

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 PROPORTIONATE SHARE LIABILITY No. R97-16

8 (35 ILL. ADM. CODE 741) (Rulemaking-Land)

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14 Proceedings held on October 19, 1998, at 10:00

15 a.m., at the Illinois Pollution Control Board, 600

16 South Second Street, Springfield, Illinois, before the

17 Honorable Cynthia I. Ervin, Hearing Officer.

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Board Member Kathleen M. Hennessey

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Board Member Marili McFawn

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Regulatory Group.

1            E X H I B I T S

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3 NUMBER                            ENTERED

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Hearing Exhibit 17                    10

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Hearing Exhibit 18                    55

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Hearing Exhibit 19                    100

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1 PROCEEDINGS

2 (October 19, 1998; 10:00 a.m.)

3 HEARING OFFICER ERVIN: Good morning. My name is

4 Cynthia Ervin. I am the Hearing Officer in this

5 proceeding originally entitled, In the Matter of:

6 Proportionate Share Liability, 35 Illinois

7 Administrative Code, Part 741, docketed as R97-016.

8 Present today on behalf of the Illinois Pollution

9 Control Board is the presiding Board Member in this

10 rulemaking, Chairman Claire Manning.

11 CHAIRMAN MANNING: Good morning.

12 HEARING OFFICER ERVIN: To her right is Board

13 Member Marili McFawn.

14 BOARD MEMBER McFAWN: Good morning.

15 HEARING OFFICER ERVIN: And to her right is her

16 Attorney Assistant, Chuck King.

17 MR. CHARLES KING: Good morning.

18 HEARING OFFICER ERVIN: To my left is Board Member

19 Kathleen Hennessey.

20 BOARD MEMBER HENNESSEY: Good morning.

21 HEARING OFFICER ERVIN: To her left is her Board

22 Assistant, Richard McGill.

23 MR. MCGILL: Good morning.

24 HEARING OFFICER ERVIN: With us also today on

25 behalf of the Board is Joel Sternstein, who is Board

1 Member Nick Melas' Attorney Assistant.

2 Also with us is Marie Tipsord, Board Member

3 Girard's Attorney Assistant.

4 Just as background, on February 2nd, 1998, the

5 Illinois Environmental Protection Agency filed a

6 proposal to add a new Part 741 to the Board's waste

7 disposal regulations. The proposed rules would

8 establish procedures for the implementation of

9 Proportionate Share Liability provisions of new

10 Section 58.9 of the Environmental Protection Act,

11 established by Public Act 89-443, effective July 1st,

12 1996.

13 In addition to establishing Proportionate Share

14 Liability in environmental actions, Section 58.9 also

15 directed that the Board adopt within 18 months, the

16 effective date of the amendatory act, rules and

17 procedures for determining proportionate share. The

18 statutory deadline was later extended until January

19 1st, 1998 by Public Act 90-484. The last regularly

20 scheduled Board meeting before this deadline is

21 December 17th, 1998. The Board accepted this matter

22 for hearing by order dated February 5th, 1998.

23 To date, four hearings have been held in this

24 matter. This first hearing took place in Springfield

25 on May 4th, 1998. The second hearing was held in

1 Chicago on May 12th, 1998. The third and fourth  
2 hearings were held in Springfield on May 27th and June  
3 10th, respectively.

4 On September 3rd the Board adopted rules to  
5 implement the Proportionate Share Liability provisions  
6 of Section 58.9 for First Notice. Pursuant to Hearing  
7 Officer order, dated September 8, two additional  
8 hearings were scheduled for today and tomorrow.

9 The purpose of these hearings is to allow the  
10 Board to receive testimony from the Agency and other  
11 interested persons on the merits of the Board's First  
12 Notice proposal. The Board has received prefiled  
13 testimony from the Illinois Environmental Protection  
14 Agency, the Illinois Attorney General's Office, and  
15 David Rieser, on behalf of the Illinois Steel Group  
16 and the Chemical Industry Council of Illinois. This  
17 testimony will be taken as if read and marked as an  
18 exhibit to the proceedings. A short summary of the  
19 testimony may be allowed prior to opening the floor  
20 for questions.

21 The prefiled testimony will be presented in the  
22 following order: The testimony of Gary King on behalf  
23 of the Agency; the testimony of Matthew Dunn on behalf  
24 of the Attorney General's Office; and the testimony of  
25 David Rieser on behalf of the Illinois Steel Group and

1 Chemical Industry Council of Illinois.  
2 After the Board hears the prefiled testimony,  
3 anyone else who would like to testify will be given  
4 the opportunity to do so as time allows. This hearing  
5 will be governed by the Board's procedural rules for  
6 regulatory proceedings. All information which is  
7 relevant and not repetitious or privileged will be  
8 admitted. All witnesses will be sworn and subject to  
9 cross-questioning.

10 Please note that any questions asked by a Board  
11 Member or staff member are intended to help build a  
12 complete record for Board's decision and does not  
13 express any preconceived opinion on the matter.

14 Are there any questions regarding the procedures  
15 we will be following today?

16 Seeing none, then I will turn it over to Chairman  
17 Manning or any of the Board Members for any additional  
18 comment.

19 CHAIRMAN MANNING: Good morning. I just want to  
20 especially welcome you all to this, part two of the  
21 Board's hearings regarding procedures for the  
22 implementation of proportionate share provisions that  
23 are now found in the Illinois Environmental Protection  
24 Act.

25 From the beginning of this rule, and I guess even

1 from its legislative genesis, the one thing we all  
2 knew was that this proceeding and this rule was going  
3 to be difficult. Judging from the public comments and  
4 the prefiled testimony that we have received in this  
5 matter since our First Notice opinion went out, is I  
6 think that is one thing we can all agree on, at least,  
7 that this is a proceeding that is difficult.

8 I want you all to know that in the short amount of  
9 time that we have between First and Second Notice we  
10 intend to fully examine all of the concerns raised by  
11 those public comments and in the prefiled testimony.  
12 We intend to do so with open minds and with a concern  
13 for the ultimate workability and legal stability of  
14 this rule and the Agency's and the State's  
15 environmental programs.

16 We specifically thank the Agency for its diligence  
17 in presenting and supporting its proposal, and also  
18 for the rest of you for all of your continued  
19 participation, which we continue to welcome.

20 Thank you, and let's proceed. Anything else from  
21 anyone?

22 HEARING OFFICER ERVIN: We will begin with  
23 Agency.

24 Mr. Wight, do you have any opening comments you  
25 would like to make?



1 MR. WIGHT: No opening statement, just brief  
2 introductions, and then we will go to Gary King's  
3 testimony.  
4 I am Mark Wight. I am an Assistant Counsel with  
5 the Illinois Environmental Protection Agency.  
6 With me today are Gary King, on my immediate left,  
7 who is the Manager of the Division of Remediation  
8 Management within the Bureau of Land.  
9 To my immediate right is Larry Eastep, who is the  
10 Manager of the Remedial Projects Management Section  
11 within the Bureau of Land.  
12 To Larry's right is John Sherrill, who is a  
13 supervisor within the Remedial Projects Management  
14 Section.  
15 Bill Ingersoll has been with us in the past as one  
16 of our witnesses. Bill is absent today, so it will  
17 just be the three gentlemen you see here along with  
18 me.  
19 Gary has prefiled testimony, and I think that what  
20 we will do is -- well, maybe first you would like to  
21 swear in the witnesses and then we will just identify  
22 his testimony as an exhibit and then go from there.  
23 HEARING OFFICER ERVIN: Would the court reporter  
24 swear in the witnesses.  
25 (Whereupon Gary King, Larry Eastep, and John

1 Sherrill were sworn by the Notary Public.)

2 MR. WIGHT: Gary, I am handing you a document that

3 has been marked as Exhibit Number 17. Would you

4 please take a look at that.

5 (Mr. King reviewed the document.)

6 MR. WIGHT: Do you recognize the document?

7 MR. GARY KING: Yes, I do.

8 MR. WIGHT: Could you identify it for the record,

9 please.

10 MR. GARY KING: It is a copy of the prefiled

11 testimony that I submitted in this proceeding.

12 MR. WIGHT: Is that a true and correct copy of the

13 document that was earlier filed with the Board.

14 MR. GARY KING: Yes, it is.

15 MR. WIGHT: Thank you. Does anyone else need

16 copies?

17 HEARING OFFICER ERVIN: Is there any objection to

18 the admittance of this document as Exhibit Number 17?

19 Seeing none, this document will be admitted into

20 the record as Exhibit Number 17.

21 MR. WIGHT: Thank you.

22 (Whereupon said document was admitted into

23 evidence as Hearing Exhibit 17 as of this date.)

24 MR. WIGHT: Gary, if you would like to proceed

25 with your statement.

1 MR. GARY KING: I want to keep, as far as  
2 comments, fairly brief.  
3 What we tried to do with our testimony here is to  
4 outline the -- we tried to, in the amount of time we  
5 had, go through the Board's proposed rule and identify  
6 the issues and concerns as best as we could relative  
7 to things that we would see as far as implementation  
8 issues for us. What we did, you will see in our  
9 attachment, is really we have kind of listed out those  
10 questions and tried to focus on those things that we  
11 thought were confusing, we didn't understand what was  
12 intended, or what the meaning or how it would work.  
13 Then for areas that we thought we understood how it  
14 was supposed to work we tried to comment and address  
15 specifically what we thought the implementation issues  
16 would be rather as to those specific issues.  
17 I was not prepared to go through in any kind of  
18 detail relative to the comments and questions. We  
19 thought they were fairly self-explanatory. But if  
20 there is any questions relative to what we have, I  
21 certainly would be willing to do my best to answer  
22 those.

23 HEARING OFFICER ERVIN: Thank you. Then we will  
24 open it up for questions. I know the Board has  
25 several questions.

1 Is there anyone out in the audience that has

2 questions at this time for the Agency?

3 All right. Then we will begin with the Board's

4 questions.

5 CHAIRMAN MANNING: Obviously, I think in this

6 proceeding we are going to have to hit some nails on

7 the head pretty quickly. One of the biggest issues

8 that I think that we need to deal with is the issue of

9 applicability. We understand the Agency's concern. We

10 understand the concerns raised by the Attorney

11 General's Office. We have interpreted certain

12 provisions in our First Notice opinion and order.

13 My question to the Agency, and anyone else who

14 wants to answer this question, is whether there is a

15 belief out there that applicability itself is better

16 resolved in a quasi-judicial or quasi-judicial

17 capacity where the Board would be dealing with a case

18 before it, as opposed to in this particular

19 rulemaking. In other words, whether the question of

20 applicability is left better for another day and

21 whether it, in fact, needs to be addressed in the

22 rulemaking proposal presented by the Agency. In point

23 of fact, whether we just went forward with the

24 Agency's applicability section, which does not have

25 any interpretation in it, as a matter fact. So that

1 is the question I will leave you with. You don't  
2 necessarily have to answer it today.  
3 I am not sure whether we are left in more of a  
4 quagmire if we leave it open-ended like that. There  
5 has been, I think, an admission, at least on the part  
6 of the Attorney General's Office, that a legislative  
7 fix is necessary to resolve some of the problems. The  
8 Board certainly feels that way. It was pretty evident  
9 in our First Notice opinion. And whether that happens  
10 or does not happen is left to be decided, of course,  
11 by people other than the Board.

12 But in terms of the applicability question, that  
13 is something we threw around internally at the Board  
14 and something we throw out to all of you in terms of  
15 saving the question of applicability for another day.

16 If you have any immediate response on that, Mr.  
17 King, go ahead.

18 MR. GARY KING: You know, we certainly appreciate  
19 the struggle as far as interpretation on this. It is  
20 not one of those things that was entirely clear from  
21 the face of the legislation. It is why, from our  
22 standpoint, we went back and tried to recreate how the  
23 legislative discussion went, recreate how the issues  
24 came up, and look at the legislative history. And  
25 that's why we felt that the Board certainly could

1 resolve the applicability issue by reaching the point  
2 that we suggested.

3 I think what we proposed, particularly with the  
4 errata amendments we had, I think there was some  
5 interpretation there. I think it would resolve things  
6 in a way that wouldn't undermine any efforts as far as  
7 the Agency is concerned with maintaining our  
8 programs.

9 For us, the big issue as far as the Board having a  
10 statement on applicability that didn't -- that did not  
11 undermine our regulatory programs was that was really  
12 the goal. I mean, we wanted to be in a position to be  
13 able to go to the federal government and say, yes, you  
14 can take a very stringent reading of this rule, the  
15 statute, but you should follow the interpretation that  
16 takes a more holistic view of the statute. And that's  
17 what we proposed to the Board and that's what we think  
18 the Board should proceed with.

19 As far as leaving it for another day, I mean,  
20 another day for us is a major consequence, because we  
21 are going to be in a position that, you know, another  
22 day is going to begin a process next year of starting  
23 discussions with the U.S. EPA relative to withdrawal  
24 of some of our program authorities. And that's a  
25 major dooms day for us once we start down that path.

1 So leaving the issue for another day for us is not  
2 a good thing. We want to have something that is --  
3 that will resolve this issue on applicability in a way  
4 that we can maintain programs that we have been  
5 administering for many years.

6 CHAIRMAN MANNING: You realize, of course, that  
7 the Board's resolution would not be the final  
8 resolution anyway, and that whatever we determine in  
9 the rule would be subject to a legal challenge, in  
10 terms of whatever we rule on in applicability one way  
11 or the other anyway.

12 MR. GARY KING: Well, it is like anything that --  
13 any final action that the Board takes or the Agency  
14 takes. I mean, we always recognize that, yes, there  
15 can be a legal review of that decision. But we -- and  
16 I think the Board always tries to make the best  
17 judgment it can given the facts and the law before  
18 it. Regardless of whether there is a legal challenge,  
19 you know, we certainly would argue to the federal  
20 government that it is the -- that it is the Board's  
21 decision that represents what is the law for purposes  
22 of the State of Illinois until there is a court action  
23 that concludes otherwise.

24 It may very well be that, you know, the Board  
25 could be reversed in some kind of court action at some

1 point in the future. I mean, that has happened in  
2 other situations, and we deal with it at that time.  
3 But we always felt that the best interpretation, the  
4 interpretation that was most consistent with what the  
5 legislature intended when they drafted this statute is  
6 what we ultimately came out with as far as our  
7 rulemaking proposal.

8 HEARING OFFICER ERVIN: Do we have any follow-up  
9 to that?

10 BOARD MEMBER HENNESSEY: Do you happen to know,  
11 Mr. King, what the status of the two circuit court  
12 cases that we discussed in our First Notice opinion  
13 is? Or maybe someone from the Attorney General's  
14 Office would know. I am just wondering if those are  
15 in a position to be appealed anytime soon.

16 MS. WALLACE: Those cases were not appealed as far  
17 as I know. So I don't know, other than that, what the  
18 status is.

19 BOARD MEMBER HENNESSEY: Thank you.

20 HEARING OFFICER ERVIN: One of the things the  
21 Board did regarding applicability, as Chairman Manning  
22 has talked about, and as we talked about the  
23 legislative fix, is the Agency aware of any  
24 negotiations or any legislative efforts that are  
25 underway to fix the applicability section? Or have



1 there been any discussions with the U.S. EPA to date?

2 MR. GARY KING: There was the letter, which is  
3 part of the Board's record, from the U.S. EPA. There  
4 have not been any subsequent discussions, you know. I  
5 think one of the reasons why there have not been is  
6 because there is a Board's proceeding still out  
7 there.

8 As far as legislative issues, it would be best  
9 under any circumstance to have a clearer statement of  
10 the legislation, legislative intent relative to the  
11 issue. We would agree with that. There have not been  
12 any efforts to go back and try to negotiate anything  
13 at this point. But, certainly, that is -- there is  
14 potential for that to happen.

15 HEARING OFFICER ERVIN: Thank you.

16 MR. CHARLES KING: I would like to clarify  
17 something that you said earlier. You think it would  
18 be better, one way or the other, that -- you said  
19 before you think it would be better one way or the  
20 other to bring the matter to a head now in this  
21 proceeding, in either direction, rather than to leave  
22 it unresolved to be dealt with later in a contested  
23 case?

24 MR. GARY KING: What I was trying to -- I am not  
25 sure I answered that question directly. What I was

1 trying to do is support the proposal that we presented  
2 as being consistent. I think what we presented was  
3 consistent with the statute and represented good  
4 public policy. I don't know how the Board avoids  
5 making some kind of decision here that -- I guess what  
6 you are indicating is perhaps the Board could simply  
7 put the statutory language in there and then make no  
8 comment as to how it would operate. Is that -- I  
9 think that's what --

10 MR. CHARLES KING: Well --

11 HEARING OFFICER ERVIN: You know, whether or not  
12 sitting in this quasi-legislative capacity is really  
13 the place to be interpreting the applicability  
14 section, and whether or not that actually should be  
15 better done in an adjudicatory contested case.

16 MR. CHARLES KING: Maybe another way to put it  
17 would be from your perspective would it be better to  
18 have it the way it was put in the First Notice  
19 proposal or better to just have no statement at all?

20 MR. GARY KING: It would be better to have the  
21 First Notice statement from our perspective.

22 BOARD MEMBER HENNESSEY: I had one follow-up  
23 question. The U.S. EPA mentioned that -- even in  
24 their public comment they suggested that even if we  
25 had adopted your proposal on applicability there was

1 going to be some delegation problems under some  
2 programs, suggesting that some legislative fix would  
3 be necessary to preserve Illinois' delegated authority  
4 under those programs, even if we adopt the Agency's  
5 proposal.

6 Do you have a comment on that?

7 MR. GARY KING: I think the one issue was the  
8 Underground Injection Control Program, that that was  
9 not covered by the legislation. I think that was one  
10 of the issues that they pointed out, and from --  
11 again, from a practical standpoint, the Underground  
12 Injection Control Program, you know, we have one staff  
13 person who administers that and applies to maybe a  
14 handful of facilities in the State. You know, we  
15 tried to give that program back to the U.S. EPA  
16 several years ago, and we couldn't get them to take it  
17 back.

18 You know, it is a difference between -- from my  
19 perspective, from a management perspective, it is a  
20 big difference between when you are talking about, you  
21 know, a very small program affecting a very limited  
22 number of facilities, as opposed to a very large  
23 program affecting maybe hundreds of thousands of  
24 facilities, which is what the RCRA and the LUST  
25 programs apply to.

1 As far as their issues on the Clean Water Act and  
2 the Clean Air Act, you know, our legal review on that  
3 was they were stretching it quite a bit as far as kind  
4 of the interpretation they were making. We would  
5 certainly argue with them that their interpretation  
6 was over expansive.

7 BOARD MEMBER HENNESSEY: So the only program that  
8 you still see a problem with is the Underground  
9 Injection Program?

10 MR. GARY KING: Right.

11 BOARD MEMBER HENNESSEY: They mention something  
12 about the Safe Drinking Water Act.

13 MR. GARY KING: That's part of the Underground  
14 Injection Control Program.

15 BOARD MEMBER HENNESSEY: Okay.

16 MR. GARY KING: The Underground Injection Control  
17 Program flows out of the Safe Drinking Water Act.

18 CHAIRMAN MANNING: So is that -- I don't  
19 understand. Is that worth getting the legislative fix  
20 for it? Is that what you are saying, it is or isn't  
21 or you don't agree with the U.S. EPA? I guess I am  
22 not following where this is going in terms of the U.S.  
23 EPA's concern that there is a legislative problem  
24 anyway.

