I just don't know. That's where they are.
2 They have already gone through management sign-off at this
3 particular time.

4 HEARING OFFICER JACKSON: Okay. We would like to take a
5 short five minute break to discuss a few things and see if we
6 have a couple more questions for you when we come back. Okay.
7 Off the record.

8 (Whereupon a short recess was taken.)

9 HEARING OFFICER JACKSON: Okay. We will go back on the
10 record.

11 I think we are nearing completion of the hearing today. I
12 know we do have at least one more question from the Board and
13 then we will take any additional questions from the members of
14 the audience.

15 Chairman Manning, I think you had a question.

16 CHAIRMAN MANNING: I do. What I would really like to ask

17 the Agency to have a handle on before we close the record of this
18 proceeding today is the other proposals that we don't have yet
19 could you at least explain to the Board how they relate to the
20 issues that are currently before the Board? I mean, what is the
21 other shoe here? So if you could explain the interrelationship
22 between what it is you are doing now and what we are about to get
23 at some point, which we don't know, and what it is that we have
24 before us now? Thank you.

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1 BOARD MEMBER KEZELIS: The more the merrier.

2 CHAIRMAN MANNING: Jump right in there.

3 MR. GARY KING: For instance, on the MTBE contaminants, it
4 is going to be -- we are establishing corrective action
5 objectives for it under TACO. But TACO does not set up a process
6 by which MTBE is investigated at a site. So that is what we are
7 doing under 732 and under 740, as well. 732 would establish kind
8 of a framework for monitoring for MTBE at sites that have had
9 releases and how they then handle -- as Doug was saying earlier,
10 how we handle the cost related to MTBE and electing in for
11 further remediation and in all that investigatory and remediation
12 stuff under the tank program gears off of whether a contaminant
13 is listed as an indicator contaminant. That is what has to
14 happen with MTBE.

15 Similarly, under 740, it is a new -- it would be a new
16 contaminant to be investigated for a site that is undergoing

17 remediation under 740, and it is not included there at this
18 point. So I think that is kind of -- there may be some other
19 implementation, but I think that is probably the key transition
20 between TACO and the other two sets of rules.

21 CHAIRMAN MANNING: I would reiterate Member Kezelis'
22 comment that to the extent to which the Agency can get us those
23 proposals as soon as possible while we are doing this it would be
24 much appreciated, even though, as you know, our docket is very

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1 large, and I didn't think I would be asking for more rulemakings
2 to come our way. I find myself kind of in that position, that I
3 think the more knowledgeable we are about what else is going to be
4 proposed the better off we are.

5 HEARING OFFICER JACKSON: Okay. Before we proceed with any
6 other questions, I want to note that Ms. Geving did provide me
7 with a copy of a document entitled, "Basis for Proposing a
8 Preventive Notice and Response Level for MTBE in 35 Illinois
9 Administrative Code 620." It is my understanding that this will
10 be offered as IEPA Exhibit 2 in this matter?

11 MS. GEVING: That's correct.

12 (Whereupon said document was duly marked for purposes of
13 identification as IEPA Exhibit 2 as of this date.)

14 HEARING OFFICER JACKSON: Okay. Are there any objections
15 to the introduction of this document? Okay. It is so entered

16 into the record then.

17 (Whereupon said document was admitted into evidence as IEPA
18 Exhibit 2 as of this date.)

19 HEARING OFFICER JACKSON: Are there any other questions at
20 this point?

21 Yes. Please state your name and affiliation for the
22 record.

23 MR. RODECK: Sean Rodeck with Handex. Mr. Clay indicated
24 that if you do find off-site contamination and you want to get

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1 back into the program, associated with MTBE, would you re-enter
2 as 732 regulations or, for example, if you had closed the site
3 under 731, would you still have to come back in and perform site
4 classification activities and call it a new incident number or
5 how would that work?

6 MR. CLAY: We have -- it is proposed in 732, and just
7 thinking through this, I am not sure with a 731 site and the
8 remediation was done under 731 -- I guess I would like to think
9 about that further. It may require another incident being called
10 in. I would like to think about that further and maybe address
11 that in the 732 rulemaking.

12 THE COURT REPORTER: Sir, could I have your last name
13 again?

14 MR. RODECK: Rodeck, R-O-D-E-C-K.

15 THE COURT REPORTER: And who are you with?

16 MR. RODECK: Handex, H-A-N-D-E-X.

17 THE COURT REPORTER: Thank you.

18 HEARING OFFICER JACKSON: Any other questions or comments
19 from any of the Agency witnesses?

20 Okay. Hearing none, are there any other individuals
21 present today who would like to make a presentation to the Board?

