

1 ILLINOIS POLLUTION CONTROL BOARD

2 IN THE MATTER OF:)
)
3 HEARINGS PURSUANT TO)
 SPECIFIC RULES, PROPOSED) R99-9
4 NEW SUBPART K, INVOLUNTARY) (Rulemaking -
 TERMINATION PROCEDURES FOR) Procedural Rules)
5 ENVIRONMENTAL MANAGEMENT)
 SYSTEM AGREEMENTS, 35 ILL)
6 ADM. CODE 106, SUBPART K)

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9 REPORT OF PROCEEDINGS had in the
10 above-entitled matter before RICHARD R. MCGILL, JR.,
11 Hearing Officer for the Illinois Pollution Control
12 Board, reported by Kim M. Howells, CSR, a Notary
13 Public within and for the County of Cook, State of
14 Illinois, at the James R. Thompson Center, 100 West
15 Randolph Street, Suite 11-500, Chicago, Illinois on
16 the 29th day of September 1998, at the hour of 10:00
17 a.m.

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1 A P P E A R A N C E S:

2 ILLINOIS POLLUTION CONTROL BOARD
Mr. Richard R. McGill, Jr.
3 Hearing Officer
100 West Randolph Street
4 Suite 11-500
Chicago, Illinois 60601
5 (312) 814-6983

6 ILLINOIS POLLUTION CONTROL BOARD MEMBERS:

7 Ms. Marili McFawn
8 Ms. Kathleen M. Hennessey
9 Ms. Kathleen Crowley

10

11

12 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS:

13 Ms. Laurel L. Kroack, Assistant Counsel
14 Mr. Roger Kanerva, Environmental Policy Advisor

15 Audience members were present but not listed on this
16 appearance page.

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1 THE HEARING OFFICER: Good morning. My name is
2 Richard McGill. I've been appointed by the Illinois
3 Pollution Control Board to serve as hearing officer
4 in this rulemaking proceeding entitled: In The
5 Matter of Hearings Pursuant to Specific Rules,
6 Proposed New Subpart K, Involuntary Termination
7 Procedures For Environmental Management System
8 Agreements, 35 Illinois Administrative Code 106,
9 Subpart K.

10 The docket number for this rulemaking is
11 R 99-9, and today is the first hearing. Also
12 present today on behalf of the board is Kathleen
13 Hennessey, the lead board member assigned to this
14 rulemaking --

15 MS. HENNESSEY: Good morning.

16 THE HEARING OFFICER: -- Board Member Marili
17 McFawn who is also assigned to this rulemaking, and
18 Kathleen Crowley, the board's senior attorney.

19 By way of background, on August 17, 1998,
20 the Illinois Environmental Protection Agency, or
21 agency, filed a proposal to amend 35 Illinois
22 Administrative Code 106. The agency proposes to
23 establish procedures for involuntary termination of
24 Environmental Management System Agreements or EMSAs

1 entered into pursuant to Section 52.3 of the
2 Environmental Protection Act. The proposed rules
3 would be added to the existing procedural rules of
4 the board.

5 Section 52.3 of the act provides for a
6 voluntary pilot program to allow persons to propose,
7 and the agency to accept pursuant to an EMSA, a
8 pilot project to implement innovative environmental
9 measures, even if one or more of the terms of the
10 EMSA is inconsistent with an otherwise applicable
11 statute or regulation of the state.

12 Section 52.3-2(c) of the act requires the
13 board to complete this rulemaking no later than 180
14 days after receipt of the agency's proposal. Given
15 this deadline, the board on August 20, 1998, adopted
16 the agency's proposal for first notice without
17 commenting on the merits of the proposal. The first
18 notice appeared in the Illinois Register on
19 September 4, 1998.

20 Please note that sign-up sheets for this
21 proceeding, service and notice lists, are located
22 here at the front of the room. Those on the notice
23 list will receive only board opinions and orders and
24 hearing officer orders. Those on the service list

1 will receive these documents plus certain other
2 filings. Also here at the front of the room are
3 copies of the current notice and service lists.
4 These lists are updated periodically. I've also
5 placed in front of the room copies of my two hearing
6 officer orders in this matter dated August 28, 1998,
7 and September 4, 1998, respectively.

8 Besides witnesses for the agency, if you
9 wish to testify today, you must sign in on the
10 appropriate sign-up sheet here at the front of the
11 room. Time permitting, after the agency's
12 testimony, we will proceed with the testimony of
13 persons who sign up in the order their names appear
14 on the sign-up sheet.

15 As for today's hearing format, the hearing
16 will be governed by the board's procedural rules for
17 regulatory proceedings. All information that is
18 relevant and not repetitious or privileged will be
19 admitted. All witnesses will be sworn and subject
20 to cross-questioning.

21 If you do not wish to give testimony, you
22 may file written public comments. It should be
23 noted, however, that generally the board gives
24 greater weight to testimony because the witness is

1 under oath and subject to questioning.

2 As for the order for today's proceeding,
3 we will begin with anyone who would like to testify
4 regarding the decision of the Department of Commerce
5 and Community Affairs to not conduct an economic
6 impact study for this rulemaking. Then we will
7 proceed with the agency's testimony. Time
8 permitting after that, we will proceed with the
9 testimony of any persons who sign up in the order
10 their names appear on the sign-up sheet.

11 Anyone may ask a question of any witness.
12 I ask that during question periods if you have a
13 question, please raise your hand and wait for me to
14 acknowledge you. When I acknowledge you, please
15 state your name and any organization you are
16 representing here today.

17 Please speak one at a time. If you are
18 speaking over each other, the court reporter will
19 not be able to get your statements down for the
20 record. Please note that any questions asked by a
21 board member or staff are intended to help build a
22 complete record for the board's decision and not to
23 express any preconceived notion or bias.

24 Are there any questions about the

1 procedures we will follow today?

2 Seeing none, I note that there's one
3 additional hearing scheduled in this matter. It is
4 scheduled for Tuesday, October 6, 1998, at 1:30 p.m.
5 at the board's Springfield office located at 600
6 South 2nd Street, Suite 402. At the end of that
7 hearing, I will set a deadline for filing public
8 comments. The board is presently accepting public
9 comments.

10 Would any of the board members present or
11 Ms. Crowley like to make any remarks at this time?

12 MS. HENNESSEY: No thanks.

13 THE HEARING OFFICER: Seeing none, we'll now
14 proceed with the matter of the Department of
15 Commerce and Community Affairs decision to not
16 conduct an economic impact study for this
17 rulemaking.

18 As background for this portion of today's
19 hearing, Public Act 90-489, which became effective
20 January 1, 1998, requires the board to request the
21 department of Commerce and Community Affairs, or
22 DCCA, to conduct an economic impact study on certain
23 proposed rules before adopting those rules. Within
24 30 to 45 days of the board's request, DCCA may

1 produce a study of the economic impact of the
2 proposed rules.

3 The board must make the economic impact
4 study or DCCA's explanation for not conducting this
5 study available to the public at least 20 days
6 before public hearing on the economic impact of the
7 proposed rules. The board requested by letter dated
8 August 18, 1998, that DCCA conduct an economic
9 impact study for this rulemaking. The board's
10 letter referenced a letter dated June 26, 1998, from
11 DCCA in which DCCA notified the board that DCCA
12 would not be conducting economic impact studies on
13 rules pending before the board during the remainder
14 of fiscal year 1999.

15 In its letter, DCCA explained that it
16 lacks the technical expertise and the financial
17 resources to conduct these studies. Therefore, in
18 its letter, the board asked that DCCA notify the
19 board within 10 days of receipt of the board's
20 letter if DCCA intended to conduct an economic
21 impact study for this rulemaking.

22 The board further stated that if it did
23 not receive this notification, the board would rely
24 on DCCA's June 26, 1998, letter as a required

1 explanation for not conducting the study. The ten
2 days for DCCA to notify the board have expired and
3 the board did not receive any notification from DCCA
4 that it will conduct an economic impact study.

5 Is there anyone who would like to testify
6 regarding DCCA's explanation for not conducting an
7 economic impact study for this rulemaking?

8 Seeing none, we will move on to the next
9 portion of this hearing. The purpose of this
10 portion of the hearing is to receive testimony from
11 the agency on its proposed rules.

12 Ms. Kroack, you may begin.

13 MS. KROACK: Good morning. My name is Laurel
14 Kroack. I'm assistant counsel for the Illinois
15 Environmental Protection Agency for the Bureau of
16 Air and the Air Regulatory Unit. I'm here today on
17 behalf of the IEPA.

18 The agency's proposed board regulation is
19 consistent with our obligations under Section 26 and
20 Section 52.3-2(c) of the Illinois Environmental
21 Protection Act and 35 Illinois Administrative Code
22 Section 102.121(b) in support of the proposed
23 amendments to Part 106.

24 These amendments address the procedures

1 for involuntary termination of an Environmental
2 Management Systems Agreement or EMSA for short.
3 These agreements are entered into between the
4 Illinois EPA and sponsor pursuant to Section 52.3 of
5 the Environmental Protection Act.

6 We've included in this proposal the
7 addition of a new Subpart K entitled: Involuntary
8 Termination Procedures for EMSAs, Subpart K. This
9 rulemaking closely tracks the board's existing
10 procedures under 35 Illinois Administrative Code
11 Part 103 with some changes.

12 Participation in this program is voluntary
13 and at the discretion of the Illinois EPA. Second
14 52.3-1(c) specifically provides that any decision by
15 the agency to reject an initial proposal under this
16 section is not appealable. Therefore, although
17 these procedures are closely modeled on Part 103,
18 they are somewhat truncated and do not allow all of
19 the procedural safeguards though they cover most of
20 the procedural safeguards.

21 With me today is Roger Kanerva, manager of
22 environmental policy and policy advisor to the
23 director of the agency, Mary Gade. Mr. Kanerva will
24 offer some brief testimony on the development of the

1 EMSA program in Illinois and its purposes.

2 At this time, I'd like Mr. McGill to swear

3 in Mr. Kanerva.

4 THE HEARING OFFICER: Will the court reporter

5 please swear in the witness?

6 (Witness sworn.)

7 THE HEARING OFFICER: You may begin your

8 testimony, Mr. Kanerva.

9 MR. KANERVA: Well, do you all mind if we just

10 read this into the record then? It's fairly short.

11 THE HEARING OFFICER: That would be fine.

12 MR. KANERVA: In fact, it may be the shortest

13 testimony we've given on a subject in a long time, I

14 hope.

15 WHEREUPON:

16 ROGER A. KANERVA,

17 called as a witness herein, having been first duly

18 sworn, testified, and saith as follows:

19 Again, my name is Roger A. Kanerva,

20 K-a-n-e-r-v-a, and I'm the environmental policy

21 advisor to the director of the agency.

22 One of my responsibilities is to manage

23 the initiative known as the regulatory innovation

24 pilot program, RIPP. Thank goodness it has another

1 P on there.

2 This program was authorized by legislation
3 that amended the Environmental Protection Act in
4 1996 to add Sections 52.3-1 through 4. I was one of
5 the principal authors of this legislation and
6 participated in the legislative process. This
7 program passed the general assembly easily since
8 there was no opposition or controversy involved.

9 All the affected interests believe this
10 could be a beneficial program for both the
11 environment and participants provided that the
12 workable safeguards were put in place. One of the
13 safeguards is the subject of this regulatory
14 proceeding.

15 As you might imagine, developing and
16 operating this program is an interesting challenge
17 for the Illinois EPA.

18 (Counsel tendered documents.)

19 MR. KANERVA: In particular, we've been careful
20 not to do something that would have a chilling
21 effect on participation in the RIPP. After all, we
22 had the experience of trying to work with the U.S.
23 EPA's XL Program and learn firsthand how
24 administrative difficulties can discourage potential

1 project sponsors and block beneficial projects.

2 In contrast, the Illinois EPA worked on
3 building more certainty into Illinois' program by
4 developing and adopting agency rules for this
5 program. Despite the delays and glitches within the
6 Federal XL Program, these efforts took some time,
7 but we believe this will have tremendous payoffs as
8 we receive and start to work on invitation
9 projects.

10 This step also resulted in delaying the
11 development of these proposed rules, obviously,
12 beyond the December 31, '96, filing date provided in
13 the act. As work on the agency rules was completed,
14 development of this proposal would have begun so we
15 can have a consistent approach.

16 Initiation of the termination process is
17 one of the major aspects of this proposed rule and
18 the Environmental Management System Agreements
19 between the agency and project sponsors are
20 generally modeled after contractual arrangements
21 rather than the typical demand and control
22 regulatory model.

23 This two-party voluntary arrangement is
24 built on mutual trust and a commitment to explore

1 regulatory invitation. If something goes seriously
2 wrong with a project along the way, there must be a
3 clear certain way of halting a project in a timely
4 manner. As I've already stated, these procedures,
5 in effect, become one of the basic safeguards in the
6 RIPP. The environment is protected because the
7 agency can initiate termination process for good
8 cause, if necessary. The rights of the project
9 sponsor are protected since the board acts as an
10 independent adjudicator of the merits of this
11 action.