25 MR. GARY KING: If they have a concern -- let's

1 just say that the only issue is the Underground  
2 Injection Control Program. And the U.S. EPA was  
3 saying we are going to take that program back because  
4 your legislation relative to the Underground Injection  
5 Control Program is not consistent with federal law and  
6 regulations. You know, we might very well say on that  
7 one that's okay with us. But the same issue is not  
8 true for the RCRA and the LUST programs.

9 BOARD MEMBER HENNESSEY: Of course, it is possible  
10 that even though you disagree with them about the  
11 Clean Water Act and the Clean Air Act, that they are  
12 still going to withdraw delegated authority. I mean,  
13 you don't know what the outcome of that argument is  
14 going to be.

15 MR. GARY KING: That's correct. The argument that  
16 is the most difficult one for us is relative to the  
17 RCRA and the LUST programs. The Clean Water Act, you  
18 know, it comes out of a different -- it is really kind  
19 of hard to see where they are going on some of those  
20 corrective action concerns. Because when you are  
21 talking about the Clean Water Act issue, they are not  
22 really corrective action. You are talking about  
23 control of discharges for the most part.

24 HEARING OFFICER ERVIN: One of the things that the  
25 Board did in its First Notice proposal is it removed

1 the references to pesticides, reasoning that they were  
2 included in the regulated substances under CERCLA.  
3 Can the Agency comment on whether they agreed with  
4 that?

5 (Mr. Wight and Mr. King confer briefly.)

6 MR. GARY KING: In a sense the Board's statement  
7 or the Board's proposal in taking out pesticides is  
8 more favorable to the State than what we had initially  
9 proposed. There are various pesticides that have come  
10 along over the years that have not been included  
11 within the CERCLA definition of a hazardous  
12 substance. You know, so that is -- in essence, it is  
13 a more favorable interpretation to the State.

14 We didn't really talk about it in our comments.  
15 We had included it in our initial proposal because we  
16 sensed that that was the -- that the intention of the  
17 legislature was to deal with that as a whole. There  
18 are -- as I was saying, there are pesticides which are  
19 not included as hazardous substances. Cleanup and  
20 corrective action and cases seeking cleanup of those  
21 pesticides that are not included would not be subject  
22 to the Proportionate Share Liability concepts.

23 HEARING OFFICER ERVIN: Thank you. In your  
24 prefiled testimony you state on page two, under  
25 Section 741.110, the Agency has no objection to the

1 expansion of the definition of remedial action as long  
2 as the Board clarifies that these activities are  
3 remedial action only to the extent that they are  
4 consistent with permanent remedies.

5 For the record, can you explain why you want the  
6 definition to be limited as such to the permanent  
7 remedies at the site?

8 MR. GARY KING: I believe what we are reflecting  
9 on is the definition of remedial action as it is set  
10 forth in the Environmental Protection Act.

11 HEARING OFFICER ERVIN: You were wanting us to  
12 clarify for some reason that -- I think what we did is  
13 we added to the definition of remedial action.

14 (Mr. Wight and Mr. King confer briefly.)

15 MR. GARY KING: What we were focusing on there is  
16 to have remedial action not include removal action.  
17 We were trying to draw that distinction there.

18 HEARING OFFICER ERVIN: Was there a certain -- was  
19 there certain language you wanted us to incorporate or  
20 just to make it clear in the opinion itself?

21 MR. GARY KING: Make it clear in the opinion.

22 HEARING OFFICER ERVIN: Another area that the  
23 Agency seems to have quite a bit of concern in --

24 MR. GARY KING: Just to go back on that. See,  
25 what we are referencing is the fact that there is the

1 definition of remedial action in Section 58.2 and then  
2 there is a definition of remedial action in Section  
3 3.34. The narrowest -- I mean, if you are going to  
4 take the most narrow focus, you would simply use the  
5 definition that is in Section 58.2, but what we wanted  
6 to make sure was that it did not include removal  
7 actions.

8 HEARING OFFICER ERVIN: Okay.

9 MR. CHARLES KING: Currently the way the proposal  
10 is put together it talks about things in terms of  
11 responses which is defined to include removal or  
12 remedial actions. So do you think that is or is not  
13 appropriate?

14 MR. GARY KING: The Board was asking the question,  
15 I think, about whether it should be -- whether it  
16 should be remedial action used, because that is the  
17 term that is carried in 58.9. We felt that given the  
18 direction the Board was headed, with having a more  
19 limited view of the terms there, that for consistency  
20 sake they should not be expanding remedial action to  
21 include removal actions, because they are different  
22 concepts.

23 MR. MCGILL: Would the Agency prefer that the rule  
24 not include removals?

25 MR. GARY KING: Yes.



1 HEARING OFFICER ERVIN: I understand that another  
2 area that seems the Agency has some concern is  
3 information orders precomplaint discovery. The Agency  
4 questions whether it would be subject to  
5 interrogatories and depositions by private parties  
6 seeking to develop their own cases by deposing Agency  
7 project managers. And I think you go on to assert  
8 this would constitute a resource burden on the Agency.

9 Even if the Board did not adopt this rule  
10 regarding precomplaint discovery or discovery before  
11 an action is filed, wouldn't the Agency still be  
12 subject to these deposition by someone arguing that  
13 the Board should apply Supreme Court Rule 224 to our  
14 proceedings, or possibly by a FOIA request?

15 MR. GARY KING: I think one of the issues as far  
16 as applying the Supreme Court rule is the nature of  
17 the limitations on those. I mean, there is  
18 limitations on that rule that are not reflected in the  
19 Board's proposal, which I think would tend to limit  
20 this, the use of this tool as a prelitigation issue.

21 I mean, one of the arguments that I am sure we  
22 would make is that the FOIA process serves the same  
23 purpose as the existing Supreme Court rule and,  
24 therefore, there is really no reason for that existing  
25 Supreme Court rule to be applied to the Agency.

1 We respond to thousands of FOIA requests on an  
2 annual basis, but we have a routine for handling  
3 those. Obviously, if you include the concept of  
4 interrogatories and depositions, that changes things  
5 dramatically from our standpoint in terms of the use  
6 of resources in responding to those requests.

7 HEARING OFFICER ERVIN: You talked about  
8 safeguards from Rule 224 that were not included. Are  
9 you talking about the 60 day period in which one of  
10 these would be viable?

11 MR. GARY KING: Right.

12 HEARING OFFICER ERVIN: If those were included,  
13 would the Agency still have concerns regarding this?

14 MR. GARY KING: I still would have concerns  
15 because, as I was saying, if not for -- if somebody  
16 was just going to argue that the Supreme Court rule  
17 applied in a prefile situation, obviously, we have not  
18 been posed with this question, but I would anticipate  
19 that there is probably some case law out there that  
20 says that in a prefiled situation the way you have  
21 access to what the government has, as far as records,  
22 is through the FOIA process, you know. So we would  
23 still have concerns even with those limitations put  
24 on.

25 MR. CHARLES KING: Under the rule the way the

1 Board has proposed it, before a person can come in and  
2 get an information order they have to file an  
3 affidavit that says that they couldn't get that  
4 information from any other source. So if the  
5 information is available from the Agency through a  
6 FOIA request, wouldn't that preclude someone from  
7 coming in to use that process if they could get the  
8 information that way?

9 MR. GARY KING: Yes. But if their question  
10 relates to what is inside the head of a project  
11 manager, then that FOIA request would not resolve that  
12 issue.

13 HEARING OFFICER ERVIN: Another area of concern to  
14 the Agency is this whole Section 741.125, dealing with  
15 notice to the Agency. Assuming that the rules are  
16 going to cover private enforcement actions, what role  
17 does the Agency want to play in these cases as far as  
18 receiving notice, not receiving notice? Does the  
19 Agency have any opinion or position on what role they  
20 actually want to have in these types of cases?

21 MR. GARY KING: Our biggest concern is that we  
22 don't want the fact that a private action has been  
23 filed to somehow put us in a position where we are  
24 collaterally estopped from raising some issue or  
25 arguing that a different result should obtain in a

1 matter that we are then directly involved with. We  
2 certainly wouldn't want to have somebody say, well, I  
3 provided the Agency notice. The Agency did not  
4 respond. Therefore, the Agency cannot raise the issue  
5 that they are now raising in a subsequent proceeding.

6 HEARING OFFICER ERVIN: What if you would be  
7 collaterally estopped regardless of whether you  
8 received notice?

9 MR. GARY KING: I guess we could be -- I guess  
10 that could be the result. But we certainly don't want  
11 to invite that to be the case.

12 BOARD MEMBER McFAWN: What if that was the  
13 result? Wouldn't you want notice rather than it being  
14 undertaken without any awareness on the Agency's  
15 part?

16 MR. GARY KING: I mean, one of the problems that I  
17 testified to with regards to the notion of  
18 incorporating this third party type case in the rule  
19 was the potential for us now to have our resources  
20 committed to something that was important to the  
21 parties that were involved, but was marginally  
22 important to the citizens of the State in terms of  
23 cleanup and remediation. We certainly don't want to  
24 have proceedings which are going to put the State in a  
25 position where we have to invest resources to avoid

1 some estoppel that then take away from our business of  
2 trying to get sites cleaned up so that public health  
3 and the environment are protected in the State.

4 BOARD MEMBER McFAWN: But, again, would you rather  
5 have a notice or not if collateral estoppel is going  
6 to kick in?

7 (Mr. Wight and Mr. King confer briefly.)

8 MR. GARY KING: I mean, if the choice is you are  
9 going to be estopped no matter what, then we would  
10 rather have the notice. But, I mean, if that's -- but  
11 that's a different conclusion from saying that because  
12 you get the notice you are estopped. So, I mean, if  
13 the conclusion were that you are going to be  
14 collaterally estopped no matter what, then do you want  
15 the notice or not, I guess we want to receive the  
16 notice. We certainly don't want to invite, by the  
17 fact that we received notice, a collateral estoppel  
18 argument that would not otherwise be there.

19 BOARD MEMBER McFAWN: Do you or your lawyers have  
20 any opinion as to whether or not absent a notice of  
21 collateral estoppel it would be applicable?

22 MR. GARY KING: I don't see how it would be. We  
23 are assigned a set of responsibilities that we are  
24 supposed to handle and deal with. I don't think -- if  
25 we did not receive notice, I don't see how we would be

1 collaterally estopped.

2 CHAIRMAN MANNING: Part of the problem, I think,  
3 that we are having with this whole issue of private  
4 cost recovery is that people -- I get the sense that  
5 we all want to sort of shove it under the rug and say,  
6 you know, that's a different issue. You know, from  
7 the Board's perspective we are trying to segue the  
8 private cost recovery and the authority to deal with  
9 private cost recovery and the whole idea of citizens  
10 enforcement actions, and the Act says any person, you  
11 know, that kind of thing, within the SRP program.

12 I guess I am wondering and had some thoughts in  
13 the direction of when the Board originally made its  
14 decision on private cost recovery, it did so before  
15 the SRP program. I am wondering that if there is a  
16 way to sort of segue private cost recovery actions  
17 within the SRP program? In other words, say, if a  
18 person is seeking private cost recovery, they need to  
19 first go through the SRP program, whether that might  
20 not resolve a lot of problems that we are all having  
21 in terms of moving forward the private cost recovery  
22 and yet administering a program in going forward with  
23 clean ups, be they private clean ups or public clean  
24 ups.

25 I guess I throw that out as food for thought and

1 reaction back. This is not to say the Board is  
2 intending to go that way. I just want to be real open  
3 about things that we have discussed, and really sort  
4 of -- I am sensing that there is real tension here  
5 with the idea of the private cost recovery, and the  
6 whole idea of the proportionate share SRP programs.

7 MR. GARY KING: I think that is -- I think you are  
8 correct in seeing that tension there. One of the  
9 things that, as we commented in the rules, is that we  
10 saw that Subpart C is being opened up in a way that  
11 would allow remedial decisions outside of the context  
12 of the Agency dealing with them. And how would that  
13 then affect later on our involvement with those  
14 remedial decisions.

15 When we put the proposal, our proposal together,  
16 we made it clear that that remediation decision was  
17 kind of an up front thing. So I think to the extent  
18 that you are focusing on the fact that if the Agency  
19 has made a remediation decision under Title 17 as part  
20 of the site remediation program up front, before you  
21 get into this private cost recovery action, I think  
22 that would be positive from our standpoint and would  
23 certainly tend to clear up some, if not many, of the  
24 issues that we face.

25 HEARING OFFICER ERVIN: In the Agency's prefiled

1 testimony, you say that you would like it clarified  
2 for the record or that language be added to Section  
3 741.130 to make it clear that documents shedding light  
4 on contribution to the release and share allocation as  
5 well as an occurrence of the release itself were  
6 included.

7 Did you have any particular language you wanted to  
8 offer to achieve this?

9 (Mr. Wight and Mr. King confer briefly.)

10 MR. GARY KING: We don't have any suggested  
11 language right now, but we could offer some as far as  
12 the comments we file.

13 HEARING OFFICER ERVIN: Okay. In your testimony  
14 the Agency also questions whether if the complaint  
15 named two or more parties in an action to compel  
16 remedial action or to recover costs did this  
17 automatically trigger a Subpart B allocation  
18 proceeding, or must there be a specific request  
19 included in the complaint.

20 Does the Agency have an opinion on whether or not  
21 a specific request should be included in every  
22 complaint or was it enough simply just to bring an  
23 action against two or more people seeking to recover  
24 costs or remedial action?

25 MR. GARY KING: We were confused on how this was



1 supposed to operate, particularly -- again, I will  
2 give you an example. I mean, if you have a site where  
3 the harm is nondivisible, and we bring a complaint and  
4 it is focused on two or more defendants, is that now a  
5 proportional share liability case given the fact that  
6 the harm is not divisible. We were confused with how  
7 that would work, as an example in the context of the  
8 proposal.

9 CHAIRMAN MANNING: Could you go further with that  
10 example? What does it mean, the harm is  
11 nondivisible? What situation? Can you throw out  
12 one?

13 (Mr. Wight and Mr. King confer briefly.)

14 MR. GARY KING: One area where nondivisibility  
15 becomes an important concept is where you have an  
16 impact on people in terms of their drinking water. If  
17 you had multiple persons sending a contaminant --  
18 let's just say -- let's take benzene as an example,  
19 because it is a common contaminant. If you had a  
20 number of defendants that had sent benzene to a site,  
21 and that went in the groundwater and now it was  
22 consumed by somebody and it caused harm to them  
23 through the drinking water, you might not be able to  
24 in any way identify, fingerprint from whom that  
25 benzene came from that ended up in somebody's drinking

1 water. And in that case the harm would be  
2 indivisible. You couldn't tell -- you couldn't divide  
3 out and say this person caused the harm, because you  
4 wouldn't know from whom the contamination came from  
5 that actually was consumed.

6 MR. CHARLES KING: In that case wouldn't that --  
7 if the action was brought to regress that harm, that  
8 would not be for remediation for response costs, would  
9 it, so it wouldn't fall under this scheme?

10 MR. GARY KING: I was assuming that it would be  
11 included.

12 MR. CHARLES KING: Well, the -- at the first  
13 hearings and in the initial comments it was argued to  
14 the Board, and I can't remember by who, that the  
15 legislature, by enacting this whole scheme, had  
16 decided as a matter of law or policy that all of this  
17 kind of harm was divisible. So do you have any  
18 comment or response to that?

19 MR. GARY KING: In our proposal we -- the way we  
20 structured our proposal, we dealt with that  
21 divisibility, that issue of not being divisible. That  
22 was just incorporated within the structure of our  
23 proposal. We didn't see that happening with the  
24 Board's proposal. That's why I think it is still an  
25 issue out there.

1 BOARD MEMBER HENNESSEY: The way you address that  
2 was by burden shifting, basically? If someone -- if  
3 the PRP was not able to show what its percentage was,  
4 then it was potentially liable for any unallocated  
5 shares; is that correct?

6 MR. GARY KING: Right.

7 MR. MCGILL: In the example you just gave, the  
8 harm that you are describing as indivisible, are you  
9 referring to the injury to the human or are you  
10 talking about the contamination of the groundwater?

11 MR. GARY KING: In my example I was referring to  
12 the injury to the person who was consuming the  
13 groundwater.

14 MR. MCGILL: You would characterize that as an  
15 action to recover response costs or seek remedial  
16 action?

17 MR. GARY KING: Well, if you have somebody that is  
18 injured or threatened to be injured, then you  
19 certainly want to take action to stop that injury from  
20 occurring.

21 BOARD MEMBER HENNESSEY: Are you really referring  
22 to the cost of supplying them with alternate drinking  
23 water supplies as a response cost, or are you talking  
24 about actually the medical costs?

25 MR. GARY KING: I am talking about doing the

1 corrective action to stop the contamination from going  
2 into the groundwater and thus going into their  
3 drinking water supply.

4 BOARD MEMBER McFAWN: Couldn't that then be  
5 divisible? I mean, couldn't some argue, well, you  
6 were the generator of X amount of gallons of benzene  
7 versus myself who was the generator of lesser gallons  
8 of benzene.

9 CHAIRMAN MANNING: Or time? You have been doing  
10 it for five years, others have been doing it for two.

11 Or is your point that you have to point a finger at  
12 one of three of them who are benzene generators, and  
13 if you can't do that then it is nondivisible.

14 MR. GARY KING: Let's go back to the original  
15 question we focussed on, and that was how is the  
16 Agency filing the complaint. I mean, what are we  
17 facing in that situation. We are not sure how that is  
18 supposed to be handled.

19 CHAIRMAN MANNING: Okay.

20 BOARD MEMBER McFAWN: Well, our question was if  
21 you file it against two or more persons, so it is  
22 presumed that you are going to be filing it against  
23 two or more parties. So doesn't that, under the  
24 language of the statute, mean that it is subject to  
25 proportionate share?

1 (Mr. Wight and Mr. King confer briefly.)

2 MR. GARY KING: What we are trying to clarify with  
3 this question -- I mean, if you look at the Board's  
4 proposed rule under 205, I mean, it says the complaint  
5 may include a request for allocation of proportionate  
6 shares of liability. Well, does that -- if we filed  
7 against two or more, do we still -- is that now  
8 optional that we include it? I mean, what is then  
9 supposed to happen? If we have filed against two  
10 people, is there any kind of defense that has to be  
11 raised or proved?

12 BOARD MEMBER McFAWN: Well, I think that -- maybe  
13 I have lost track of this, but I think our question to  
14 you was do you think you should have to request in  
15 your complaint Proportionate Share Liability be  
16 resolved, or do you think it is just enough that you  
17 have brought it against two persons, that it is  
18 assumed that it would be at issue? Maybe your  
19 attorneys or the Attorney General can assist in  
20 answering this as well.

21 MR. GARY KING: The reason why we phrased the  
22 question in our comments is because we didn't have an  
23 answer, so that's why we were asking the question. We  
24 just didn't --

25 BOARD MEMBER McFAWN: Okay. You don't have any

1 position or preference or anything like that?

2 HEARING OFFICER ERVIN: That's what we were  
3 asking, to see if you did have a position on it or  
4 whether you were just throwing out a question.

5 MR. WIGHT: We are just trying to figure out how  
6 it works, what did you have in mind when you wrote  
7 that.

8 BOARD MEMBER HENNESSEY: But just so we are clear,  
9 I mean, we would like to hear from you on what you  
10 think we should do, if we are going to have this kind  
11 of provision, which should it be a requirement that it  
12 be in the complaint, or is there going to be a  
13 presumption that anytime an enforcement action is  
14 filed against two or more persons that we have a  
15 Proportionate Share Liability proceeding.