22 Okay. One thing I want to talk about before we conclude
23 today is the September 22nd hearing that is currently scheduled
24 to take place at the James R. Thompson Center in Chicago. We do

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1 have a short hearing on the 21st to discuss the Economic Impact
2 Study that the Board requested DCCA do, but that is, for all
3 intents and purposes, a very short nonsubstantive type of
4 hearing.

5 Is there anyone present today who would request that the
6 Board hold another hearing on that September 22nd date? If we
7 have no specific request for a hearing on that date then we are
8 inclined at this point to proceed with a public comment period
9 that would expire in approximately 30 days from the last day of
10 hearing, the last day of hearing being September 21st. So the
11 public comment period would expire, I believe, as previously set,
12 for October 23rd. It is a Monday.

13 Are there any objections to that proposal? Okay. Then any
14 of the questions that have been put to the Agency or any other

15 presenters today where the presenter has indicated a need to look
16 into it and get back to the Board, I would simply ask that you do
17 so in writing before the end of that written public comment
18 period.

19 Yes, Mr. Rieser?

20 MR. RIESER: Well, I have forgotten how close October 23rd
21 was to here. It is my suggestion that to the extent the Agency
22 comes up with additional information that we have some time to
23 look at it so that we can comment on it appropriately. For
24 example, in terms of the implementation dates and things like

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1 that, I would like to see what they have to say and then our
2 comments may change depending on that. There may not be a way to
3 do that.

4 HEARING OFFICER JACKSON: Ms. Geving, do you have any
5 suggestions in that regard?

6 MS. GEVING: That is tricky. With regard -- I think I have
7 tried to address the implementation question with regard to the
8 entire rulemaking, with the exception of MTBE, as when things
9 become effective at the adoption date by the Pollution Control
10 Board, and we would implement those rules based upon that date.
11 And any plans or anything that comes into the Agency for approval
12 after the adoption date we would, of course, apply the law that
13 is on the books at that time of our decision after that date. I
14 think that the case law is pretty clear on that issue.

15 With the exception of MTBE, I don't know what we can say
16 definitively at this point, that the rules really need to come
17 before the Pollution Control Board. I don't know that there is
18 an answer without that happening.

19 MR. RIESER: Understood.

20 HEARING OFFICER JACKSON: I would also note that although
21 we are in a tight statutory deadline for the Subdocket A portion
22 of this rulemaking, if, after public comments are filed with
23 regard to any of the Subdocket B proposals, if any of those
24 comments raise in your minds the need for another hearing you

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1 could so request that the Board schedule another hearing to
2 discuss any of those matters and we could then have as an option
3 a delay in the second notice of the Subdocket B portion of this
4 rulemaking. So that is another option that would be out there if
5 there was something that raises significant question contained in
6 the public comments.

7 Okay. I will note, then, on the record, and I am not sure
8 that the court reporter knows this, so I hope we are not catching
9 her off guard. We have requested an expedited transcript for
10 this proceeding, so that will enable everyone to promptly review
11 it and get those public comments in as soon as possible. The
12 transcript will be available on the Board's web site. The
13 Board's web site is www.ipcb.state.il.us. It should be available

14 within three to five business days of today's hearing. Hard
15 copies of the transcript or any Board document in this
16 proceeding, for that matter, are available from the Board's
17 Clerk's office as well. The first notice opinion and order are
18 currently on our web site.

19 The next hearing in this matter, then -- since we have
20 concluded with our business today, tomorrow's hearing will be
21 cancelled. The next hearing will be scheduled -- is scheduled
22 for 12:00 noon on September 21st at the James R. Thompson Center
23 in Chicago to discuss the Economic Impact Study that was
24 requested of DCCA by the Board in this matter.

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1 Are there any other matters that we need to address on the
2 record at this point?

3 Okay. Then we are adjourned. Thank you all very much.

4 (Hearing Exhibits were retained by
5 Hearing Officer Amy Jackson.)
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1 STATE OF ILLINOIS)
) SS
2 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

4

5 I, DARLENE M. NIEMEYER, a Notary Public in and for the
6 County of Montgomery, State of Illinois, DO HEREBY CERTIFY that
7 the foregoing 141 pages comprise a true, complete and correct
8 transcript of the proceedings held on the 11th of September A.D.,
9 2000, at 600 South Second Street, Springfield, Illinois, In the
10 Matter of: Proposed Amendments to Tiered Approach to Corrective
11 Action Objectives, 35 Ill. Adm. Code 742, in proceedings held
12 before Amy Jackson, Hearing Officer, and recorded in machine

13 shorthand by me.

14 IN WITNESS WHEREOF I have hereunto set my hand and affixed
15 my Notarial Seal this 13th day of September A.D., 2000.

16

17

18

19

20 Notary Public and
21 Certified Shorthand Reporter and
22 Registered Professional Reporter

21

22 CSR License No. 084-003677

23 My Commission Expires: 03-02-2003

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