

1 ILLINOIS POLLUTION CONTROL BOARD

2 In the Matter of:)
3 RIVERVIEW FS, INC.,)
4 Petitioner,)
5 vs.) PCB 97-226
6 ILLINOIS ENVIRONMENTAL) (UST-Reimbursement)
7 PROTECTION AGENCY,)
8 Respondent.)

9

10 TRANSCRIPT OF PROCEEDINGS had at
11 the hearing of the above-entitled matter, taken
12 stenographically by Cheryl L. Sandeck, CSR,
13 before BRADLEY P. HALLORAN, Hearing Officer, held
14 at 519 Blackhawk Boulevard, South Beloit,
15 Illinois, on the 5th day of December, 2000, at the
16 hour of 9:30 a.m.

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1 PRESENT:

2 HEARING TAKEN BEFORE:

3 Illinois Pollution Control Board
4 100 West Randolph Street
5 Room 11-500
6 Chicago, Illinois 60601
7 (312) 814-8917,
8 BY: MR. BRADLEY P. HALLORAN

9 -----

10 BRYAN G. SELANDER
11 1827 Eighteenth Avenue
12 P.O. Box 1595
13 Rockford, Illinois 61110
14 (815) 397-0500,

15 appeared on behalf of
16 Riverview FS, Inc.;

17 ILLINOIS ENVIRONMENTAL PROTECTION
18 AGENCY
19 BY: MR. DANIEL P. MERRIMAN
20 1021 North Grand Avenue East
21 P.O. Box 19276
22 Springfield, Illinois 62794-9276
23 (217) 782-5544,

24 appeared on behalf of the
 Illinois Environmental Protection
 Agency.

 ALSO PRESENT: Mr. Stan Tobias
 Mr. Douglas Oakley
 Mr. Blake Harris
 Ms. Joyce Gibbons

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21 NO EXHIBITS WERE ADMITTED

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1 HEARING OFFICER HALLORAN: Good morning. My
2 name is Brad Halloran. I am a hearing officer
3 with the Illinois Pollution Control Board, and I
4 am assigned to this matter.

5 We are here today in pollution control
6 docket No. PCB 97-226, entitled Riverview FS,
7 Inc., versus Illinois Environmental Protection
8 Agency, where petitioner has appealed the IEPA's
9 final determination regarding petitioner's request
10 for reimbursement from the underground storage
11 tank fund.

12 It is approximately 9:35 on
13 December 5th, the year 2000. I want to note for
14 the record that there are no members of the public
15 present. But if there were, of course, they would
16 be able to comment subject to cross-examination.

17 We are going to run this hearing
18 pursuant to 103 of the Board's regulations where
19 the matter deals with an appeal pursuant to
20 Section 22.18(b)(g) and Section 40 of the Illinois
21 Environmental Protection Act.

22 I note that this hearing is intended to
23 develop a record for review of the appeal by the
24 entire Pollution Control Board. I will not be

1 deciding the case. It is the Pollution Control
2 Board that will be making the ultimate decision.
3 They will review the transcript of this proceeding
4 and the remainder of the record and render a
5 decision in this matter.

6 My job is to ensure an orderly hearing
7 and a clear record so that the Board can have all
8 the necessary information before it to render its
9 decision.

10 After the hearing, the parties will
11 have an opportunity to submit post-hearing briefs.
12 These too will be considered by the Board.

13 With that said, it is my understanding
14 that there are no preliminary motions to be made,
15 and if the parties would introduce themselves.

16 MR. SELANDER: I am Brian Selander. I
17 represent Riverview FS. And with me is Stan
18 Tobias of Riverview FS.

19 HEARING OFFICER HALLORAN: Mr. Merriman.

20 MR. MERRIMAN: Mr. Hearing Officer, I am Dan
21 Merriman. I represent the Illinois Environmental
22 Protection Agency. Present also this morning is
23 Mr. Doug Oakley, who is the manager of the LUST
24 claims unit; Blake Harris, who was the reviewer of

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1 the claim in question; and Ms. Joys Gibbons, who

2 is a member of the field operations section of the
3 Rockford field office who also acted as a project
4 manager on the leaking underground storage tank
5 case in question.

6 HEARING OFFICER HALLORAN: Thank you.

7 Mr. Selander, would you like to make an
8 opening statement?

9 MR. SELANDER: I would. And before I do, I
10 believe Mr. Merriman and I would like to recommend
11 to the hearing officer that we will stipulate to
12 the admission of both the Agency administrative
13 record technical file and the Agency
14 administrative record fiscal file, copies of which
15 I believe the hearing officer has.

16 HEARING OFFICER HALLORAN: I do, and it will
17 be granted.

18 MR. MERRIMAN: Thank you.

19 OPENING STATEMENT

20 BY MR. SELANDER:

21 We are here this morning to review a
22 decision which was communicated to Riverview FS by
23 letter with a date of May 12, 1997, relating to
24 that company's submission to the Agency of a

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1 request for reimbursement for remediation from an

2 underground storage tank which contained gasoline.
3 In that decision, the IEPA was presented initially
4 with a request for \$159,577.18 in costs incurred
5 by Riverview FS in the course of that remediation.
6 The deductible that was applied was \$10,000. And
7 the State concluded that it would pay \$89,344.58
8 of the request.

9 All of the work at the time I believe
10 of the decision had been completed. And so the
11 shortfall between the amount Riverview FS paid to
12 the contractors and the amount that has been
13 reimbursed by the IEPA is \$70,232.60. This appeal
14 followed that communication of the decision.

15 Initial application for the
16 reimbursement was filed and received by the IEPA
17 on January 30th of 1996. It followed, of course,
18 the corrective action plan. The work had been
19 completed as of June 13th of 1994, I believe.

20 There are principally three invoices
21 specifically that have been commented on by the
22 decision of the IEPA. And principally the
23 complaint and the justification for the rejection
24 of the costs tendered center on a failure to

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1 appropriately document the costs and that the
2 costs were excessive. And in that decision it is

3 broken out looking principally at the cost for
4 laboratory sampling and for the costs of
5 excavation and disposal of contaminated soils.

6 The time frame is a particularly
7 difficult one for Riverview FS in that from the
8 time the application for reimbursement was made
9 until, ultimately, the decision of the IEPA was
10 offered to it, almost one and a half years had
11 elapsed. In that initial submission, I believe
12 all of the documentation which was reviewed on
13 costs have been tendered. And making it
14 particularly difficult after a year and a half of
15 review is the fact that the contractor is no
16 longer in business. That time frame has
17 jeopardized to a degree the petitioner's ability
18 to respond to the May 12, 1997 decision of the
19 IEPA in that the absence of that contractor from
20 the scene has made it virtually impossible for
21 them to further supplement the documentation that
22 they have been able to tender to the State for
23 review.

24 Riverview also has pursued trying to

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1 reach people who were employed by that company who
2 have personal information and have been

3 unsuccessful in doing that.

4 We would argue that the time frame has
5 posed a difficult obstacle for the petitioner to
6 be able to further supplement their submission to
7 the IEPA and that that time frame was created
8 solely by the IEPA's time in reviewing the
9 submission that was tendered back in '96.

10 HEARING OFFICER HALLORAN: Thank you,
11 Mr. Selander. Mr. Merriman?

12 OPENING STATEMENT

13 BY MR. MERRIMAN:

14 Normally, I waive statements, but we
15 are dealing with an unusual situation here because
16 this is what the Agency, for lack of a better
17 term, refers to an old law case. So I will make a
18 brief opening.

19 Prior to September 13th, 1993, when
20 title -- the new Title 16 of the Environmental
21 Protection Act became effective, Section 22.18b --
22 former Section 22.18b of the Act controlled
23 reimbursement leaking underground storage tank
24 corrective action cost claims. This is an old law

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1 case. The reporting of the release occurred prior
2 to September 13th, 1993. It was submitted and
3 reviewed pursuant to 22.18b of the Act and the

4 procedures that were in effect at the time.

5 There is nothing particularly unusual
6 about the length of time in this case in the
7 context of the time period in which it was
8 submitted. Title 16 did modify the Agency's
9 procedures significantly in that it imposed
10 certain mandatory time periods for review and left
11 the failure to complete the review as a denial by
12 operation of law if the Agency didn't actually do
13 the review in most instances.

14 So in the context -- and I think we
15 will have testimony about this briefly. But in
16 the context of the time period, since the Title 16
17 cases were, in fact, under a tight time frame,
18 they were required to be given priority for the
19 limited resources that we have for the review.
20 And again the burden is and always has been on the
21 applicant to supply the appropriate documentation.
22 Section 22.18b(d) (4) (C) was the provision, the
23 former section that is applicable here that
24 described the standard for reimbursement. And the

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1 Agency could reimburse reasonable costs of
2 corrective action provided they were adequately
3 documented. And the statute went on to say that

4 the accurate documentation had to be a breakdown
5 of those costs on a time-and-material basis or
6 some other form of documentation that the Agency
7 was aware of.

8 This is all part of the application
9 process for reimbursement. And it is something
10 that was, obviously, known or should have been
11 known to the persons who are submitting the
12 reimbursement, the requested contractor in this
13 instance, to submit a reimbursement request.

14 Time-and-material breakdown relates to
15 invoices and time sheets. These are matters that
16 are documented at the time or approximately at the
17 time that they are incurred. So they are -- other
18 than the unusual circumstance in this case of the
19 contractor being out of business and perhaps not
20 being as cooperative with the owner/operator as we
21 would hope, there again is nothing particularly
22 unusual about this case and the ability or lack of
23 ability to provide additional documentation.

24 One brief comment about the figure

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1 involved, the amount sought in the April 14th,
2 1997 request for reimbursement was, indeed,
3 \$159,577.18. The amount paid as a result of the
4 Agency's review of that claim was, indeed,

5 \$89,344.58. However, there is a statutory
6 deductible of \$10,000 that was also applied. I
7 don't believe that the applicability of the
8 statutory deductible is in issue here. So really
9 the amount in issue rather than being \$70,232.60
10 is, I believe, \$60,232.60.

11 With that, I think the decision letter
12 of May 12th, 1997, set forth in attachment A
13 thereto, the reasons for the deductions that the
14 Agency applied here and sets forth an explanation
15 and the fiscal record, which is in evidence in
16 this case, will, I think, bear out the reason.

17 For purposes of the reference,
18 attachment A appears on pages -- for example, on
19 pages 5 and 6 of the fiscal record and again on
20 pages 93 and 94 of the fiscal record. The reason
21 that it appears twice in the fiscal record is that
22 the first reference, pages 5 and 6, are in the
23 context of them being attached as they were
24 required to be to the petition for review. And

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1 the second reference in the record toward the end
2 of the fiscal record is the letter that was sent
3 by the Agency to the owner/operator.

4 And with that, I have nothing further

5 as far as an opening statement.

6 HEARING OFFICER HALLORAN: With that said, I
7 believe we can start our case-in-chiefs.
8 Mr. Selander?

9 MR. SELANDER: Yes. I would like to call
10 Stan Tobias from Riverview FS.

11 HEARING OFFICER HALLORAN: Mr. Tobias, if you
12 could - I think we established the witnesses are
13 going to sit over there.

14 (Witness duly sworn.)

15 STAN TOBIAS,
16 called as a witness herein on behalf of Riverview
17 FS, having been first duly sworn, was examined and
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SELANDER:

21 Q. Mr. Tobias, would you state your name
22 for the record?

23 A. Stan Tobias. I am the general manager
24 of Riverview FS.

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1 Q. And Mr. Tobias, in your capacity as
2 general manager of Riverview FS, are you familiar
3 with the appeal that is being heard today by this
4 hearing officer?

5 A. Yes, I am.

6 Q. And in the course of -- in your role as
7 general manager, are you familiar with the records
8 and the books of -- the finances of Riverview FS?