16 MR. GARY KING: I guess we will have to try to  
17 reach some comment in our written comments.

18 HEARING OFFICER ERVIN: Okay. Thank you. Moving  
19 on to another section, another area has been the  
20 affirmative defense, what you have to plea, what if  
21 you don't amend. I would like to just give you a  
22 scenario, and if you can tell me if you have any  
23 position on how this should play out.

24 Assume that the Agency brings an enforcement  
25 action against A seeking 100 percent of the cost of

1 the remedial action. And A asserts that the Agency  
2 can't bring the action against them for 100 percent of  
3 the cost, because there is another person, let's say B  
4 out there, who is also liable. The Agency refused to  
5 amend the complaint to include B. We hold a hearing  
6 and later the evidence shows that both A and B are, in  
7 fact, liable.

8 What is the Agency's position, or do you have a  
9 position on what happens to A? Does A escape  
10 liability? Do they not escape liability?

11 MR. GARY KING: Well, I mean, certainly, we would  
12 hope that they do not escape liability based on that.  
13 That would certainly be an inappropriate outcome. I  
14 mean, the fact that in that hypothetical there could  
15 have been many reasons why we chose not to bring an  
16 action against B. One of the reasons might be that we  
17 just didn't feel that we had sufficient proof to bring  
18 an action against B. If it turns out later on that,  
19 yes, B was, in fact, responsible that shouldn't be a  
20 reason for A to escape liability.

21 HEARING OFFICER ERVIN: Does that violate  
22 58.9(a)(1) where you have brought an action against  
23 someone for more than their proportionate share?

24 (Mr. Wight and Mr. King confer briefly.)

25 MR. GARY KING: I mean, if we have taken a good

1 faith action and think there is only one person  
2 liable, I don't know why that should then bar what we  
3 have done initially. I mean, in essence, it is saying  
4 that based on what the evidence was determined at  
5 hearing, you have violated an initial provision and,  
6 therefore, you have no case against anybody. That  
7 just doesn't seem to be correct. If there was some  
8 issue of bad faith, maybe that would be the result.

9 HEARING OFFICER ERVIN: So your result would be  
10 that we would go ahead and apportion whatever we could  
11 to A?

12 MR. GARY KING: Yes.

13 BOARD MEMBER HENNESSEY: Of course, this whole  
14 question could be avoided if you, in your request for  
15 relief, would ask for, in the alternative, 100 percent  
16 of the costs or whatever the Board determines the  
17 proportionate share to be?

18 MR. GARY KING: Yes, I would assume that would be  
19 true.

20 MR. CHARLES KING: Or another possible way of  
21 dealing with that scenario, would it be sufficient at  
22 the end of that proceeding, if the complaint was  
23 amended to conform to the proof, to allege or to seek  
24 a finding of liability for a proportionate share?

25 That's a discretionary amendment, so when you go



1 through the proceeding you can't necessarily be  
2 guaranteed that if you guess wrong and the Board  
3 determines later that there is more than one party  
4 liable that you are going to be able to make that  
5 amendment. But is having that possibility there or  
6 that vehicle enough to potentially save that  
7 proceeding?

8 MR. GARY KING: I suppose that's another option.  
9 I mean, in a sense we are dealing with a fairly  
10 theoretical issue because when we bring cost recovery  
11 cases in these types of proceedings, I was trying to  
12 recall the last time we brought a case where there was  
13 only one respondent. I mean, there is -- just  
14 virtually every time there is two or more defendants.

15 HEARING OFFICER ERVIN: Thank you. In Section  
16 741.225, proof of liability, is it the Agency's  
17 position that this section should be stricken from the  
18 rules?

19 (Mr. Wight and Mr. King confer briefly.)

20 MR. GARY KING: In the context of the Board's  
21 proposal, we think this provision should be stricken.

22 HEARING OFFICER ERVIN: Now, again, is it that you  
23 just don't like this particular provision or that you  
24 don't -- or within the context of what the Board did,  
25 you just don't believe it fits? Is that -- do you

1 think that there should be --

2 MR. GARY KING: Can I answer both on those? What  
3 we were saying in our comments was that, yes, it does  
4 not fit. It does not fit within the context of the  
5 other issues as far as establishing liability.

6 HEARING OFFICER ERVIN: Do you believe that there  
7 should be a liability provision in these rules?

8 MR. GARY KING: Again, within the context of what  
9 the Board has here, I would say no, given the way it  
10 has been structured. We had one within ours, but that  
11 was a given structure to our methodology. But the way  
12 it is structured here I would say no.

13 HEARING OFFICER ERVIN: If the Board does strike  
14 this and deals with -- if the Board does strike this,  
15 then should it also strike all reference to cause or  
16 contributed type liability language throughout the  
17 rules?

18 MR. GARY KING: What you are then really talking  
19 about is transforming this strictly into an allocation  
20 type proceeding.

21 HEARING OFFICER ERVIN: Exactly.

22 MR. GARY KING: I think that would be consistent  
23 with the rest of where things are going.

24 HEARING OFFICER ERVIN: Does the Agency have a  
25 position on whether or not these should just be

1 allocation procedures?

2 (Mr. Wight and Mr. King confer briefly.)

3 MR. GARY KING: Again, within the context of the  
4 way the Board has it structured, we wouldn't see any  
5 real problem to it being just an allocation procedure.

6 HEARING OFFICER ERVIN: In your prefiled testimony  
7 you mention a work agreement, a settlement in the form  
8 of a work agreement. Could you just maybe give us an  
9 idea of exactly what these work agreements are and  
10 what the difference is between a settlement and a work  
11 agreement? It was under Section 741.239.

12 MR. MCGILL: 230.

13 HEARING OFFICER ERVIN: Pardon me. I am sorry.  
14 It is 230.

15 MR. CHARLES KING: Page 11.

16 HEARING OFFICER ERVIN: Towards the end of that  
17 paragraph on page 11.

18 MR. GARY KING: Frequently what we end up with in  
19 settlements are not just an agreement to pay a  
20 percentage of costs or a percentage of anything. It  
21 is an agreement that somebody is going to perform a  
22 specific element of work. Then that work element that  
23 they are going to perform is incorporated into the  
24 settlement. So that's the context that we were using  
25 that phrase there. So if you are looking -- so if you

1 are thinking about a specific type of work agreement,

2 what would be a specific work agreement?

3 HEARING OFFICER ERVIN: Yes. Is this a concept

4 that we need to work into our rules if we are dealing

5 with settlements? You just told me that the work

6 agreements are incorporated in the settlement.

7 MR. GARY KING: What we were concerned about --

8 you mean the way we do it now? We do incorporate work

9 agreements as part of settlements in that you can have

10 a specific PRP or a group of PRPs performing a

11 specific element of work. The concern that we had

12 with 230(a) was that it was very narrow in terms of

13 allowing specific parties to break out and reach

14 settlements relative to their liability. That was our

15 focus and so when we were saying work agreements, it

16 was to support our original comment that this was too

17 committed.

18 MR. MCGILL: Just a follow-up question to that.

19 Does the Agency believe that the State, as

20 complainant, should be able to settle with one

21 respondent even if the other respondents are not

22 parties to the settlement?

23 MR. GARY KING: Yes. That is what we have -- the

24 way we have done that, of course, is there is a

25 settlement presented to -- that settlement is

1 presented either to the Board or to a court, if it is  
2 a court action, and then the court or the Board would  
3 be given the opportunity to agree with that settlement  
4 or not.

5 MR. MCGILL: In that situation, if the Board  
6 eventually allocates a greater share of liability to  
7 the settling party than that party settled for, what  
8 becomes of the shortfall?

9 MR. GARY KING: The shortfall would have to be  
10 absorbed by somebody else, I mean, either the  
11 defendant or the plaintiff, the other defendants or  
12 the plaintiff or the State.

13 BOARD MEMBER McFAWN: Shouldn't it be the party  
14 who agreed to the settlement, the party or parties?

15 MR. GARY KING: Well, if that's the case, then it  
16 really is -- you are really saying that anytime a case  
17 is filed it has to go all the way to the end with  
18 everybody involved. And it really would tend to  
19 impact the ability of people who in good faith want to  
20 terminate their involvement in a proceeding. I mean,  
21 we see that happen a lot of times. A lot of times a  
22 defendant will pay a premium over what he thinks his  
23 liability really is in terms of some proportional  
24 share in order to get out of the proceeding and not be  
25 paying additional transaction costs.

1 BOARD MEMBER McFAWN: Well, in that case the  
2 premium was not used up because of the ultimate  
3 allocation. Wouldn't the windfall then go to the  
4 parties that agreed to the settlement? So don't they  
5 run the risk of either a shortfall or a windfall.

6 MR. GARY KING: That's probably true. I mean,  
7 that's kind of the nature of any settlement, is that  
8 you reach an agreement and you make certain  
9 assumptions and you reach what you think is a fair  
10 conclusion. We normally don't want to see those --  
11 the integrity of that process interfered with by  
12 subsequent order.

13 BOARD MEMBER McFAWN: Well, it does not interfere,  
14 would it? When you settle prematurely the ultimate  
15 conclusion of an action, isn't that a risk normally  
16 run by the federal government, the state government or  
17 any other party settling?

18 MR. GARY KING: Yes, but then you live by it. You  
19 live by the settlement you reach.

20 BOARD MEMBER McFAWN: You do. And wouldn't part  
21 of that settlement be that if you are the party that  
22 reached the settlement and there is a shortfall, in  
23 other words, you settled too cheap, who pays the  
24 difference?

25 MR. GARY KING: If it is a cost recovery case we

1 have already paid that amount. If it is an  
2 enforcement type proceeding, then it would mean that  
3 we either would have to pick up some of the shares of  
4 the remediation or the other defendants may then agree  
5 to pick up that additional amount, or maybe some other  
6 person who wants to proceed and get the site cleaned  
7 up who does not have any liability in regards to it.

8 BOARD MEMBER McFAWN: So that would be a voluntary  
9 assumption.

10 MR. GARY KING: Right.

11 BOARD MEMBER McFAWN: If you didn't have a case  
12 where there was a voluntary assumption of the  
13 shortfall due to a settlement, who should be  
14 responsible for the shortfall; the parties that  
15 settled, except for the party that bought out, the de  
16 minimis parties, for example?

17 MR. GARY KING: I mean, you are saying the  
18 plaintiff then -- I mean, you are saying it is the  
19 plaintiff that bears the burden of the shortfall?

20 BOARD MEMBER McFAWN: If the plaintiff was the one  
21 who entered into the settlement with a defendant or  
22 multiple, in your example, de minimis defendants.

23 MR. GARY KING: I think a plaintiff always has to  
24 bear the potential consequences of the settlement.

25 BOARD MEMBER McFAWN: Okay. That's all I was

1 asking.

2 MR. GARY KING: Okay.

3 MR. MCGILL: So you would not envision in that  
4 scenario imposing the shortfall on nonsettling  
5 respondents who have been allocated their respective  
6 shares at the end of a proceeding?

7 MR. GARY KING: I think that is generally true. I  
8 think there might be some situations where you  
9 subsequently identified some other PRPs who were not  
10 included and should have been included. You know,  
11 they then might pick up that portion. I think your  
12 statement is generally true.

13 MR. MCGILL: Setting aside what a settlement  
14 provision in the rules should contain, do you believe  
15 it is necessary to have a settlement provision in the  
16 rules outside of a Subpart C voluntary allocation?

17 (Mr. Wight and Mr. King confer briefly.)

18 MR. GARY KING: I was just going back and looking  
19 at our original proposal. We didn't have anything in  
20 there like that because we thought that you just --  
21 settlements would just proceed as they would in any  
22 kind of case. I mean, under your normal set of Board  
23 procedures as far as a settlement. So we didn't see a  
24 need for that specific provision.

25 MR. CHARLES KING: In the current proposal, an



1 allocation proceeding is not an adversarial  
2 proceeding, so there won't be necessarily that kind of  
3 complainant, respondent dichotomy when you go in for a  
4 settlement. So it is not as if the complainant could  
5 necessarily just come in and say I have agreed with  
6 respondent X as to what his liability is so,  
7 therefore, he can go out of the proceedings.

8 So in light of that interpretation, does that  
9 change the way you would view the necessity for having  
10 a specific provision about it?

11 Maybe another aspect of that, also, to kind of  
12 build on what Mr. McGill asked, is if a settlement is  
13 going to work out to be -- well, party A and B talk  
14 about and agree that party B will agree to pay up to X  
15 amount, and then they are out of the proceedings, and  
16 if there is a shortfall, party A will pick that up.  
17 Could that be done contractually between party A and B  
18 without having to bring a proceeding about it or get  
19 an order approving that?

20 MR. GARY KING: That happens all the time where  
21 you have parties who will reach agreement as far as  
22 the settlement on these issues without having  
23 litigation.

24 MR. CHARLES KING: Could the State enter into a  
25 contract like that without any Board order?

1 MR. GARY KING: I think that the Attorney  
2 General's Office may want to comment on that, but I  
3 don't think we have done that in the past. I think  
4 they have kind of instructed us that we shouldn't do  
5 that.

6 HEARING OFFICER ERVIN: We will ask them when they  
7 come up.

8 MR. CHARLES KING: Many of these questions will  
9 also be coming their way.

10 BOARD MEMBER HENNESSEY: Just a question. In your  
11 comments you stated that Section 741.230 also may be  
12 contrary to Section 22.2(a) of the Act. Can you  
13 expand on that, please?

14 MR. GARY KING: Well, 22.2(a) allows for  
15 settlements with specified -- there is a specified  
16 procedure that is allowed under there, and we were  
17 concerned that what was being said in 230 was putting  
18 the State in a position where we would not be able to  
19 take advantage of 22.2(a) where it was applicable.

20 BOARD MEMBER HENNESSEY: Are there any specific --  
21 can you point out either now or later in your comments  
22 the specific conflicts that you see?

23 MR. GARY KING: If you look at 230, kind of the  
24 premise is that all parties may agree. Okay. The  
25 premise under 22.2(a)(a), it begins whenever

1 practicable and in the public interest the State of  
2 Illinois shall reach a final settlement with a  
3 potentially responsible party in an administrative  
4 action or civil action, et cetera. So the concept  
5 there is you can reach an agreement with a potential  
6 responsible party. 230 is premised on the fact that  
7 you have to have all of the parties.

8 BOARD MEMBER HENNESSEY: Are there any other  
9 conflicts between 230 and 1022.2(a) that concern you?

10 (Mr. Wight and Mr. King confer briefly.)

11 MR. GARY KING: That was the primary concern that  
12 we had.

13 BOARD MEMBER HENNESSEY: Okay.

14 HEARING OFFICER ERVIN: 741.335, you had some  
15 concerns regarding that particular provision. If the  
16 Board included a requirement that the Board's opinion  
17 would order parties to perform the remediation or pay  
18 the share determined during the proceeding, would that  
19 eliminate your concerns regarding 741.335?

20 MR. WIGHT: I am sorry. Could you repeat that,  
21 please?

22 HEARING OFFICER ERVIN: Sure. You had some  
23 concerns regarding Section 741.335. I was curious  
24 that if the Board, in our rules, included a  
25 requirement that the Board's opinion in a particular

1 case would order a party to perform the remediation or  
2 pay the share determined during the proceeding, would  
3 that eliminate your concerns with this particular  
4 section?

5 Because you raised a question, if it does not  
6 include the order to perform or pay, in what sense  
7 will a party's default be a violation of a Board  
8 order. It is in your testimony on the bottom of page  
9 14. So if we included that in our order, in a  
10 particular case would that --

11 MR. GARY KING: I believe that would resolve that  
12 issue.

13 HEARING OFFICER ERVIN: Okay. Thank you. Are  
14 there any additional questions.

15 MR. MCGILL: Can we go off the record.

16 HEARING OFFICER ERVIN: Sure. Let's go off the  
17 record for just a moment, please.

18 (Discussion off the record.)

19 HEARING OFFICER ERVIN: Let's go back on the  
20 record.

21 Are there any additional questions for the Agency  
22 at this time?

23 MR. WIGHT: Just a second.

24 HEARING OFFICER ERVIN: Sure. I am sorry.

25 (Mr. Wight and Mr. King confer briefly.)

1 MR. GARY KING: We were just taking a brief  
2 conference to talk about my last response.

3 HEARING OFFICER ERVIN: Okay.

4 MR. GARY KING: My last response continues to be  
5 accurate, but we just want to make sure that it is  
6 clear. We prefer the approach that we had outlined in  
7 our proposal as being a more successful resolution of  
8 the issue as opposed to what the Board's approach is.

9 HEARING OFFICER ERVIN: Okay.

10 BOARD MEMBER McFAWN: This is concerning final  
11 orders?

12 MR. GARY KING: Right.

13 HEARING OFFICER ERVIN: Okay. Are there any  
14 additional --

15 MR. GARY KING: It is concerning the event of a  
16 shortfall when there is a default.

17 HEARING OFFICER ERVIN: Okay. Anything else for  
18 the Agency?

19 Mr. Wight, do you have any --

20 MR. WIGHT: No, we have nothing further.

21 HEARING OFFICER ERVIN: All right. I would like  
22 to thank you for your comments and your continued  
23 participation.

24 We will take a ten minute break. After that we  
25 will start with the A.G.'s testimony.

1 (Whereupon a short recess was taken.)

2 HEARING OFFICER ERVIN: Okay. We will go back on  
3 the record.

4 We will now move to the prefiled testimony of  
5 Matthew Dunn, on behalf of the Attorney General's  
6 Office.

7 Would the court reporter please swear in the  
8 witnesses.

9 (Whereupon Matthew Dunn and Elizabeth Wallace were  
10 sworn by the Notary Public.)

11 HEARING OFFICER ERVIN: Ms. Wallace, do you have  
12 any opening comments to make?

13 MS. WALLACE: I just want to enter into the record  
14 the testimony of Matthew J. Dunn, the Chief of the  
15 Environmental Enforcement Division for the Illinois  
16 Attorney General's Office.

17 And is this your testimony?

18 MR. DUNN: Yes, it is.

19 HEARING OFFICER ERVIN: Are there any objections  
20 to the admittance of this document?

21 Seeing none, we will admit into the record the  
22 testimony of Matthew J. Dunn, Chief, Environmental  
23 Enforcement, Asbestos Litigation, Division of the  
24 Office of the Illinois Attorney General's Office, as  
25 Exhibit Number 18.

1 (Whereupon said document was admitted into  
2 evidence as Hearing Exhibit 18 as of this date.)  
3 HEARING OFFICER ERVIN: Thank you. You may  
4 proceed.

5 MR. DUNN: Madam Hearing Officer, Madam Chairman,  
6 Members of the Board, it is my pleasure to be here  
7 today and to weigh in once again on this rulemaking.

8 I can echo the comments of the Agency as to the  
9 time and deliberation that the Board has obviously  
10 spent on this matter. Whereas we, in our initial  
11 proposal, had many months to get something together  
12 and all of that, the Board has digested it and much  
13 more in a relatively short time period. We very much  
14 recognize the amount of effort that has gone into what  
15 is before us.

16 There are a lot of significant issues, many of  
17 which have been framed by the people who work under  
18 the building that I can see out of the corner of the  
19 window here. As we all struggle to move forward on  
20 those issues, we do so in a cooperative spirit to try  
21 to find what is best both from that meaning and also  
22 for the people and the environment of the State of  
23 Illinois.