12 Program deficiencies: The act sets forth
13 two types of program deficiencies. The first is
14 described in Section 52.3-4(b). It empowers the
15 agency to terminate an EMSA if the performance is so
16 deficient that it threatens the very purposes for
17 allowing these regulatory innovation projects as
18 specified in the act. In essence, these
19 deficiencies approach emergency conditions that must
20 be acted upon very quickly to avoid severe
21 consequences.

22 The second type of deficiency involves
23 less immediately threatening circumstances but ones
24 that must not be allowed to continue or to grow in

1 magnitude. In essence, these deficiencies are
2 warning signs that a project is unlikely to be
3 successful. We have identified five deficiencies
4 that would fall in this category.

5 In the following points I explain the
6 reasoning behind these priority concerns. The first
7 is misrepresentation. This undermines the basic
8 trust that went into the agency's agreement to the
9 project in first place. If important flaws are
10 discovered in the factual basis for the agreement,
11 how can one be sure that the rest of the project
12 would be executed as promised?

13 The second is access restriction. It is
14 critical to the success of this program that open
15 communications and access are maintained. How else
16 can the public and the agency be sure that things
17 are proceeding according to the project plan?

18 The third is falsification. The agency
19 and the public must be able to rely on the integrity
20 of the data and the information that participants
21 generate during project implementation; otherwise,
22 flawed evaluations and conclusions about the work
23 done under this program are likely to result.

24 The purpose of this pilot program is to

1 explore and learn what efforts are better than pass
2 regulatory practices. To accomplish this task, we
3 must have sound information.

4 The fourth point is ancillary violations.
5 The participants in this program are supposed to be
6 the good environmental citizens. If environmental
7 violations occur, they're outside the scope of the
8 EMSA, the agency should still be concerned because
9 this reflects poorly on the capability of the
10 participant to deliver.

11 The fifth point is failure to correct
12 noncompliance. Participants should be responsive if
13 noncompliance with an EMSA occurs especially when
14 time has been afforded for the corrective action.
15 In other words, we don't expect perfection, but we
16 do want participants to act responsibly if problems
17 develop.

18 The agency has proposed three outcomes for
19 these cases, three decision-making outcomes. First,
20 the board may agree with the agency and order the
21 termination of the EMSA.

22 Second, the board may be convinced that
23 the sponsor deserves another opportunity to address
24 the deficiencies and, therefore, ordering that

1 termination is deferred for a period not to exceed
2 90 days. During this period of time, the sponsor
3 would have an opportunity to rectify the problem.

4 Third, the board may disagree with the
5 agency and order that termination be rejected.
6 Moreover, the proposal also includes additional
7 remedies the board might want to consider imposing
8 on the sponsor that are more along the lines of
9 typical enforcement remedies.

10 Involvement of other parties: The agency
11 is given considerable thought to the rights of other
12 parties that might be interested in a specific
13 case. On balance, it seems fair to allow for
14 intervention on the part of persons that showed
15 interest in the project by participating in the
16 public notice and hearing process for the execution
17 of an EMSA.

18 I want you to keep in mind as well that
19 these projects have to satisfy requirements for
20 stakeholder involvement that go beyond anything
21 found in the permitting process. Sponsors should be
22 able to count on knowing who are the interested
23 parties.

24 Technical feasibility and economic

1 reasonableness: Since these are procedural rules
2 and in addition are patterned after existing board
3 enforcement procedures, there is no issue of
4 technical feasibility and economic reasonableness.
5 Moreover, entering into an EMSA is a voluntary act
6 for both parties. A sponsor would have to see
7 entering the program as in their best interest, and
8 the agency would have to concur.

9 These termination procedures impose no new
10 substantive burdens on any regulated entities in
11 Illinois. These procedures merely establish the
12 process for deciding if a project should be
13 terminated and, thus, serve as a safeguard for
14 regulatory experiments that get out of hand.

15 My concluding comments are that Illinois
16 is one of a handful of states that have shown the
17 environmental leadership to pursue the Regulatory
18 Innovation Program. We have been careful to put the
19 building blocks together one at a time and to offer
20 plenty of opportunities for involvement by
21 interested parties.

22 The proposal we have filed is the last
23 major component of the program. Potential project
24 sponsors want to have the whole picture when they

1 enter into an EMSA. The agency also wants to be
2 able to assure the public that all planned
3 safeguards are in place and operable, if needed.

4 Completion of this rulemaking will
5 complete the stage for a productive and responsible
6 innovation program for Illinois.

7 Go Cubs, on the record.

8 MS. KROACK: At this time, I'd like to submit
9 Mr. Kanerva's testimony into the record as an
10 exhibit.

11 THE HEARING OFFICER: I've been handed a copy
12 of testimony by Roger A. Kanerva, a five-page
13 document. Is there any objection to entering this
14 scribed document as a hearing exhibit?

15 Seeing none, I am marking this document as
16 Exhibit No. 1 and entering it as a hearing exhibit
17 into the record.

18 (Exhibit No. 1 marked
19 for identification,
20 09/29/98.)

21 THE HEARING OFFICER: Does that conclude the
22 agency's presentation?

23 MS. KROACK: That concludes our presentation,
24 but for one point.

1 When we were reviewing the rules, we
2 noticed that under Section 106.962 that we have
3 limited intervention to persons who had participated
4 in the public hearing on the EMSA. However, we went
5 back and looked at our rules for participation and
6 noticed that hearings are only held if requested.
7 So given that there's an inconsistency there, we
8 would suggest the addition of the following
9 language: After Section 106.962(a) following the
10 comma, the hearing officer shall permit any person
11 who and we would suggest the insertion of who
12 submitted written comments on the EMSA or
13 participated in the public hearing on the sponsor's
14 EMSA, and that would cover the inconsistency.

15 THE HEARING OFFICER: Thank you.

16 Does that conclude the agency's
17 presentation?

18 MS. KROACK: Yes, it does.

19 THE HEARING OFFICER: We will now proceed with
20 questions for the agency.

21 As I mentioned earlier, if you have a
22 question, please raise your hand and wait for me to
23 acknowledge you. When I acknowledge you, please
24 state your name and any organization you are

1 representing here today.

2 Before the board proceeds with its
3 questions, does anyone else have any questions?

4 Seeing none, do any of the board members
5 have a question?

6 MS. HENNESSEY: I have a few questions.

7 First of all, I just wanted to find out
8 have you entered into any EMSAs yet?

9 MR. KANERVA: We do not have an official letter
10 of intent to sponsor a project filed yet. So,
11 obviously, we haven't gotten to the point of
12 actually having a finalized agreement. We do have
13 five or six companies that we're talking with right
14 now that I believe are real serious about doing a
15 project.

16 MS. HENNESSEY: Okay. You mentioned in your
17 statement of reasons that you had contacted several
18 associations about the development of these rules
19 and that only the Chemical Industry Council of
20 Illinois have submitted written comments.

21 Can you tell us what they had to say?

22 MS. KROACK: Give us a minute.

23 MS. HENNESSEY: Sure.

24 MR. KANERVA: I was sitting there yesterday

1 trying to decide whether to bring my comment file
2 from the folks we sent it out to, and I left it. It
3 works every time.

4 MS. CROWLEY: Absolutely.

5 MR. KANERVA: I remember a couple of procedural
6 things they asked about.

7 THE HEARING OFFICER: Why don't we go off the
8 record for a minute?

9 (Discussion had off
10 the record.)

11 THE HEARING OFFICER: If you'd restate that
12 question.

13 MS. CROWLEY: Yes.

14 While we were looking for the Chemical
15 Industry's comment, just one follow-up on the five
16 or six companies who are speaking with the agency
17 about EMSAs, my question is whether you can give us
18 any kind of general time frame when do these
19 companies intend -- when would they like to finalize
20 a project, when would they like to begin a project
21 within six months, within a year, two years,
22 whatever you can give us to enlighten us.

23 MR. KANERVA: I think that within six months is
24 closer to reality for several of them. There is,

1 you know, a certain amount of time, obviously,
2 required to go through the notice and an opportunity
3 for a hearing process, but I think we could be to
4 that stage having a draft EMSA out there for
5 comment, I'd say, within about four months from now,
6 which would probably mean that we'd get closure,
7 say, at the six or seven month period, something
8 like that.

9 But it's a little hard to predict because
10 the first few through the process are the pioneers.
11 I mean, we've already come across several really
12 interesting points in talking to these companies
13 that they weren't aware we were focusing on and we
14 weren't aware what they were focusing on, and so
15 we're kind of working our way through that.

16 But once the template gets out there -- as
17 soon as we've got one of these things and it's out
18 there for public review and other people could see
19 it, then I think, you know, it will be a faster
20 process.

21 MS. CROWLEY: So in addition to the statutory
22 requirement that we complete this rulemaking within
23 six months, there would also be some practical
24 benefits to our having it completed at about the

1 time these things are ready to --

2 MR. KANERVA: Yes.

3 MS. CROWLEY: -- be finalized?

4 MR. KANERVA: Yeah. With the first few
5 companies that we're talking about, they, obviously,
6 have access to the proposal we filed, and, you know,
7 our discussions with them are consistent with what
8 we have here. So they sort of know this is what we
9 would be hoping would be on the books for them to --
10 for the agreement to be patterned after.

11 MS. CROWLEY: Thanks.

12 MR. KANERVA: But we have the comments here
13 from the Chemical Industry Council from a counsel
14 for them. Let me see. I haven't looked at these in
15 a while.

16 THE HEARING OFFICER: I'd just like to mention
17 that if the agency would like, you're welcome to
18 have that entered as a hearing exhibit. You're
19 certainly free to offer any testimony on it as
20 well.

21 MR. KANERVA: She has her markings all over it
22 here.

23 MS. KROACK: That's what I'm concerned about.

24 MR. KANERVA: There's a couple of -- two or

1 three points that are the most important, I think.
2 I mean, they expressed overall some support with
3 going forward with this and then asked some
4 questions.

5 But the version we sent out for review
6 essentially only gave the option to the agency
7 and/or the board, obviously, to call for a hearing
8 on the termination procedure, and they were kind of
9 concerned that that may be too one-sided. It didn't
10 hurt to suggest it. And the solution we came to
11 there was just to make it required across the
12 board. If you do one of these proceedings, you have
13 a hearing, and then there's no debate. Okay.

14 MS. KROACK: They had a number of minor
15 comments like changing the definition of the board
16 to, referencing Section 5 of the act, adding the
17 definition of clerk.

18 They raised a question of whether 15 days
19 is sufficient to file an answer, and, again, we did
20 not make that change because we believe that
21 timeliness of completing one of these hearings is
22 essential to public support and confidence in this
23 program.

24 They asked for a language change in

1 Section 106.954 which we made. In Section 106.958,
2 they said that we are properly assuming the board
3 burden of proof and indicating intent to have a
4 basically fair set of rules.

5 On motions and responses, they thought the
6 time frames were a little short, but they said that
7 in their belief only substantive motions can only be
8 ruled upon the board, and procedural motions can
9 only be ruled upon by the hearing officer. Again,
10 we did not accept that comment. We felt that the
11 hearing officer could rule upon all motions, and the
12 board had the opportunity to review those.

13 They wanted the board to have authority to
14 order depositions or interrogatories to the extent
15 they would expedite the process or ensure its
16 fairness. We felt that depositions and
17 interrogatories were time consuming and didn't fit
18 within the time frames. However, we did allow for
19 additional discovery as the board deemed necessary
20 under that section. So we had addressed it
21 slightly, but not to the extent that they wanted
22 to.

23 They didn't like the language on the
24 settlement procedure in 106.970. Again, we didn't

1 make those changes because it's consistent with the
2 existing language in Part 103.

3 And they've concluded in general the
4 balance of the provisions track existing board
5 procedures and should not be objectionable in and of
6 themselves except to the extent that it amounts to
7 the agency specifying board provisions. Most of
8 these rules are to be adopted by the Pollution
9 Control Board which, of course, they are.

10 And I think I can get a clean copy and
11 submit this.

12 MS. HENNESSEY: At the next hearing?

13 THE HEARING OFFICER: You can do that at the
14 next hearing. That will be fine.

15 MS. KROACK: Okay.

16 MS. HENNESSEY: That would be great.

17 MR. KANERVA: I might say that the issue about
18 holding the hearing or who could call for it was
19 also raised by one of the specific companies we were
20 talking to. They just didn't get around to actually
21 filing a written comment, but they made it clear
22 that that was a concern to them.

23 So it came pretty clear we ought to just
24 go with the hearing requirement, and let it go at

1 that.

2 MS. CROWLEY: As a follow up to all of that, I
3 haven't actually sat down and run out the various
4 times that you've allowed for certain actions to
5 take place.

6 Roughly how quickly would you like to see
7 one of these termination proceedings wrapped up from
8 the filing to the board's decision?