9 A. Yes, I am.

10 Q. And you are, therefore, aware of the
11 claim that had been filed with the IEPA back in
12 1996?

13 A. Yes.

14 Q. Okay. The information from that claim
15 would indicate that the one of the primary
16 contractors was a company called Mankoff; is that
17 correct?

18 A. That's correct.

19 Q. Are you familiar with efforts that have
20 been made recently to try to reach Mankoff in
21 order to supplement any information for this
22 matter?

23 A. Yes, I am.

24 Q. To your knowledge, is Mankoff Equipment

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1 still in business?

2 A. They are not.

3 Q. Now, your business involves the
4 chemical industry as well as to a degree the
5 construction industry; is that correct?

6 A. We are an agricultural cooperative.

7 Q. Okay. And as such, you -- well, let me
8 withdraw that.

9 Mr. Tobias, the amount of the claim is
10 \$159,577.18; is that correct?

11 A. That's correct.

12 Q. And in the record which is before the
13 hearing officer, there are copies of checks which
14 I can show to you, a summary of which is found in
15 the fiscal file at page 44. Could you glance at
16 that and the following pages, which, I believe,
17 reflect photocopies of the actual checks from that
18 summary?

19 A. Yes. They are all Riverview checks.

20 Q. Those are all Riverview checks payable
21 in this manner.

22 The total in that column was
23 \$161,546.68; is that correct?

24 A. That's correct.

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1 Q. From January 26th of 1996 when the
2 initial application for reimbursement was filed,
3 do you recall hearing anything further from
4 the State of Illinois on this matter until a
5 contact was made to your consultant on March 3rd
6 of 1997?

7 A. No.

8 Q. You didn't -- you don't recall having
9 received any phone calls or any correspondence
10 from the IEPA requesting any additional
11 information or --

12 A. I wouldn't have been at Riverview FS
13 until after the January date.

14 Q. Okay.

15 A. But no.

16 Q. From that January date forward --

17 A. No.

18 Q. -- and from your review of the records
19 of that company, have you noticed anything in
20 those records which would reflect any contact made
21 with your predecessor?

22 A. No, I didn't see anything.

23 Q. The January date you referred to would
24 have been January of 1997?

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1 A. I thought you said '96.

2 Q. '96 was the initial submission, right.
3 When did you begin at Riverview FS?

4 A. Mid 1996.

5 Q. Okay. So from -- so there was no
6 contact with you from mid 1996 and you are unaware

7 of any contact from your review of the records of
8 that company prior to that?

9 A. That's correct.

10 Q. Was the first time that Riverview FS
11 became aware of the State's positions with regard
12 to the expenditures made when you received the
13 letter from the State of Illinois dated May 12th
14 of 1997?

15 A. As far as what we were going to receive
16 from the State --

17 Q. Correct.

18 A. -- yes.

19 Q. Is that the first time that Riverview
20 FS was made aware of the basis for any deductions
21 from the amounts expended by Riverview FS in this
22 matter?

23 A. I can't really answer that.

24 Q. But to the best of your knowledge?

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1 A. To the best of my knowledge, yes.

2 Q. And based on your review of the records
3 of Riverview FS, that is also the case?

4 A. That's correct.

5 MR. SELANDER: That is all I have of
6 Mr. Tobias.

7 HEARING OFFICER HALLORAN: Mr. Merriman, any

8 cross?

9 MR. MERRIMAN: Just very briefly.

10 CROSS-EXAMINATION

11 BY MR. MERRIMAN:

12 Q. Mr. Tobias, did you personally prepare
13 the request for reimbursement that was submitted
14 to the Agency?

15 A. No, sir.

16 Q. Who is Daren Poppen?

17 A. He was a controller for the company at
18 that time or an accountant.

19 Q. And that would have been in -- would he
20 have been with the company in January of 1996?

21 A. Yes.

22 Q. Just for the record to clarify, when we
23 refer to the company, we are referring to
24 Riverview FS, right?

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1 A. That's correct.

2 Q. How about a company entitled Terra Nova
3 Research, are you familiar with them?

4 A. Yes, sir.

5 Q. In what context or capacity?

6 A. Pardon?

7 Q. In what context or capacity are you

8 familiar with them?

9 A. In just reviewing the documentation.
10 That would be my only contact with Terra Nova.

11 Q. To your knowledge, was Terra Nova
12 retained or hired by Riverview FS to oversee the
13 underground storage tank removal project at issue
14 here?

15 A. That would be my understanding.

16 Q. And they, in turn, again, to your
17 knowledge, retained Mankoff Industries or Mankoff
18 -- I forget the name under which Mankoff was
19 operating at the time.

20 MR. SELANDER: Equipment.

21 MR. MERRIMAN: Mankoff Equipment.

22 THE WITNESS: That is my understanding, yes.

23 BY MR. MERRIMAN:

24 Q. Did Riverview FS receive copies of all

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1 of the bills and invoices of the various
2 subcontractors that worked at the site?

3 A. I believe they did.

4 Q. And did Riverview FS, in turn, submit
5 those for reimbursement or was that Terra Nova or
6 Mankoff?

7 A. I believe that Terra Nova presented the
8 reimbursement forms and did that type of work for

9 Riverview.

10 Q. So you didn't personally do that?

11 A. I wasn't even there when that was done.

12 Q. We referred previously to page 44 of
13 the record, which was a summary of checks that
14 were submitted with the application for
15 reimbursement. And not that any of the costs that
16 were incurred by Riverview FS specifically are in
17 question, but I am just curious that a number of
18 checks had Intercounty Title Company listed as a
19 payee. Are you aware of that?

20 A. No. Well, I saw the checks, yes.

21 Q. And you don't know what --

22 A. No, sir.

23 Q. Okay. We see a check, for example, to
24 Mankoff Equipment Company in the amount of

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1 \$23,789.18 appearing on that page, and we also see
2 a couple of checks to Terra Nova Research and one
3 to Dewey Heslop Trucking & Excavation, and two
4 smaller checks to All Contractors Equipment
5 Company.

6 MR. SELANDER: May I?

7 MR. MERRIMAN: I was going to give him a copy
8 to look at before I ask this. Thank you.

9 BY MR. MERRIMAN:

10 Q. But I just don't know -- I am not clear
11 of the nature of the Intercounty Title Company,
12 unless you perhaps used a banking intermediary to
13 pay Terra Nova and then they were installments of
14 some sort. I am not sure what those are, are you?

15 A. No, I am not.

16 Q. During the period of time from mid
17 1996 to May 1997 while the application for
18 reimbursement was pending, I believe you testified
19 that you didn't have any personal communication
20 with the Illinois Environmental Protection Agency
21 regarding the application; is that right?

22 A. Not that I remember.

23 Q. You don't know whether Terra Nova, for
24 example, may have had communication with the

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1 Illinois EPA?

2 A. I don't know that.

3 Q. Nor do you know whether Mankoff may
4 have had any communication?

5 A. No, sir. I guess my -- the first thing
6 I saw in this was the letter, and it had a bearing
7 on me from the standpoint that the receivable from
8 the EPA as far as what was presented was carried
9 as a current receivable. And as such, when we

10 received or I received the letter that this amount
11 was going to be paid, it required a write-off of
12 income for Riverview FS, which kind of got my
13 attention.

14 Q. It is a substantial loss?

15 A. Yes, sir.

16 Q. Do you know whether Riverview FS had
17 any direct dealings with Mankoff Equipment or was
18 that all handled through Terra Nova?

19 A. I couldn't tell you.

20 Q. Have you yourself had any direct
21 dealings with Mankoff Equipment Company or any of
22 their personnel --

23 A. No, sir.

24 Q. -- either prior or after this?

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1 A. No, sir.

2 MR. MERRIMAN: I believe that is all I have
3 for this witness. Thank you, sir.

4 HEARING OFFICER HALLORAN: Redirect?

5 MR. SELANDER: Real quick. Just a brief
6 redirect.

7 REDIRECT EXAMINATION

8 BY MR. SELANDER:

9 Q. Mr. Tobias, in reviewing those checks,

10 I believe you had testified in response to one
11 of Mr. Merriman's questions about paying
12 subcontractors. The checks that are in the record
13 reflect the only payments that you are aware of
14 that were made by Riverview FS on this matter; is
15 that correct?

16 A. That's correct.

17 Q. So they would reflect the recipients of
18 those funds and they do not, you know, break down
19 into generally individual trucking companies or
20 laboratory people or -- they are principally to
21 that title company to Mankoff to Terra Nova; is
22 that correct?

23 A. That's correct.

24 MR. SELANDER: That is all I have.

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1 HEARING OFFICER HALLORAN: You may step down,
2 Mr. Tobias. Thank you.

3 Mr. Selander, any further
4 witnesses?

5 MR. SELANDER: I would -- I do have questions
6 for Mr. Oakley and would like to call him unless
7 it would be more convenient to the hearing officer
8 to do that in the course of Mr. Merriman's case.

9 MR. MERRIMAN: Feel free.

10 HEARING OFFICER HALLORAN: Mr. Merriman, do

11 you have any objection?

12 MR. MERRIMAN: No. I think it is right under
13 the rules to call him.

14 (Witness duly sworn.)

15 DOUGLAS OAKLEY,
16 called as a witness herein on behalf of Riverview
17 FS, having been first duly sworn, was examined and
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SELANDER:

21 Q. Mr. Oakley, please state your name and
22 your occupation for the record?

23 A. Douglas E. Oakley. I am a unit
24 manager. I manage the LUST claims unit for the

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1 Illinois Environmental Protection Agency.

2 Q. Now, Mr. Oakley, you are familiar with
3 the matter that is before the hearing officer
4 today, Riverview FS versus IEPA?

5 A. Yes, sir, I am.

6 Q. Do you recall an application for
7 reimbursement that was filed or received by your
8 office on January 30th of 1996 in this matter?

9 A. Yes, I am.

10 Q. And in the result of that review is

11 reflected in the letter generated in May -- I am
12 going to keep referring back to that date and I
13 am going to keep misstating it unless I look.

14 -- yes, May 12, 1997?

15 A. Yes.

16 Q. There is a rather significant time
17 frame between that submission of that request for
18 reimbursement and the letter generated by your
19 office with the result. Could you elaborate a bit
20 on what the workload of your particular agency and
21 your particular unit was in that time frame?

22 A. Yes. At that particular point in time
23 we were woefully understaffed. We were behind.
24 In some cases it would take up to -- I think at

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1 one point in '95 it would have taken up to like 15
2 years to get payment. We were -- we had
3 contractual people mostly that we used, and they
4 were laid off. I believe it was in '96, right
5 around in the spring of '96 around the same time
6 all this was occurring. And essentially that was
7 the problem. We didn't have the staff to keep up
8 with the amount of claims that were coming in at
9 that time. Therefore, we were running backlog and
10 it took us longer to get them out.

11 Q. So you -- let me -- I am going to show

12 you what is page 72 of the fiscal file. This is a
13 memo that apparently went to you from I assume an
14 employee Ricki Witte; is that correct?

15 A. Uh-huh.

16 Q. And the date on that is February 7 of
17 '96. On that memo it would appear that this is
18 some sort of an intake memo which would have been
19 generated maybe soon after that package had
20 initially been received; is that correct?

21 A. That's correct.

22 Q. There is also some handwriting on that
23 -- on what is that typed memo. Could you identify
24 that or elaborate on its creation?

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1 A. Those are notes by Doug Tolan who did
2 the summary of this particular claim. It went
3 through a two tier review here. It went through
4 an accounting review and a technical review to
5 make sure the technical merits were in line also.

6 The original review done by Ricki Witte
7 was done by Blake Harris for -- and he did his
8 technical review and he also rendered what he
9 deemed unreasonable costs. So it went through a
10 two-tier review, which was the reason for the time
11 lapse.