24 I will refrain this time, as I did when we were --  
25 when I was last in front of the Board in this matter,

1 from going over all of the testimony again. I think  
2 it is probably fair to say that on some of the items  
3 at issue reasonable minds can differ, and they have.  
4 I really would stand upon the testimony that has  
5 been presented, with the fear of opening things too  
6 wide, sometimes you get -- unfortunately, in life  
7 where you get to a point where you are not sure if  
8 something is something you need to be trying to save  
9 and keep it breathing or whether it is time to hang a  
10 do not resuscitate on it. I don't know that we have  
11 quite reached that spot yet in the Attorney General's  
12 Office as far as the legislation that we are all  
13 trying to put meaning to in this rulemaking.  
14 But, certainly, there are some critical issues  
15 that are out there that have been discussed this  
16 morning, and have been discussed extensively both in  
17 what was presented to the Board and in the Board's  
18 First Notice, and what will continue to occupy many of  
19 us in the weeks and months ahead.  
20 With that, we would be happy to address any  
21 questions that the Board Members or others might  
22 have. Thank you.

23 HEARING OFFICER ERVIN: Thank you. Are there any  
24 questions at this time?

25 I know the Board has several. I guess we can



1 begin with applicability, since that has been a very  
2 major issue here.

3 Are there -- are you aware of any legislative  
4 efforts to fix Section 58.9 as far as the  
5 applicability?

6 MR. DUNN: No, I am not, nor is the Attorney  
7 General's Office involved in it.

8 HEARING OFFICER ERVIN: The two Circuit Court  
9 cases that we cited in our First Notice opinion and  
10 order that have dealt with the interpretation of  
11 Section 58.9, are you aware at all of what stage those  
12 are --

13 MR. DUNN: I am. One would be final and period  
14 for appeal passed. If you can refresh me as to the  
15 names, I can -- the non Cook County one, is that one,  
16 I believe, Designer Metal.

17 CHAIRMAN MANNING: Yes, I think so.

18 MR. DUNN: LaSalle County, I believe.

19 BOARD MEMBER HENNESSEY: Midwest Metallics?

20 MR. DUNN: That's the Cook County. If you could  
21 direct my attention to the page in the First Notice, I  
22 can try to --

23 HEARING OFFICER ERVIN: It is on page 15.

24 MR. DUNN: Thank you very much.

25 HEARING OFFICER ERVIN: Illinois versus Designer

1 Metal Products, Inc.. That is LaSalle County. The  
2 other one is Midwest Metallica.

3 MR. DUNN: Thank you. The Designer Metal is --  
4 there is a final order. No appeal has been taken. I  
5 am sure the time has run in that proceeding. Midwest  
6 Metallica remains pending. That was not a final  
7 order. The possibility of appeal remains and is  
8 alive. Although, having said that, the status of the  
9 underlying proceeding is it is not imminent, to say  
10 the least, with respect to when a resolution of that  
11 would become appealable.

12 HEARING OFFICER ERVIN: But no interlocutory  
13 appeal?

14 MR. DUNN: That is correct.

15 HEARING OFFICER ERVIN: Could you speak up? They  
16 are having some problems hearing you in the back.

17 MR. DUNN: I will try to, yes.

18 HEARING OFFICER ERVIN: In your prefiled testimony  
19 you note that the Board's interpretation of the  
20 applicability of Section 58.9 of the Act threatens  
21 Illinois' delegation authority under RCRA, LUST and  
22 the Clean Water Act.

23 We had some questions about the Clean Water Act,  
24 because that is not one -- it is not covered by the  
25 limitations in Section 58.1. But the Agency testified

1 this morning that one of the reasons that they didn't  
2 have concerns with the Clean Water Act was because it  
3 was not really corrective action. Is that why you  
4 have that as listed as one of the reasons why it  
5 threatens the Illinois Clean Water delegation  
6 authority or --

7 MS. WALLACE: The reason we included it is because  
8 the U.S. EPA referenced it in its letter to you when  
9 it commented on the --

10 HEARING OFFICER ERVIN: Is that a problem as a  
11 result of our interpretation or as a result of just  
12 the statute itself?

13 MR. DUNN: I would say the statute itself, yes.  
14 What you get to is the potential that certain  
15 discharges and violations of the Clean Water Act over  
16 time could result in accumulation of materials that we  
17 would rather not have in the bottoms of our streams,  
18 our rivers and our creeks. And it is possible that  
19 not only just ceasing that effluent or discharge  
20 violation, that you also want some type of remediation  
21 to occur. That's where I think it arises.

22 BOARD MEMBER HENNESSEY: Mr. King described that  
23 as kind of a stretch. Would you agree with that?

24 MR. DUNN: You know, as a person working on the  
25 Division of Land, you know, as Gary does more, I am

1 sure they have focused, as have we, on RCRA and LUST  
2 and much more. You would find the number of potential  
3 matters that could be implicated under RCRA and LUST  
4 or impacted much larger than I can see it happening  
5 under a Clean Water Act case.

6 MR. MCGILL: Would the remediation actually be  
7 performed pursuant to the Clean Water Act or its  
8 regulations in your example?

9 MR. DUNN: Yes. The other thing you get into is,  
10 from my chair, is not wanting to give up any possible  
11 authorities. And whether I would use that one first  
12 or have it as my third or whatever, I would hate to  
13 have any of them potentially impacted, whether it was  
14 going to be my third bullet or my first.

15 MR. MCGILL: But you think there may be authority  
16 under the Clean Water Act to require a remediation?

17 MR. DUNN: Yes.

18 HEARING OFFICER ERVIN: Chairman Manning asked the  
19 Agency this question. I guess we will give you an  
20 opportunity to answer, as well. If this is the  
21 appropriate proceeding to determine the applicability  
22 of Section 58.9 and how it interacts with 58.1, or if  
23 it is better left for a contested case?

24 MR. DUNN: I think that it is appropriate  
25 procedurally in this proceeding. I think the Board

1 has to -- I think the Board has to grapple with this,  
2 as it is so central to what the substantive is going  
3 to be.

4 HEARING OFFICER ERVIN: Okay. We have gone over  
5 this before, I think, but in your prefiled testimony  
6 you object to the regulations covering private party  
7 allocation proceedings. Given the language of Section  
8 58.9, as it uses any person, how can the Board exclude  
9 these private enforcement actions from those rules?

10 MR. DUNN: I think where we start, and we very  
11 much echo the Agency on that, and not to in any way  
12 minimize what I know the Board continues to grapple  
13 with, as do we, and in effect, there is created here a  
14 cause of action against the People of the State of  
15 Illinois. And so an issue is raised, in my mind, did  
16 the General Assembly intend that when it undertook  
17 adding 58.9 to our statute. The people, the  
18 taxpayers, are holding the bag for orphan shares. Was  
19 that contemplated? Was it -- it certainly wasn't  
20 debated. And then you throw in the applicability  
21 concerns to a large number of cases and authorities  
22 that the State is involved in.

23 So that was the reason behind the Agency's  
24 proposal trying to allow for some ability there  
25 without going to the extent that a cause of action

1 against the State with the types of consequences which  
2 are not only likely -- not only probable but likely  
3 that the State would have to either get in or run the  
4 risk of being barred in the future in assessments  
5 against the State.

6 The whole cleanup program that the State -- that  
7 the Agency is moving forward could be driven or  
8 threatened to be driven by private parties and their  
9 LUST dispute or whatever, which on the scale of 1 to  
10 100 rates 1 being low, rates down there for the  
11 Agency, compared to some other facility and, yet, the  
12 State has to deal with that or run the risk of having  
13 assessments against the taxpayers.

14 MS. WALLACE: Even if we don't choose to get  
15 involved, we could be brought in as a necessary party,  
16 which has been done in the past, and we could be drawn  
17 into a lot of cases that we don't think we need to be  
18 involved in.

19 HEARING OFFICER ERVIN: Along that same lines  
20 then, if these rules do cover private enforcement  
21 actions or allocation proceedings, should the Agency  
22 receive notice? And the follow-up question, if they  
23 are going to be estopped either way --

24 MS. WALLACE: I think the Agency gave a good  
25 answer to that question. We don't know for sure

1 whether or not we would be estopped from pursuing an  
2 action in the future given the current case law. I  
3 mean, we would make a strong argument that we  
4 shouldn't be, but we don't know for sure what the  
5 result would be.

6 MR. DUNN: I think among the issues there is the  
7 State amenable to sue from the language that is in  
8 58.9. Is that a suit that can be heard before the  
9 Board, or is it something that somehow a legal  
10 impediment that would require it to go to the court of  
11 claims that exists? It is one that you do not see in  
12 my testimony, and we kicked around as we continued our  
13 discussions with the Agency colleagues and within my  
14 office.

15 Is there a requirement of waiver of sovereign  
16 immunity by the General Assembly to allow monetary  
17 assessment to be rendered against the State of  
18 Illinois? And if so, is such a waiver of sovereign  
19 immunity existent in 58.9 by those terms or other  
20 persons, getting the exact words in the right order,  
21 to allow to infer that the General Assembly did want  
22 to create such a cause of action?

23 This has been a very large -- we spent -- in  
24 discussions with SRAC leading to the Agency's  
25 proposal, this was a topic that got a lot of attention

1 from us, and especially from my office, over the  
2 concern that it does create a cause of action against  
3 the State, and that the General Assembly so intends it  
4 should be more definitive than perhaps is in 58.9.

5 CHAIRMAN MANNING: I am not sure where you are  
6 going. Maybe I am just listening too simplistically  
7 here, but how does a private cost recovery action  
8 equate to a cost recovery action against the State?  
9 When we are talking private cost recovery generally we  
10 are talking a private cost recovery against another  
11 private citizen, and it is two private parties and the  
12 State is not generally involved in it. So where are  
13 you going with the sovereign immunity?

14 MR. DUNN: That was the whole 100 percent  
15 allocation part that to the extent a compromise came  
16 out of the SRAC discussions and all of that of, fine,  
17 if it is something that is not going to implicate the  
18 cofferers of the State of Illinois, to where the State  
19 has to come in and have some type of allocation for  
20 orphan shares to where there is going to be an  
21 assessment that the State's monetary liability is X  
22 amount, fine.

23 If it is just two companies, two private  
24 individuals, whatever, A and B, or A through Z, or  
25 whatever, the concern is, and the type of cost



1 recovery matters that my office is involved with from  
2 referrals from IEPA is multiple parties. It is rare  
3 that there is only one. Oftentimes there is dozens.  
4 There have been sites that have had over 1,000.  
5 And without a doubt you run into a certain  
6 percentage that are not around any longer. And in --  
7 maybe those are the bigger type cases than just  
8 successive owners of a gas station in Carlinville or  
9 Litchfield or whatever trying to figure out where they  
10 are with respect to something. So if there was some  
11 way where the orphan issue and the State's liability  
12 under that or that concept was not implicated, then I  
13 think you avoid all of the issues I just raised  
14 regarding sovereign immunity. But if there are  
15 companies that cannot be found, are no longer in  
16 existence, they have been released through bankruptcy,  
17 and that happens, frankly, in the predominant -- in  
18 most of the cases that we have we will have orphans.  
19 BOARD MEMBER McFAWN: But if you have a private  
20 cost recovery action and it is resolved by the Board  
21 and liability is a proximate share being allocated and  
22 there is an orphan, nothing compels the State to pay  
23 that orphan share. Liability is not being held  
24 against the State.  
25 BOARD MEMBER HENNESSEY: I think it is important

1 that -- just following up on that comment -- not to  
2 confuse the issues. I mean, you are talking about the  
3 State possibly having some liability assessed against  
4 it. That is a big issue, and that does raise  
5 sovereign immunity questions. But I think what the  
6 Board's rules contemplated more was the State has an  
7 interest in knowing and trying to minimize an orphan  
8 share. Because even though it is not going to be  
9 legally required to pay an orphan share, if cleanup is  
10 to go forward in some cases the State will voluntarily  
11 pick up an orphan share, in some cases. So the issue  
12 was does the State want to know that these things are  
13 going on so that they can get involved so as to  
14 minimize the orphan share. I think those are two very  
15 different questions.

16 MR. DUNN: The answer to your question is, yes, I  
17 think we do want to know that they are out there.

18 CHAIRMAN MANNING: I think, you know, that's a  
19 good point in that part of our concern with the  
20 private cost recovery actions that come to the Board  
21 is we feel that we are kind of out there alone with  
22 the State not being involved. And we have one private  
23 citizen against another private citizen, and that's  
24 why I raised with Mr. King earlier in his testimony  
25 the idea of perhaps now with the SRP program somehow

1 segueing the private cost recovery actions within the  
2 SRP program and whether we could do that as a Board  
3 procedurally. I don't know whether you heard that or  
4 whether you wish to comment on that.

5 But I think our problem is we are looking at  
6 private cost recovery simply as these are the kinds of  
7 cases that we get, that we think that, for whatever  
8 reason, the Agency may want to know about just  
9 administratively, if for no other reason.

10 Certainly, it wasn't, I don't think, our intention  
11 that they wanted to know about it because of potential  
12 fiscal liability, but rather for the good of  
13 environmental cleanup that is going on throughout the  
14 State to have sort of a broad-based administrative  
15 knowledge of what is going on privately, so that the  
16 public decisions could be made accurately as well.

17 So I guess I am not sure where I am going with  
18 this and what question I am asking specifically, but  
19 we, as a Board, I think, at least I will speak for  
20 myself, felt that if we left the issue of private cost  
21 recovery alone and didn't deal with it in this  
22 rulemaking we would really be leaving a big stone  
23 unturned, and this would not be workable anyway  
24 because we would have the private cost recovery  
25 actions moving forward in a different context.

1 I guess if there is a question there it is simply  
2 to what extent might you want to comment on the Board  
3 moving forward with private cost recovery actions, and  
4 how does it relate to this proportionate share  
5 rulemaking?

6 MS. WALLACE: I think that's a big question, and  
7 we tried to address it in our testimony. We are  
8 uncomfortable with private cost recovery actions for  
9 the reasons that Matt stated. I mean, there is  
10 essentially going to be an allocation done to the  
11 State, because it doesn't go to anybody else. You can  
12 say that it is not something that the State has to  
13 pay, that's true. But in reality nothing will get  
14 done if somebody doesn't pick up the orphan share.

15 So if you have a private cost recovery action, and  
16 it involves a cleanup -- I mean, if somebody spent  
17 money but they need to continue the remediation, and  
18 there is an allocation done that might cover the  
19 entire costs of -- past costs and future costs, there  
20 will be no cleanup if the State does not come in and  
21 pay the share.

22 BOARD MEMBER McFAWN: But there wouldn't be any  
23 cleanup anyhow. I mean, the State has not engaged in  
24 any -- has not chosen this as a site to become  
25 involved in to bring the action. So what the Board is

1 facing is two parties or multiple parties trying to  
2 resolve an allocation and liability and resolve that  
3 for them.

4 CHAIRMAN MANNING: And most of these --

5 BOARD MEMBER McFAWN: And part of it is an orphan,  
6 and now whether those parties do or do not want to  
7 pick up that orphan share, because the State is  
8 absent, is between them.

9 CHAIRMAN MANNING: Most of these cases that we  
10 have seen at the Board do not even involve the State.

11 It is one party purchasing a piece of property that  
12 that party decides to cleanup and seeks to recover  
13 from subsequent owners or whatever the cost of the  
14 cleanup. Those are the kinds of cases the Board is  
15 getting independently of this rule that we had hoped  
16 to deal with altogether in the context of the  
17 proportionate share, because that particular piece of  
18 language, it seems to us, applies to those situations.

19 MS. WALLACE: So do you envision these cases  
20 coming under your rule, these private actions, being  
21 strictly cost recovery with no remedial work at all?

22 BOARD MEMBER HENNESSEY: As I see the statute, and  
23 I think we can't -- we have to deal with this issue  
24 because it could be for remedial action. I can sue my  
25 neighbor if he has contaminated my property and say,

1 Board, order him to clean this up. I mean, even  
2 though people don't -- there is a disagreement, and I  
3 think we said this in the First Notice -- there is a  
4 disagreement whether the Board has authority to do  
5 private cost recovery actions at all.

6 But there didn't seem to be any disagreement that  
7 any citizen of Illinois can bring an action against  
8 any other citizen and require them to perform remedial  
9 action. So we are going to have those cases even if  
10 we suddenly overrule Ostro and those cases and say, we  
11 are not going to get involved in it anymore, we are  
12 still going to have the situations that involve  
13 remedial action. We still have to find what do we do  
14 with this language in 58.9(a)(1) that says in no event  
15 may any person bring an action pursuant to this Act or  
16 require any other person to perform remedial action.

17 I guess that's more of a statement than a  
18 question. But, I mean, that's -- I actually don't see  
19 your testimony really telling us what to do with that.

20 MS. WALLACE: The only thing you can say about it  
21 is it is a limitation on liability. It does not  
22 create liability. So just because it says it in there  
23 does not mean you have to write a regulation to allow  
24 enforcement of something that does not require  
25 enforcement.

1 BOARD MEMBER McFAWN: I guess going back to our  
2 original question, I just want to make sure I  
3 understand this. You agree with the Agency that the  
4 State would rather be on notice that these actions are  
5 occurring?

6 MS. WALLACE: Yes.

7 MR. DUNN: Yes. Just a comment from the earlier  
8 discussion, I think it is fair to say that we both see  
9 these issues arise from our daily work, and as the  
10 work of the Board, in having to deal with private cost  
11 recovery issues, which Chairman Manning pointed out,  
12 the State is not there for them. So we don't have  
13 that as much as a day in and day out proceeding and  
14 issue. Hearing about it and knowing a little bit more  
15 of the context of how the Board is attempting to deal  
16 with it helps me in my understanding of how the issue  
17 gets put out here.

18 MR. CHARLES KING: This might be an appropriate  
19 point to bring up. The settlement question, which was  
20 also discussed with the Agency, if the settlement  
21 mechanism would be if a party wants to settle with  
22 some other party to an allocation proceeding, and they  
23 do -- and they reach an agreement between themselves,  
24 and the party that remains agrees to take any  
25 shortfall of the party that is getting out of the

1 proceeding, could the State -- that would, if -- under  
2 that arrangement, if the State was settling out with  
3 the de minimis parties that could actually result in  
4 an enforceable obligation against the State, as  
5 opposed to just the voluntary assumption of one that  
6 is laying out there. So is that something that the  
7 State could do without a Board order?

8 MR. DUNN: It could, yes.

9 MR. CHARLES KING: I mean, could it be done on the  
10 level of -- could the people in the trenches, so to  
11 speak, be making those decisions and entering into  
12 those contracts?

13 MR. DUNN: The way our office would deal with it  
14 is we would see it more as, you know, resolution of --  
15 the trench people, per our policy, is we would -- it  
16 would go to my level, at least, within the Attorney  
17 General's Office, the Division Chief. It would go  
18 through the Bureau Supervisor to myself, and then  
19 depending upon the particulars of it, it could go  
20 outside of the division higher into the  
21 administration.

22 The reason that that would be something that we  
23 don't do and don't like to do is that having it as a  
24 Board order or having it as a Circuit Court order  
25 makes it -- it raises it up a notch as far as whether



1 it is just an agreement between a couple of parties,  
2 contractual, or now something that has gone through  
3 established procedures within the State of Illinois  
4 and has been approved by a duly created Board and like  
5 that.

6 We get those offers all of the time, well, let's  
7 settle this enforcement case in the back room and  
8 let's not have a consent order. Let's not have a  
9 complaint. We will send you the check and we will  
10 sign a letter saying that we will never do it again  
11 and that kind of thing.