9 MS. KROACK: Hearing is required to be held
10 within 60 days of the filing of our statement of
11 deficiency. There are procedures to allow for a
12 30-day extension under extreme extenuating
13 circumstances or justice allows another provision
14 for extending in case there's intervention.

15 So assuming that it's 60 days, the board
16 renders a decision 30 days after that, so 90 days
17 really to wrap this up. Answers have to be filed
18 quickly. Motions have to be filed quickly.
19 Responses to motions have to be filed quickly.
20 Discovery has to be completed essentially within a
21 40-day time frame.

22 And, again, we're assuming that we're
23 going to have a high level of cooperation with these
24 companies. There will be a complete exchange of

1 information. And if there isn't, that's a
2 sufficient reason to go ahead and terminate.

3 We aren't really in the enforcement mode
4 where we're suggesting penalties along the lines of
5 the statute or anything like that. We just want to
6 terminate these people and get them back into the
7 regular regulatory framework.

8 MS. HENNESSEY: Would you mind being sworn in
9 if you're going to be addressing some of these
10 questions?

11 MS. KROACK: I thought this might happen.

12 (Witness sworn.)

13 MS. HENNESSEY: I think either one of you can
14 address this question. I think it would be helpful
15 for us to have on the record the agency's overall
16 rationale for the shorter time frames that you're
17 providing on these terminations as compared to an
18 ordinary enforcement case.

19 MR. KANERVA: Well, let me start and if you
20 want to supplement it.

21 You know, we expect these projects to be
22 unique. People are going to try some things that
23 are significantly different from what we have as a
24 regulatory system right now. Being the optimist,

1 that's good. We, obviously, want to try some new
2 things. The idea being to help us design probably
3 entirely a new generation of environmental
4 protection approaches some driven by things like the
5 international marketplace and companies moving out
6 to do their own Environmental Management Systems, in
7 effect, moving almost beyond where we are with many
8 aspects, not all, but many aspects of the current
9 regulatory system.

10 A balance -- the opposite side of that is
11 going to be it would be a little naive to think that
12 every single of one of these approaches will work
13 out to 100 percent of our expectation and we will
14 encounter no problems. So we wanted to be in a
15 position that if something does go significantly
16 wrong with one of these projects, that we can move
17 very quickly to get it stopped and get this
18 participant back into the traditional regulatory
19 model.

20 We didn't want to be in a position -- you
21 all have experienced this, not a lot, but it
22 happens. Permit appeals, for instance, go on for
23 extended periods of time. I'm aware of some that
24 are several years in the process of getting hammered

1 out. Other kinds of procedures can be fairly
2 extended. We felt this should be brought to a head,
3 period, and if the agency's concerns are
4 substantiated by the board, get them out of the
5 program. Stop the project.

6 MS. HENNESSEY: One question I had is the
7 deadlines you've set on the board here. You want a
8 final board decision within 30 days of the hearing.
9 Now, is that going to be 30 days after the
10 conclusion of the hearing, or is it going to be 30
11 days after the conclusion of posthearing briefs?

12 MS. KROACK: Thirty days after the conclusion
13 of the hearing. Posthearing briefs had to be filed
14 within -- I need to look at this again. Posthearing
15 briefs had to be filed relatively quickly.

16 (Counsel perusing documents.)

17 MS. KROACK: Okay. I take that back. We have
18 a schedule for submission of briefs to the board
19 under 106.974, and that allows the board to
20 determine how quickly they want briefs to be
21 submitted. We were assuming that briefs were
22 required to be submitted. There would be a very
23 brief time period for submitting those. And we also
24 said that the posthearing procedures, including

1 Section 103.223 which covers briefs and oral

2 argument, would apply. I've got to look at it.

3 MS. HENNESSEY: Well, we have that here, and it

4 requires briefs within 14 days --

5 MS. KROACK: Okay.

6 MS. HENNESSEY: -- after receipt of final

7 transcripts in the board offices or otherwise

8 ordered by the hearing officer.

9 MS. CROWLEY: And our current court reporter

10 contract requires receipt of transcripts within five

11 business days of the conclusion of the hearing.

12 MS. KROACK: So we, perhaps, need to extend the

13 30 days to a longer period of time to adjust for

14 receipt of --

15 MS. CROWLEY: Well, at the very least, those

16 mechanics have to be taken into consideration by the

17 board in addition to the board's own desire to have

18 some time to review the material and draft an

19 opinion.

20 MS. HENNESSEY: As well as the fact that we

21 have board meetings scheduled which may not -- we

22 don't want to be holding special board meetings to

23 address these.

24 MS. KROACK: I realized when we suggested 30

1 days as a time period that it might not be
2 sufficient. But, again, we didn't or couldn't talk
3 with the board about what they thought was
4 appropriate. So, obviously, if the board feels they
5 need more than 30 days, then you need more than 30
6 days. We just suggested 30 days as -- our intent
7 behind all of these time frames was to get as much
8 speed into the process as could reasonably be
9 permitted or allowed and allow the process to still
10 proceed. If additional time is necessary for the
11 board, then, obviously, that has to be factored in.

12 MS. HENNESSEY: Okay. Just so I understand
13 this, did you envision that there would be any
14 consequences if the board failed to meet the
15 30-day --

16 MS. KROACK: No.

17 MS. HENNESSEY: -- deadline?

18 It's not that an agreement is, for
19 example, terminated if the board doesn't issue the
20 opinion?

21 MS. KROACK: No.

22 MR. KANERVA: No.

23 MS. HENNESSEY: Okay.

24 MS. KROACK: There's no default judgment in

1 favor of either the agency or the sponsor.

2 MS. HENNESSEY: Okay.

3 THE HEARING OFFICER: This is a related
4 question dealing with Section 106.956(b), and that
5 section requires the board to order an EMSA
6 terminated if the sponsor does not respond to the
7 agency's statement of deficiency within the
8 specified time, and I believe the specified time is
9 within 15 days of the filing of the statement of
10 deficiency. And 106.956(b) goes on to say that the
11 board's order shall not be entered not later than 30
12 days after the filing of the petition. I assume
13 that means the statement of deficiency?

14 MS. KROACK: It does.

15 THE HEARING OFFICER: But does the agency
16 contemplate that there's no situation where the
17 board may grant a motion to extend the time to file
18 an answer?

19 MS. KROACK: We had not envisioned that
20 extensions of time to file an answer would be given
21 generally. We're assuming that sponsors will be
22 very familiar with the set of rules, will understand
23 involuntary termination procedures, will understand
24 that their obligations are if they receive the

1 statement of deficiency from us, which must be
2 served by certified or registered mail, they,
3 obviously, have to be an officer or agent to accept
4 them and they must respond quickly.

5 And, you know, an answer can also be
6 supplemented, but an initial answer must be filed.
7 They can't choose to ignore it. So we really
8 weren't envisioning that extensions would be
9 granted.

10 MS. HENNESSEY: I think we have some other
11 questions on time frames, but let me just switch to
12 a different topic.

13 The agency has carved out what its
14 referred to as summary terminations, and I gather
15 from both your testimony and the statement the
16 reasons is the agency's position that under certain
17 circumstances the agency can terminate an EMSA
18 without going through the procedures that you
19 propose. And, first of all, I just wanted to get
20 your statement on the record on your basis for that
21 interpretation of the statute.

22 MR. KANERVA: Sure.

23 The section we're referring to
24 dealing with the agency acting to terminate is

1 Section 52.3-4(b) which -- let me just read that.
2 It's fairly short here. In the case of deficient
3 performance of any term or condition, the
4 Environmental Management System Agreement that
5 prevents achievement of the stated purposes in
6 Subsection B of Section 52.3-1, the agency may
7 terminate the agreement, and the participant may be
8 subject to enforcement in accordance with the
9 provisions of Sections 31 and 42 of this act.

10 Having been the one that worked on getting
11 that language in there, the plain understanding of
12 that provision in my recollection is that we would
13 build directly into the agreements a statement
14 equivalent to this that, in effect, if they're
15 having a problem or if performance deficiency is so
16 severe that, in effect, they are not going to be
17 able to achieve what the original purpose is of the
18 program was and that there's two different
19 categories of purposes stated under that prior
20 section, then we just should go right ahead and
21 terminate.

22 Most everything else is probably going to
23 be some kind of a, perhaps, difference of opinion or
24 a judgmental kind of thing that it seemed to us made

1 more sense to go into an arena like the board and
2 essentially have both parties state their case, and
3 then let the decision get made.

4 So there's both aspects. Of course, the
5 authority for doing and then the mandate to file
6 this proposal. These proposal rules are in a
7 separate section here dealing with involuntary
8 termination as well.

9 MS. HENNESSEY: So would you -- just in terms
10 of terminology, you would consider that summary
11 termination as a different thing than an involuntary
12 termination?

13 MR. KANERVA: Well, to the extent that it is
14 directly specified and provided for in the statute,
15 yes, it's different, I think, than what it is that
16 we're putting into this rulemaking that's being
17 adopted by the board.

18 MS. HENNESSEY: Would the agency's decision to
19 summarily terminate an EMSA be appealable to the
20 board?

21 MR. KANERVA: The act doesn't state that it
22 is. It doesn't have that -- it doesn't have that
23 procedural mechanic built into it.

24 MS. HENNESSEY: So is it the agency's position

1 that that decision would not be appealable?

2 MR. KANERVA: Yeah. At this point, I think

3 that's the way we viewed it.

4 MS. HENNESSEY: And on the summary

5 terminations, is the -- well, is that -- I don't see

6 that that's necessarily addressed in your own rules

7 for this program, and I'm wondering what criteria

8 the board would apply to -- well, I guess two

9 questions.

10 What criteria would the agency apply to

11 determine how to proceed through an involuntary

12 determination before the board versus going through

13 a summary termination?

14 MR. KANERVA: You're right. I said summarily

15 terminate, so I guess it's a summary termination.

16 MS. HENNESSEY: And by summary termination, I

17 mean a termination that does not go through the

18 rules that you're proposing today?

19 MR. KANERVA: Right. Right.

20 MS. CROWLEY: But that summarily terminate is

21 not a statutory term, correct?

22 MR. KANERVA: Correct. That's the only reason

23 I commented on it. It's just my way of referring to

24 it in the testimony.

1 MS. CROWLEY: Right.

2 MR. KANERVA: I would characterize it this
3 way: What we've chosen to do here is set out the
4 specifics of what it is that would result in us
5 acting under the involuntary termination approach.
6 Okay. And that's the five deficiencies that are
7 described in here that I alluded to earlier, the
8 misrepresentation, the failure to provide access,
9 falsification, et cetera.

10 So, in effect, if someone were to do one
11 of these things, then clearly this would be the path
12 we followed. I think one way to conceptualize this
13 is we may, in effect, have a situation where all of
14 the wheels come off the cart, and we've got five or
15 six of these things that have gone completely off
16 track in one big shot.

17 In other words, this project has just gone
18 completely off track or, in effect, we may have --
19 we may already have documentation that they failed
20 to achieve what it is they thought they were going
21 to achieve, a dramatic failure to do it like, let's
22 say, they were going to have some huge reduction of
23 emissions somehow because of this new thing they
24 were going to do, and we find out right out of the

1 box they haven't falsified anything. They haven't
2 created -- you know, they haven't not let us see the
3 record or do anything like this, but we have
4 documentation that the thing is a major failure.

5 That's a point at which we would probably
6 just want to stop and say go back to the old control
7 program, and let's get at least back on track there
8 rather than go through these procedures.

9 Look at it as a difference. You know,
10 there's these specifics, and then there's what's
11 left. The what's left is the project has gone --
12 you know, it's just not working, period.

13 MS. HENNESSEY: Does there have to be -- I
14 guess what criteria are you going to apply to
15 determine when an EMSA is not fulfilling the goals
16 of the program and can be summarily terminated?

17 MR. KANERVA: Because each agreement will have
18 to specify exactly what it is setting forth as
19 innovative environmental measures. That's a term of
20 art out of the legislation. It's referenced in our
21 rules. Again, it's referenced in these. So it will
22 describe exactly what that is.

23 Now, the statute has sort of a generic
24 descriptor of that like achieves admission

1 reductions or discharge reductions or environmental
2 risk reductions. But each agreement will have a
3 specific description of what that is, X amount or
4 percent of emissions reduction or whatever it is
5 that they're going to do, substitution to get rid of
6 certain toxic chemical for nontoxic chemicals
7 because of major process improvements of some kind,
8 perhaps, that aren't mandated at all by regulation.
9 Well, that's environmental risk reduction.

10 So, I mean, those specific things are
11 characterized for meeting the test of innovative
12 environmental measure, and we have to do that in
13 order to pass muster that this is a valid project.
14 Somebody, conceivably, could challenge us proceeding
15 with the project if we don't have that sort of
16 threshold basis for it.

17 So that will be our trigger in deciding if
18 something has, you know, gone dramatically wrong.

19 THE HEARING OFFICER: The current agency rules
20 require the EMSA to specify the specific innovative
21 environmental measures?