12 Q. The next document in the record --
13 again, are some additional review notes apparently
14 created by Ricki Witte. This is on page 74 of the
15 fiscal file dated February 7 of '96; is that
16 correct?

17 A. Yes. This would indicate to me that
18 the change in queue date that must have -- she
19 must have asked for some sort of documentation.
20 This would indicate to me that it would have been
21 incomplete. The original submittal would not have
22 been complete until it appears here April 14th.

23 Q. Of '96?

24 A. Correct.

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1 Q. Let me take you -- the next document in
2 again the fiscal file on page 75 appears to be a
3 memorandum created on February 20th of '97, about
4 a year later. Could you elaborate a bit on the
5 content or the format of that document?

6 A. Okay. That was when both Ricki's
7 initial review -- and I believe Ricki transferred
8 out somewhere in the middle of all this. I mean,
9 I, obviously, don't remember the exact dates, but
10 I believe that is what happened here.

11 But it went to Blake Harris who
12 finished up the accounting review, and he sent it

13 back to the Doug Tolan who did the summary and
14 wrote the actual final decision letter. And this
15 document is, essentially, Blake's document back
16 through me to my boss at that time, John Stellar,
17 indicating the deductions that he thought should
18 be made.

19 Q. Okay. In the decision letter, the
20 attachment A to that document contains some
21 uniform references to amounts of money and with --
22 let me just break it into two parts. One is with
23 regard to the soil matter. And the uniform amount
24 that is being allowed by the IEPA is \$55 a cubic

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1 yard, as it would appear, as I read attachment A.
2 Could you tell me the basis for that number?

3 A. What we did in it was the spring and
4 fall of '93, we gathered data from actual claims
5 that we -- that were submitted. We fed them into
6 a computer. This was my boss's idea. I helped
7 gather the data. I had nothing to do with the
8 actual computer work or anything. But what we did
9 was we gathered data regarding all sorts of cost,
10 personnel, equipment to include cubic yard rates.
11 We fed them into a computer. We calculated a
12 mean, and then we calculated one standard

13 deviation from that mean. And it kicked -- the
14 computer kicked out \$50 dollars a cubic yard. And
15 we just kind -- we adjusted up to 55 in the hopes
16 that we could pretty much encompass, 80, 95
17 percent of all the claims that were submitted at
18 that time. And that is how the \$55 per cubic rate
19 came into being.

20 However, if we did see a rate over \$55
21 a cubic yard, what we could do traditionally is we
22 would ask for a time-and-material breakdown to
23 support this rate. It is possible in some cases
24 that possibly a landfill would charge more money.

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1 But generally speaking, we -- most of
2 the costs we saw were 55 or less. And so that is
3 how we handled it. We felt at this point we could
4 set, you know, and not pay until we received a
5 time-and-material breakdown to support what I
6 believe ranges from \$99 to \$114 a cubic yard here
7 or we can pay what we deemed a fair and reasonable
8 price and then have the owner submit the
9 documentation at a later date. So that is the
10 choice we made at that point. Rather than
11 withhold all payment, we decided to pay what we
12 felt was fair and reasonable.

13 Q. The numbers that went into that 50 or

14 \$55 computerized calculation, do you know how --
15 either how many inputs were made or whether they
16 were based on any geographic area of Illinois?

17 A. They were from all over Illinois. They
18 were in -- I don't know exactly how many entries
19 were made of a significant amount. But what was
20 -- I remember at the time what was interesting was
21 that there really wasn't that much difference
22 between rates, say, in northern Illinois versus
23 southern Illinois.

24 Q. You mentioned that this process was

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1 conducted in the spring and fall of 1993, I
2 believe?

3 A. Yes.

4 Q. Do you know if that process had been
5 undertaken previous to that time frame?

6 A. I don't believe so. I believe we
7 pretty much required time-and-material breakdowns
8 right across the board up to that point.

9 Q. And since that initial computerized
10 calculation was made in the spring and fall of
11 '93, do you know how frequently, if ever, it has
12 been updated?

13 A. It is being updated as we speak.

14 Q. Would that be the first time since the
15 fall of '93?

16 A. We have adjusted it up like three
17 percent per year. So we went from 50 to 55. When
18 we hit 55, we pretty much left it because we
19 weren't seeing that many costs higher than that.

20 Q. Okay. It was -- to your knowledge
21 then, it was adjusted from 50 to 55 maybe one
22 time?

23 A. Over a period like, I want to say,
24 three years. I mean, I don't remember the exact

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1 dates. But over a period of probably three to
2 four years we would adjust it up.

3 Q. Do you know if the process that went
4 into making that adjustment was similar to the
5 initial process of creating that figure?

6 A. No, it wasn't.

7 Q. It was different?

8 A. Yes.

9 Q. It was just basically a percentage
10 increase?

11 A. Right.

12 Q. And as far as running through kind of
13 the survey and feeding that data into a computer
14 and coming up with a calculation, you believe that

15 since spring or fall of '93 the current effort to
16 do that is the first effort of that type that has
17 been done since then?

18 A. Of this magnitude, yes.

19 Q. The second aspect I would like to ask
20 about is the calculation on the sampling costs.
21 It would appear uniformly that the Agency has
22 allowed \$210 per sample. And this was for BETX
23 samples. The costs that had been tendered by
24 Riverview FS and that they incurred were \$369.

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1 Could you elaborate again on how that BETX sample
2 calculation was arrived at?

3 A. Well, I might have to defer to Blake on
4 this particular question because our accounting
5 numbers generally \$150 sticks in my mind as the
6 maximum amount we would pay for a BETX sample.
7 And I believe at that particular point in time,
8 the LUST technical section where also gathering
9 some costs and using pretty much our -- saying
10 they had more staff and better resources than us.
11 And I think at that time they were gathering data
12 and using our same sort of scenario to develop
13 some newer rate sheets.

14 But how the 210 was arrived at, I think

15 Blake would be better off explaining that.

16 Q. Do you know the process that would have
17 gone into the calculation of that, though?

18 A. I believe it was the same process that
19 we used initially, and they gathered that up from
20 actual claims, fed them into a computer and
21 calculated the mean and calculated one standard
22 deviation from that mean.

23 Q. But you weren't personally involved in
24 that?

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1 A. No.

2 Q. So you are a bit uncertain about that
3 aspect of it?

4 A. Right.

5 Q. Was additional pressure put on
6 reviewers of these claims in this time frame
7 because of the change in law, because of the time
8 frame implementation?

9 A. Well, you are talking two different
10 claims here. The old program claims we had no
11 time frame --

12 Q. I understand.

13 A. -- limits. But, yes, we had to react
14 within 120 days on the new law claim.

15 Q. And when did that -- when did that

16 process have an impact on your office?

17 A. That would have been after September of
18 '93.

19 Q. And at that time this claim would have
20 been pending; is that right?

21 A. I believe -- I believe that wasn't
22 submitted in until '96; is that correct?

23 Q. Correct.

24 A. And is that four years after the

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1 incident was reported? Was that in '92?

2 MR. MERRIMAN: Yes.

3 THE WITNESS: Okay.

4 BY MR. SELANDER:

5 Q. At the time that this claim was
6 pending, you would have -- would you have been
7 receiving claims that were required to be
8 processed within the 120-day time frame.

9 A. Yes, we would have.

10 Q. And how did you differentiate as an
11 office between those that did and those that did
12 not receive that benefit?

13 A. We simply had two lists. One we deemed
14 Title 16 claims -- and we still have this day, we
15 have lots of old program claims. So we had two

16 running lists.

17 Q. And is it a natural consequence of that
18 legislative change were claims that you did not
19 categorize as Title 16 claims, did they suffer a
20 bit in the time of their processing because of the
21 legislative commitment?

22 A. I would say that was a fair assessment.

23 MR. SELANDER: That is all I have.

24 HEARING OFFICER HALLORAN: Mr. Merriman.

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1 MR. MERRIMAN: I have got some clarification
2 questions.

3 CROSS-EXAMINATION

4 BY MR. MERRIMAN:

5 Q. Mr. Oakley, I am going to refer you
6 back to page 72 of the fiscal record, which I will
7 show you. I believe this was an internal memo
8 from your unit, Ricki Witte, addressed to you and
9 dated February 7th, 1996; is that right?

10 A. That's correct.

11 Q. It contains -- and I think you were
12 asked about handwritten figures referenced as cuts
13 and have some dollar figures and some item
14 numbers. Would those have been placed on that
15 document in February of '96 or at some later time?

16 A. At some later time. Those are Doug

17 Tolan notes. I would infer from this document
18 they were placed there on or around April 14th of
19 '97.

20 Q. Now, this April 14th of '97 date, is
21 that the -- okay. Let me ask, is that the queue
22 date that was you refer to as a modified queue
23 date?

24 A. I believe at some point in time there

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1 was a problem with the P.E. certification, and I
2 believe Doug Tolan had asked for -- I mean,
3 obviously, I don't remember every single little
4 minutia here. But I believe he had asked -- there
5 was some problem with a P.E. certificate and he
6 had required that.

7 Q. For the record, just to clarify a queue
8 -- and that is spelled q-u-e-u-e -- date is what,
9 Mr. Oakley?

10 A. That is the date we use to simply keep
11 things in line. It is first-in first-out. In
12 some cases it is the date we received a complete
13 claim.

14 Q. And when you refer to first-in
15 first-out, you are referring to vouchers for
16 payment?

17 A. And claims that are submitted for
18 review. They are given a date. It is sort of a
19 tracking date. So we review them in order,
20 first-in first-come first-served.

21 Q. And --

22 A. And that is old program one way -- you
23 know, batch of old program and a batch of new
24 program. It is still first-come first-serve, but

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1 it is two separate -- obviously, with the 120-day
2 date, the new program stuff would be reviewed
3 somewhat quick.

4 Q. In your prior testimony, you mentioned
5 that at one point in time owners and operators
6 would -- were in -- were waiting or had to wait
7 for up to 15 years. Was that for payment of their
8 claims?

9 A. Yes.

10 Q. It is not a 15-year delay period for
11 the review?

12 A. No. That would have been payment.

13 Q. Could you explain a little bit, again
14 for the record, to help clarify for the Board, it
15 has been some years since we have had a number of
16 the old law cases before the Board. And some of
17 the personnel have changed, and the process may

18 not be at as familiar. But if you could review,
19 do you -- by you I am referring to the LUST claims
20 unit -- actually make payment for the
21 reimbursement requests? Do you write a check and
22 send the money to the owner/operator?

23 A. No, sir.

24 Q. How is that done?

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1 A. We prepare a voucher that is signed off
2 on various people within the Agency. Eventually,
3 it winds up in our fiscal section, the Agency
4 fiscal section. And they, in turn, forward those
5 documents to the comptroller who actually issues
6 the checks.

7 Q. And at one period in time there were
8 more vouchers or claims prepared awaiting payment
9 than there was money available; is that correct?

10 A. That's correct.

11 Q. And prior to legislative changes that
12 affected funding, there was a very substantial
13 backlog that even if the claim had been completely
14 processed and was sitting at the comptroller's
15 office, would there be a period of time before the
16 owner/operator would actually receive money?

17 A. That's correct. However, it wouldn't

18 sit at the comptroller's office. It would sit
19 either in our unit or in fiscal.

20 Q. Why is that?

21 A. Because we saw no reason to forward it
22 to the comptroller. We felt we had a better
23 handle on it than flooding them with a bunch of
24 paperwork that they couldn't pay.

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1 Q. And as money came into the fund, then
2 claims were submitted to the comptroller's office
3 for payment?

4 A. Correct.

5 Q. And how was the process done to
6 determine who got paid when there was a lot of
7 money or not enough money and a lot of claims
8 waiting?