12 As a matter of policy, we do not do it that way.  
13 We go to a public forum. We want -- we believe it is  
14 appropriate that the people know how these matters are  
15 being dealt with and on what terms. And I say that --  
16 it never has or never would, but it is a strong policy  
17 that we would not want to do that.

18 As far as then having two or more parties and one  
19 saying, B, if you pay 25 percent of the total we will  
20 pick up the other 75 percent. Vis-a-vis those  
21 parties, that's fine. An agreement between private  
22 parties, sure. But if A -- if A does not -- is at  
23 some point unable to fulfill its share of it, we don't  
24 then -- we are very cautious of not buying into those  
25 things if the money is not in the bank or in escrow or

1 already there.

2 Generally we would want it to be that all of the  
3 parties are responsible for 100 percent, and the  
4 allocation that is dealt with between them. So we  
5 would look very closely at an indemnification as a  
6 shield for us to pursue B further.

7 MR. CHARLES KING: I guess the context that we  
8 were thinking of when we were describing it is you  
9 have a big proceeding with a bunch of parties and some  
10 of them are, obviously, not in for a significant  
11 share. And they come to you, perhaps in a case that  
12 started with a State enforcement complaint, and they  
13 come to you and they say, look, we want out of here.  
14 We will pay X dollars not to have to worry about this  
15 anymore.

16 Then that, at least -- well, let's just assume  
17 that that agreement couldn't find some other party to  
18 the allocation proceeding who is not settling. So we  
19 are still going to have to go through a proceeding  
20 where people would come in with their information and  
21 the Board would chop it up and assign numbers to  
22 everyone.

23 At the end of that day, if what was assigned to  
24 the party that bought out early is more than what they  
25 actually put in, then under the proposal that we have

1 been talking about, the State could -- if the State  
2 had been the party that settled with them, that would  
3 result in the State actually being liable for that  
4 shortfall.

5 So if I understand what you are saying, then you  
6 would support including a provision in the rules  
7 providing for something like that and making that a  
8 procedural mechanism as opposed to just leaving it to  
9 letters, contracts, and agreements outside of the  
10 Board proceeding?

11 MR. DUNN: Well, I definitely, I think, would want  
12 it dealt with in a proceeding as compared to on the  
13 side. I don't know that I described it because that  
14 there is a liability shift that if the State does a de  
15 minimis deal, as the General Assembly has suggested is  
16 appropriate in 22.2(a), as was discussed earlier  
17 today, and if -- and in all good faith and with the  
18 sanctioning of that settlement it was found that that  
19 was an appropriate consideration for the discharge of  
20 liability to those parties, that it should follow, as  
21 I understand your scenario, that if, in fact, it does  
22 not turn out that way, even though the Board has  
23 accepted that de minimis buy-out, and now that the  
24 State should make up the shortfall, I don't think I am  
25 there yet as to your scenario. I do think it should

1 be done with the Board. And in settlements that we do  
2 in de minimis categories and all of that, it is done  
3 through order. They are all listed. The total amount  
4 that is being paid is put forth. So it is out there.

5 MR. CHARLES KING: Well, the only time that --  
6 well, never mind. Scratch that.

7 BOARD MEMBER McFAWN: Under your scenario, Mr.  
8 Dunn --

9 (Mr. Dunn and Ms. Wallace confer briefly.)

10 BOARD MEMBER McFAWN: Mr. Dunn, under your  
11 scenario were you assuming that the Board had accepted  
12 that settlement, that de minimis settlement?

13 MR. DUNN: I guess I added that to the question  
14 scenario, yes.

15 BOARD MEMBER McFAWN: Okay. If the settlement was  
16 reached and not affirmed by the Board process, how  
17 would you then -- would you assume that the liability  
18 had shifted to the State or not?

19 MR. DUNN: Without further consideration, I can't  
20 answer that.

21 BOARD MEMBER McFAWN: Perhaps in the comments?

22 MR. DUNN: Yes.

23 BOARD MEMBER McFAWN: We would certainly welcome  
24 the Attorney General's opinion on this question.

25 MR. DUNN: Yes.

1 MS. WALLACE: So that is if we entered into a  
2 contractual agreement with de minimis parties outside  
3 of any kind of a Board order?

4 BOARD MEMBER McFAWN: Right. During the process  
5 of a liability and/or proportionate share proceeding  
6 you might enter into such an agreement with de minimis  
7 or other types of parties, and we wonder what the  
8 ramifications are to the State, should that settlement  
9 prove to be a shortfall from the actual share  
10 allocated to the settling party.

11 BOARD MEMBER HENNESSEY: I have a question as to  
12 whether that can even happen under the Act.

13 BOARD MEMBER McFAWN: All right.

14 BOARD MEMBER HENNESSEY: Whether the A.G. can  
15 settle an enforcement case without getting court  
16 approval.

17 MR. DUNN: I think what it comes down to would be  
18 similar, perhaps, to declination of prosecution.

19 CHAIRMAN MANNING: A withdraw of a complaint?

20 MR. DUNN: Or not even filing one. Following --  
21 when I say, you know, in the criminal context, if  
22 somebody is investigated and it is found that the  
23 charges are not warranted, a letter, we decline to  
24 prosecute you at this time.

25 In the situation here, I think what we get down to

1 is that there are only the State's Attorney and the  
2 Attorney General that can file that government  
3 action. So that if the Attorney General determined  
4 that, you know, a resolution outside of a Board  
5 proceeding or outside of a court proceeding and in a  
6 settlement contractual way, I don't believe there is  
7 legal impediment to that. I think the authority is  
8 there, and in the sound judgment of the Attorney  
9 General's Office it is a legal approach to handle  
10 things.

11 BOARD MEMBER HENNESSEY: Okay.

12 MR. DUNN: Just one that has to be cautiously  
13 approached.

14 MR. MCGILL: But once the State files a complaint  
15 with the Board, what is your position on whether --  
16 once the State files a complaint with the Board, do  
17 you think the State can settle with that respondent  
18 without getting Board approval of that settlement?

19 MR. DUNN: Yes. I mean, the State could non sue,  
20 I would assume.

21 MR. MCGILL: So you think it is discretionary as  
22 to whether you get Board approval of that settlement?

23 MR. DUNN: I would say so, yes.

24 MR. MCGILL: In that situation you would --

25 MR. DUNN: Just so that the term settlement,

1 quote, unquote, resolution settlement and however it  
2 would be termed, in whatever form it would be  
3 documented, I think the authority is there. Generally  
4 it would not be a Board settlement, and it wouldn't  
5 have the official nature and the enforceability that  
6 the Act provides to such a document. Which, again, it  
7 is a policy matter that makes that something that is  
8 not our first choice of filling in the blanks on an  
9 out-of-court situation. Again, generally we are -- we  
10 are frequently asked, please, let's not do this  
11 officially. Let's not have a court case. Let's not  
12 have a Board docket number or whatever. And routinely  
13 the answer is that that is not going to happen, and it  
14 is not fitting with the general policy of the office.

15 MR. MCGILL: You view that as a policy decision of  
16 Attorney General's Office?

17 MR. DUNN: I do.

18 MR. MCGILL: In that situation, if the complaint  
19 had been filed with the Board and you wanted to settle  
20 without a Board order approving that settlement, you  
21 would just file a motion to voluntarily dismiss the  
22 enforcement case?

23 MR. DUNN: I think that is a -- I think that  
24 procedurally that is a step that can be taken. And as  
25 to whether and when, the -- I mean, I am confident

1 that the Board is looking at its docket to see that  
2 that does not happen much, if at all, and I wouldn't  
3 expect that to change.

4 MR. MCGILL: Okay.

5 HEARING OFFICER ERVIN: Information orders or the  
6 pre-discovery before an action is filed, I think it is  
7 your position that they shouldn't be used as a tool by  
8 private parties. Can you explain why it should be  
9 limited to the State's use only?

10 MS. WALLACE: Well, we think there is no support  
11 for it under the Act and the Agency's proposal did  
12 mirror CERCLA authority, where there is no private  
13 right for information orders under CERCLA. We also  
14 think, you know, under Section 4 of the Act we do have  
15 an investigative authority. So it would be broadening  
16 those authorities that are already granted to the  
17 State to allow just the State to pursue these kinds of  
18 information orders.

19 HEARING OFFICER ERVIN: But why, exactly,  
20 shouldn't -- you just don't believe that there is  
21 authority for allowing it to be broadened to private  
22 citizens or is that what --

23 MS. WALLACE: That's true, and there is just too  
24 much opportunity for misuse there.

25 HEARING OFFICER ERVIN: You don't think that the



1 procedures that we set out as far as that you have to  
2 file an affidavit with the Board explaining that you  
3 couldn't get the information any other way, and it has  
4 to be related in some respect to remediation or  
5 whatever, that that protects it at all.

6 MS. WALLACE: I wouldn't say it does not protect  
7 it at all. I just think that to -- to give private  
8 parties this type of authority or access to  
9 information without support from the legislature is  
10 something that we are not comfortable with.

11 HEARING OFFICER ERVIN: Regarding the proof of  
12 liability, in your prefiled testimony, you state that  
13 the Board did not include contribution to a release as  
14 a basis of liability. Could you explore that a little  
15 bit more and tell us what exactly -- do you have a  
16 definition of contributed as used in Section 58.9?

17 MS. WALLACE: I don't have a definition for  
18 contributed to, but our real concern, as we stated in  
19 the testimony, is we need to be able to include  
20 generators as responsible parties under Section  
21 22.2(f) of the Act, and they should not be excluded  
22 because the only -- it appears to be the only way that  
23 a person can be liable for a release is if they  
24 proximately caused the release.

25 We are concerned that that could be interpreted to

1 exclude generator defendants. So we think if you  
2 included the language contributed to the release,  
3 which is language that is in Section 58.9, that that  
4 would give us the authority to include generators as  
5 liable persons.

6 MR. CHARLES KING: Do you think we need Section  
7 741.225 in these rules at all?

8 MS. WALLACE: We support what the Agency proposed  
9 to address liable persons, so that is what we would  
10 support.

11 HEARING OFFICER ERVIN: If these rules did just  
12 cover allocation proceedings, would you agree that  
13 that section should be taken out?

14 MS. WALLACE: You know, I hadn't thought about  
15 this before. And I don't know how you can just have  
16 an allocation proceeding without discussing  
17 liability. And I would like to give that further  
18 thought. But I would --

19 CHAIRMAN MANNING: Liability is really dealt with  
20 on a case by case basis then. Liability issues would  
21 be dealt with just like in a regular enforcement  
22 action in a quasi-judicial capacity, as opposed to  
23 having any sort of statement regarding liability and a  
24 procedural rule and, therefore, the proportionate  
25 share rules would become more procedural in nature,

1 less procedurally substantive.

2 MR. CHARLES KING: And then the flip side of  
3 looking at this is how can you have an allocation  
4 until you have got liability to determine. So I guess  
5 that they are connected, but you can't really -- is  
6 there -- or can you think of them without making that  
7 sort of dichotomy there at that point, and what  
8 naturally is going to flow from that distinction as  
9 how to handle it procedurally. That is kind of what  
10 we are trying to wrestle with here.

11 MS. WALLACE: I would like to think about that  
12 some more. I don't know if Matt has any thoughts on  
13 it at this point.

14 HEARING OFFICER ERVIN: That's fine.

15 MR. CHARLES KING: I was just bringing that up,  
16 because if you are going to respond to this in  
17 comments, that is another way of looking at it that  
18 you may want to consider.

19 BOARD MEMBER McFAWN: Mr. Dunn, did you have any  
20 comments on that now?

21 MR. DUNN: I think as a gut reaction, that  
22 liability needs to be addressed in the rulemaking. I  
23 think it is such a fundamental part of any of these  
24 types of cases and then adding, as the General  
25 Assembly did, the proximate cause issue --

1 HEARING OFFICER ERVIN: Could you speak up,  
2 please?

3 MR. DUNN: And then adding the proximate cause  
4 issue in the mix, as is in 741.225, I think getting a  
5 basic initial understanding from the Board on that as  
6 compared to the first case and then the second case  
7 and the third case that arise, as all this was Board  
8 implementation, we are better off having some guidance  
9 now, understanding that there is still going to be  
10 interpretations as this all moves forward. But at  
11 least it is out there. We will look and if we think  
12 of anything different from what I just said we will  
13 put it in writing.

14 BOARD MEMBER McFAWN: We appreciate your initial  
15 comments, and would be most curious if you continue to  
16 look into this question whether or not it is a  
17 judicial question versus regulatory legislative  
18 questions.

19 MR. CHARLES KING: Also, as the attorneys who are  
20 going to be involved in this, do you believe that the  
21 non adversarial allocation proceeding that is outlined  
22 in this proposal is workable?

23 MS. WALLACE: In Subpart C?

24 MR. CHARLES KING: No, in Subpart B now, the way  
25 it is set up in the rules of the First Notice proposal

1 the allocation determination is rather than A versus  
2 B, A has to prove certain things against B to get an  
3 order, everybody who is liable who can be located  
4 comes in with whatever information that they have, and  
5 the Agency can come in with any information that they  
6 have, all that information is put in front of the  
7 Board and then the Board evaluates it all and assigns  
8 liability numbers to everyone. So it is not the same  
9 type of adversarial proceeding that you get in a  
10 liability determination.

11 MR. DUNN: We find it intriguing and one that if  
12 it worked could well streamline the situation, and it  
13 probably could use some streamlining. So I guess we  
14 are optimistic on that.

15 MR. MCGILL: I just had a couple of questions  
16 relating to Section 741.230 on settlements, just by  
17 way of follow-up. Setting aside the issue of what a  
18 settlement provision should contain, does the Attorney  
19 General's Office believe that it is necessary to have  
20 a settlement provision in these rules, and this is  
21 outside of the Subpart C, voluntary allocation.

22 MR. DUNN: If I recall the Agency's testimony  
23 correctly, I think they had thought that the Board's  
24 procedural rules already -- or the general rules deal  
25 with that. I think I would concur with that. A

1 cross-reference or something like that may well work  
2 to the same effect here.

3 MR. MCGILL: And just one other question. I take  
4 it, then, that it would be the Attorney General's  
5 Office position that the State, as complainant, should  
6 be able to settle with one respondent even if the  
7 other respondents are not parties to the settlement?

8 MS. WALLACE: Yes.

9 MR. DUNN: Yes.

10 MR. MCGILL: Thank you.

11 HEARING OFFICER ERVIN: Mr. Dunn, we gave a  
12 hypothetical to the Agency about the Agency brought an  
13 action against A seeking 100 percent of the response  
14 costs, and A raises that there is another person out  
15 there who is liable for response costs. And the  
16 Agency does not want to amend their complaint to  
17 include B.

18 Would you agree with the Agency that A should not  
19 escape liability but, rather, we should just determine  
20 of whatever we could of their proportionate share?

21 MR. DUNN: Yes.

22 HEARING OFFICER ERVIN: You don't think bringing  
23 an action against somebody for 100 percent, when they  
24 are not completely liable, violates Section  
25 58.9(a)(1), which you can't bring an action against

1 someone for more than a proportionate share?

2 MR. DUNN: It does not follow that section. The  
3 word violate is -- it is like no person shall commit  
4 air pollution who are opening burning. It does not  
5 follow it. I think generally once on notice that B  
6 has been identified, we at the Agency are going to  
7 take a hard look at B and figure out whether we  
8 believe under the different codes that we operate  
9 under of good faith pleadings and things like that,  
10 whether B can be brought in. So that the peril is  
11 then that we have to do the case twice. We can deal  
12 with A and get a 35 or a 75 or a 95 percent  
13 allocation, and then have to do it all over again with  
14 B, which I think punishment is the word, but it is  
15 burden enough that the government is going to make  
16 sure that B needs to be there. One of the items that  
17 I had not looked at was whether B could bring a -- I  
18 am sitting here today and I don't know the answer to  
19 that, under the Board's procedural rules.

20 MS. WALLACE: If I might just add, there are  
21 situations where there are a few potentially  
22 responsible parties, but we can't -- we don't have  
23 enough evidence to know whether or not any of those  
24 additional parties contributed to the contamination.  
25 So we couldn't add B if they fell into that category.

1 But then additional information came up later, at some  
2 later date then, obviously, we would pursue them. So  
3 we wouldn't know what -- you would have to figure out,  
4 I guess, what A's proportionate share would be based  
5 on the --

6 HEARING OFFICER ERVIN: They would not escape  
7 liability?

8 MS. WALLACE: If we can prove that they are a  
9 liable party, then the question is what is their  
10 share.

11 HEARING OFFICER ERVIN: Okay.

12 MR. DUNN: I totally concur with that. And  
13 oftentimes you are dealing with companies that have  
14 been bought and sold and merged and acquired, and  
15 there used to be something and now there isn't, and in  
16 the meantime one of them that was the offshoot went  
17 through bankruptcy. And we literally have a tree that  
18 looks like a forest. And those are the types of  
19 issues where I am sure A would say, well, it's a  
20 straight line to B, whereas perhaps we may take a  
21 little closer look at it and be concerned that maybe  
22 the line is interrupted somewhere. So these things  
23 get real complicated real fast and do.

24 MR. CHARLES KING: If those provisions that Ms.  
25 Ervin was talking about in 58.9(a)(1) are



1 jurisdictional, is it enough to save the case if at  
2 the end of it you can move to go back and amend the  
3 complaint to conform to the pleadings of the proof and  
4 to request an allocation, to request rather than 100  
5 percent clean up, their proportionate shares?

6 MR. DUNN: You know for -- just to respond to the  
7 scenario that has several things in there that I will  
8 accept as true, for purposes of it, I think that --

9 MR. CHARLES KING: Well, please feel free to  
10 comment on whether those things are true or not in  
11 your comment.

12 MR. DUNN: I don't see it as jurisdictional at all  
13 and, you know, I would certainly argue that it is the  
14 thought that if the State found 99 or 999 companies  
15 and missed number 1,000 that it could go through a  
16 year's proceeding before the Board, and at the end of  
17 which because somebody found number 1,000, and the  
18 missing receipt in the shoe box, and we did not name  
19 1,000 that a year's worth of work by the Board and the  
20 other 999 companies participants is jurisdictionally  
21 defective.

22 MR. CHARLES KING: No, I don't think that would  
23 raise the jurisdictional problem. The jurisdictional  
24 problem would -- because presumably in that case where  
25 you have filed a complaint against 999 parties, you

1 are seeking each one's proportional share of the  
2 cleanup. The place where it is going to be a problem  
3 is where you are suing one party and they claim that  
4 they are not entirely responsible and you, in good  
5 faith, believe they are, believe that that defense is  
6 bogus and at the end of the day they are going to be  
7 completely liable.

8 And then at the end of the day actually the proof  
9 comes out that there is a finding that, yes, someone  
10 else is responsible and may or may not even know who.

11 But at that point what you have is a complaint that  
12 was filed against that party for more than their  
13 proportionate share of the responsibility. So at that  
14 point that would appear to clearly be what 58.9(a)(1)  
15 says you can't do.

16 Now, at that point, there exists a process to, at  
17 the discretion of the Board or the Hearing Officer,  
18 amend the complaint to conform to the proof. At that  
19 point if you can come in and ask to amend the prayer  
20 for relief and instead of asking them to clean up the  
21 whole thing, ask them to be directed to clean up their  
22 proportionate share, does that make -- does that solve  
23 that problem?