22 MR. KANERVA: Right.

23 THE HEARING OFFICER: Do you have the section
24 that is specified?

1 MR. KANERVA: I could probably dig that out
2 here.

3 Section 187.402(b)4, and this is under
4 development of an EMSA. It is at kind of the stage
5 where we have an official document. We refer to it
6 as the draft EMSA, and it shall include in Item 4
7 the description of the innovative environmental
8 measures being proposed as a part of the pilot
9 project.

10 That was really a basic commitment to the
11 public interest groups that we spent some time
12 talking about. They perceived that companies would
13 get certain benefits and value out of participating
14 that they wanted to make it crystal clear what it is
15 that essentially Illinois was going to get out of it
16 in terms of the measures to be provided.

17 There's also in Section 406 a reference to
18 the criteria that actually restates the basic
19 provisions that are in the act saying that each EMSA
20 must meet that test of achieving number one or two
21 there.

22 MS. HENNESSEY: The agency's proposed
23 Section 187.402 does not provide -- as I read it,
24 that there should be a -- that the agreement will

1 state when the EMSA can be terminated by the
2 agency.

3 Is that correct? Am I reading that
4 right? For example --

5 MR. KANERVA: You're saying when Section 402 --

6 MS. HENNESSEY: Right.

7 MR. KANERVA: -- is there a specific reference
8 to the agreement describing the termination

9 process?

10 MS. HENNESSEY: Right.

11 MR. KANERVA: I don't think there is one.

12 MS. HENNESSEY: Okay.

13 MS. KANERVA: It does mention terms and
14 conditions for involuntary termination.

15 MS. HENNESSEY: But it doesn't mention --

16 MR. KANERVA: It doesn't mention the summary
17 termination. Maybe we coined a term here. You all
18 have to define this somehow. I don't know. That's
19 your bailiwick.

20 We've made it very clear to the project
21 people we talked about as to what these three parts
22 were; otherwise, it would have been, I think,
23 exceedingly confusing for them to figure out what
24 this proposal was we're filing, but there's

1 essentially a voluntary process. A project
2 participant has to have some way, if they wanted to,
3 to get out of it themselves. So there's a voluntary
4 approach which is described in our agency rules.

5 There's the statutorily-based summary
6 termination, I guess, we're calling it, and then
7 there's the involuntary termination provided for
8 under rules for the board. So, I mean, those are
9 the three pieces.

10 MS. HENNESSEY: Well, what recourse would a
11 company had if they had a disagreement with the
12 agency as to whether an EMSA should be summarily
13 terminated?

14 MR. KANERVA: This comes back to certain other
15 agency actions that can be taken. I think, the
16 answer we've given at this point that people seem to
17 have been comfortable with -- I mean, if there's
18 just an outright legal or technical disagreement
19 here that can't get resolved and the agency goes
20 ahead and acts to terminate, it's an agency action,
21 and they can take it to court. They can ask a court
22 to review it.

23 MS. HENNESSEY: Oh, okay. A court, but not the
24 board?

1 MR. KANERVA: Not the board. In the case of
2 that one that one category of thing, the
3 statutory-based termination, the everything went
4 wrong version.

5 MS. CROWLEY: You may not be able to address
6 this today, but if you could also take a look at
7 Section 5(d) of the act which allows, towards the
8 end, for board hearings on other petitions for
9 review of final determinations which are made
10 subject to the act or board ruling which involved a
11 subject which the board is authorized to regulate.
12 Some of the question is would that be applied here?

13 Some of the concern and some of what we're
14 trying to explore here in the record is that there
15 is generally or can be a concern about -- I hate to
16 use the bad words due process if the agency takes
17 summary action that can involve a company's ability
18 to operate since, in part, this will be in lieu of
19 various other kinds of permits.

20 And so that's why we're trying to explore
21 this summary termination concept that is not flushed
22 out in these rules. I'm trying to get some idea of
23 how you envision workings so that we can also check
24 our law books and see if it looks feasible legally

1 in terms of making this thing work in the beginning

2 and not --

3 MS. KROACK: We'll look at that and be prepared

4 to give you an answer at the next hearing.

5 But I do want to point out that we have

6 other cases where the agency takes a, quote, final

7 action. It's not subject to a board procedure.

8 This is then reviewable by the appellate court for

9 whatever district is appropriate, generally where

10 the source is located.

11 But, secondly, it's not as if the company

12 then is operating in a vacuum, then they're subject

13 to the underlying regulations that would otherwise

14 be applicable to them and they have provided by the

15 legislation itself in Section 52.3-4. They're

16 providing the time to apply for any update to their

17 permits that might be required to operate their

18 existing permits that have been out there. It may

19 not be operating, but they're still in place. It's

20 sort of their default position.

21 They have time to go back and update those

22 without being subject to enforcement actions for

23 failure to have proper permits, and they're allowed

24 to continue operating. So they're not denied the

1 opportunity to operate or are subjected to

2 additional enforcement during that period.

3 MS. HENNESSEY: And also -- maybe you can tell

4 me now or next week -- when you said the agency

5 takes some actions that are not reviewable to the

6 board, but they are reviewable to the court, is that

7 under the Administrative Procedure Act?

8 MS. KROACK: Right, the Administrative

9 Procedure Act provided those decisions are

10 reviewable.

11 MS. HENNESSEY: But that would be in the

12 circuit court rather than the appellate court, I

13 believe?

14 MS. CROWLEY: Yes.

15 MS. KROACK: Yes.

16 MR. KANERVA: I think that's true, yes.

17 MS. KROACK: I have to check. You could be

18 right.

19 MS. McFAWN: But in any case, where would you

20 anticipate these would go? Where the APA would say

21 they'd go?

22 MS. KROACK: Where the APA would say they would

23 go.

24 MS. McFAWN: What is the agency policy behind

1 distinguishing this kind of termination from an
2 involuntary termination for the purposes of review?

3 Why would you have these types of
4 terminations go to the circuit court or the
5 appellate court versus having it come through the
6 board?

7 MS. KROACK: Essentially timing. Again, the
8 board procedures is just another layer of procedure,
9 and the board decisions are all reviewable by the
10 appellate court.

11 MS. McFAWN: So would circuit court opinions?

12 MS. KROACK: Circuit court opinions, and that's
13 true, but it's just an additional layer of review.

14 MS. McFAWN: Why is it an additional layer?

15 If we acted in lieu of the circuit court,
16 why is that an additional layer?

17 MS. KROACK: The point is that your decisions
18 are reviewable by the appellate court. These would
19 go to the circuit court, and, again, that would be
20 reviewable --

21 MS. McFAWN: By the appellate court.

22 MS. KROACK: -- by the appellate court.

23 We haven't eliminated that. It maybe that
24 we've made an error. I thought that agency's

1 decisions were under the APA review by the appellate
2 court.

3 MS. McFAWN: I think there are mandamus actions
4 for failure to act. Those are given by the
5 appellate court. That may be where you're off
6 track.

7 MS. KROACK: Maybe. But we felt that because
8 this is a voluntary pilot program with a very short
9 expiration date, we can't enter into initial
10 agreements after December 31, 2001, and these are
11 innovative. They're new. And a company is often
12 asking to participate in exchange for being excused
13 from another applicable regulatory requirement that
14 the danger of something going wrong and the public
15 losing confidence in this program or danger to the
16 environment itself is such that we had to have a
17 procedure for terminating these quickly.

18 And when we terminate, they then must
19 begin to comply -- they must begin to comply with
20 underlying regulatory requirement, and they get time
21 to come into compliance with any new regulations
22 that have come into existence after the agreement
23 and time to update their permits. But they have to
24 go to the old system that was in place when they

1 entered into this agreement.

2 So the environment and the integrity of
3 the program is protected during the status of the
4 appeal for a review by the board. Of course, they
5 get to continue to operate under the EMSA until
6 there's a board decision. And then even after the
7 board decision, there's an appellate process. This
8 process throws them back into their basic regulatory
9 framework.

10 MS. HENNESSEY: So the time saved is if you go
11 under the APA, you can terminate and then they can
12 argue that decision in the circuit court; whereas,
13 under an appeal to the board, you can't terminate
14 the EMSA until the board says that you can?

15 MS. KROACK: Right.

16 MR. KANERVA: Right.

17 MS. McFAWN: So what -- you were mentioning
18 earlier that if an agreement is terminated -- this
19 is not the involuntary agreement, but what are we
20 calling it now?

21 MS. HENNESSEY: Summary termination.

22 MR. KANERVA: Summary termination.

23 MS. McFAWN: Summary termination. Okay. So
24 under the summary termination, you had said that if

1 it's terminated, the facility shall have sufficient
2 time to apply for and receive the necessary permits
3 to continue operation.

4 How much time are you allowing them to do
5 that?

6 MS. KROACK: That would depend on the permit.
7 Cap permits you would get the time allowed for a cap
8 permit. You submit your initial cap application,
9 and, you know, the cap application process would
10 take significantly longer than a state-operating
11 permit, and a FESOP would be somewhere in between, a
12 federal reinforcement state-operating permit would
13 be somewhere in between.

14 So it would depend on the permit they
15 needed and the permit that they applied for, and it
16 would be within the time frames allowed for under
17 existing rules.

18 MS. McFAWN: Okay. So during that gap between
19 terminations so you no longer are acting under the
20 agreement between the agency and the sponsor, you
21 are not, you said, required to go back and comply
22 with your permit. But what if you're the sponsor
23 that needs your permits modified taking into account
24 the changes in operations you, perhaps, undertook

1 because you thought the EMSA would be workable?

2 MR. KANERVA: Let me jump in here with a second

3 aspect of that concept because I think we're

4 getting -- at least I sense we're getting a couple

5 of things crisscrossed.

6 MS. McFAWN: Okay.

7 MR. KANERVA: We wanted to change their status

8 and their potential liability. That's what we're

9 really trying to do here with this quick exit

10 provision because the statute specifically says not

11 only can we terminate it, but they may be subject to

12 enforcement.

13 MS. McFAWN: What does that mean?

14 MR. KANERVA: That means exactly what it says.

15 MS. McFAWN: Okay. Could you elaborate maybe

16 what you think that will mean? What will you

17 enforce against them?

18 MR. KANERVA: If they had, in fact, haven't

19 reapplied quickly for their permits or any of the

20 basic regulatory provisions they should have been

21 under, they've got every fundamental violation we

22 could throw at them. They don't have permits for

23 their air emissions. They don't have permits for

24 their waste discharges. You name it. They don't

1 have their record permit in place. Whatever it is
2 they disconnected in order to move over into the
3 innovation program that they can't get reconnected
4 really quickly and they may not be able to, we have
5 a basic enforcement case that's probably going to be
6 open and shut. I mean, there isn't a debate.
7 They've lost their protection under this innovation
8 program because it's terminated, and they're now
9 subject to whatever regulations they should have
10 been meeting.

11 So, in effect, there is a -- I mean, it's
12 not like we were hoping any of this is going to
13 happen. Okay? I mean, this a kind of a big club
14 sort of situation. In essence, the table has just
15 turned completely on them. They're out of this
16 innovation thing. They're subject to enforcement.
17 We can act as quickly or whenever we want. If
18 they're fiddling around with permits or not
19 modifying them the way they want, I mean, we'll just
20 turn this into a giant enforcement case and go after
21 them. Big time. Now, does anyone think we'll run
22 into that? I certainly hope not.

23 But we needed some sort of ultimate safety
24 valve out there for a project that just was a major

1 failure.

2 MS. HENNESSEY: If the EMSA is terminated by
3 the board or the agency and there's this period
4 where they're applying for new permits, what
5 regulations or what limits are they subject to while
6 the permit application is pending?

7 MR. KANERVA: Well, it depends on where they
8 wind up, I think, in this. I mean, we could have a
9 whole mixture of things happen. Some sources are
10 subject to -- what a permit does is simply state the
11 rule it's applicable to them in many of the air
12 emission situations. Okay. But the rule is there,
13 and it applies to people.

14 So, you know, if they've been operating
15 outside of air rule blah, blah, blah, blah, blah or
16 VOM emissions and they lose that ability under this
17 agreement, then suddenly that air rule applies to
18 them again, and we would enforce that air rule
19 whether it's six pounds an hour of one emission or
20 some sort of a control performance achievement, 80
21 percent removal, whatever the air provision is would
22 apply to them right away.

23 In other cases, a permit might have
24 specified something specific, and we would go back

1 to a more fundamental violation, you know, operating
2 that piece of equipment without a permit, for
3 instance, or something like that.

4 Now, again, I think you might be getting a
5 sense of why the first few agreements were doing --
6 actually were an interesting challenge to work
7 through this, but the two pieces here are going to
8 be clearly specified in these agreements. The one
9 piece is exactly what things it is they're saying
10 they want not to apply to them anymore. So you know
11 exactly what it is they should have met when you
12 unplugged them, and then they want -- they have to
13 describe exactly the alternative they're going to
14 do.