9 A. It was a first-come first-serve.

10 Q. Was that the purpose of keeping track
11 of a queue date?

12 A. That's correct.

13 Q. So cases were assigned on order of
14 payment based on the date that the completed
15 reimbursement package was received?

16 A. Correct.

17 Q. You mentioned that there was a two-tier
18 review process. Could you explain just a little

19 bit of detail about that, what is done in the
20 first tier?

21 A. The first tier is, essentially, we look
22 to the cost to make sure they are eligible,
23 reasonable, associated with the correct agency
24 approved corrective action. The second tier,

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1 generally speaking, would be a technical review.
2 However, in this case at that particular point
3 in time Blake Harris was sort of an
4 accountant/technical person, so his review not
5 only included technical documentation but also
6 accounting.

7 Q. If invoices and canceled checks and
8 other things are submitted or copies of those are
9 submitted, is there a process of just crunching
10 the numbers to see that the documents that are
11 submitted and the total numbers of those comport
12 to the summaries that are also submitted as a part
13 of the application process?

14 A. Yes.

15 Q. And just to help for the record,
16 appearing on -- beginning on page 7, I believe, of
17 the administrative record, I will show you this,
18 it is fiscal volume of the administrative record,

19 is a letter dated June 16, 1997, purporting to be
20 a letter -- I am sorry. I gave the wrong page
21 number. That is -- I am talking about page 10
22 dated January 2nd, 1996, purporting to be a letter
23 from Terra Nova Research Incorporated to the
24 Illinois Environmental Protection Agency. Would

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1 this be the initial application cover letter?

2 A. I believe so.

3 Q. And the application begins and the
4 documents that were contained in the application
5 for reimbursement are in the administrative record
6 beginning at page 11 of the fiscal file?

7 A. Yes, I believe so.

8 Q. And again, just to cover ourselves,
9 these documents that -- for example, summary
10 sheets and there are invoices, there are
11 statements and canceled checks and so forth, would
12 these be items that were submitted to the Illinois
13 Environmental Protection Agency as a part of the
14 application?

15 A. Yes, I believe it was.

16 Q. And you mentioned that there is a
17 requirement that a professional engineer
18 certification be submitted along with the
19 application?

20 A. Correct.

21 Q. I am going to ask you to refer in the
22 record to page 82. And would you take a quick
23 look at that? Again, when I refer to the record,
24 I am referring to page 82 of the fiscal volume.

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1 Could you tell us what that document is?

2 A. Well, that is a letter from Doug Tolan,
3 who is in the accounting unit, to Mr. Huck
4 outlining some facts that apparently the P.E.
5 certification only covered certain dates, and
6 there were dates on some of these bills that were
7 outside of that particular certification.

8 Q. Would that be -- have been deemed a
9 deficient certification for purposes of that
10 application?

11 A. Yes, it would.

12 Q. And did that letter request that a new
13 or more complete or additional P.E. certification
14 be submitted?

15 A. Yes, it did.

16 Q. And I am going to now refer you to
17 page 85 of the record. Can you identify -- or
18 take a look at that and tell us what that is.

19 A. I believe that is the response to

20 Mr. Tolan's letter?

21 Q. And does that bear a date that it was
22 received by the Agency?

23 A. April 14th, 1997.

24 Q. So was there an attachment to that

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1 letter?

2 A. Yes, there was.

3 Q. And what was that attachment?

4 A. It would be on page 86, which is a P.E.
5 certification to include the correct dates.

6 Q. Okay. So the April 14th, 1997,
7 received date explains the reference to the queue
8 date on page 72 of the record that we were asked
9 about before?

10 A. Correct.

11 Q. I just wanted to clarify all of that.
12 It is all in the record, but I wanted to make sure
13 that that was clarified.

14 Now, I am going to refer you again to
15 the fiscal file of the record page 75. That is a
16 memorandum that you previously testified to by
17 Blake Harris and you or from you under your
18 signature, and I believe you testified that Blake
19 Harris prepared that memorandum?

20 A. That's correct.

21 Q. And that was addressed to John Stellar?
22 A. Yes.
23 Q. Who is John stellar?
24 A. John Stellar was my boss at that time.

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1 He was the unit manager of remedial RPAPU.
2 Q. The initials RPAPU following John
3 stellar's name stand for what?
4 A. Remedial projects accounting and
5 procurement unit.
6 Q. And is that unit still in existence?
7 A. No. We are now LUST claims unit. We
8 have branched off. At that particular point in
9 time, the unit handled contracts for other state
10 cleanups. For instance, they hired companies to
11 go out and clean up hazardous waste sites and so
12 forth. So we were a subunit of this unit.
13 Q. The subunit that was handling LUST
14 claims at the time of RPAPUs, essentially, is the
15 same thing as the LUST claims unit now?
16 A. Yes.
17 Q. And you are the manager now of the LUST
18 claims unit?
19 A. That's correct.
20 Q. And you were the manager of the LUST

21 subunit of RPAPU?

22 A. That's correct.

23 Q. Back in the spring and fall of 1993
24 when you gathered data for purposes of determining

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1 costs for reimbursement of claims, do you have any
2 recollection as to the number of cost areas or
3 types of cost that you looked at or can you
4 describe them a little bit?

5 A. Well, personnel, there is probably
6 hundreds of titles, personnel titles. Equipment,
7 there is hundred of pieces of equipment that are
8 used in LUST cleanups. We had stock items, such
9 as Visqueen, things of that nature. There is
10 hundreds, if not thousands.

11 Q. What was the reason for doing this?
12 Couldn't you have just picked a number and said
13 this is what we will reimburse?

14 A. We possibly could have done that. But
15 we believed that would be a more fair and
16 equitable way to do it, in that we gathered data
17 from actual claims that had been submitted. And
18 you know, I didn't come up with a theory. John
19 Stellar came up a theory to feed these into a
20 computer and calculate the mean and the standard
21 deviation. And we felt that was the most fair and

22 equitable way rather than having government
23 bureaucrats tell the people how much they can
24 charge, we decided to let the marketplace set the

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1 rate.

2 Q. So you didn't want to fix rates; you
3 wanted to reflect rates?

4 A. That's correct.

5 Q. If these -- these claims you submitted
6 -- excuse me. Strike that.

7 The claims that were submitted, were
8 they claims that were submitted for reimbursement
9 or were these claims that you had seen had already
10 been paid by someone?

11 A. They were both. But essentially they
12 were ones that had already been paid.

13 Q. So somebody -- well, all right. Strike
14 that.

15 A. It depends on when work was performed.
16 You know, prior to -- well, whatever.

17 Q. Were other claims besides LUST
18 reimbursement claims considered when you were
19 looking at various costs for personnel and
20 equipment?

21 A. Not to my knowledge.

22 Q. And the claims that you referred to
23 were from all parts of the state?

24 A. That's correct.

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1 Q. Did they cover -- I want to ask you
2 whether or not there was any account taken of
3 seasonal variation. Did these claims include
4 costs that were incurred at various times of the
5 year?

6 A. Yes.

7 Q. And once this vast number of data were
8 put into the computer, the computer generated a
9 mean; is that correct?

10 A. That's correct.

11 Q. This would be basically -- for someone
12 who is not a mathematician like me, that would be
13 basically an average?

14 A. Well, you throw out the highest rate
15 and the lowest rate and calculate a mean.

16 Q. And that would be a mean for each item?
17 For example, if you have a particular personnel
18 cost at a particular rate or a particular piece of
19 equipment rental costs, each of those -- the
20 computer program would generate a mean cost?

21 A. That's correct.

22 Q. Was the \$55 per cubic yard for soil

23 removal and excavation or excavation
24 transportation disposal at issue here, was that

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1 the mean?

2 A. That was one standard deviation from
3 the mean.

4 Q. Okay. And that is a statistical term
5 that sort of describes a range above and below the
6 mean, does it not?

7 A. That's correct.

8 Q. What was the purpose of using the one
9 standard deviation from the mean as opposed to the
10 mean?

11 A. To allow for -- we felt it was more
12 fair to calculate one standard deviation because
13 it would, in fact, allow for a little more to be
14 paid.

15 Q. And if I understand the purpose of
16 this, you testified in response to Mr. Selander's
17 questioning that prior to this you required
18 time-and-material breakdowns across the board?

19 A. That's correct.

20 Q. Was that a -- sometimes a
21 time-consuming process?

22 A. Yes.

23 Q. And was then the purpose of doing this
24 a way to sort of eliminate the need for the

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1 time-and-material breakdown if the costs appeared
2 to fall within a particular range or sort of were
3 presumptively reasonable?

4 A. That's correct.

5 Q. If the cost came outside of that range,
6 were they automatically unpayable?

7 A. At that particular point in time, we
8 would ask for subcontractor invoices, such as
9 trucking receipts, landfill receipts, costs
10 associated with the excavation in order to
11 determine the actual rates that were paid.

12 Q. And are those the kinds of things that
13 are associated with what we refer to previously as
14 a time-and-material breakdown?

15 A. That's correct.

16 Q. And does former Section 22.18b(d) (4) (C)
17 require a time-and-material breakdown for
18 reimbursement?

19 A. Yes, or other agency approved
20 accounting methods.

21 Q. So using this process you came up with
22 a figure of \$50 per cubic yard as one standard
23 deviation or --

24 A. Correct.

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1 Q. -- above the mean cost?

2 A. Correct.

3 Q. And in this instance, the costs that
4 were submitted were higher than that; is that
5 right?

6 A. That's correct.

7 Q. And you -- I believe you mentioned that
8 you have two options. One is to not pay anything
9 and let the owner/operator subsequent to the
10 denial either resubmit with time-and-material
11 breakdowns, or during the course of an appeal
12 attempt to provide the time-and-material
13 breakdown, and if that was, indeed, submitted,
14 that justified the costs, what would the Agency
15 do?

16 A. We would pay them.

17 Q. The other option, I assume, then is
18 what you did in this case, and that was to pay
19 what was deemed to be reasonable?

20 A. Correct.

21 Q. And if I understand you correctly, that
22 \$55 was an adjustment up from the first standard
23 deviation of the mean?

24 A. That's correct.

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1 Q. And it is not in the mean itself, it is
2 a figure that is higher than the mean?

3 A. Right. It is one standard deviation
4 from the mean, and it was also adjusted up \$5 to
5 allow for inflation.

6 Q. You referenced a 3 percent -- is that 3
7 percent annual increase?

8 A. That sticks in my mind. But, you know,
9 I might have -- I would have to research this. I
10 can't remember.

11 Q. Without getting into the actual dollar
12 figures, there was a periodic adjustment for
13 inflation?

14 A. Yes.

15 Q. Was it similar to the consumer price
16 index adjustments?

17 A. Frankly, I don't know.

18 MR. MERRIMAN: I think that is all that I
19 have.

20 HEARING OFFICER HALLORAN: Thank you. Can we
21 go off the record for a second?

22 (Discussion had off the
23 record.)

24

1 REDIRECT EXAMINATION

2 BY MR. SELANDER:

3 Q. Mr. Oakley, I believe Mr. Merriman
4 showed you some correspondence -- and this is from
5 page 82 of the fiscal file -- which was a letter
6 to an engineer at Terra Nova Research relating to
7 the P.E. certification form that apparently had
8 been sent in response to a telephone call placed
9 by the Agency on March 3rd of '97.

10 A. Okay.

11 Q. This letter then followed the receipt
12 by the Agency on March 5th of a P.E. certification
13 form which was found on page 81 of the fiscal file
14 from Mr. Huck.

15 A. I believe this is a technical piece or
16 -- however the fiscal piece is somewhat different,
17 and that would be this document (indicating.)

18 Q. And do you know how it differs? The
19 language as I read through it is very similar,
20 although I will admit in the first sentence there
21 may be a deviation with regard to the language.