24 MR. DUNN: I think -- obviously, that is out there  
25 in the Supreme Court rules and other places to, one,

1 provide due process and, two, to help to make sure  
2 that justice is done in the proceeding. So is it  
3 helpful? Yes. I don't know that it answers it  
4 entirely. I think that, one, as I have today, I would  
5 argue it is not a jurisdictional issue.

6 I am not sure -- although I understand your  
7 scenario and how you have framed it, I am not sure of  
8 mine having close to 1,000 because still they would  
9 say the State sought that they pay more than, quote,  
10 unquote, their fair share. But another perhaps would  
11 be a catchall I know we do in Circuit Court. I would  
12 have to refresh myself to Board pleadings of such  
13 other further relief as the Board deems appropriate,  
14 as we often do, to just try to leave all potential  
15 options open to where you ask for it all here, Mr.  
16 Attorney General. You also asked us to do what was  
17 right and we will.

18 BOARD MEMBER McFAWN: I think that is what Mr.  
19 King was asking you.

20 I also had a question kind of along the same  
21 lines, and that is, and Ms. Wallace please join in  
22 here because in the past you have helped us on the  
23 pleading questions. We had asked the Agency and would  
24 like your input on this question, as well.

25 If the complaint names two persons to compel

1 remedial action of the cost recovery, does this  
2 trigger the allocation proceeding automatically or  
3 should the complaint request it? Do you have any  
4 thoughts on that?

5 MS. WALLACE: Well, if we think that 58.9 applies  
6 we already address that in our complaint. In our  
7 prayer for relief we say that -- the prayer for relief  
8 says something like make them pay their proportionate  
9 share. So that's how we address it. Now, as long as  
10 we think 58.9 applies, that's how we would address it.

11 BOARD MEMBER McFAWN: Since you do that at the  
12 standard matter, you don't think -- should the Board  
13 have a rule to that effect or --

14 MR. DUNN: If we may put that in our written  
15 comment also.

16 BOARD MEMBER McFAWN: Sure.

17 HEARING OFFICER ERVIN: Are there any additional  
18 questions for the Attorney General's Office at this  
19 time?

20 BOARD MEMBER McFAWN: I have just a couple more.

21 HEARING OFFICER ERVIN: Okay.

22 BOARD MEMBER McFAWN: It is back on the  
23 applicability area that was first talked about. You,  
24 in your prefiled testimony, had said that there must  
25 be a legislative amendment to address the threat to

1 Illinois' delegation authority. That would be at page  
2 one.

3 Would you -- I was not certain. Do you think in  
4 any case that section of the legislative amendment is  
5 going to be needed, whether we go with the Agency's  
6 view of applicability, or the Board's, or even  
7 SRAC's?

8 MR. DUNN: I think that a lot of issues have been  
9 put on the table by Region 5, and that to the extent  
10 that they hold a lot of the cards here, I think, yes,  
11 there is a very good probability that whatever comes  
12 out of all of this, looking at it legislatively, it  
13 will still be necessary.

14 BOARD MEMBER McFAWN: And you think that is  
15 because of the U.S. EPA versus the legislation  
16 itself?

17 MR. DUNN: No, I think it is because of the  
18 legislation.

19 BOARD MEMBER McFAWN: Okay.

20 MR. DUNN: I don't think that the U.S. EPA has  
21 changed the requirements for delegation or what a  
22 state has to have or what the Attorney General has to  
23 be able to certify to. I don't think they have  
24 changed. I think what has changed is the adoption of  
25 58.9.

1 If I could maybe segue, and just as a point of --  
2 it is beyond our prefiled testimony, but point to what  
3 we believe to be an inconsistency of the direction  
4 that the General Assembly has given all of us, if I  
5 could just maybe give a couple citations.

6 First is Section 11 of the Act. The findings of  
7 the General Assembly regarding that the State of  
8 Illinois should obtain a delegated program status for  
9 underground injection control and PDS programs. And  
10 also in Section 20 of the Environmental Protection  
11 Act, Section 20(a)(7) and (8) and (13) and (14). So  
12 20(a)(7), (8), (13) and (14).

13 All three of the provisions I have -- in both, in  
14 11 and 20, the General Assembly said that it is in the  
15 interest of the People of the State of Illinois to  
16 authorize and secure federal approval of hazardous  
17 waste programs, solid waste programs, and 11 for the  
18 Clean Water Programs.

19 The reasonable minds differing here as to whether  
20 applicability and that whole issue, I think, it has  
21 been put forth in the prefiled testimony of others and  
22 the A.G., for that matter. The General Assembly, can  
23 it be fairly said that they intended to, in fact,  
24 overrule and repeal or give no meaning to its prior  
25 findings and its prior directives, in my estimation,

1 to the Agency to go out and get these delegated  
2 programs? Or can it be found that they were ignorant  
3 that that would be a consequence? I would suggest  
4 that they wouldn't be agreeable to something that --  
5 to that big of an issue. Let me just add to the  
6 citations our comments in the prefiled testimony,  
7 because we are taking a look at those sections and how  
8 they would maybe get involved here.

9 CHAIRMAN MANNING: Ms. Wallace, if I might just  
10 develop a little bit your answer to Member McFawn  
11 about the question regarding the prayer for relief.  
12 Your answer was succinctly that when we -- just so  
13 long as 58.9 applies. Just for purposes of the  
14 record, when are those situations -- I mean, it would  
15 be nice if we had a succinct statement on the record  
16 from the Attorney General's Office in looking at these  
17 complaints currently in your interpretation of 58.9,  
18 what are those situations?

19 MS. WALLACE: Well, up until this date we have  
20 always alleged them in cost recovery complaints. That  
21 is what I do. I don't think anyone else does in any  
22 other type of enforcement action.

23 CHAIRMAN MANNING: What do you mean? Just you as  
24 an Assistant Attorney General, and no one else as an  
25 Assistant Attorney General?

1 MS. WALLACE: I am sorry. In cost recovery  
2 actions only do we in our prayer for relief cite the  
3 proportionate share language that is stated in 58.9.

4 CHAIRMAN MANNING: Is that the same as saying it  
5 is the only time that would apply?

6 MR. DUNN: Yes, I think, obviously, the Attorney  
7 General has a view of the applicability provision and  
8 how it carries over to other types of cases and  
9 complaints that we would file under those statutes  
10 RCRA, and LUST primarily. So, obviously, now we have  
11 the Board's view in its First Notice of the  
12 applicability issues. So it is kind of a work in  
13 progress as to how that is going to play. As I  
14 understand the question, is it, does it go there  
15 automatically or does the complainant or respondent  
16 have to ask to go to the allocation? Is that the --

17 CHAIRMAN MANNING: Well, I understood Ms.  
18 Wallace's answer to be that when you believed the  
19 proportionate share kicked in, you would ask for it in  
20 your prayer for relief. So that a determination was  
21 made up front by the Attorney General's Office that,  
22 in fact, 58.9 gets in. And I guess my question was  
23 heretofore before the Board's First Notice opinion,  
24 what were those situations, and I understood the  
25 answer to be you have only had a couple of them and



1 they were strict cost recovery against multiple  
2 parties.

3 MS. WALLACE: No, I didn't say we only had a  
4 couple. But what I do and a couple other people in  
5 our office is just cost recovery actions. Every cost  
6 recovery action that we file we have included this  
7 proportionate share language in our prayer for  
8 relief. As I understand it, that's the only type of  
9 complaint that we would allege Proportionate Share  
10 Liability in.

11 MR. DUNN: I believe that is accurate.

12 BOARD MEMBER HENNESSEY: If I can just -- I think  
13 this was your position before First Notice. If, for  
14 example, you had a party that spilled benzene at the  
15 site and you wanted to either order them to undertake  
16 remedial action -- say you wanted to order them to  
17 undertake remedial action, and you decided to sue them  
18 under 21(a) for some reason, open dumping. And, yet,  
19 that's a situation in which you believe that 58.9 does  
20 not apply; is that correct?

21 MR. DUNN: Yes, that's correct.

22 BOARD MEMBER HENNESSEY: So there is still joint  
23 and several liability for the cleanup of that benzene  
24 even despite 58.9?

25 MR. DUNN: Yes.

1 BOARD MEMBER HENNESSEY: All right.  
2 BOARD MEMBER McFAWN: Now, given that position,  
3 and all these questions are on the applicability, if  
4 the Board could resolve this sitting in its  
5 adjudicatory posture on a contested case or could do  
6 it in this proceeding sitting in its legislative  
7 posture, do you have a preference of how that is  
8 done?

9 MR. DUNN: I think the applicability issue is  
10 central to the rulemaking, and that this is where it  
11 needs, in the first instance, to be dealt with.

12 BOARD MEMBER McFAWN: Okay.

13 HEARING OFFICER ERVIN: Are there any other  
14 questions at this time?

15 Seeing none, I would like to thank you both for  
16 your testimony today and your continued participation.

17 MR. DUNN: I appreciate coming here. Thank you.

18 MS. WALLACE: Thank you.

19 HEARING OFFICER ERVIN: Seeing that it is around  
20 lunchtime, we will take an hour break for lunch and  
21 reconvene at a quarter till 2:00. At that time we  
22 will hear from Mr. Rieser.

23 (Whereupon a lunch recess was taken from 12:40  
24 p.m. to 1:50 p.m.)

25

1           AFTERNOON SESSION

2           (October 19, 1998; 1:50 p.m.)

3    HEARING OFFICER ERVIN: We will proceed with Mr.  
4 Rieser's testimony.

5    Would the court reporter please swear in the  
6 witness.

7    (Whereupon David Rieser was sworn by the Notary  
8 Public.)

9    HEARING OFFICER ERVIN: Ms. Rosen, do you have any  
10 opening statement?

11   MS. ROSEN: No, I am merely here today to -- I am  
12 Whitney Rosen from the Illinois Environmental  
13 Regulatory Group. I will be assisting Mr. Rieser, if  
14 need be, but I won't be testifying. Thank you.

15   HEARING OFFICER ERVIN: Okay. You may proceed  
16 whenever you are ready.

17   MR. RIESER: As a couple introductory remarks, I  
18 was introduced as testifying on behalf of the Chemical  
19 Industry Council of Illinois and the Illinois Steel  
20 Group. In fact, I am testifying on behalf of the Site  
21 Remediation Advisory Committee, or SRAC, although I  
22 have filed an appearance on behalf of the other two  
23 trade associations, my testimony today is here purely  
24 on behalf of SRAC.

25   Now, a copy of my testimony has been marked as

1 Exhibit Number 19. And if I could just do this by

2 myself --

3 HEARING OFFICER ERVIN: Certainly.

4 MR. RIESER: Exhibit Number 19 does represent a

5 true and accurate copy of the testimony that was filed

6 on my behalf. I would ask that it be admitted by the

7 Board.

8 HEARING OFFICER ERVIN: Are there any objections?

9 The testimony from David Rieser will be entered into

10 the record as Exhibit Number 19.

11 (Whereupon said document entered into evidence as

12 Hearing Exhibit 19 as of this date.)

13 MR. RIESER: I, too, am primarily going to stand

14 on the written testimony and be prepared to answer

15 questions, because that seems to be a mode that is

16 working pretty well today. Since I have had the

17 opportunity to listen to the discussions that we had

18 this morning and some other things, there are a couple

19 of sort of primary contextual issues that occurred to

20 me, one of which is that it is important to understand

21 that what we are doing here today with this

22 proportionate share is entirely new. We are blazing

23 new ground.

24 So that means that we can use the models in the

25 past the best we can, but we are doing things that are

1 very different from what we have done before. So what  
2 that meant is that when we work with the Agency, and  
3 by that I mean SRAC, work with the Agency to develop  
4 the initial proposal, we wanted to define something  
5 that was simple, that was workable, and that could be  
6 used as a template or model, if you will, for how  
7 these things could be done.

8 It was intentionally limited because of all of  
9 those things, because we didn't know how it was going  
10 to work in other contexts, and because of the issues  
11 of applicability and how it would apply to other  
12 federal programs. It was made intentionally narrow  
13 and simple to see if it would be workable.

14 The regulated community, on behalf of which I  
15 speak, believes very strongly in proportionate share  
16 and the concept of proportionate share. When we  
17 proposed and adopted the legislation two years ago, we  
18 had an idea in mind of how it would apply, and as we  
19 worked and negotiated with the Agency and the Attorney  
20 General's Office, and been involved in these hearings,  
21 we have obviously gotten a lot more information.

22 There has been a huge amount of information  
23 exchanged. And nothing in that information has  
24 suggested to me that it is not still workable.

25 But I think it is important to keep it -- keep the

1 narrow focus of the initial proposal and use that as  
2 not an experiment exactly, but as a model to see how  
3 this actually plays out. So that is one piece of  
4 context. This is something new, and because it was  
5 new we focused the attempt to work with it on a very  
6 specific set of problems to see exactly how it would  
7 play out in practice.

8 The second thing -- if you wouldn't mind, I am  
9 going to sit over on the other table, because there is  
10 outside noise that is --

11 HEARING OFFICER ERVIN: Sure.

12 MR. RIESER: I can't hear myself talk. Okay.

13 Thanks.

14 The second issue -- the second piece of contextual  
15 information is that all of this is happening in the  
16 context of enforcement actions of adversary  
17 proceedings brought, as we proposed, by the State.  
18 And so it was our expectation that in this process the  
19 people would behave as they typically behave in  
20 adversary proceedings, in other words, they would  
21 challenge each other.

22 They would challenge things that happened. But  
23 they would also try and find resolutions that made  
24 sense based on the legalities, the economics, and  
25 everything else. We tried to provide that those

1 things, the settlements and everything else, would  
2 still happen as they currently happen in trying to  
3 provide mechanisms for those to still play out.  
4 Again, this is something that is an experimental  
5 thing and a new thing that people are doing, and to a  
6 certain extent we knew that we couldn't predict  
7 everything that would happen, but we also knew that as  
8 people worked each individual case, A, different  
9 problems would come up but, B, different solutions  
10 would arise as people found solutions to move the  
11 thing forward.

12 Because I think as David Howe testified, these  
13 cases can be difficult and intractable and for most  
14 people involved, usually everybody involved, they want  
15 to find a solution that works that doesn't involve the  
16 spending of a lot of additional money on  
17 nonremediation type activities.

18 So those are the two -- those are the two things  
19 that I just sort of wanted to emphasize as matters of  
20 context in terms of how we approach these issues. I  
21 want to stand on my testimony. I want to add a couple  
22 of additional items that I didn't address. One would  
23 be Section 741.145, and this has to do with the  
24 reopener.

25 The Board, obviously, had to choose between two

1 different approaches: one, a very specific reopener  
2 in terms of money, and one a very open-ended  
3 reopener. I don't think there is any issue  
4 specifically with the idea of having a reopener tied  
5 to issues of what makes a substantial difference in  
6 the eventual outcome.

7 But the two things that I do think can be somewhat  
8 problematic are the standards that are being used for  
9 reopening. In 741.145(a)(1), you talk about  
10 information that could have been discovered with due  
11 diligence. One of the tensions in all of these things  
12 and one of the tensions always in dealing with  
13 remediation issues with the Agency, you know, in  
14 pretty much any type of setting is how much  
15 information you gather before you actually start going  
16 out and doing the work of remediating a site.

17 You would hate to have a situation -- and it is  
18 certainly the goal of people who are responsible for  
19 cleaning up sites to gather the information that they  
20 think is necessary, which is not always the same  
21 amount of information that the Agency thinks is  
22 necessary, but the people who are doing the work  
23 believe makes sense for the type of remediation that  
24 they plan to do.

25 One would hate to have a situation where their



1 ability to allocate costs or evaluate the issues of  
2 allocation were limited because they didn't do an  
3 incredibly thorough, take samples every ten feet type  
4 of initial investigation solely to meet what might be  
5 interpreted as the due diligence requirements that the  
6 Board has put in here for reopeners.

7 People may be very diligent in terms of the work  
8 that they do to arrive at a remediation solution, but  
9 that may or may not meet the due diligence  
10 requirements of this section. And I think that  
11 something along the lines that was originally  
12 proposed, which was in terms of just sort of the  
13 information that you develop new information at the  
14 end of the process that you didn't have before, which  
15 sort of takes this idea of due diligence out of the  
16 question.

17 Again, you can't get the change unless it is going  
18 to make a substantial difference. But arguing about  
19 whether somebody should have or could have gotten that  
20 information initially strikes me as not being a useful  
21 issue.

22 The second item that I wanted to talk about was  
23 225(b), the language of the proof of liability  
24 section. And I understand there will be questions  
25 coming about whether the Board keeps this liability

1 section in or not. And I will address that broader  
2 question when I get that question.

3 But the thing I want to address specifically is  
4 the Board includes as a standard that people failed to  
5 mitigate a release. I see that as incredibly  
6 problematic, especially when you are dealing in the  
7 context of a new owner of property come into the  
8 property. I think one of the central issues in all of  
9 this, because this is part of the Brownfields bill,  
10 the site remediation act, which was intended to  
11 encourage Brownfields, is that one of the things that  
12 you want and that, we, the regulated community, wanted  
13 out of this situation was that people could buy and  
14 sell property without being as concerned about the  
15 past sins that occurred on the property being visited  
16 upon them.

17 It sets the stage for a new owner being liable  
18 because they didn't do anything about a known problem,  
19 whether it is serious or not. Obviously, if it is a  
20 serious problem, there may well be obligations. But  
21 if it is not a serious problem but they are just not  
22 taking action, that could still be viewed as a failure  
23 to mitigate, and creates a liability. And that puts  
24 us right back where we were before without solving the  
25 problems that proportionate share was designed to

1 solve.

2 The third element, the third issue was the  
3 settlements. And, again, I guess I would like to echo  
4 the discussion that we have already had by the Agency  
5 and the Attorney General's Office, which are that  
6 settlements are a necessary part of this process.  
7 This is intended to happen in an enforcement context.  
8 In an adversary context people ought to be able to  
9 make the decision to settle their cases.

10 And I suppose language is needed in the  
11 regulation, unless it is made very clear that the  
12 Board intends to allow settlements to occur anyway, in  
13 which case I am not sure language as to how those  
14 settlements will occur is necessary. When a  
15 settlement is made, obviously, that puts the --  
16 between one but not all of the parties, it does put a  
17 certain amount of risk on the plaintiff accepting the  
18 settlement, in our case the State of Illinois.

19 But on the other hand, these settlements, when  
20 they occur, are made with huge premiums. Huge is a  
21 relative term, obviously. But there are sizable  
22 premiums that are associated with these settlements,  
23 that are designed to deal specifically with that  
24 risk. And given those types of premiums, the  
25 probability of there being an issue of -- well, let me

1 put it this way. The premium is set to deal with that  
2 specific risk, and so that amount, I assume, will be  
3 sufficient to deal with the possibility that what  
4 liability has been accepted by virtue of the  
5 settlement is not quite enough to take care of -- take  
6 care of things for that group of parties.

7 So I strongly encourage the Board to maintain the  
8 ability, as was originally proposed -- well, it wasn't  
9 part of the proposal. But certainly make the -- draft  
10 the regulations so as not to preclude the possibility  
11 of settlement, because those are what makes this thing  
12 work.

13 That concludes my extemporaneous testimony, but I  
14 am prepared to answer questions about my written  
15 testimony if there are any.