15 I think it should be a pretty clear cut
16 enforcement case. You know, here's the five things
17 that they're not doing that they would have had to
18 do, and here's the two things they should be doing,
19 and that's what we would go after.

20 MS. CROWLEY: If I can make sure that I
21 understand this. Okay. You have somebody operating
22 under an EMSA. So that if they are complying with
23 all the terms and conditions of the EMSA, they're
24 considered to be in compliance with all applicable

1 environmental rules in that particular area?

2 MR. KANERVA: Correct.

3 MS. CROWLEY: Let's assume the summary

4 termination and that perhaps that looks like an

5 agency letter that says we are terminating the EMSA

6 pursuant to whatever part of the statute it is you

7 have time to get new permits. Since we know that a

8 permit -- someplace it says that basically having a

9 permit only absolves you of a charge of operating

10 without a permit. As soon as that EMSA letter comes

11 from the agency saying it's over, you're done, then

12 they are subject to an enforcement agency the next

13 day for being out of compliance with whatever the

14 rule should have been. I'm right there?

15 MR. KANERVA: Correct.

16 MS. KROACK: But not for permit violations.

17 MS. CROWLEY: But they don't get nailed for not

18 having a permit, but they get nailed for violation

19 of whatever the substantive regulation is?

20 MS. KROACK: Right. And they must timely apply

21 for a permit. In other words, they can't wait two

22 years. They have to get out there and apply for a

23 permit. The time it takes to issue a permit varies

24 depending on the type of permit they're requesting.

1 So as long as they've submitted an
2 application and we say that shall be deemed -- under
3 our rules, we say any application shall also be
4 deemed a timely and complete application for
5 renewal.

6 MS. CROWLEY: Right, which is what the statute
7 says?

8 MS. KROACK: Right.

9 MS. CROWLEY: So essentially an agency
10 termination is like a revocation of a site-specific
11 rule or a revocation of a variance or adjusted
12 standard or any of those other individual sort of
13 regulatory change, relief, whatever mechanisms.
14 Once it's terminated, they are out of compliance
15 with the law?

16 MS. KROACK: They may be. They may be able to
17 come into compliance quickly --

18 MS. CROWLEY: But they are out of compliance
19 with the law.

20 MR. KANERVA: Technically, yeah.

21 MS. CROWLEY: -- and soon as it's terminated?

22 MR. KANERVA: Yes.

23 MS. CROWLEY: Okay. I just wanted to make sure
24 I understood.

1 MR. KANERVA: And that's the status that
2 people, you know, wanted to be clearly applicable
3 here. I think our discussions with the attorney
4 general's office was the same way. I mean, they
5 wanted these companies to realize that if they
6 really got into deep trouble here, they could have
7 the attorney general after them immediately if the
8 project got stopped.

9 MS. CROWLEY: Since you bring up the attorney
10 general's office -- again, you may not have an
11 answer to this question. But is this one of those
12 situations like permit appeals where basically the
13 agency would be handling proceedings before the
14 board in the ordinary course? I mean, like permit
15 appeals, for instance, the agency lawyer usually
16 handles permit appeals.

17 MR. KANERVA: Delegated authority, yeah.

18 MS. KROACK: Correct. We anticipate that
19 agency attorneys would appear on behalf of the
20 agency in involuntarily termination proceedings
21 before the board under these rules.

22 MS. CROWLEY: But that is, obviously, up to the
23 attorney general to decide --

24 MS. KROACK: Correct.

1 MS. CROWLEY: -- whether or when it prefers to
2 do so itself?

3 MS. KROACK: That's true.

4 MS. CROWLEY: So in these cases where we read
5 when that the agency can terminate, do we read that
6 as we read the rest of the statute that the agency
7 or the people can terminate?

8 MS. KROACK: Yes, you have to read the people,
9 and I think that's actually covered by 52.3-4.

10 MS. CROWLEY: Fine. I just wanted the record
11 clear on that.

12 THE HEARING OFFICER: I have a related question
13 along those lines, but just one more question on the
14 summary termination. Is that address in the current
15 agency rules, the procedures surrounding summary
16 termination?

17 MS. KROACK: No. Not in any -- no.

18 THE HEARING OFFICER: Okay. Because I was
19 looking at act. Section 52.3-4(d) says the agency
20 may adopt rules that are necessary to carry out its
21 duties under this section, and that's the section
22 that has the summary -- what we're calling summary
23 termination provision. But the agency has not
24 adopted any rules?

1 MS. KROACK: We've adopted rules under that
2 section. It does not specifically cover summary
3 termination.

4 THE HEARING OFFICER: Okay. And there are no
5 plans for the agency to promulgate rules?

6 MR. KANERVA: Not at the moment. I think that
7 depending on how these first few projects go, we'll
8 see if for some reason some companies are extremely
9 concerned about that angle of all of this, and we
10 might try -- you know, we might reconsider that and
11 decide if we should go ahead and try and develop
12 something. But so far that has not come up as
13 something that people are worried about.

14 MS. KROACK: I also would like to point out
15 that one company that we spent the most time talking
16 with about doing an EMSA, we have discussed this and
17 discussed including how we would treat that within
18 the EMSA itself. It would be sort of a contractual
19 agreement as to how we would treat that, what their
20 obligations were to apply for permits and how they
21 would deal with new laws that come into place after
22 the EMSA but before termination.

23 MS. HENNESSEY: Let me make sure I understood
24 the question you asked. Either the agency or the

1 attorney general can summarily terminate an EMSA; is
2 that correct? Did I understand that correctly?

3 MS. CROWLEY: That was the question I posed
4 given --

5 MS. KROACK: I thought you involuntary
6 termination -- involuntary termination procedures
7 and not the summary termination.

8 No. The summary termination is intended
9 it's the contractual arguments between the agent and
10 the sponsor, and it's intended to only cover the
11 agency, and I apologize. I thought we were talking
12 about involuntary.

13 MS. CROWLEY: Well, thank you for clarifying
14 that. But once we get into the rules that you have
15 proposed, we should read those as meaning the people
16 or the agency?

17 MS. KROACK: Yes.

18 MR. KANERVA: Right.

19 MS. CROWLEY: Thanks for clarifying that,
20 Member Hennessey.

21 MS. McFAWN: So back to the agency's rules, so
22 you don't have any rules that address this type of
23 termination? Like, for instance, you don't have any
24 rule that would say how you would interpret the

1 statutory terms' sufficient time to apply for and
2 receive necessary permits?

3 MR. KANERVA: At the moment, no.

4 MS. McFAWN: Okay. You do -- Roger, you
5 mentioned that you have rules under (d), the one
6 cited to the agency by Richard, to adopt rules that
7 are necessary to carry out its duties under this
8 section.

9 Are those the rules that you attached to
10 your --

11 MS. KROACK: Yes.

12 MS. McFAWN: Okay. Do those have --

13 MR. KANERVA: Those are adopted under a
14 different authority.

15 MS. McFAWN: These were (indicating)?

16 MR. KANERVA: Yeah. Not (d) under this part of
17 the act.

18 MS. McFAWN: Okay.

19 MR. KANERVA: It's the earlier provision that
20 says the action may adopt rules to carry out this
21 program.

22 MS. McFAWN: Okay.

23 THE HEARING OFFICER: Is that --

24 MR. KANERVA: That section.

1 THE HEARING OFFICER: Just for clarification,
2 if you could refer to the section of the act, if you
3 know. I think you may be referring to Section --

4 MR. KANERVA: Section 52.3-2(b).

5 THE HEARING OFFICER: Okay.

6 MR. KANERVA: The action may adopt rules to
7 implement this section.

8 MS. McFAWN: Okay.

9 THE HEARING OFFICER: Thank you.

10 MS. McFAWN: But you don't have any then that
11 you've adopted or proposed for adoption under
12 52.3-4(d)?

13 MR. KANERVA: Correct. And if you'll note, (d)
14 makes specific reference to mechanisms for
15 alternative dispute resolution.

16 MS. McFAWN: That is one type, yes.

17 MR. KANERVA: Yeah. It doesn't limit it to
18 that, but it gives a clear direction that that's
19 intended to sort of deal with different ways of
20 doing things under this program.

21 At this point, we raised the idea of
22 alternative dispute resolution. We didn't speak of
23 like arbitration or anything, but we batted that
24 around a little bit and didn't get a glowing warm

1 and fuzzy reaction out of the company that we were
2 talking to. It's just a little -- maybe too far
3 outside the envelope, I think, at this time.

4 MS. McFAWN: And so there's no rules also --
5 just for the record, there's no rules that have been
6 proposed or adopted concerning performance assurance
7 provisions under 52.3-4(a); is that right?

8 MR. KANERVA: 4(a)?

9 MS. McFAWN: Yeah. (A) talks about the agency
10 ensuring that the EMSA have specific arrangements.

11 MR. KANERVA: Oh. Yeah. Right. No. There
12 aren't.

13 MS. McFAWN: Okay. And just before we leave
14 the section of the act, too, for the record, we got
15 into this discussion about the attorney general's
16 powers and the agency's powers. If I'm
17 understanding our discussion correctly, you
18 anticipate the agency would be the ones to go to
19 court for the summary termination; is that correct?

20 MS. KROACK: (Nodding head.)

21 MS. HENNESSEY: Could you answer verbally,
22 Laurel?

23 MS. McFAWN: That's true, right?

24 MS. KROACK: At this point, yes, that's true.

1 MS. McFAWN: Thank you.

2 THE HEARING OFFICER: At this point, I

3 think -- let's go off the record.

4 (Break taken.)

5 MS. HENNESSEY: Could I just make a comment

6 just to follow up on what we were talking about?

7 And this is not a question. It's more of a

8 comment. It's something to think about.

9 I think it would be advisable for the

10 agency to consider whether an EMSA could be

11 considered a property right and whether there might

12 be some due process rights that would attach to that

13 that would -- should be complied with in a summary

14 termination. I don't know if that's really a

15 subject for the board rules, but it's just something

16 I think -- for us to get some overall comfort with

17 this program, it would be good to think about.

18 Go ahead.

19 THE HEARING OFFICER: Thank you.

20 MR. KANERVA: Just one response to that, and we

21 will -- I mean, obviously, we'll kind of think

22 through this, our explanation, here a little bit

23 more.

24 But at least to me when we were talking

1 with people doing the adoption of this program, it
2 was pretty clear we had drawn some distinctions
3 between this voluntary arrangement -- that's the key
4 thing here -- the voluntarily aspect of it, like
5 entering into a contract with the agency, as opposed
6 to the permitting process.

7 I mean, to begin with there's nothing
8 voluntary about a permit. If that rule is
9 applicable -- I mean, if that requirement for permit
10 is applicable to you, you're mandated to apply for
11 the permit and get it. If not, you're subject to,
12 you know, certain legal sanctions. The agency's
13 under affirmative -- we can't not decide to process
14 a permit. If an applicable comes in, we're under a
15 legal mandate to proceed with it. It's not
16 voluntary on our part. We can't say we don't like
17 this, see yeah. And, in fact, if we just
18 arbitrarily deny or, you know, decide can didn't
19 like a project, that's appealable.

20 So, I mean, sort of speaking as a program
21 person, there's a fundamental front-end distinction
22 to this. You know, there is no mandate on either
23 party that creates an obligation here along the line
24 you're describing at least equivalent to a permit

1 system. When you use the term "property right,"

2 that's a whole different ball game.

3 MS. HENNESSEY: Well --

4 MR. KANERVA: We've got to think about.

5 MS. HENNESSEY: -- whether the voluntary nature

6 of these contracts makes a difference to that

7 determination -- and I don't know as I sit here

8 today. I do know that there's a very extensive body

9 of law on what is and what is not a proper right

10 and --

11 MR. KANERVA: Sure.

12 MS. HENNESSEY: -- it's a complicated

13 question. So I'm not saying I know what the

14 solution is. I just raised the issue.

15 MS. CROWLEY: I have not looked at the case

16 recently, but you might want to take a look at an

17 early 1980s federal case, *Martell v. Mosey*, which

18 involved an agency permit denial that got into the

19 whole property rights and --

20 MS. KROACK: Matel?

21 MS. CROWLEY: *Martell*, M-a-r-t-e-l-l --

22 MR. KANERVA: *Steve Martell*.

23 MS. CROWLEY: -- *v. Mosey* which was a permit

24 denial that was --

1 MS. HENNESSEY: Allegedly.

2 MS. CROWLEY: -- not allowed because the
3 procedures were too summary.

4 THE HEARING OFFICER: I had a question.
5 Section 106.946(a) provides that a proceeding to
6 involuntarily terminate an EMSA may only be
7 commended by the agency.

8 In that context, the way the proposed
9 rules are set up, violations of the act or
10 regulations not addressed by the EMSA may be alleged
11 in the statement of deficiency and serve as a basis
12 for deficient performance. And the board's final
13 opinion and order may address these violations, and
14 I think cease and desist is mentioned and some other
15 potential actions.