22 A. I think, essentially, this is just a
23 document that says that the professional engineer
24 did, in fact, look at some of these costs and he

1 believes that they were -- they were associated
2 with corrective action at this particular site and
3 it was to have a professional person certify it.

4 Q. In that letter it -- on page 82, once
5 again, it seems to indicate in the second
6 paragraph that the original P.E. certification
7 covers corrective actions performed from
8 December 16th of '92 through June 13th of '94;
9 however, the claim had costs through July 31 of
10 '94. Can you tell the hearing officer what
11 happened on or about June 13th of '94 that would
12 have caused some alteration in the format?

13 A. I don't understand the question.

14 Q. Okay. It would -- in reading this
15 letter on page 82, it indicates the original P.E.
16 certification covers corrective actions performed
17 through June 13 of '94. However, this
18 reimbursement claim includes performance through
19 July 31 in order to reimburse these costs, the
20 proper P.E. certification must be submitted
21 covering this time period.

22 A. Okay.

23 Q. Presumably that means after June 13th
24 of '94. Do you know what administratively or

1 procedurally the Agency did in that time frame to
2 cause you to request that Mr. Huck submit a
3 different form?

4 A. I wouldn't. No, honestly I don't.

5 Q. As we look back at page 81 and the
6 professional engineer's certification form that
7 Mr. Huck sent to the Agency in response to that
8 March 3rd, '97 phone call, it seems to contain the
9 exact same language as the professional engineer
10 certification form found on page 184 of the
11 technical file, which seems to be stamped
12 April 11th of '96.

13 A. I believe these were both technical
14 documents. However, this document is a fiscal
15 (indicating.)

16 MR. MERRIMAN: Can you refer to a page number
17 when you say this document for the record?

18 THE WITNESS: The engineer's certification on
19 pages 81 of the fiscal and page 184 of the
20 technical file appear to me to be technical P.E.
21 certifications. The document on page 86 of the
22 fiscal file is a fiscal P.E. certification. That
23 is what is I believe.

24

1 BY MR. SELANDER:

2 Q. Okay. In light of that review -- I
3 guess I just have to ask this, although I am being
4 somewhat redundant. But would then the technical
5 form that you refer to on page 184 and page, I
6 guess, 81 have been appropriate or sufficient for
7 the cost review through June 13th as the letter on
8 page 82 seems to indicate that for costs after
9 that date it would require the different format?

10 A. No. I would -- I believe the original
11 fiscal P.E. certification what was probably -- and
12 I don't have the document. But I believe the
13 original P.E. certification would have been from
14 December 16, '92, through June 13, '94. However,
15 when Doug Tolan was looking at these documents, he
16 must have noticed that there were costs incurred
17 between June 13th, '94, and July 31st, '94. So he
18 called the P.E. to submit another certification to
19 cover those costs beyond that date of June 13th.

20 Q. Okay. Would it have been the pattern
21 and practice of your department to record in some
22 manner and place in the file evidence of contacts
23 with an applicant?

24 A. Yes.

1 Q. Okay.

2 A. It should have been.

3 Q. And the reason I ask the question, on
4 page 78 of the fiscal file is notes from a
5 telephone conversation between Mr. Tolan and
6 Steve Thornhill of Terra Nova about that P.E.
7 certification issue.

8 A. Okay, good.

9 Q. And those are dated on March 3rd of
10 '97. Prior to that, though, there is nothing in
11 the record that reflects any contact between the
12 Agency and anyone on this matter after the receipt
13 of the package. Again, just to reassure, the
14 pattern and practice would have been to include a
15 note in the file had there been a conversation or
16 a memo or a letter or something; is that correct?

17 A. That's correct.

18 Q. When you received applications for
19 reimbursement in this particular time frame where
20 there was an old set of standards and a new set of
21 standards, how did the Agency make the
22 differentiation?

23 A. Well, Title 16 claims had a certain,
24 i.e., notification date, claims submitted with a

1 date higher than whatever that was, was
2 automatically a Title 16. There was an option.
3 You could opt some of these old claims, old sites
4 into Title 16.

5 Q. At the point of application?

6 A. No. It was generally done before
7 application.

8 Q. Okay.

9 A. Yes. But I mean, we had a computer
10 tracking system that indicated what -- if they
11 were Title 16 site versus an old program site.

12 Q. Okay. The calculations that you have
13 testified to that went into the basis in this case
14 for the \$55 soil and the -- and the BETX issues
15 were known within the Agency. But were they
16 communicated outside the Agency aside from through
17 application in specific instances?

18 A. No.

19 Q. So they weren't published in the
20 Illinois Register? They were just --

21 A. Yes.

22 Q. Would that -- I mean, would the Agency
23 have had authority to publish those calculations
24 to your knowledge?

1 A. I wouldn't know. It is probably more
2 of a legal type question. We essentially didn't
3 want to publish rates because the ceiling would
4 become the floor, and we also wanted to allow for
5 some, you know, competition.

6 Q. Were the queue date references utilized
7 in both the old system and the new?

8 A. Yes.

9 Q. And did they have different purposes
10 between those two systems?

11 A. No, no. Essentially they are just like
12 a tracking date.

13 Q. Even within the new system then, they
14 weren't utilized to assure that the Agency wasn't
15 bumping into the 120-day time frame?

16 A. Well, I mean, that was essentially one
17 of the reasons they were utilized, to make sure we
18 didn't miss the 120-day time frame.

19 Q. But they were utilized in the old
20 system?

21 A. They were, yes.

22 Q. I am asking, they were?

23 A. Yes.

24 Q. And what was their main purpose in the

1 old system?

2 A. Essentially for tracking purposes.

3 MR. SELANDER: Thank you, Mr. Oakley.

4 THE WITNESS: Thank you.

5 HEARING OFFICER HALLORAN: Mr. Merriman, any
6 recross?

7 MR. MERRIMAN: Yes.

8 RECCROSS-EXAMINATION

9 BY MR. MERRIMAN:

10 Q. Mr. Oakley, I am going to refer you to
11 page 20 of the fiscal file of the record and ask
12 if this is, in fact, a document that you were
13 referring to at one point in your conversation --

14 A. No.

15 Q. -- with Mr. --

16 A. Yes. Yes, this is the original, I
17 believe, the original P.E. certification.

18 Q. And this is the P.E. certification for
19 the reimbursement application?

20 A. Correct, that Doug Tolan questioned.

21 Q. And it bears, does it not, a period of
22 dates from one date through another?

23 A. Correct.

24 Q. And that final date is?

1 A. 13 June 1994.

2 Q. Okay. And the application itself,
3 referring back to the cover letter on page -- that
4 appears on page 10 of the administrative record,
5 does the cover letter refer to a period of time
6 that these claims cover?

7 A. Yes, it does.

8 Q. And that period would be what?

9 A. 16 December 1992 through 13 June 1994.

10 Q. Now, I am going to refer you to
11 page 33, I believe of the administrative record
12 just as an example, and ask if you can take a look
13 at that and tell us what that is.

14 A. It appears to be an invoice from a
15 trucking company.

16 Q. And does it bear a date?

17 A. July 18th, 1994.

18 Q. And that is after June?

19 A. June 13th of '94.

20 Q. And it actually has a date, does it
21 not, on which the stone loads were delivered?

22 A. I would infer that would be July 18th,
23 1994.

24 Q. Does it reference --

1 A. On July 12th and 14th, delivered on
2 July 12th and 14th.

3 Q. And that is, in fact, beyond June 13th?

4 A. Correct.

5 Q. So this would be an example of one of
6 the cost items that may have been included in the
7 package for costs that were incurred later that
8 required the additional P.E. certification?

9 A. Correct.

10 Q. Just to clarify, there are P.E.
11 certifications that are submitted with the
12 reimbursement package that means that a licensed
13 professional engineer certifies that the costs
14 submitted were costs incurred in connection with
15 corrective action?

16 A. Correct.

17 Q. And the technical submissions are more
18 -- are also P.E. certifications, but they would
19 refer more to design and engineering issues?

20 A. Cleanup standards and things of that
21 nature, I believe.

22 Q. So although they may look alike and
23 contain the same language, it really depends on
24 their purpose and what they are submitted with as

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1 to what they are or the nature of the

2 certification?

3 A. That's correct.

4 Q. The numbers -- briefly, you were asked
5 by Mr. Selander if the Illinois EPA had published
6 the list of numbers, and you said something about
7 the floor being the ceiling. Can you explain what
8 you meant by that?

9 A. The ceiling becoming the floor.

10 Q. Or the ceiling becoming the floor,
11 excuse me.

12 A. I think if we published the maximum
13 rates that we would pay for a particular item or
14 personnel or whatever, obviously, I mean, I would
15 believe that most consultants would come in at
16 that high rate.

17 Q. So in other words, it would be
18 tantamount to the Agency setting or fixing prices?

19 A. That is a fair assessment.

20 Q. Was this methodology a rule as you
21 understand it?

22 A. No.

23 Q. Was it a tool that was used by your
24 unit to identify certain costs that required

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1 further inquiry or might be susceptible to further

2 inquiry?

3 A. That is exactly right.

4 MR. MERRIMAN: And I think we got the
5 references earlier to this document taken care of
6 when you referred to the pages on the record, so I
7 have no further questions.

8 HEARING OFFICER HALLORAN: Mr. Selander, any
9 re-redirect?

10 MR. SELANDER: No.

11 HEARING OFFICER HALLORAN: Okay. You may
12 step down, Mr. Oakley.

13 Off the record.

14 (Discussion had off the
15 record.)

16 (Short recess taken.)

17 HEARING OFFICER HALLORAN: We have taken
18 approximately a ten-minute break. It is about
19 11:10 a.m. on December 5th. I believe
20 Mr. Selander has finished his case-in-chief; is
21 that correct?

22 MR. SELANDER: We have, yes.

23 HEARING OFFICER HALLORAN: With that said,
24 Mr. Merriman, would you like to proceed.

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1 MR. MERRIMAN: Thank you. I would call Blake
2 Harris.

3 (Witness duly sworn.)

4 BLAKE HARRIS,

5 called as a witness herein on behalf of the
6 Illinois Environmental Protection Agency, having
7 been first duly sworn, was examined and testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MR. MERRIMAN:

11 Q. For the record, please, tell us your
12 name.

13 A. Blake Harris.

14 Q. And your employer?

15 A. Illinois EPA.

16 Q. How long have you been so employed?

17 A. Since July of '93.

18 Q. What is your present job title or your
19 duties?

20 A. I am an accountant, financial assurance
21 reviewer for hazardous waste and solid waste
22 sites.

23 Q. And how long have you been engaged in
24 that particular task?

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1 A. Since February of '99.

2 Q. Prior to that, what did you do?

3 A. Prior to that, I worked for LUST, now
4 the claims unit, RPAPU, worked there from August
5 of '95 until February of '99.

6 Q. RPAPU is the acronym RPAPU?

7 A. Remedial projects accounting and
8 procurement unit.

9 Q. Remedial projects?

10 A. Correct.

11 Q. Now, referred to as the LUST claims
12 unit?

13 A. LUST claims.

14 Q. And how long did you work in that unit?

15 A. For about three and a half years.

16 Q. And prior to that, what did you do?

17 A. Prior to that, I was a LUST project
18 manager for two years.

19 Q. When you say LUST, that is also an
20 acronym?

21 A. Leaking underground storage tank.

22 Q. Is there a difference between a claims
23 reviewer and a project manager?

24 A. Project manager reviews the technical

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1 reports, seldom sees building claims. Maybe once
2 in a blue moon they would be the really high
3 dollar ones. When I moved to RPAPU, I did a cross

4 between the two. I did the technical reviews and
5 incorporated the billing into that. I compared
6 the bills to what was done technically in the
7 field.