16 HEARING OFFICER ERVIN: Are there any questions  
17 for Mr. Rieser?

18 I guess we will start off with the applicability,  
19 like we have with all of the others.

20 MR. RIESER: Okay.

21 HEARING OFFICER ERVIN: Are you aware of any  
22 legislative efforts that are ongoing as to amend  
23 Section 58.9?

24 MR. RIESER: Well, obviously, the Board has  
25 presented us with a challenge in their First Notice

1 opinion that has to make all of us involved in this  
2 process think about it. But I don't know that we have  
3 gotten out of the thinking about it stage. Some of  
4 the discussions that have been discussed, and there is  
5 only a very light discussion stage, is whether it  
6 might be useful to extend the time for the decision  
7 date in this matter. Because we don't have the time,  
8 and the veto session is not conducive to any type of  
9 significant substantive change of this regulation. So  
10 the initial discussions focused on whether it would be  
11 useful to have additional time so that we can engage  
12 in those discussions in the new session with the new  
13 legislature.

14 Further than that, I don't think anyone can say.  
15 The Attorney General's Office would like to see this  
16 thing change substantially. I am not sure I would  
17 like to see it change substantially, but I certainly  
18 understand, from the Board's order, that there are  
19 issues that need to be dealt with and could be dealt  
20 with. And there may be opportunities, as a result of  
21 that, to focus discussions of legislative change in a  
22 certain way that was not possible before. But other  
23 than some immediate discussions providing additional  
24 time to have those discussions, without the Board  
25 being forced to adopt a regulation that has obviously

1 had a lot of concern from the people that worked on

2 it, there has not been anything specific.

3 Then the other possibility -- I mean -- no.

4 Okay. That's it.

5 HEARING OFFICER ERVIN: Would you agree, though,

6 that even if we adopted, say, your proposal or the

7 Agency's proposal that there still would need a

8 legislative fix to cover, say, the Clean Water Act,

9 the Safe Drinking Water Act, like the U.S. EPA has

10 talked about? Or are you more aligned with the --

11 MR. RIESER: I don't think that -- if our proposal

12 were -- the Agency, in its addendum, kind of -- and we

13 got very close on what the final applicable proposal

14 ought to be. And if that were adopted, I don't think

15 there would be any need for further changes. I agree

16 with Gary that it is a very -- it is a huge stretch to

17 think that the Clean Water Act delegation would be at

18 all threatened by the adoption of this. I mean, it is

19 sort of one thing to lay things out in a letter where

20 the U.S. EPA is being asked to list its concerns. And

21 it is quite another thing to start the process of

22 removing a delegation for a program that really does

23 not specifically direct -- it is not specifically

24 directed at the issues we are dealing with here.

25 So, no, I don't think a need for change would be.

1 And this is a very good example of the desire of the  
2 groups of us who worked on this regulation to focus on  
3 the things that we really thought we could  
4 accomplish. And I think it is -- and to focus on  
5 those programs where we really think this applied, and  
6 to move it away from the programs where we didn't  
7 think it would apply, or if we did we thought there  
8 would be issues that would be raised with the U.S.  
9 EPA.

10 I want to stress, as I did in my testimony, and  
11 was stressed by the comments of the testimony of the  
12 Attorney General's Office, there is no question that  
13 the people who wrote the legislation, if nothing else,  
14 they meant it to be very narrowly focused on the  
15 specific issues of cost recovery, and not to threaten  
16 the delegation of the federal programs. And I don't  
17 think there is -- well, I certainly said in my  
18 comments that -- in my testimony, that I don't -- as a  
19 legal matter, I don't see that the Board is forced to  
20 take a position where it would be contrary to one of  
21 the goals of the Act, which is to allow the State of  
22 Illinois to administer federal programs. So I think  
23 if the Board went back to the initial proposal, as it  
24 has been amended and discussed, then that issue would  
25 not have to be addressed in any legislative change.

1 HEARING OFFICER ERVIN: Do you have a position on  
2 whether or not the applicability issue should be  
3 decided -- is appropriately decided in this rulemaking  
4 or is it more appropriately decided in a contested  
5 case?

6 MR. RIESER: There is no question that it can be  
7 appropriately decided in this rulemaking. And I think  
8 that -- I think it should be. It seems to me if you  
9 are going to do anything in a rulemaking, it is to  
10 decide the extent and scope of the rule, and that's  
11 what we are talking about, and make that clear so that  
12 people don't waste their time bringing things up to  
13 and having a series of motions to dismiss and fights  
14 over whether something applies or doesn't apply. I  
15 think part of the process is to say this is what this  
16 regulation applies to. And that that is just a key  
17 issue to be decided in a regulatory proceeding.

18 BOARD MEMBER McFAWN: But even if we decide in  
19 this regulatory proceeding, if these actions are  
20 brought in the Circuit Court, how will it play there?

21 MR. RIESER: We will find out. I mean, I think  
22 that the -- it was very interesting how the issue of  
23 how the Circuit Court came up and was dealt with. I  
24 think the Circuit Courts tend to give the Board  
25 deference certainly on regulatory matters and always



1 have. And that those of us who have challenged the  
2 Board on regulatory matters have tended to come up  
3 very, very short. And I think that if the Board took  
4 a strong stand and explained stand, that would be an  
5 issue for the Courts to look at in terms of how that  
6 statute would be interpreted.

7 Obviously, they are not bound by the Board's  
8 decision in the context of a case brought to the  
9 Circuit Court. But it would be -- you know, it would  
10 certainly be something that could be presented to them  
11 as support one way or another. And I think that, by  
12 and large, they would find that a Board decision on  
13 this issue, given the Board's expertise in this area,  
14 would tend to be convincing.

15 But, you know, again, anything can happen. We are  
16 dealing with a new program, a new idea. And, again,  
17 what we tried to do is to make it simple and focused  
18 and to the extent it continues to be simple and  
19 focused, I think it has a better shot of working than  
20 if it is boarded and gone on to things that we have  
21 not really thought about how they are going to  
22 integrate into the entire system.

23 BOARD MEMBER HENNESSEY: The Attorney General's  
24 position is that this 58.9 only applies to the types  
25 of sites listed in 58.1 and that it also only applies

1 to cost recovery actions under Section 22.2(f) of the  
2 Act. Do you agree with that?

3 MR. RIESER: No, because it also applies -- it is  
4 not only cost recovery, it is also forcing  
5 remediation. I mean, the language in 58.9 is  
6 certainly broader than simply cost recovery, because  
7 it talks in terms of action to conduct -- it talks in  
8 terms of actions brought to conduct remedial action or  
9 to seek recovery of costs. So it has to have a  
10 broader application than simply cost recovery actions  
11 brought under 22.2(f). On the question of the  
12 continued validity of 22.2(f), given 58.9 but, again,  
13 that's not something that we have to decide. But  
14 certainly 58.9 applies on its face to actions to  
15 require remediation.

16 BOARD MEMBER HENNESSEY: The hypothetical that I  
17 threw out this morning, you have a situation in which  
18 someone has dumped benzene and the State has brought  
19 an action, for whatever reason, under Section 21(a)  
20 alleging that they have engaged in open dumping.

21 MR. RIESER: Uh-huh.

22 BOARD MEMBER HENNESSEY: Would 58.9 apply to that,  
23 assuming that more than one party was responsible?

24 MR. RIESER: Right. I mean, that played out in  
25 kind of a different way. I mean, the -- if you -- if

1 what you had was one person dumping benzene, then  
2 plainly the hazardous regulations and things would  
3 apply and statutory prohibitions that are contained in  
4 the Illinois Environmental Protection Act would apply  
5 directly to that conduct.

6 But suppose what you had was one person dumping  
7 benzene at a site where other people had shipped drums  
8 of benzene and they were stored in lined trenches  
9 which weren't shown to be having any releases or in  
10 which no releases were implicated. Well, the dumper  
11 might be liable for this dumping release, but that  
12 does not mean that all of the generators to that site  
13 are also liable.

14 So it is a -- you know, again, you have to look at  
15 the whole context of the site and the whole fact  
16 situation before you can say this is how it would  
17 apply in any given situation. The idea of this is to  
18 focus that discussion so that the State just can't  
19 say, well, you know, you took stuff -- you know, one  
20 guy dumped benzene, but because you sent a pail of  
21 benzene to the site you are completely liable for the  
22 entire cleanup of all of the drinking water of a town  
23 of 20,000 people.

24 It is designed to get away from that and to be  
25 able to make the judgment that there should be a

1 proportionate liability in response to these types of  
2 issues. So it provides a better way of making those  
3 decisions, in my opinion, a better way of making those  
4 decisions than just saying, hey, anyone who took  
5 anything to that site, they are completely liable for  
6 the entire costs of dealing with that problem.

7 BOARD MEMBER HENNESSEY: Well, just to focus on a  
8 particular issue that I wanted to look at here, which  
9 is you have a situation where parties A and B have  
10 dumped benzene at a site. The State sues A under many  
11 sections of the Act. One of the sections that they  
12 sue them under is 21(a), alleging open dumping.

13 MR. RIESER: Right.

14 BOARD MEMBER HENNESSEY: Would A be able to assert  
15 that 58.9 applies to that particular claim?

16 MR. RIESER: I guess they could assert that, but  
17 whether that would either limit their liability or not  
18 is going to be a factual question that gets decided.

19 To the extent that they have regulatory  
20 responsibilities that they violated, then my previous  
21 testimony was that they have to be responsible for  
22 their regulatory responsibilities under federal law  
23 and we certainly stand by that.

24 But to the extent that is not the end of the  
25 question, then it is not the end of the question. And

1 that is going to have to be decided, again, on a case  
2 by case basis. I don't think -- none of this was  
3 designed to get away from the idea that people are  
4 responsible for their conduct. What it was designed  
5 to do is to encourage -- to create the situation where  
6 they are responsible only for their conduct and not  
7 for the conduct of others.

8 So the real question, the hypothetical that you  
9 propose, in my mind, is not what happens to A. It is  
10 what happens to B and C, who may have taken stuff  
11 there that is not at all related to what A did. And  
12 how do we decide what happens to them.

13 BOARD MEMBER HENNESSEY: Well, I am really looking  
14 at it more narrowly in terms of -- obviously, they  
15 have to comply with a whole bunch of other laws that  
16 relate to how you handle benzene or hazardous waste.  
17 But when we are presented with that kind of claim and  
18 there is a motion to dismiss or the -- because A  
19 asserts that B should have been brought in, 58.9(a)(1)  
20 applies. I mean, do you have a position as to whether  
21 that would be -- as you understand the Act, because I  
22 think these are questions that are likely to come up.

23 MR. RIESER: Well, I -- again, I don't think the  
24 fact that there are other people involved, and this  
25 goes into a lot of different issues, joinder and other

1 things like that. The fact that there are other  
2 people involved, does not deprive the State of the  
3 authority to go after individual parties. But I think  
4 what it does require is that State has to identify and  
5 decide what people did and to start the process that  
6 the Board finishes of saying this guy did this, this  
7 person did that, this other person did this other  
8 thing and, therefore, that is what they are  
9 responsible for.

10 That is what we are going to try to make them do,  
11 and that's what they are responsible for doing.  
12 Instead of saying we don't have to do that, it is just  
13 enough that C sent a pail of benzene there, therefore,  
14 they are responsible for cleaning up this entire  
15 drinking water problem because C is Caterpillar and  
16 they have lots of money. It is to look at the whole  
17 thing, the whole situation, and allocate  
18 responsibility among responsible parties in a way that  
19 is proportionate to their activities at the site. And  
20 it is not designed to get one or the other, quote, off  
21 the hook from their regulatory responsibilities.

22 Again, how that is going to play out is going to  
23 be incredibly fact specific. And it is going to be  
24 the job of everyone involved to bring the facts to the  
25 Board and the Board has to make a decision. But it is

1 designed to spread the responsibility fairly and  
2 equitably in a way that is commensurate with what  
3 people actually did.

4 BOARD MEMBER McFAWN: So Proportionate Share  
5 Liability does apply to that fact scenario? Just  
6 spread it around?

7 MR. RIESER: Well, again, because we are assuming  
8 that there is more than one person involved.

9 BOARD MEMBER McFAWN: That was the scenario that  
10 she gave you.

11 MR. RIESER: Right. When there is more than one  
12 person involved in the situation then proportionate  
13 share can apply. Whether it applies to any person to  
14 the same extent it is going to depend on what that  
15 person has alleged to have done. I think we have been  
16 very clear in saying that if what that person did was  
17 violate RCRA regulations by improper disposal, that  
18 person is liable for their violations of the RCRA  
19 regulations.

20 BOARD MEMBER McFAWN: And is that person only  
21 liable for cost recovery and remedial action?

22 MR. RIESER: They would be -- as a RCRA violator  
23 they would have remedial responsibilities under the  
24 RCRA framework.

25 BOARD MEMBER McFAWN: And if the action was

1 brought under open dumping would they have --

2 MR. RIESER: Excuse me.

3 (Mr. Rieser and Ms. Rosen confer briefly.)

4 MR. RIESER: I am going to have to put together a

5 better response for that in comments, because 21(a) is

6 not a federally driven requirement. And I think our

7 ideas on these things is that we want to protect, we

8 need to protect -- we believe it was important that --

9 again, the SRAC believe that it is important to

10 protect the federal programs, but just because the

11 State can -- I am going to use the verb concoct,

12 although that is not entirely fair.

13 In theory, under a statutory theory for alleging a

14 violation does not mean the proportionate share would

15 not apply. That is a double negative, as well. This

16 is why I want to do this in comments. Because I think

17 that there are situations where you could identify a

18 statutory violation, and I wouldn't want proportionate

19 share to be unavailable to those people.

20 I think the statutory violation issue is tied

21 directly to those statutes that are involved in

22 administering the federal programs. And to the extent

23 that they are not involved in administering the

24 federal programs, I have a slightly different -- I

25 think there ought to be a slightly different way of



1 approaching those. Whether that plays out or not, I

2 would have to look at it more carefully.

3 BOARD MEMBER McFAWN: I will be interested to read

4 it.

5 MR. RIESER: Okay.

6 HEARING OFFICER ERVIN: We will give you the same

7 opportunity that we gave everyone else regarding what

8 has to be included in a complaint. Do you need or do

9 you have a position on whether or not you need to

10 explicitly request -- should it be included in the

11 complaint that you are seeing Proportionate Share

12 Liability or is it enough that you just bring an

13 action against two or more people?

14 MR. RIESER: I think it is enough to bring an

15 action against two or more people. I think whether it

16 is alleged specifically as part of the complaint, it

17 is part of the law that we are dealing with. And the

18 method of resolution that has been identified by the

19 legislature is specifically proportionate share. So

20 whether or not it is alleged, that is the legal --

21 that's the legal method of resolution.

22 So I -- in my mind, that is not a huge issue,

23 because that has to be how it is resolved, whether it

24 is described in the complaint or not.

25 HEARING OFFICER ERVIN: Mr. Rieser, from your

1 testimony, is it your position that Proportionate  
2 Share Liability can never be raised as an affirmative  
3 defense?

4 MR. RIESER: No, of course, not. It is that it  
5 doesn't have to be. Again, the affirmative defense  
6 issue goes against something that we proposed, and was  
7 one of the central issues in our debate before the  
8 Board. And that had to do with the burden of proof.  
9 When I hear the term affirmative defense, what my  
10 automatic assumption is is that someone who has the  
11 burden -- affirmative defense has the burden of  
12 proving that defense.

13 And at least in my review of the Illinois  
14 Environmental Protection Act, it is indicated that  
15 when the legislature required somebody to present an  
16 issue as an affirmative defense they were very  
17 specific in saying that. And that without that  
18 specificity, you couldn't really assign to somebody  
19 this issue as an affirmative defense. I testified to  
20 before, and what I still maintain is that it is the  
21 State's burden to prove what people's liability is.

22 And when I say liability it is -- I don't draw  
23 distinctions between liability and allocation in  
24 proof, what people's responsibility is at a given  
25 site. That's the State's burden to prove. I

1 understand, from my review of the Board's order, that  
2 the Board appeared to carve out and limit the extent  
3 to which -- I should say the level of proof that  
4 needed to be presented by an individual who had the  
5 burden of an affirmative defense.

6 But what is not clear to me is the -- it is not  
7 clear to me that that burden can truly be limited in  
8 the way that these things turn out. Because I could  
9 see -- the Board appeared to be saying, and this is a  
10 question that I have, and that I think I expressed in  
11 my testimony, that all that person who is asserting an  
12 affirmative defense needed to show is that were other  
13 people involved.

14 But I can certainly see situations where the State  
15 would say, well, it is not enough just to show that  
16 there were other people involved, that there were  
17 prior owners or other generators. You have to show  
18 what they did, because the regulation, the proposed  
19 regulation talks in terms of alleging and proving what  
20 other people did. Well, that may not have to be their  
21 specific share. The Board was specific about saying  
22 that.

23 But, certainly, you are getting into a situation  
24 where to assert -- to take advantage of what the  
25 legislature has said is a limitation on the State's

1 power in this area, you now have to prove what other  
2 people were doing at a site. Then that, in my mind,  
3 goes well beyond the way things ought to be. I mean,  
4 I think that it is one thing if -- you know, it is one  
5 thing if you have to say what you did at a site which,  
6 again, I have an issue with.

7 But, obviously, people are going to be bringing  
8 forward this information. But to also have to show,  
9 have to assert what other people did at the site, in  
10 my mind, brings it back to being a joint and several  
11 liability situation where the PRP always had the  
12 burden of disproving what it did and proving what  
13 everybody else did. And I think this was designed to  
14 get away from that.

15 CHAIRMAN MANNING: What, then, is the legal  
16 obligation of any given respondent when proportionate  
17 share is appropriately raised in any proceeding before  
18 us?

19 MR. RIESER: Well, they have to answer the  
20 allegations that are raised against them. I mean, it  
21 is no different than any other enforcement case.  
22 Remember, that is what we are talking about. We are  
23 talking about an enforcement case. Just because we  
24 are dealing with issues relating to cost recovery or  
25 remediation makes it no less of an enforcement case.

1 They have to respond to the allegations that are  
2 made by the State. And they are entitled to -- they  
3 are entitled to the burdens that are imposed upon any  
4 plaintiff in any action to force somebody to do  
5 something that they don't think they have to do.

6 MR. CHARLES KING: Well, let's explore that.  
7 Suppose the allegations are you proximately cause a  
8 release and, therefore, we want you to clean it up.  
9 Now, until someone establishes that someone else was  
10 involved in that release, proximate share liability  
11 doesn't even enter into it, does it?

12 MR. RIESER: But see, it doesn't happen in a  
13 vacuum. These cases are not brought in an information  
14 vacuum where there is only one person and no one knows  
15 what is going on. As has been testified by the State,  
16 A, these actions are not brought very often. B, they  
17 are brought after long -- typically long and involved  
18 investigations of given sites to identify potentially  
19 responsible parties. C, one of the key issues that  
20 the State raised in support of the idea that the  
21 shifting of the burden of proof, was the necessity to  
22 force people to come forward with information that is  
23 already resolved by the Board's requirement that  
24 people bring that information to the floor from the  
25 time the complaint is filed. So --

1 MR. CHARLES KING: But in the --

2 MR. RIESER: Excuse me. So it is not the

3 situation that the State --

4 MR. CHARLES KING: But you are not responding to

5 the --

6 HEARING OFFICER ERVIN: Wait. Let him finish.

7 MR. RIESER: Excuse me. But it is not the

8 situation that the State has no information, and the

9 only way it can do anything is by going out and suing

10 the one person that knows about it. It has a fair

11 amount of information. It may not have all of the

12 information, but it has a lot of information, because

13 it does not -- these things don't happen without that

14 level of information being available.