16 My question is, is this, in effect, an
17 enforcement action that must be brought by the
18 attorney general on behalf of the agency?

19 MS. KROACK: Let me answer that. The question
20 wasn't that you could impose the statutory
21 enforcement penalties on them by failure to comply.
22 It's whether we can go forward with involuntarily
23 terminating because they haven't met the status for
24 being in the program. They haven't -- they've

1 got -- the EMSA may cover five areas of regulation
2 that are applicable to them, but not ten or 15 other
3 areas. If in ten or 15 other areas or one of those
4 areas they are in serious violations of underlying
5 requirements, the question is whether this is the
6 type of participant in this program who should be
7 continued to be allowed to participate even if
8 they're complying with the EMSA and the rules --
9 their agency rules.

10 And Part 187 does say that you have to be
11 in compliance with the terms of your EMSA and you
12 have to say what applies to you and what doesn't.
13 And what does apply to you, you're subject to those
14 rules. The question is not whether you are deciding
15 that they're out of compliance with that program and
16 imposing penalties. It's deciding you're out of
17 compliance, and, therefore, they should be
18 terminated from this program.

19 So the remedy is different, and actually
20 the decision is somewhat different too. It's
21 whether their status as a participant in this
22 program continues to be appropriate.

23 THE HEARING OFFICER: I think I understand your
24 response, but as you envision this, the board would

1 still be finding a violation of the act or
2 regulations, and under 106.956(d), the board in its
3 order could direct the sponsored cease and desist
4 from violations of the act or regulations. And then
5 (d)4 mentions such other orders that may be
6 appropriate.

7 So it's your understanding the board could
8 be finding a violation and imposing in its order
9 some form of remedy whether that's a cease and
10 desist or such other order that the board deems
11 appropriate?

12 MS. KROACK: We're generally thinking that you
13 would find termination of this agreement, the EMSA,
14 to be property at that point, that that would be the
15 remedy of choice. But you may say that this is a
16 minor violation. We'll cease and desist from this
17 minor violation in order to continue your
18 participation in the EMSA.

19 We're looking at the -- what you're
20 actually finding is, yes, you are finding a
21 violation of another regulation, but what you're
22 really finding is that their status as participant
23 because of that violation is no longer appropriate
24 and as a result, here's the appropriate remedy for

1 dealing with the EMSA. You're entitled to be a
2 participant or you're not, or you're entitled to be
3 a participant but we're going to issue a cease and
4 desist order if you fail to comply with it. Then
5 we'll terminate you from this program. So we looked
6 at that as being different than an actual
7 adjudication on the merits in position of statutory
8 penalties of a regulation not covered by the EMSA.

9 THE HEARING OFFICER: So you think that the
10 fact that statutory penalties -- so you contemplate
11 that the board would not impose statutory penalties
12 in this procedure?

13 MS. KROACK: Correct.

14 THE HEARING OFFICER: And that based on that
15 distinction, you don't think this strays into the
16 province of the attorney general?

17 MS. KROACK: No. And I don't think that a
18 decision of the board finding a violation of one of
19 those other requirements would be binding upon you
20 in a separate -- it would be binding in a separate
21 enforcement action.

22 MS. HENNESSEY: It would not be?

23 MS. KROACK: It would not be binding. I don't
24 think it would even be necessarily a precedent. It

1 would be merely for determining their participating
2 in this program.

3 MS. HENNESSEY: Should 906 -- I'm sorry.

4 Should Section 106.946 also refer to the
5 attorney general in line with what we were talking
6 about before the break?

7 MS. KROACK: The attorney general is,
8 obviously, entitled to bring an action to terminate
9 these. We looked at those actions as falling under
10 Section 52.3-4. We really looked at these rules as
11 our way the terminating one of those provisions.

12 But, again, the attorney general is sort
13 of our official representative in most matters. So
14 we really had not thoroughly addressed that issue or
15 contemplated it in that context in this way. We had
16 always envisioned that they would have the right to
17 terminate, but we looked at their rights as being
18 under Section 52.3-4, and they can go in, you know,
19 do it whatever way they felt was appropriate under
20 existing law.

21 We hadn't really looked at these results
22 as addressing necessarily how they would pursue
23 their right to terminate, and their right to
24 terminate is, of course, tied to the language in

1 52.3-4. So perhaps we need to think about that.

2 THE HEARING OFFICER: Because --

3 MS. HENNESSEY: I don't know what the
4 typical -- maybe Kathleen Crowley knows whether -- I
5 mean, is it sufficient to just say the agency can
6 commence it, and then, of course, that doesn't
7 interfere with the attorney general's decision to
8 represent the agency?

9 MS. CROWLEY: I believe it's legally efficient
10 to say that the agency make mince as everything else
11 the act does and so forth. It's the court
12 interpretation that arguably adds rights that are
13 not specifically outlined in the act and in the
14 rules.

15 MS. KROACK: That's how we viewed it, but,
16 again, we're really looking at these procedures that
17 we would follow and leaving the attorney general to
18 elect to use these or whatever other legal remedies
19 they felt were available to them including 52.3-4.

20 THE HEARING OFFICER: I had a question
21 regarding 106.953(c). I was wondering can the
22 hearing officer make the determination of, quote,
23 uncontrollable circumstances warranting the delay of
24 hearing or only the board?

1 MS. KROACK: My initial reaction is the hearing
2 officer. We used the word the board, but under
3 these rules, the hearing officer is entitled to
4 render all decisions up to the final decision, which
5 that's a board decision.

6 But every other rulings on motions or
7 every other setting of deadlines or dates or what
8 discovery is appropriate, the hearing officer could
9 act on behalf of the board. So I would say the
10 hearing officer would be appropriate here as well.

11 THE HEARING OFFICER: In that same subsection,
12 there's a reference to a limit of 30 days for
13 delay. Is that 30-day delay a one-time only
14 extension, or would it apply to each request for
15 delay?

16 MS. KROACK: We had really envisioned a
17 one-time delay of 30 days. Again, though, our goal
18 in drafting these were to have short time periods as
19 possible. If the board thinks they need to allow
20 additional time for additional requests based on
21 different reasons, then perhaps that's appropriate
22 here as well.

23 THE HEARING OFFICER: Thanks.

24 Just move over to 106.952(f). Why does

1 the agency provide public notice? What was the
2 rationale for that approach?

3 MS. KROACK: Generally, this tracks Part 103
4 where the agency gives notice of compliant and
5 hearing under certain circumstances, and this tracks
6 that language.

7 THE HEARING OFFICER: There are a couple
8 references. One in Subsection F where it says
9 compliant, and that occurs elsewhere, and then other
10 times it may refer to petition. Should that for
11 consistency be statement of deficiency?

12 MS. KROACK: It should.

13 THE HEARING OFFICER: In 106.954(d), can an
14 EMSA address and operate in lieu of federal and
15 local environmental laws and regulations?

16 MS. KROACK: Only if there's an acceptance of
17 that by the local government agency and federal
18 agency involved. We're anticipating that as we go
19 forward, U.S. EPA will become -- may become a party
20 to these or we will submit these as a set provision,
21 and then they can operate in lieu of federal
22 requirements, but, again, that requires approval of
23 U.S. EPA.

24 MR. KANERVA: Yeah. But the basic -- yeah.

1 That's one option if they decide to go that far.
2 But just the base authority for an EMSA,
3 notwithstanding any action by U.S. EPA, we can't
4 change a federal requirement. But the feeling was
5 there could be federal requirements out there that
6 have for some reason they have significantly failed
7 to comply with them, it could threaten the viability
8 of our project. So we wanted the option -- wanted
9 it to be one of the reasons that we might act under
10 this rule.

11 THE HEARING OFFICER: That same Subsection D --

12 MR. KANERVA: And, again, let me --

13 THE HEARING OFFICER: I'm sorry.

14 MR. KANERVA: It's a little hard at this point
15 to give you a complete sense of this, but it's a bit
16 of a challenge to figure out exactly how to string
17 these different procedures together. I mean, it
18 isn't necessarily all that simple to just disconnect
19 from this rule or that rule or whatever. Some of
20 these we've managed to do an amazing job over the
21 years, but my term is nested rules. The air program
22 is the most infamous collection of nested rules we
23 ever saw in our lives. Once you get your foot into
24 this pathway, you find this rolling set of things

1 that apply to you. So a lot of that is also
2 patterned into the federal law.
3 So, in effect, we might be able to do
4 something dramatically different by just tweaking
5 one part of that, but, again, it's related to six or
6 seven things, and they all kind of go together. So
7 we really keep or kept our options open here that if
8 we try and work with one part of the system, we
9 aren't just completely shutting ourselves off from
10 looking at the rest.

11 THE HEARING OFFICER: Thank you.

12 That same Subsection D as well as
13 Subsection E -- again, I'm in Section 106.954.
14 Regarding those two subsections the reference there
15 to a violation, must that violation be at the pilot
16 project facility or facilities?

17 MR. KANERVA: It needs to be at whatever sites
18 and/or related areas are identified as within the
19 scope of the agreement. Okay. I phrased it that
20 way carefully because some of these agreements might
21 actually define -- might not actually use a
22 traditional, quote, unquote, facility-related
23 definition as to how they're applicable because some
24 of these folks may wind up doing some things off

1 site of their traditional facility or on a larger
2 boundary than what we would regularly consider a
3 facility to a surrounding site in a way that will,
4 you know, be different than what we've usually dealt
5 with.

6 THE HEARING OFFICER: But it wouldn't
7 contemplate a situation where simply that sponsor
8 was in violation at some site totally unrelated to
9 the pilot project?

10 MR. KANERVA: Twenty miles away that's not
11 within the -- no.

12 MS. HENNESSEY: I had a question on that
13 section. You refer in Section 106.954(d) to a
14 situation in which an appropriate authority has sent
15 a notice of violation, complaint, or other notice of
16 failure to comply. Could that appropriate authority
17 include a citizen that's filing a citizen's
18 complaint?

19 MR. KANERVA: I don't think we envisioned that,
20 no. We used the words has sent a notice of
21 violation, complaint, or other -- I don't think we
22 envisioned that as being a citizen action.

23 MS. HENNESSEY: So appropriate authority is
24 only a governmental agency?

1 MR. KANERVA: Yes.

2 THE HEARING OFFICER: A related question on

3 Subsection E when it refers to the agency mailing a

4 notice of violation. It says pursuant to

5 Section 31(a) or (b). So I take it the disjunctive

6 "or" there it can be a notice of violation sent

7 under (a) that alone would be sufficient? It need

8 not be both (a) and (b)?

9 MR. KANERVA: Right. Yes, that's correct.

10 THE HEARING OFFICER: Thanks.

11 MR. KANERVA: Either one.

12 THE HEARING OFFICER: What if an EMSA covers,

13 say, several facilities, but the violation is only

14 at one facility? Does the agency contemplate the

15 board could, in effect, terminate the EMSA as to

16 only that one facility that's in violation?

17 MR. KANERVA: I think -- well, I think it

18 depends on the circumstances the board would need to

19 take into account, the relative magnitude and

20 importance of that particular deficiency. I mean,

21 if it turns out that deficiency of -- there's three

22 different facilities involved in this, but this is

23 the main innovative feature described in the

24 agreement, it may be important enough that the

1 board's decision is to stop the whole project as
2 opposed to just stop what they're doing at that one
3 place.

4 THE HEARING OFFICER: Okay. A question on
5 106.954(c), really a related question. It refers to
6 if the sponsor has falsified any monitoring data,
7 record keeping information, or reports. I take it
8 that is data regarding the pilot project?

9 MR. KANERVA: Correct.

10 THE HEARING OFFICER: Okay. Just a couple of
11 questions about terminology. In 106.956(c)2 -- I'm
12 sorry. Before I ask the question on terminology,
13 refer to 106.956(c)2. Does the agency contemplate
14 conditional board orders under (c)2?

15 MR. KANERVA: Let me start. You may need to
16 put the legal tweaks on it.

17 I think we -- practically speaking, I
18 think we envisioned a situation where a company
19 might wind up deciding they weren't truly serious
20 about the concerns we had about a project. And, in
21 effect, the way to get their attention, seriously
22 get their attention, would be to start this
23 process.

24 Now, you know, that may entrench everybody

1 or it may suddenly send off some alarm bells and
2 wake some people up to the effect that they decide
3 wow, we better get our act together. I think in
4 that case if the board is convinced, they come right
5 in the door and say, whoa, okay, there's some
6 problem here and we recognize that now. We think we
7 can get back on track in 60 days. If that situation
8 exists, we felt why not let them have that
9 opportunity if the board is persuaded that they're
10 sincere and they make a good case. And then make
11 your decision based on how they do.

12 But that shouldn't go too long, in
13 effect. So it's sort of like a time-out period. If
14 they can convince you, absolutely convince you, that
15 within 90 days they're going to have this all
16 straightened out and they'll be in good shape again,
17 then you might decide to give them a breather. That
18 was our concept.