8 Q. In fact, that is part of what
9 Mr. Oakley referred to earlier as the two-tiered
10 review process or the two-stage process; is that
11 correct?

12 A. Two-tiered process I believe he is
13 referring to is the accountant would do their
14 review and then it would come to me for the
15 technical review.

16 Q. What was the purpose of the technical
17 review?

18 A. It was to evaluate the bills from a
19 technical standpoint rather than the accounting
20 standpoint. The accountants would look more at
21 plan pulls and amounts of markup and stuff like
22 that. I would be doing a cross between the two,
23 but also comparing what was done in given dates to
24 the technical reports that were submitted.

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1 Q. Make sure these costs were actually
2 corrective action and were actually incurred in
3 the work that was documented to have been done at

4 the site; is that what you are saying?

5 A. Correct.

6 Q. Just again for clarification, when you
7 used the phrase plan pulls -- and a lot of the
8 terms that we use because we are familiar with
9 them may not be familiar to someone else. Can you
10 briefly explain what a plan pull is?

11 A. A plan tank pull would be they apply to
12 pull the tank, for example, prior to knowing there
13 was any contamination.

14 Q. When you they applied, they applied to
15 the --

16 A. State fire marshal. Like they were
17 doing upgrade on their station, there is no
18 requirements of contamination to their knowledge.

19 Q. And office the state fire marshal
20 issues permits to --

21 A. Yes.

22 Q. So when you say apply, they requested a
23 permit?

24 A. Yes.

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1 Q. And what was your connection with --
2 excuse me, you are familiar, are you not, with the
3 reimbursement package at issue in this case, and
4 that would be the Riverview FS facility?

5 A. Yes, I am.

6 Q. And that was a LUST incident No.
7 92-3569?

8 A. Yes, it is.

9 Q. Can you tell us what you did in
10 connection with this particular claim?

11 A. What I did, could you explain?

12 Q. Well, in what capacity were you
13 familiar with this claim for reimbursement?

14 A. I completed the technical bill review
15 on this claim. I reviewed the reports and
16 compared those to the bills to what was done out
17 in the field.

18 Q. Calling your attention to page 75 of
19 the Agency administrative record fiscal file, do
20 you recognize that document?

21 A. Not of the administrative record of the
22 fiscal file.

23 Q. Fiscal file, page 75 of the fiscal
24 file. Do you recognize that document?

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1 A. Yes. This is the memo I sent to Doug
2 Oakley after my completion of the technical
3 review.

4 Q. There is a reference at the bottom of

5 that page in handwriting relating to certain
6 dollar figures and some numbers and then a
7 statement that says "see attached notes." Do you
8 know who wrote that?

9 A. That is my handwriting.

10 Q. The numbers, No. 18 and 6, No. 18 and
11 No. 23, what do those things refer to?

12 A. Those refer to the nature of the cuts.
13 I can't recall. It is from our list. I believe 6
14 was lack of documentation. 18 was justification
15 of the bills.

16 Q. So there is a sort of a standard list
17 of the nature -- when you say cuts, are you
18 referring to deductions?

19 A. Deductions for the accountant's
20 purposes. That is the number they use.

21 Q. So this summarizes, essentially, your
22 review, these three numbers, and the references to
23 the bases?

24 A. Yes.

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1 Q. Referring to the following page,
2 page 76 in the record, whose notes are these?

3 A. Those are my notes.

4 Q. And do they also or do they more
5 thoroughly reflect your review?

6 A. More thoroughly than those numbers do
7 on the other page, yes.

8 Q. Let's start briefly with page 76. Can
9 you describe and explain your notes here. You say
10 there is a reference at the top upper left-hand
11 corner of that page that says invoice, and then it
12 has a number. And then it has a name underneath
13 that, I believe.

14 A. Yes, that is Mankoff's invoice. The
15 amount that was cut is over to the right in the
16 middle there or deducted. And to the far right is
17 the reason for the deduction.

18 Q. Now, this invoice No. 3557, if I could
19 ask you or refer you to pages 35 and 36 of the
20 fiscal record, page 35, does that appear to be a
21 Mankoff Equipment, Inc., invoice No. 3557?

22 A. Yes.

23 Q. And on page 36 does that appear to be a
24 continuation of the same invoice?

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1 A. Yes, it does.

2 Q. And would that be what you referred to
3 on page 76 in your notes as invoice 3557 Mankoff?

4 A. Yes.

5 Q. Below that and again on the left-hand

6 side of the page you have 3741 Mankoff?

7 A. That is another invoice number.

8 Q. Referring you back to page 37 of the
9 fiscal record, does that appear to be a Mankoff
10 Equipment, Inc., invoice No. 3741?

11 A. Yes, it does.

12 Q. Following through on page 77 of the
13 administrative record, upper left-hand corner,
14 there is a reference to a number 4961; is that
15 right?

16 A. Correct.

17 Q. Now, again back to page 38 of the
18 fiscal record, does that appear to be a Mankoff,
19 Inc., invoice No. 4961?

20 A. Yes, it does.

21 Q. And would that then be the invoice that
22 you referred to on page 77 of the fiscal file in
23 your notes?

24 A. Yes.

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1 Q. Then there is a number below that,
2 5013. And I ask you to -- refer you to pages 39
3 and 40 of the fiscal file, 5013, pages 39 and 40
4 appear again to be Mankoff, Inc., invoices
5 No. 5013 in two pages?

6 A. Yes.

7 Q. All right. Let's stop right there.
8 Could you go back to the \$6,178.50 amount cut at
9 the top of page 76 of the fiscal file. And could
10 you explain briefly what that is, what that
11 represents?

12 A. Well, that is from invoice No. 3557.
13 It is \$11,953.50. It is the sum of the
14 excavation, transportation and disposal charges
15 that were billed from Mankoff divided by the
16 amount of cubic yards that were removed on that
17 day to come up with a cubic yard dollar amount of
18 \$113.84.

19 Q. Now, you have got something in your
20 notes following your calculation referring to a
21 maximum amount payable without sufficient
22 justification; is that right?

23 A. Yes.

24 Q. You were here earlier when Mr. Oakley

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1 testified to that figure?

2 A. Yes.

3 Q. And you were aware of that figure at
4 the time, I take it, that you conducted your
5 review?

6 A. Yes, I was.

7 Q. There is a reference to
8 time-and-material breakdown, receipts, invoices,
9 et cetera. Were any of these things provided with
10 the application to support the \$113.84 per cubic
11 yard rate that Mankoff charged?

12 A. No, they were not.

13 Q. And I believe you, in fact, calculated
14 the \$55 per cubic yard times the 105 cubic yards
15 to come up with an amount that was reimbursed for
16 the owner/operator?

17 A. Yes, it was reimbursed or took 58.84
18 times the amount to get what was not reimbursed or
19 what was deducted.

20 Q. On the top of page 77 of the fiscal
21 file, you have got a figure of \$30,914. Can you
22 explain briefly what that is?

23 A. It was reduced or cut for the same
24 reason as in the previous invoice. It was any

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1 amount over \$55 a cubic yard that could not be
2 supported through time-and-material breakdown was
3 multiplied times the cubic yard rate and cut.
4 Also there is, I believe, BETX in that invoice. I
5 will have to go back to that invoice and see.

6 Q. That would be invoice 4961, and I
7 believe you testified that that one takes 38?

8 A. BETX samples were reduced from \$369 to
9 \$210 per BETX sample. And that was based on an
10 internal guidance document that LUST used for
11 Title 16 budgets. They had a maximum BETX that
12 they would pay of 140 per sample, and we decided
13 to give them -- or I decided to give them
14 50 percent more than what the LUST section was
15 doing to try to be as fair as possible. But we
16 did not have any invoices from the lab to support
17 any of those amounts.

18 Q. Now, if I understand correctly, you are
19 saying that the price that Mankoff invoiced the
20 owner/operator for the BETX sample was \$369?

21 A. Correct.

22 Q. Per sample?

23 A. Per sample.

24 Q. Did Mankoff perform those samples

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1 themselves?

2 A. I do not know that.

3 Q. Do they have a certified laboratory?

4 A. I do not believe they do. I don't know
5 whether they have a certified laboratory or not.

6 Q. Have you ever encountered either before
7 or after this any documentation that would

8 indicate that Mankoff had their own lab?

9 A. Not that had their own lab.

10 Q. Were you familiar with laboratory
11 charges for BETX analysis at about this time?

12 A. Yes.

13 Q. Were you familiar with the prices or
14 average prices?

15 A. I was familiar with the prices.

16 Q. And in your experience what were the
17 prices?

18 A. My experience at this particular time
19 when these -- looking back through all the bill
20 packages I have every seen, when these BETX
21 samples were supposedly taken, they range from
22 between 50 and probably a high side maybe saw \$85
23 in my experience.

24 Q. Not \$369?

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1 A. Never \$369.

2 Q. Was there anything that you saw in the
3 technical records that would justify this dollar
4 amount as opposed to what you were used to seeing?

5 A. No.

6 Q. About how many reviews of reimbursement
7 claims, if you can estimate, have you been
8 involved in?

9 A. Hundreds, many hundreds.

10 Q. And you have never seen anything

11 charging \$369 for a BETX sample?

12 A. Never.

13 Q. If I understand correctly, at the time

14 the leaking underground storage tank or LUST

15 section technical staff had developed some numbers

16 that they were using for Title 16 budget

17 reviews --

18 A. For budget reviews, yes.

19 Q. -- That included BETX samples?

20 A. It included BETX, yes.

21 Q. And the number that they were using you

22 said was?

23 A. \$140.

24 Q. The final figure on page 77 of the

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1 record is a dollar amount in the amount of, I

2 believe, \$599.50; is that correct.

3 A. Yes.

4 Q. What was that deduction for?

5 A. That was for seeking reimbursement or

6 putting together their bill package. That is not

7 payable.

8 Q. That has typically been a

9 nonreimbursable cost?

10 A. It is not reimbursed.

11 Q. Was there ever any time-and-material
12 breakdown submitted for the -- that you know of
13 for the cubic yard rates that were applied here by
14 Mankoff or the BETX sample rates that were applied
15 by Mankoff?

16 A. Prior to the final decision letter.

17 Q. Either.

18 A. Subsequently we received information
19 further -- supposedly further documentation in
20 December of '98 that indicated \$75 dollars is
21 actually what was paid for the BETX samples. And
22 we also received a receipt from the landfill only
23 which indicated \$18 per cubic yard.

24 Q. Okay. So, for example, on this \$113.84

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1 cubic yard, you ultimately received justification
2 for \$18 of it?

3 A. 18. So there is almost a hundred that
4 is not documented.

5 Q. And with respect to the BETX samples,
6 you said 75. That is what Mankoff actually paid
7 for their BETX samples?

8 A. That is what Mankoff paid, yes.

9 Q. But you didn't have this information

10 prior to the May 12th, 1997 decision date?

11 A. Correct.

12 Q. Would it have made a difference if
13 Mankoff had actually given you the
14 time-and-material breakdown prior to May 12th,
15 '97?

16 A. With the BETX it would have made a
17 difference because that would have shown that we
18 could have reduced it to \$75.

19 Q. In other words, you would have
20 reimbursed it at the rate of \$75 rather than the
21 rate that it was actually reimbursed?

22 A. Correct. As far as the landfill, there
23 is no accurate way to determine the other
24 components there, the digging and the

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1 transporting. So the landfill wouldn't have done
2 much by itself, that receipt from the landfill.
3 We would have needed the rest of the picture.

4 Q. Something that Mankoff paid for
5 excavation and hauling of the contaminated soil?

6 A. Correct.

7 Q. Now, was this \$113.84 rate that you
8 referenced the only rate that Mankoff applied for
9 cubic yards?

10 A. Could you please restate that?

11 Q. Well, you previously testified to the
12 \$6,178.50 deduction that came from the March 20th,
13 1993 Mankoff invoice 3557 found at pages 35 and 36
14 of the record --

15 A. Okay.

16 Q. -- fiscal record.

17 A. Okay.

18 Q. And that you indicated there was 105
19 cubic yards with a \$113.84 per cubic yard rate
20 applied by Mankoff.

21 A. Okay.

22 Q. Were other rates applied by Mankoff in
23 this reimbursement package for different periods
24 of time?

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1 A. Well, the rates varied per invoice, if
2 that is what you mean. They ranged from upper 90s
3 to 113.

4 Q. Without getting into all this detail
5 because I think we have covered that, but I am
6 going to refer you to pages 5 and 6 of the
7 administrative record, fiscal file again. This --
8 can you describe or explain what pages 5 and 6
9 are?

10 A. Pages 5 and 6 are the accountant's

11 summary of what I gave them in my notes. This is
12 what they would have attached to the final
13 decision letter that gets sent to the owner.

14 Q. In essence, it is the actual deductions
15 that are made?

16 A. Those are the summary of the deductions
17 that were made.

18 Q. And the references to --

19 A. Dates.

20 Q. -- the rationale or the reasons for the
21 deductions?

22 A. Yes.

23 Q. Have you had an opportunity to review
24 this attachment A that would have been prepared by

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1 the accountant?

2 A. Yes.

3 Q. When you say prepared by the
4 accountants, that would have been someone other
5 than you?

6 A. It would have been in this case Doug
7 Tolan, yes.

8 Q. And he is a member of the LUST claims
9 unit?

10 A. Yes.

11 Q. He works for Doug Oakley?

12 A. Yes.

13 Q. Having reviewed this, is it an accurate
14 reflection of your review and the notes that you
15 prepared?

16 A. Yes.

17 Q. The numbers that it includes and the
18 citations to the rates; is that right?

19 A. Yes.

20 Q. So, for example, on page 5 of the
21 record, paragraph 2(b)(1), there is a reference of
22 a 106.06 cubic yard rate; is that right?

23 A. Correct.

24 Q. And how would you derive that rate?

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1 A. Well, that came from invoice 4961.

2 Q. That would have been page 38 of the
3 administrative record?

4 A. Okay. That would have been calculated
5 by taking the amount of cubic yards -- well,
6 first, it would have been calculated taking the
7 amount that Mankoff was taking for cubic yards,
8 which was 68.50, and the machine time for the
9 truck and the trucks and the foremen, adding those
10 things together, the sum of those, and dividing
11 that by the amount of cubic yards.

12 Q. Is that the process or the method that
13 you used in determining the rates that were
14 charged throughout the review from the various
15 invoices?

16 A. Yes.

17 Q. Now, just to clarify one point, could
18 you turn to the next page, page 6 of the record,
19 and paragraph -- the first line on that page,
20 which would be item 2(B)(5), I believe; is that
21 right?

22 A. Yes.

23 Q. This begins with a date of 5/26/94. Is
24 that the date of the invoice?

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1 A. Yes, that would be the date of the
2 invoice.

3 Q. And then it has a dollar amount \$20,889
4 divided by?

5 A. Yes, divided by.

6 Q. And then it has a figure of \$210.

7 A. That should be cubic yards.

8 Q. Is this a typographical error?

9 A. Yes, it is.

10 Q. Is the number correct?

11 A. The number is correct.

12 Q. So the division is correct, but it is
13 not 20,889 divided by \$210, it is divided by 210
14 cubic yards?

15 A. Correct.

16 MR. MERRIMAN: I don't think I have any other
17 questions.

18 HEARING OFFICER HALLORAN: Mr. Selander, any
19 cross?

20 MR. SELANDER: Briefly.

21 CROSS-EXAMINATION

22 BY MR. SELANDER:

23 Q. Mr. Harris, if you could look back at
24 page 35 of the fiscal file?

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1 A. Okay.

2 Q. And if you could take me through that
3 invoice. Your calculation, of course, is -- the
4 total is different than the 68.50, which is in the
5 middle of that invoice, relating to 105 cubic
6 yards removed by Mankoff. I think your
7 calculation -- I think your calculation for
8 invoice 3557 totaled, of course, 113.84 a cubic
9 yard. Could you just walk me through once again
10 how you got from that 68.50 to that 113.84?

11 A. Sure. You take the 68.50 times 105
12 cubic yards. That is 7,192. And you add the

13 machine time, the total for that, the trucks,
14 which presumably transport the soil, and the
15 foremen, those things together, add total amounts
16 billed for those and divide that by 105 cubic
17 yards.

18 Q. Okay. You don't have separate
19 schedules for removal rates or truck rates, for
20 hauling rates as has previously been testified to
21 with regard to certain other specific items that
22 you do have cost projections for?

23 A. What do you mean separate schedules?

24 Q. For example, I believe Mr. Oakley

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1 testified that for standard items like Visqueen,
2 for product type-related items, for BETX sampling
3 you have more or less a standard rate. Do you not
4 break down as this invoice breaks down a cost
5 figure for the truck -- I mean, do you not have an
6 internal number, for example, for the hauling?

7 A. We don't have an internal number for
8 each individual part of it, the digging, the
9 hauling, the disposal. They generally fall
10 somewhere around 15 to \$17 for each of them.

11 Q. So you have a uniform calculated number
12 based on the that entire process as opposed to the

13 pieces that make up that process?

14 A. Correct.

15 Q. Would the distance -- I know Mr. Oakley
16 testified to a degree as to the manner in which
17 that 55 or \$50 number was calculated. And I
18 believe he testified that it was adjusted for
19 seasonal-type conditions. Was it also adjusted,
20 do you know, for distance to landfill?

21 A. The \$55 number?

22 Q. Yes. The number for the excavation
23 disposal?

24 A. I guess, for example, the landfill, the

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1 only landfill that could have been used, it was
2 documented that was the only landfill that could
3 have been used and it was an extreme distance,
4 then there could have been rationale for adjusting
5 that higher.

6 MR. SELANDER: That is all I have.

7 HEARING OFFICER HALLORAN: Thank you,
8 Mr. Selander.

9 Mr. Merriman, any redirect?

10 MR. MERRIMAN: Just one or two questions.

11 REDIRECT EXAMINATION

12 BY MR. MERRIMAN:

13 Q. Just to clarify, on page 35 of the

14 administrative record where it says this is the
15 invoice -- the Mankoff invoice No. 3557, where it
16 says in the middle of the page 105 c.y. -- I
17 assume cubic yards -- removed at \$68.50 per cubic
18 yard, that is removal or excavation only, is that
19 right, based on the invoice?

20 A. It may be, but they also have machine
21 loading on there too, so it is hard to say.

22 Q. So maybe even something less than?

23 A. It may be just a part of that because
24 it is hard to say.

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1 Q. And it is -- and when we refer to and
2 when Mr. Oakley has referred to a per cubic yard
3 rate, we are referring to more than just digging
4 it up?

5 A. It is digging, transporting and
6 disposing of it.

7 Q. And how are these costs normally based
8 on your experience, the hundreds of claims you
9 have looked at submitted? Are they broken down in
10 a manner such as this so that some of them they
11 show how much for digging up each cubic yard, how
12 much for loading it into the truck, how much for
13 transporting it? When they are submitted, are

14 they normally submitted that way?

15 A. Normally, they are broken down. You
16 have an invoice from the landfill that shows the
17 date that the soil was accepted, how much was
18 accepted. You would have invoices from the
19 trucking company showing how many trucks they ran,
20 how many people were driving those trucks, the
21 distance from the landfill, that type of thing.

22 And as far as the excavation firm, you
23 would know the different, I guess, equipment they
24 had out there, bobcat, backhoe, who was running

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1 those, the amount of hours they spent. They would
2 all be broken down into the invoices per company.

3 Q. So you could add those all up and
4 compare them with a billed per cubic yard rate to
5 verify that they, in fact, substantiate that rate;
6 is that correct?

7 A. Correct.

8 Q. But no breakdown in that manner was
9 submitted with respect to this claim?

10 A. No.

11 HEARING OFFICER HALLORAN: Mr. Selander, any
12 recross?

13 RECCROSS-EXAMINATION

14 BY MR. SELANDER:

15 Q. The ordinary process that you have just
16 gone through with regard to the calculation and
17 what the Agency is used to seeing, that is
18 something that you are accustomed to seeing but to
19 your knowledge is not a requirement?

20 A. What is not a requirement?

21 Q. That there be separate invoices from
22 the landfill, from the equipment rental place,
23 from the trucker.

24 A. I guess if it came in under 55 a cubic

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1 yards, it wouldn't be as critical. I would still
2 expect those unless it was put out for a bid.

3 Q. Well, but the -- I understand the
4 time-and-material perspective that the Agency
5 brings to this. I guess my question is if the
6 Agency is not faced with -- let me withdraw that.

7 If the Agency in reviewing these claims
8 does not see specific invoices from those
9 entities, they will still consider the claim; is
10 that -- I mean, they will consider the number?

11 A. Assuming the number is below 55 cubic
12 yards without further documentation. Is that what
13 you are saying?

14 Q. I am not really reaching the level of

15 the dollar amount. It is more the format that I
16 am asking about. And I guess from the format
17 perspective, what I am trying to ask you is absent
18 individual invoices from, let's say, the four
19 entities that make up a project of hauling and
20 disposing of contaminated soils, if -- you have no
21 requirement to receive invoices from all of those
22 four, do you?

23 A. Well, I would say the law requires a
24 time-and-material breakdown. I would request them

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1 if they were not provided in the billing package.

2 Q. But a breakdown, not necessarily
3 separate invoices from all of the subcontractors?

4 A. I would want separate invoices from all
5 the subcontractors.

6 Q. Are you mandated, to your knowledge, by
7 either law or regulation to receive separate
8 invoices from all the subcontractors?

9 A. I believe the law says or other agency
10 approved methods. If they put it out for a bid
11 and they show they went out for bids, that would
12 be accepted as well.

13 Q. If the XYZ Company in a hypothetical
14 were to break out landfill costs, you know,
15 trucking costs, equipment costs, labor costs, you

16 would find that unacceptable?

17 A. If they were to break it out, you are
18 saying document the cost?

19 Q. Yes.

20 A. No, I would not.

21 MR. SELANDER: That is all I have.

22 HEARING OFFICER HALLORAN: Mr. Merriman, any
23 re-redirect?

24 MR. MERRIMAN: I don't think so.

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1 HEARING OFFICER HALLORAN: Mr. Harris, you
2 can step down. Thank you.

3 Any other witnesses, Mr. Merriman?

4 MR. MERRIMAN: Yes. I have one witness that
5 I want to ask about three or four questions. And
6 that would be Joyce Gibbons.

7 (Witness duly sworn.)

8 JOYCE GIBBONS,
9 called as a witness herein on behalf of the
10 Illinois Environmental Protection Agency, having
11 been first duly sworn, was examined and testified
12 as follows:

13 DIRECT EXAMINATION

14 BY MR. MERRIMAN:

15 Q. Would you state your name for the

16 record, please?

17 A. Joyce Gibbons.

18 Q. And your occupation?

19 A. I am an environmental protection
20 specialist with the Illinois EPA.

21 Q. And in what capacity are you employed
22 by the Illinois EPA as environmental specialist?

23 A. A field inspector.

24 Q. And which region?

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1 A. In the Rockford regional office.

2 Q. Are you familiar with the site in
3 question, the Riverview FS site?

4 A. Yes.

5 Q. And what -- how did you come to be
6 familiar with this site?

7 A. At that time I was working -- the
8 program I worked in was the leaking underground
9 storage tank section. And that particular site
10 was in my region, and I was assigned as a project
11 manager for the technical aspects.