19 THE HEARING OFFICER: I think the concern was
20 that the Subsection C refers to the board rendering
21 a final decision which suggested that it would be in
22 a form of some conditional order that the EMSA would
23 terminate automatically if some condition isn't
24 satisfied within so many days.

1 What you're contemplating is actually a
2 situation where there, in effect, would be an
3 interim board order, a period of time for the
4 sponsor to comply, and then a final board decision
5 after that time period to see if they have rectified
6 the problem.

7 MS. KROACK: You are correct. It does
8 contemplate conditional interim orders.

9 THE HEARING OFFICER: And now I had a few
10 questions on terminology.

11 In 106.956(d)2, what is meant by
12 performance assurance compensation?

13 MR. KANERVA: Well, we tried not to use the
14 other P word, penalty. The whole approach with this
15 program has been to follow this contractual model
16 approach, and the legislation refers to performance
17 assurance. Again, we keep harping on the word
18 performance because, again, we're performing under a
19 contract concept as opposed to complying with a
20 regulation concept. The word compensation was just
21 simply another way to say something about payments
22 without referring to some kind of traditional
23 enforcement language.

24 THE HEARING OFFICER: So you had contemplated

1 some monetary payment based on their past failure to
2 comply with the EMSA?

3 MR. KANERVA: Right, as a possibility. I mean,
4 it's something the board might as it can in other
5 traditional enforcement type of things.

6 MS. McFAWN: I just wanted to make sure. This
7 would be for past noncompliance with the EMSA, not
8 future?

9 MR. KANERVA: Correct.

10 Well, one other angle to this on this
11 compensation -- and, again, it's not limited to
12 this. So, you know, I wouldn't -- it's not intended
13 to be taken that way. We have suggested one
14 approach to a company that, in effect, the
15 performance assurance would spell out a consequences
16 schedule of certain required payments for certain
17 kinds of problems, if they occur. Some are just
18 procedural. They send in their annual report a
19 month late, you know, this kind of thing. It's no
20 different than the current program. All of these
21 things need to have some sort of consequences
22 associated with them.

23 But, in effect, the agreement will
24 actually spell that out, and it will say what

1 payments are required under what circumstances,
2 et cetera, et cetera. If one of the performance
3 efficiency situations we get into involves them not
4 living up to all of that, that, in effect, they will
5 be a model sitting in front of the board when the
6 case comes forward. The agency would basically be
7 saying according to the schedule under performance
8 assurance so-and-so, a payment of X amount should
9 have been made for these various things, and those
10 various things weren't acted on properly.

11 So, you know, you'll have sort of an
12 expectation there in front of you to decide if
13 that -- that you could use as a basis for imposing
14 your own version of that. But, again, we don't have
15 one of those agreed to yet.

16 THE HEARING OFFICER: Along those lines, does
17 the agency contemplate that the board may enforce
18 remedy provisions set forth in the EMSA itself?

19 MS. KROACK: Yes.

20 THE HEARING OFFICER: So like the example Roger
21 was giving, it sounded like stipulated penalties.
22 That would be something the board order might
23 enforce where those stipulated penalties are
24 actually set forth in the EMSA?

1 MS. KROACK: Correct.

2 MS. HENNESSEY: Just a question that occurred
3 to me. These EMSA sounded an awful lot like
4 contracts. Does the agency ever contemplate
5 bringing a breach of contract action.

6 MS. KROACK: No. Because of our status as a
7 governmental agency, no. We looked at this as being
8 separate and apart. While we're treating it more of
9 a contract than either a property right or a true
10 governmental action, it's a hybrid really between
11 the two, and we felt that we needed to proceed with
12 this as a termination of an agreement.

13 Although this is more like a contract than
14 a permit, it's not specifically either of them. We
15 felt that we needed to give them as much procedural
16 safeguards in this process as possible while at the
17 same time making it a very fast process.

18 MS. HENNESSEY: Okay. Thank you.

19 THE HEARING OFFICER: What other types of
20 remedy provisions does the agency contemplate might
21 be set forth in an EMSA?

22 MR. KANERVA: Would you ask that again?

23 THE HEARING OFFICER: Yeah.

24 I was wondering you had mentioned an

1 example of stipulated penalties, something that, in
2 effect, sounds like payments, stipulated payments.

3 MR. KANERVA: Yeah.

4 THE HEARING OFFICER: What other types of
5 remedy provisions do you envision may be set forth
6 in the actual EMSA agreement?

7 MR. KANERVA: Well, it's pretty open ended at
8 this point. One company has started off thinking
9 about our stipulated payment approach and said,
10 frankly, they would like the option to be able to
11 meet the same monetary target, but do it through
12 contribution of emissions trading units under the
13 Emissions Market System. You all worked with us on
14 the rules for the Emissions Reduction Market System
15 up here in Chicago.

16 You know, there's a known market value for
17 those trading units that can be determined.
18 Essentially, we can make an equivalent trade-off
19 there, and they can contribute those to the state,
20 and they would have the same monetary value or
21 contribute them to the third-party for that matter.
22 We hadn't really gotten through all that, but that's
23 another possibility.

24 They can wind up having some kind of

1 agreement to achieve an equivalent and working with
2 some other beneficial third-party type of thing.
3 Like they may have an arrangement with a community
4 college in the area. You know, I'm just sort of
5 guessing at this point, but to maybe provide
6 assistance for environmental studies program of some
7 kind. But that would have a known expense to it.

8 Those are getting a little farfetched, but
9 at this point, you know, we haven't ruled out
10 anything in particular.

11 THE HEARING OFFICER: Are you contemplating
12 anything like an indemnity provision where the
13 agency would be compensated for, say, its resulting
14 attorneys' fees or cleanup costs or things along
15 those lines?

16 MR. KANERVA: Not really. We've actually tried
17 to stay away from situations where the agency would
18 be the one that was being given the money, you know,
19 for some pretty obvious reasons. We're trying to
20 keep it more that the money is premarked for some
21 definitive positive purpose, not to be sort of
22 adding funds to the agency's coffer, that type of
23 thing.

24 THE HEARING OFFICER: Okay. It's a terminology

1 question, and it may occur elsewhere, but I think
2 it's in 106.952(f).

3 What is a stakeholder? I mean, is that
4 defined, or should it be defined? Maybe you can
5 flush out what that means.

6 MR. KANERVA: Which specific one was it?

7 MS. HENNESSEY: (F).

8 MR. KANERVA: (F).

9 THE HEARING OFFICER: (F)1 refers to
10 stakeholders.

11 MR. KANERVA: Oh. All stakeholders.

12 Well, the stakeholders will be --
13 actually, our rules refer to it as a stakeholder
14 group. Who those entities are would actually be
15 described officially in the agreement in the EMSA.
16 There will be a list of a proper reference to each
17 one of those members.

18 THE HEARING OFFICER: F1 also seems to
19 contemplate stakeholders -- well, one named or
20 listed in the EMSA or, two, otherwise involved in
21 the development of the EMSA to the pilot project.

22 MR. KANERVA: That means they would have
23 commented during the comment period or participated
24 in the hearings for the project.

1 THE HEARING OFFICER: Okay. So that's how you
2 would determine that. They've actually filed a
3 written. How would participation at hearing be
4 determined? Does that mean they --

5 MR. KANERVA: They were there and registered as
6 a participant and commented.

7 THE HEARING OFFICER: Actually provided
8 testimony or asked questions at hearing?

9 MR. KANERVA: That they registered and they
10 were participants and signed up. She said signed
11 up. I listen to my attorney.

12 THE HEARING OFFICER: So people who attend the
13 hearing sign a form?

14 MS. KROACK: You attend the hearing, and you
15 sign the form that you've attended. Your record is
16 there. We're not requiring that you make a specific
17 comment because your comment might have been covered
18 by somebody else, but you had to register that
19 you've attended or you have to send in a written
20 comment, some record of you participating and
21 showing an interest in this project.

22 THE HEARING OFFICER: And so stakeholders would
23 be citizens or companies or government agencies?

24 MR. KANERVA: Yeah. Our rules have a

1 description of the possible entities that would be
2 part of the stakeholder group.

3 For a lot of reasons, we haven't made that
4 a specific limited set of possibilities. It's just
5 the first few projects we got in early in the game,
6 actually back in XL, convinced us there was no way
7 to do that. These are very location specific. In
8 some cases, you have local civic groups that are
9 intensely involved and want to participate. In
10 other cases, these folks are in an industrial park,
11 and there isn't a neighborhood or civic thing within
12 ten miles of them almost, you know, or at least five
13 miles. So it's quite a mixed bag.

14 THE HEARING OFFICER: The stakeholder can be
15 anyone really?

16 MR. KANERVA: Literally, we give suggested
17 categories here, but really don't limit it to that.
18 So it's anybody that both of us are willing to list
19 in the agreement who we'll think make sense.

20 THE HEARING OFFICER: And do the agency rules
21 require the listing of stakeholders --

22 MR. KANERVA: Yes.

23 THE HEARING OFFICER: In the EMSA?

24 MR. KANERVA: Yes.

1 THE HEARING OFFICER: Is this is related
2 question, and maybe you've just answered it. In
3 106.962(a), my question was, how will it be
4 determined who participated in the public hearing on
5 the sponsors EMSA? I take it your answer to that is
6 whoever signed up at --

7 MR. KANERVA: Right

8 THE HEARING OFFICER: -- hearing --

9 MR. KANERVA: Right, or submitted a written
10 comments.

11 THE HEARING OFFICER: -- or submitted a written
12 comment?

13 MS. KROACK: Correct.

14 THE HEARING OFFICER: Would it make sense to
15 use that language in the notice provision that we
16 were just discussing where you use the language or
17 otherwise involved in the development of the EMSA?
18 Are they the same group of people?

19 MS. KROACK: It was our belief that they were
20 not necessarily the same set of persons. A number
21 of people might attend a hearing and sign the
22 registration sheet, but not really be involved.
23 Individual notice would only have to be given to the
24 stakeholders or persons who otherwise actively

1 participated.

2 In other words, we didn't want -- if 500
3 people showed up at the first one of these hearings,
4 we didn't want to individually serve 500 people. We
5 wanted a public notice to serve as their notice of
6 the hearing except for those people who were
7 directly involved in the development of the EMSA.

8 MS. CROWLEY: Perhaps for the next hearing, to
9 allow Mr. Kanerva to leave when he needs to, you
10 could consider suggesting appropriate substitute
11 language that does define in 106.962(a) how you're
12 figuring out who participated in the public hearing,
13 and you might also want to take a look at the other
14 section that Mr. McGill was just looking at, which
15 was 106.952(f)1 to see whether you can be a little
16 bit more precise in both of those areas.

17 MS. KROACK: We'll do that.

18 THE HEARING OFFICER: Thanks.

19 Just one other question on terminology.
20 In 106.954, sometimes the term sponsor is used, and
21 then other times the term sponsor or owner or
22 operator of the pilot project is used. I was
23 wondering when is the sponsor not going to be the
24 owner or operator of the pilot project, and is there

1 a reason for using the different terminology?

2 MS. KROACK: We have cases where it might be
3 the parent corporation who is the sponsor, but the
4 actual facility is the subsidiary, and we wanted to
5 make sure that we were clear that we could cover
6 both the parent and the actual operator -- the owner
7 or operator.

8 And, for example, if the subsidiary owns
9 it, but they've given operations over to a
10 third-party, then all of those people would be
11 appropriate for that particular section, and there
12 are situations where that occurs. We don't know
13 that it will happen within the EMSAs, but it's
14 possible that a parent could propose a project on
15 behalf of one its subs, and the relationships might
16 be very attenuated.

17 THE HEARING OFFICER: So in 106.954(b), for
18 example, should that just read sponsor or should it
19 also say the owner or operator of the pilot project
20 failed to provide access?

21 MS. KROACK: In this case, we looked at it as
22 the sponsor is responsible for providing access. If
23 the owner or operator were to deny us, for example,
24 we would go to the sponsor and say we've been denied

1 access. It's the obligation of the sponsor to
2 provide the access. We didn't feel adding owner or
3 operator was appropriate there.

4 We tried to add the owner/operator
5 language in cases where we're talking about
6 subpoenaing, you know, who we're going to be allowed
7 to subpoena and whose cost we would have to cover.
8 And we felt that in those cases we shouldn't have to
9 cover the cost of the owner or operator of the
10 project.

11 THE HEARING OFFICER: Now, in 106.954(f), it
12 refers to the sponsor or owner or operator of the
13 pilot project has failed to comply with one or more
14 provisions in its EMSA. Isn't the agreement that
15 the EMSA is just going to be between the agency and
16 the sponsor, or does it make sense to have owner or
17 operator here as well?

18 MS. KROACK: In this case, it would be
19 appropriate to delete owner/operator. The sponsor
20 is the one who has obligated themselves.

21 MS. CROWLEY: Perhaps if you can search the
22 rules for sponsor, owner, or operator and just make
23 sure that it states exactly what you mean in each
24 particular section.

1 MS. KROACK: I agree. We did want
2 owner/operator covered in 954(d) and (e), again,
3 because the violation wouldn't necessarily be the
4 sponsors. It would be the owner/operators. We
5 tried to pick it up, and we, obviously, have a few
6 glitches in using that term. We'll search and check
7 for those.

8 THE HEARING OFFICER: Thanks.

9 Referring to be 106.960(a) regarding
10 motions preliminary to hearing. Should that refer
11 to the board as well as the hearing officer?

12 MS. KROACK: We had envisioned that motions
13 would be handled by the hearing officer throughout
14 this.

15 THE HEARING OFFICER: I'm sorry?

16 MS. KROACK: We envisioned that motions would
17 be handled by the hearing officer and not by the
18 board.

19 THE HEARING OFFICER: Let me ask a related
20 question.

21 In 106.960(g), the hearing officer's
22 authority to rule on motions is very broad. Should
23 it have exceptions addressing matters dispositive of
24 the case as does Section 103.140(e)?

1 MS. KROACK: We wanted to give the hearing
2 officer as much authority to control this case as we
3 could. If it's inappropriate to allow the hearing
4 officer to make motions that are dispositive of the
5 case, then we agree that that change should be
6 made.

7 But we felt that motions to voluntarily
8 dismiss an action on our part would be the kind of
9 motion the hearing officer could rule on. Motions
10 for summary judgment, we hadn't anticipated as being
11 filed necessarily in these types of cases. We're
12 going to have to go direct to hearing, and the board
13 would be making those decisions.

14 We were looking at motions as being other
15 types of motions, motions to require discovery, on
16 motions to extend the hearing date for the reasons
17 discussed. Those would be the kind of things
18 appropriate for the hearing officer.

19 MS. CROWLEY: For the record, we do appreciate
20 that this is a difficult time to be proposing
21 procedural rules to the boards since the board is in
22 the process of reviewing its procedural rules
23 generally. And so we are looking with an eye to
24 both the old rules, the proposed rules, and so

1 forth. So we're just trying to see where you may
2 want to consciously have a difference from what
3 currently is out there.

4 THE HEARING OFFICER: And just a related
5 question. In 106.960(h), there's no exception to
6 the prohibition on interlocutory appeals as we have
7 in 103.140(f). Is there a particular rationale for
8 that in these proposed ruled in the context of
9 involuntary terminations of EMSAs?

10 MS. KROACK: We felt that given the nature of
11 this program, this exception wasn't necessary or
12 required essentially if all rulings of the hearing
13 officer would be reviewed by the board after close
14 of hearing, and we addressed that in a separate
15 section. We felt it just wasn't required in this
16 kind of case.

17 THE HEARING OFFICER: Thank you.

18 Section 106.970, regarding that section,
19 what is the basis for the agency's position that a
20 case may be settled without a board order approving
21 a settlement?

22 MS. KROACK: What section are you referring to
23 again?

24 THE HEARING OFFICER: 106.970.

1 MS. KROACK: Okay.

2 THE HEARING OFFICER: I believe in your
3 statement of reasons you also indicated that the
4 settlement could take place without a board order.

5 MS. KROACK: Again, we looked at this as unlike
6 a permit appeal where we had traditionally
7 determined that we needed to pay a settlement of a
8 permit appeal because we had to have either a new
9 application or a board order directing us. This is
10 a voluntary arrangement.

11 And if we can voluntarily agree with the
12 sponsor as to how to correct the deficient
13 performance when they've convinced there hasn't been
14 deficient performance, we could then agree to settle
15 or they've convinced us that this remedy is
16 appropriate and it isn't as serious as you thought.
17 It was: We reported this, and we made this error,
18 but we're really in compliance. We can settle
19 this. We can submit the settlement to the board.
20 We don't -- board approval isn't necessarily -- it
21 isn't necessary because we don't really have to have
22 the board's authority to enter into the EMSA in the
23 first place.

24 We could at that point agree between the

1 parties as to how to settle the case without
2 necessarily having board approval which is different
3 from a permit appeal or an enforcement of the case.

4 THE HEARING OFFICER: What notice would the
5 board get that that is a resolution of the case? Is
6 that provided for in the rule?

7 MS. KROACK: We say under 106.970 that we'll
8 propose to file with you what we've done and how
9 we've reached the settlement, and then you would --
10 the board would voluntarily dismiss the complaint.

11 MS. CROWLEY: So you would file a motion for
12 voluntarily dismissal --

13 MS. KROACK: Correct.

14 MS. CROWLEY: -- which the board would grant
15 without a hearing?

16 THE HEARING OFFICER: Are there any other
17 questions for the agency?

18 MS. CROWLEY: I've got one more.

19 If we can go back to 106.952(e) which is
20 talking about notice of hearing. At one point a
21 little bit earlier you mentioned that you thought
22 that these EMSAs could affect the SIP. Will we have
23 to comply then with, for instance, Clean Air Act's
24 requirement for a number of days of notice of a

1 hearing, or would it be wise to?

2 MS. KROACK: It would be wise to, but I think

3 we do, I think, by giving notice of hearing.

4 MS. CROWLEY: Okay. Here you give -- you don't

5 suggest how many days notice of hearing the clerk

6 has to give. We generally have to give 21 days

7 notice of a hearing generally. Air hearings are 30

8 days notice. There may be different wrinkles for

9 some of the other program areas.

10 I guess my question is, should we just

11 assume that you want to have as much hearing as is

12 necessary -- hearing notice as is necessary given as

13 required by individual program needs?

14 MS. KROACK: In (e) I said 20 days, but I only

15 specified the parties, and I see the point now. We

16 thought that that would cover the Clean Air Act

17 requirements. Yes. I think we should -- in case

18 these do become supervisions, we should assume that.

19 MS. CROWLEY: And you would intend that the

20 clerk give the same newspaper notice of hearings as

21 it gives for everything else under Section 31?

22 You've omitted the corresponding section.

23 MS. KROACK: We were trying to avoid costly

24 public notice in the newspaper. I mean, I know it's

1 very costly for the board and the action. We were
2 going to give notice of complaint and hearing to the
3 public ten days prior, but maybe that's where we
4 should address the requirement. We should change
5 (f) to 20 days. That covers the public notice to
6 the public. That way the board isn't giving notice
7 as well.

8 MS. McFAWN: Well, one thing -- if I'm
9 understanding Ms. Crowley correctly, with air you
10 need 30, not 20 days. But let's go back a step and
11 make sure that even if these are submitted as SIPS,
12 the EMSAs, I'm not so certain what happens in the
13 case of a hearing determining whether that has to
14 comply with the 30-day notice provision that
15 normally applies to permit appeals and complaints
16 involving the air act.

17 So maybe we need to ferret that
18 information out to know if these have to track Air's
19 time provisions, RCRA's time provisions, that type
20 of thing.

21 MR. KANERVA: We can look into that to see what
22 the answer to that would be. So far, we don't have
23 much indication that the feds are going to be
24 playing very much. And, in fact, we have not talked

1 about some sort of a waiver or adjustment of federal
2 authority in the agreements we've been doing so
3 far.

4 That's an interesting question for EPA --
5 U.S. EPA for that matter. If they get into one of
6 these alternative agreements and they do a
7 site-specific rule or whatever they do, I don't know
8 whether they're going to stick to their same notice
9 provisions or not.

10 MS. KROACK: I agree with you, Ms. McFawn, that
11 we generally don't have to meet notice requirements
12 for enforcement proceedings. For example, if we
13 were to look at this as an enforcement proceeding,
14 there aren't Clean Air Act provisions on public
15 notice of enforcement proceedings. There are public
16 rights to participate, but not really requirements
17 on notice. Notice usually goes to the entering into
18 a permit or granting a permit or a variation which
19 we've met in our Part 187 rules.

20 I hadn't really thought about that
21 submitting this as a SIP provision whether there are
22 any requirements under RCRA.

23 MS. CROWLEY: Well, to the extent that --

24 MS. KROACK: I need to look at that.

1 MS. CROWLEY: To the extent that these things
2 may take the place of variances, they may take the
3 place of rules, my thought would be, to be safe, do
4 we need to give a 30-day notice of hearing to
5 prevent having to hold another hearing four years
6 down the line when U.S. EPA ends up looking at it
7 and deciding just in terms of --

8 MS. KROACK: We really hadn't thought about
9 that. I hadn't thought about it in connection with
10 termination.

11 MS. CROWLEY: Well, particularly air hearings,
12 since they may affect the SIP, and that's the one
13 that leaps out in my mind that we're always
14 hyper-conscious of giving the extra few days notice
15 to avoid any problems at the back end. There may be
16 other program areas.

17 MS. KROACK: I have to talk to the land and
18 water. I have to think about this for air because I
19 would look at it as entering into the EMSA as
20 comparable to the variance. But if you terminate a
21 variance, does that require Clear Air Act to notice
22 provisions? I'm not sure that it does.

23 MS. CROWLEY: As it would affect the SIP, we
24 would be safe and -- probably would routinely be

1 safe and just give the extra few days notice.

2 MS. KROACK: Right. That's a good point. How

3 will giving 30 days notice affect these time

4 frames? Not a problem because you're not going to

5 get an answer until -- if you file this on day one,

6 you've got a four day mailbox rule built into this

7 15 day stance. So that's day 19. If you have to

8 have a hearing --

9 MS. CROWLEY: We cut down the range of

10 potential hearing days.

11 MS. KROACK: Okay. We'll talk about that at

12 the next hearing. We'll think about that and have

13 more of a response or suggestion.

14 MS. McFAWN: Does the agency intent to submit

15 the air-related ones as SIP amendments?

16 MS. KROACK: Only if they affect -- only if the

17 sponsor wants them as a waiver of federal

18 requirement, and if you do that, we'll have to get

19 U.S. EPA involved at the front end. We're not

20 anticipating that that's going to happen at this

21 point, but it could.

22 MR. KANERVA: My preference in this process is

23 to keep the EMSAs separate from any federal

24 authority question. So if we get into a project and

1 someone -- in addition to some alternatives for the
2 state rules or alternatives that would, in fact,
3 push up against the federal one, we're going to say,
4 okay, here's the EMSA. Here's what we can do under
5 state authority. Now, we're willing to sit down and
6 add EPA to these discussions, and they may have to
7 figure out how they would do it. But their
8 authority is going to have to be the basis on which
9 that provision gets dealt with.

10 MS. McFAWN: The companies you're talking to
11 now or the sponsors you're talking to now, are they
12 related to air issues or more water and land?

13 MR. KANERVA: Really all those programs have
14 come up. Air clearly is a player here, but some
15 waste issues have come up, and, interesting enough,
16 a fair number of questions on pretreatment because
17 of so many industrial dischargers in the Chicago
18 area all go into the district, much more so than
19 district discharge.

20 MS. CROWLEY: There's a statutory provision
21 that says right to use a community-owned sewer
22 requires a 30-day notice on certain things, so. . .

23 MS. KROACK: That's true. We took those out
24 for those purposes.

1 THE HEARING OFFICER: I'd like to suggest --
2 it's certainly not required, but it would be helpful
3 if the agency could come up with an errata sheet on
4 proposed changes. That would be great if it was
5 available for the next hearing. But if not, it be
6 helpful to see suggested language changes from the
7 agency at least in public comment.

8 MS. KROACK: We'd be happy to prepare an errata
9 sheet hopefully before the next hearing.

10 THE HEARING OFFICER: Great.

11 MS. KROACK: We may have -- after the next
12 hearing, additional changes.

13 THE HEARING OFFICER: Sure.

14 MS. KROACK: But hopefully the ones we've
15 discussed today we'll have ready for the next
16 hearing --

17 THE HEARING OFFICER: Great. Thanks.

18 MS. KROACK: -- and submit it.

19 THE HEARING OFFICER: Are there any further
20 questions for the agency?

21 Seeing none, I note that no one has signed
22 up to testify on the sign-up sheet. Is there anyone
23 else who wishes to testify today?

24 Seeing no response, I will move on to a

1 few procedural matters to address before we
2 adjourn. As I mentioned earlier, there's one
3 additional hearing scheduled in this matter. That's
4 scheduled of for Tuesday, October 6, 1998, at 1:30
5 p.m. at the board's Springfield office located at
6 600 South 2nd Street, Suite 402.

7 At the end of that hearing, I will set a
8 deadline for filing public comments. The board is
9 presently accepting public comments. Copies of the
10 transcript of today's hearing should be available at
11 the board by October 2, 1998. That's this Friday.
12 Shortly after that, the transcript should be
13 available through the board's home page on the
14 Worldwide Web which is located at
15 www.ipcb.state.il.us.

16 Are there any other matters that need to
17 be addressed at this time?

18 Seeing none, I would like to thank
19 everyone for their participation today. This
20 hearing is adjourned.

21 (Whereupon, these were all the
22 above-entitled proceedings had
23 at this time.)

24