12 Q. Very generally what does a project
13 manager do?

14 A. We would review documentation that is
15 sent in to us regarding the cleanup of a leaking
16 tank site and try and determine if they have

17 complied with the applicable regulations.

18 Q. The documentation that you would
19 review, would these be technical engineering
20 submissions as opposed to requests for
21 reimbursement?

22 A. Right.

23 Q. Did you review any requests for
24 reimbursement in this case?

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1 A. No.

2 Q. Did you receive in the ordinary course
3 of your duties as a project manager a corrective
4 action plan that was submitted for this site?

5 A. Yes.

6 Q. The Agency administrative record
7 technical file has been stipulated into evidence
8 in this record, so it is here. I am going to show
9 you reference at page 4 of that volume, and it is
10 a cover letter -- page 5 rather. And it is a
11 cover sheet of a particular document; is that
12 right?

13 A. Yes.

14 Q. Is this a corrective action plan?

15 A. Yes.

16 Q. And this was prepared it, it looks

17 like, by Mankoff Equipment, Inc., and Terra Nova
18 Research?

19 A. Yes.

20 Q. And did you have a chance at some point
21 in time in the past to receive a copy of the
22 original of this document?

23 A. Yes.

24 Q. I am going to refer you to page 20 of

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1 that record and -- which is also referred to as
2 page 13 of the CAP, Corrective Action Plan, and
3 ask you -- again, I am going to refer you to
4 section 3.3, anticipated costs. Is that something
5 that old law in your experience corrective action
6 plan required?

7 A. No.

8 Q. It was just something that they
9 submitted in this particular case?

10 A. Yes.

11 Q. It says anticipated costs are displayed
12 in table 4; is that right?

13 A. Yes.

14 Q. I am going to refer your attention --
15 you to page 21, call your attention to a table,
16 that is table 4; is that right?

17 A. Yes.

18 Q. And it sets out some anticipated costs?

19 A. Yes.

20 Q. And did you review this document or
21 this particular table in connection with your
22 review of the corrective action plan to make a
23 determination as to the reimbursability of those
24 costs?

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1 A. No.

2 Q. Would that normally not be a function
3 of a project manager?

4 A. That's correct. I would not take this
5 into consideration in my review.

6 MR. MERRIMAN: Thank you. That is all I
7 have.

8 HEARING OFFICER HALLORAN: Mr. Selander, any
9 cross?

10 MR. SELANDER: No. Thank you.

11 HEARING OFFICER HALLORAN: You may step down.
12 Thank you very much.

13 Mr. Merriman, any other witnesses?

14 MR. MERRIMAN: No, we have no other
15 witnesses.

16 HEARING OFFICER HALLORAN: Would you like to
17 make a closing argument, Mr. Selander?

18 MR. SELANDER: Yes, I would.

19 CLOSING ARGUMENT

20 BY MR. SELANDER:

21 The evidence that has been presented
22 today, the documents that are in the record I
23 believe clearly show the amount of expenditure
24 that Riverview FS suffered in the course of

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1 performing as they were required to do for
2 remediation in this matter. I don't think it is
3 disputed by the Agency that Riverview, in fact,
4 did spend that money. What the dispute is, of
5 course, is about is whether or not it was
6 appropriate.

7 In order to be able to present a case,
8 it is of some importance to the parties to
9 understand what the issues are as soon as they can
10 in order to develop responses, in order to gather
11 evidence. And to a great degree here, Riverview
12 was handicapped in its ability to do that because,
13 although the application for the reimbursement was
14 made on January 26th of 1996, they had no
15 criteria, no framework from the Agency within
16 which to be able to supplement any information,
17 deficiencies the Agency viewed that application to
18 contain until they received the letter of decision

19 on May 12th of 1997.

20 One of the risks of that time frame is
21 that evidence that otherwise could have been
22 relevant to this process is no longer available to
23 the parties. And Riverview did not drag its feet
24 in this matter as to its responsiveness to the

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1 State. Once the State did make what I believe was
2 the only request, that being on March 3rd of 1997,
3 for some additional information which was an
4 additional form of the P.E. certificate, they
5 responded by facsimile within, I think, 48 hours.

6 The inability of Riverview to produce
7 any additional information is, as I indicated, in
8 part, a factor of the time frame it took the State
9 to respond to the request for reimbursement
10 because the principal contractor whose charges
11 were rejected in this matter is no longer
12 reachable presumably by anyone.

13 In addition, there is in the minds of
14 the petitioner here a question about the IEPA's
15 information that they held in-house. They knew of
16 the reimbursement rates that they were authorized
17 and we heard an explanation that to publicly
18 communicate them may have risked the increase or

19 establishment of rates within the industry.

20 On the other side of that coin, though,
21 from a petitioner's standpoint and from a
22 consumer's standpoint from the state of Illinois,
23 if, in fact, it was known by the industry or by
24 the general public what were reimbursable rates,

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1 protections that those could have afforded the
2 consumers in Illinois of the services may well
3 have prevented some of the cases like this one,
4 which is based on a claim by the State that the
5 contractor charged the petitioner more than what
6 the State believes it that should have been
7 charged for the services.

8 Again, we believe that the time frame
9 issue, the inability of the public to understand
10 or have knowledge of what the reimbursement levels
11 were within the Agency has led in great measure to
12 the position the State has taken. And,
13 unfortunately, due to that time frame, the
14 petitioner here is handicapped in its ability to
15 present any additional evidence.

16 HEARING OFFICER HALLORAN: Thank you
17 Mr. Selander.

18 Mr. Merriman?

19 CLOSING ARGUMENT

20 BY MR. MERRIMAN:

21 Q. Thank you, Mr. Hearing Officer,
22 Mr. Selander. The Agency is not unsympathetic for
23 -- to the plight of owners and operators who
24 contract with cleanup contractors who charge

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1 unreasonable rates. However, the Agency is bound
2 by the then-existing statutory requirement that we
3 can reimburse only costs associated with
4 corrective action and that corrective action cost
5 has to be reasonable and adequately documented.

6 The statute was clear, Section
7 22.18b(d)(4)(C) restricted our ability to
8 reimburse anything that wasn't documented, that
9 wasn't reasonable and it wasn't corrective action,
10 hence the review of the claim with those things in
11 mind.

12 It is true that the Agency possibly
13 could have taken historically a different route
14 and gone into a rule-making -- extensive
15 rule-making and rate setting process. There are
16 other administrative agencies that set rates for
17 various things. There are unwieldy and lengthy
18 processes. But the Agency doesn't believe that --
19 it didn't believe that it was necessary to do that

20 to determine the reasonableness of corrective
21 action costs when we have an active market at
22 play. And the testimony was that rather than set
23 rates they wanted to reflect rates. And so they
24 sampled the market. And using a method, they

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1 arrive at a mean and then added the first standard
2 deviation above the mean as a target figure.
3 Those numbers that came in underneath that first
4 standard deviation were deemed presumptively
5 reasonable, even though they may have been high
6 and may have -- if we had broken them down been in
7 any given case well in excess of the maximum
8 reasonable amount. But because of the shortness
9 of agency staff and the limitations of resources,
10 that was the decision that was made.

11 Those cases above that figure, the
12 testimony also was that they could still be paid
13 if justified, if documented, not a rule that cut
14 them off -- cutoff reimbursement at that level.
15 It just was a tool, as Mr. Oakley said, that would
16 require further inquiry or further justification
17 for them to be paid.

18 The time lapse was explained. I don't
19 think it is unusual and certainly under the
20 circumstances and during that time period

21 Riverview FS, unfortunately, finds themselves in
22 the same situation as many other owners and
23 operators under this program have been in.

24 It is interesting to note that,

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1 however, that the claim for reimbursement was not
2 submitted until January of 1996 when the work that
3 was done, the costs incurred, were completed in
4 June or perhaps July of 1994. So there was a
5 substantial period of time lapse before the claim
6 was even submitted to the Agency.

7 So the issue of the inability to come
8 up with a cooperative contractor documentation and
9 so on, the time frame is hard to determine whether
10 that was a result of the time lapse from the time
11 the work was actually done because who knows what
12 difficulties they may have had in 1996 trying to
13 obtain 199 -- December of 1992 invoices, if they
14 hadn't had them already.

15 The certification, the application, of
16 course, is supposed to be complete. The burden is
17 on the applicant to make a complete application
18 and submit it. The Agency had -- has no legal
19 requirement to do anything other than review the
20 claim and act on it as submitted.

21 When possible, you know, I am sure the
22 Agency has and does when possible request
23 additional information, as was done here in the
24 instance of the P.E. certificate. Because they

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1 wanted to get that extra amount of money, be able
2 to repay what was incurred in July as opposed to
3 prior to June.

4 We don't know whether it would have
5 made any difference if they had asked for the
6 breakdown then or not. We are under no obligation
7 to do so. What they did was they paid a
8 reasonable amount. Mr. Oakley testified that even
9 to this day, if additional documentation justified
10 the rates that Mankoff actually charged the
11 owner/operator were submitted, that it would still
12 be reimbursable.

13 But without anything more than we have,
14 more than we were given, again, like I say, the
15 burden is on the applicant because of our
16 statutory obligation to limit reimbursement to --
17 I think, again, this is from the leaking
18 underground storage tax fund -- to limit
19 reimbursement to corrective action costs that are
20 reasonable and adequately documented. There was
21 nothing that could have been done by the Agency in

22 this case that was not.

23 So I would submit that it is
24 unfortunate that Mankoff charged the rates that

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1 they did. And it is unfortunate that Terra Nova
2 didn't apparently realize the excessiveness of the
3 rates at the time or do anything about it or that
4 Riverview FS wasn't kept more closely advised of
5 how their money was being spent. And it is sad
6 that the Agency doesn't have more money to be able
7 to reimburse people what they actually are out of
8 pocket. But again limitations are there by
9 statute, and that is where they are.

10 HEARING OFFICER HALLORAN: Thank you,
11 Mr. Merriman.

12 We are going to go off the record
13 briefly and talk about the post-hearing brief
14 scheduling. Thank you.

15 (Discussion had off the
16 record.)

17 HEARING OFFICER HALLORAN: We are back on the
18 record. It is approximately 12:10. We have been
19 discussing the post-brief -- or post-hearing
20 briefing schedule. It has been decided that
21 petitioner has until January 10th to file its

22 post-hearing brief. Respondent has until February
23 7th to file his post-hearing brief. And
24 petitioner has until February 21st to file his

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1 reply, if any.

2 And I do want to note that there were
3 four witnesses who testified today. And based
4 upon my legal judgment and experience, I do not
5 find any credibility issues with none of the four
6 witnesses.

7 With that said, I want to take a break
8 until 1:00 o'clock just in case any of the members
9 of the public straggle in and want to make a
10 comment.

11 So we will see you all back here in
12 about 45 minutes. Thank you.

13 (Short recess taken.)

14 HEARING OFFICER HALLORAN: We are back on the
15 record in this matter. It is approximately
16 1:00 o'clock p.m. on December 5th, year 2000.

17 There being no member of the public
18 present, we will now conclude this hearing. Thank
19 you very much.

20 (Whereupon the proceedings in
21 the above-entitled cause were
22 concluded.)

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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF LAKE)

3 I, Cheryl L. Sandeck, a Notary Public
4 within and for the County of Lake and State of
5 Illinois, and a Certified Shorthand Reporter of
6 the State of Illinois, do hereby certify that I
7 reported in shorthand the proceedings had at the
8 taking of said hearing and that the foregoing is a
9 true, complete, and correct transcript of my
10 shorthand notes so taken as aforesaid, and
11 contains all the proceedings given at said
12 hearing.

13

14

Notary Public, Cook County, Illinois
C.S.R. License No. 084-03710

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