15 MR. CHARLES KING: Well --

16 MR. RIESER: So it is up to the State to review

17 that information, and make decisions in its own mind

18 about who did what, and to prove those allegations.

19 BOARD MEMBER McFAWN: Mr. Rieser, if the State

20 knew about other parties, and it only named one in

21 this type of action, wouldn't that be a breach of good

22 faith pleading?

23 MR. RIESER: Again, I don't think that happens. I

24 mean, as was --

25 BOARD MEMBER McFAWN: Okay. I think what he is

1 trying to say is if it happens, if you have a client,  
2 and an action like this is brought against your  
3 client, and it is only your client that is named, and  
4 your client thinks to itself, wait, there were other  
5 people at this site, what would they do?

6 MR. RIESER: Well, obviously, they would bring  
7 that information -- they would bring that information  
8 forward.

9 BOARD MEMBER McFAWN: As a defense?

10 MR. RIESER: Sure, but that's a different -- it is  
11 different to say what are you going to do to defend  
12 yourself than saying you have an affirmative duty.  
13 They could also make the decision to stand on -- to  
14 stand on the pleadings, to stand on the facts, and  
15 say, you know, when it comes time for a trial the  
16 State, you know, only proves that you brought one --  
17 you know, what did you really do. Well, I brought one  
18 pail and it is just like a massive site.

19 I mean, in my mind, again, we get back to the fact  
20 that this is an adversary system where people are  
21 going to be fighting tooth and nail over this stuff in  
22 the normal course of things in bringing things  
23 forward. But that is a different issue than what is  
24 the quantum of proof necessary to prove the case.

25 BOARD MEMBER McFAWN: I agree that those are two

1 different issues.

2 MR. RIESER: So that's the difference, in my mind,  
3 between that, bringing the information forward as part  
4 of your defense, and having an affirmative defense  
5 that you have to plead and prove in order to take  
6 advantage of Proportionate Share Liability.

7 BOARD MEMBER McFAWN: But if you have an  
8 affirmative defense, where does it say you have to  
9 prove the other person's share?

10 MR. RIESER: Well, because that -- that is my  
11 reading of what the Board had. 741.210(b) says a  
12 respondent asserting an affirmative defense for  
13 Proportionate Share Liability must allege facts  
14 establishing that two or more persons caused or  
15 contributed to the release of the regulated  
16 substance.

17 BOARD MEMBER McFAWN: And you read that to mean  
18 that you actually have to allege what their share  
19 might be?

20 MR. RIESER: Well, the Board said in its opinion  
21 that you don't have to prove shares. But I -- but,  
22 again, I don't draw the same -- as I talked about in a  
23 different context of my testimony -- I don't draw the  
24 same difference between the quantum of proof necessary  
25 to show that two or more parties contributed and what



1 their shares were. It is going to be more or less the  
2 same type of information.

3 Because if, for example, you said, well, I know  
4 there were other generators or other owners there,  
5 that is not enough to prove that they caused or  
6 contributed. You have to show that they did  
7 something. There are other generators of benzene.  
8 That is not enough to show that they caused or  
9 contributed to the release. Not because of any  
10 fingerprinting thing, but because you have not shown  
11 that what they did caused or contributed to the  
12 release.

13 So they could very well get caught up in the same  
14 factual proof issue supporting that affirmative  
15 defense, and that -- and that failure, their failure  
16 to prove their affirmative defense would mean that  
17 they could not take advantage of the Proportionate  
18 Share Liability that is supposed to apply to them in  
19 establishing the limits of their liability.

20 BOARD MEMBER HENNESSEY: Would your problem be  
21 solved if we just said it is a defense, not an  
22 affirmative defense?

23 MR. RIESER: I don't know what a defense is that  
24 is not an affirmative defense.

25 BOARD MEMBER HENNESSEY: Well, if it is not a

1 defense -- I am just -- is the logical outcome of your  
2 position that the State must allege and prove that no  
3 parties other than the respondents are responsible for  
4 a release?

5 MR. RIESER: I think what it says is that State  
6 must use the information that it has to identify those  
7 people who were responsible and then go after their  
8 shares. I mean, if they want to get 75 percent of the  
9 site, they go after 75 -- what they have are the  
10 people who caused 75 percent of the site and then they  
11 go after 75 percent of the site.

12 What it means they can't do is if they have people  
13 who are only responsible for 75 percent of the site,  
14 go after them for 100 percent of the site. And we  
15 talked before about how we make those decisions and  
16 what they have to prove and does it have to be part of  
17 the allegations. But I think it means that the State  
18 has to take the first shot at making these decisions  
19 based upon the information that it has.

20 MR. CHARLES KING: Other people besides the State  
21 can bring these cases. So the fact that the State may  
22 have lots of information, and as the Agency has  
23 indicated, you know, don't bring them against one  
24 person, doesn't make the issue go away of what if they  
25 do only bring it -- what if some third party brings an

1 action against one person?

2 MR. RIESER: Well, we talked a little bit about

3 third party, you know, my --

4 MR. CHARLES KING: Well, it is in there now, so

5 just assume that it is there.

6 MR. RIESER: I mean, the -- well, if you want to

7 take it that way, under what you have proposed, the

8 third party can issue -- can seek information orders

9 from the Board and has the advantage of the -- has the

10 advantage of the facts if all of the information is

11 submitted right after they filed the complaint and,

12 again, to gather this information. So theoretically a

13 third party has most of the same -- has some of the

14 same information gathering powers that are available

15 to the State.

16 Now, I disagree, A, that the third parties ought

17 to be involved or, B, that they should be able to use

18 the information orders. The was in my testimony. But

19 there are -- there are devices that are set out here

20 to provide for them to gather that information. And I

21 guess the question that I would have is -- one of the

22 things that we have done in this proceeding is that we

23 have gathered a huge amount of information that we

24 have never had before, we, the regulated community

25 never had before regarding how the Agency administers

1 this program and what cases they bring and how often  
2 they bring them and the types of cases that they  
3 bring.

4 But what we don't have, and what the Board has, is  
5 information regarding how many -- what types of third  
6 party actions are brought and how many of these are  
7 brought, and the types of third party claims that are  
8 brought. Because I am willing to bet by and large  
9 most of those are actions, as with the State actions  
10 involving a small number of people and probably  
11 involving people in the chain of ownership up and down  
12 of a particular facility or tenants or something like  
13 that.

14 So, again, you are talking about a limited factual  
15 network in which making these decisions are not that  
16 hard and gathering that information is not that hard.  
17 So, you know, if I am to assume third party actions, I  
18 am assuming that the Board has some information  
19 available that allows it to say these are the types of  
20 actions that we have and based on this information we  
21 think they can be done this and this way.

22 Again, we focused it purposefully away from  
23 dealing with that type of issue because, we, the  
24 regulated community and the State, don't typically  
25 deal with that type of issue. But that's how I would

1 respond.

2 BOARD MEMBER HENNESSEY: Can I just get back to  
3 the affirmative defense issue, and just focusing on  
4 State actions, third party actions we could talk  
5 about. I am just wondering -- just explain to me how  
6 this plays out a little bit. The State knows that  
7 there are two parties at the site A and B. Well,  
8 there is a site and the State believes only A  
9 contributed.

10 MR. RIESER: Okay.

11 BOARD MEMBER HENNESSEY: A believes that B did as  
12 well, but can't convince the State of that. There is  
13 a legitimate disagreement about that. The State only  
14 sues A. How does this -- how does this play out  
15 then? And who has to prove what?

16 MR. RIESER: Well, I mean, as a practical matter,  
17 the way it would play out is that A would assert  
18 whatever defenses to the State bringing the action,  
19 including proportionate share, and say, no, you can't  
20 bring this action solely against me and you would also  
21 third party B in to bring them into the mix. So  
22 that's how it would play out.

23 Is that -- do I believe that is the way it ought  
24 to be plate out? No. But that's -- so I don't  
25 believe that you ought to set up the regulations to

1 put that burden on A. The burden ought to be put on  
2 the State in making that decision that it ought to be  
3 very sure that that is -- that they are getting  
4 everybody in that they want to get in. And, again, as  
5 Matt has testified and Gary has testified, that's what  
6 they intend to do because it doesn't make any sense  
7 from a resource allocation standpoint for them to  
8 single out one individual when there is another  
9 individual involved. But as a practical matter,  
10 again, this being an adversarial situation, you bring  
11 everybody in as a defendant, you bring in everybody in  
12 that you can. But I don't think that is how the  
13 regulation should be set up.

14 BOARD MEMBER HENNESSEY: But as a practical  
15 matter, in the situation that I posited, A is, in  
16 effect -- it is not going to be up to the State to  
17 disprove what A says about B's contribution, is it?  
18 Isn't it going to be up to A to bring in B and show  
19 that B has, in fact, contributed to the problem?

20 MR. RIESER: To a certain extent it is going to be  
21 up to the State, because the State is saying -- I am  
22 assuming the State is saying that A is completely  
23 responsible. And to the extent that that is not true  
24 and that is raised in the issues, that is something  
25 that the State is going to have to deal with, and

1 whose burden is that then. I think in that context it  
2 is the State's burden.

3 Why should A -- the State has information that  
4 other people are involved, that A has presented to  
5 them, and I am assuming that is what is going to  
6 happen because, again, these things don't happen in a  
7 vacuum. Why should the State -- why should all of the  
8 risk of that situation be put on A because the State  
9 does not want to bring other people in and identify  
10 them as responsible parties into the discussion.

11 Excuse me a moment.

12 (Mr. Rieser and Ms. Rosen confer briefly.)

13 MR. RIESER: The State takes a certain level of  
14 risk if it only sues A, to the extent that the trier  
15 of fact believes the information about B, that A's  
16 liability is diminished, and if B is not there then  
17 the State does not have the party in front of it who  
18 may have additional responsibility. So that's kind of  
19 the answer.

20 BOARD MEMBER McFAWN: Can I ask one more  
21 question?

22 BOARD MEMBER HENNESSEY: Well --

23 BOARD MEMBER McFAWN: Do you want to follow-up? I  
24 am sorry.

25 BOARD MEMBER HENNESSEY: Well, I am just wondering

1 what, as a practical matter how -- A can't simply just  
2 file a pleading saying B should be in here too, and  
3 that's all they do, they don't bring any other proof  
4 to the Board.

5 BOARD MEMBER McFAWN: Rule or no rule, A is going  
6 to have -- if A wants to get out, it is going to have  
7 to tell the Board that there is somebody else, or they  
8 are going to have to tell the Court that there is  
9 somebody else involved.

10 MR. RIESER: Right. But then the question --

11 BOARD MEMBER HENNESSEY: But then there is the  
12 question of how much do they have to do to -- does the  
13 State -- once the specter of B is raised, does the  
14 State then have to prove that B is not involved? Or  
15 does A need to prove that B is --

16 BOARD MEMBER McFAWN: I don't think our rule  
17 addresses that.

18 MR. RIESER: See, I don't know, because I don't  
19 know what is meant by --

20 BOARD MEMBER McFAWN: Cause or contributed?

21 MR. RIESER: Well, not the cause or contributed.

22 That is what the statute says, and we will live with  
23 it. But I don't know what is meant by 210(b) of 741.

24 BOARD MEMBER McFAWN: So if we were to delete  
25 210(b), would anything different happen?



1 MR. RIESER: No, because you still have it set up  
2 as an affirmative defense. That imposes a specific  
3 burden. I mean, I see 210(b) as something of a  
4 limitation, I think. That is certainly the way it is  
5 talked about in the opinion. But I am not quite sure  
6 what type of limitation it is.

7 I am sort of with the Agency, in that they have a  
8 lot of questions about what things mean and  
9 uncertainties about what things mean, and that makes  
10 them uncomfortable. This is one of the areas where I  
11 have an uncertainty about what things mean, and it  
12 makes me uncomfortable as to how it is going to work  
13 out.

14 BOARD MEMBER HENNESSEY: Well, I just want to  
15 clarify. In my questions I have not been asking you  
16 about -- so we are on the same page, I am not asking  
17 about how 210 actually operates. I am asking you how  
18 you think 58.9 should operate.

19 MR. RIESER: Well, I think --

20 BOARD MEMBER HENNESSEY: I think that we have been  
21 understanding each other on that.

22 MR. RIESER: As I said, in my mind, 58.9 has to do  
23 with actions that are brought by the State. And I  
24 know, and we have heard testimony, that actions are  
25 only brought by the State after a fair amount of

1 information is gathered, and that it is up to the  
2 State to present that information and to make its own  
3 internal decisions about who is responsible for what  
4 at a given site, and it has to make those decisions in  
5 the process of filing its complaint and identifying  
6 responsible parties.

7 What it cannot do, and maybe this is -- 58.9 maybe  
8 more of a -- it started out certainly with more of a  
9 negative idea. What the State could not do is to  
10 single out potentially responsible parties for other  
11 reasons and say you are jointly and severally liable  
12 for this entire site, and so we are going to impose  
13 the burden of proving other people are involved, the  
14 burden of proving your own limitations on the extent  
15 of your involvement, all of these things on that  
16 person because of the specter of joint and several  
17 liability. It is designed to get away from that. So  
18 what it is designed to get to is obviously what we are  
19 discussing. But in my mind it is designed to get this  
20 point, that this issue of allocation is a part and  
21 parcel of the enforcement case that the State has to  
22 prove.

23 BOARD MEMBER McFAWN: You actually do believe that  
24 the State has to prove, at least for the initial -- at  
25 some point, and maybe not the initial pleading, what

1 the quantification of the defendant's share should

2 be?

3 MR. RIESER: Sure. That's what I testified to

4 before.

5 BOARD MEMBER McFAWN: You know, I just don't see

6 that in the statute. I don't see those words. I

7 don't see anything like that, you know. I can see why

8 you want it.

9 MR. RIESER: The reason I think that -- well,

10 there is two things that we can see about the

11 statute. One is that it does not assign that burden

12 to the burden of proving something, the defendants.

13 It is part of an affirmative defense, which is what is

14 done elsewhere in the Act with respect to these

15 issues. The person asserting the defense of an

16 innocent landowner has specific burden of proving

17 certain very specific things. The person asserting

18 the other defenses under 22.2(h) has specific

19 burdens. That is not set out in here.

20 So what that means, that is what we are all trying

21 to figure out. From the first meeting we ever had

22 with the Agency, this issue of burden of proof was

23 there. And it is obviously still unsettled. You

24 know, plainly, again, this being an adversary -- not

25 this regulatory hearing, but the proceedings we are

1 talking about being adversary proceedings, people will  
2 fight tooth and nail and bring whatever information  
3 they have to fight about this issue.

4 But whether -- it strikes me as going against the  
5 spirit of trying to do something different than joint  
6 and several liability to impose the risk of lack of  
7 information and these other risks on the defendants,  
8 because that is exactly what is done under joint and  
9 several liability and is exactly what we are trying to  
10 get away from here.

11 HEARING OFFICER ERVIN: Do you still have a  
12 question, Chuck?

13 MR. CHARLES KING: No.

14 HEARING OFFICER ERVIN: Along those same lines, if  
15 the State does have to prove a party's particular  
16 percentage, are there certain elements that you think  
17 they have to prove to be, say, 50 percent liable?

18 MR. RIESER: Well, again, what we now have, what  
19 we have here, what we now have, as proposed by the  
20 Board, is a process where the State can gather certain  
21 information prior to an action being filed, where upon  
22 the action being filed and at some point after that  
23 the hearing officer is empowered to issue an order  
24 requiring everyone to submit their information into a  
25 pot, essentially, and gather discovery, where that

1 information -- everybody's information should be  
2 available to them.  
3 Based on that information, that the Board talked  
4 about, all of the parties are going to be making  
5 claims about who did what and what percent. And I  
6 think what I am saying more than anything else is that  
7 the burden -- in this context there is going to be  
8 limited information. They are not going to know  
9 everything out there. They won't have dug up the  
10 place. People have died. The records will be lost.  
11 There is going to be information that gaps without  
12 question.

13 And I think what I am saying, more than anything  
14 else, is that the suppositions and inferences that  
15 everyone is going to draw from the information that  
16 they have before them, is that the State ought to have  
17 the burden of supporting it suppositions, the primary  
18 burden. If it is going to go out and say these people  
19 are responsible for X amount, which I think they are  
20 required to do, they are going to have the burden of  
21 demonstrating that.

22 It doesn't mean that the people on the other side  
23 are off scott free or if the State is wrong it goes  
24 down to zero. But it does mean that the State has the  
25 primary burden of going forward with the information

1 that documents each individual party's share. Because  
2 the way you have set it up was to try as much as  
3 possible to make all parties -- make all information  
4 available to all parties at the same time.

5 MR. CHARLES KING: So if I understand you  
6 correctly, if the State alleges that party X is liable  
7 for 50 percent, and the proof at hearing shows that  
8 party X is liable for 40 percent, then the effect of  
9 that is would be a Board order finding and allocating  
10 them 40 percent liability, not finding that the State  
11 had failed to prove their case; is that correct?

12 MR. RIESER: That's correct. I mean, you are  
13 still going to --

14 MR. CHARLES KING: Then in this case, then, what  
15 difference does it make what the State alleges in the  
16 complaint?

17 MR. RIESER: Well, again, I don't have any problem  
18 with the State not alleging percentages in the  
19 complaint, as I testified about.

20 MR. CHARLES KING: If they don't let you in the  
21 complaint, then how can we say what they have to  
22 prove?

23 MR. RIESER: I am sorry?

24 MR. CHARLES KING: If it is not alleged in the  
25 complaint, then how can you put a burden on them to

1 prove something that is not an element of their case?

2 MR. RIESER: Well, I didn't say it wasn't an  
3 element of their case. I think what I analogized to  
4 when we talked about this at the last hearing was  
5 damages, where frequently -- well, all the time civil  
6 actions are filed with damages just given a broad  
7 range of numbers. But at some point in the discovery  
8 process the plaintiff is required and this typically  
9 happens in response to interrogatories and  
10 depositions, that the plaintiff is required to  
11 identify specifically the damages it has.

12 I am perfectly willing to acknowledge that at the  
13 point of filing the complaint the State may not have  
14 enough information to make those decisions and then  
15 the Board set up a process of gathering information  
16 and have discovery and all of the rest of it. But  
17 then at some point the State does have to prove its --  
18 identify each party's responsibility and be able to  
19 make a case for each party's responsibilities.

20 MR. CHARLES KING: So at some point is the State  
21 going to have to file something with numbers on it  
22 saying what they are asserting each party's liability  
23 is?

24 MR. RIESER: Well at some point or at trial.

25 MR. CHARLES KING: Okay.

1 MR. RIESER: See, this will happen -- again, it is  
2 an adversary proceeding. I am representing the  
3 defendant. I am going to be filing an interrogatory  
4 saying state exactly what is going to happen. And it  
5 may be that we have some sort of -- at the State or  
6 Federal Court we would have a pretrial order where the  
7 specific allegations would be identified and narrowed  
8 down to the specific issues to be decided by the trier  
9 of fact. And it is at that point that we would know  
10 exactly what is -- what we are fighting over and what  
11 is going on.

12 MR. CHARLES KING: So initially the way the rules  
13 are set up now it is not an adversarial proceeding,  
14 though, as far as allocation goes. And as I read your  
15 prefiled testimony, you are arguing that it should  
16 be. So I am trying to figure out the difference and  
17 how the -- what the effect would be of setting it up  
18 the way you are saying.

19 Even if at some point there is a document filed  
20 with numbers on it, if after the hearing at the end of  
21 the day when all the proof is in and the Board makes  
22 its determination, if it is still -- if the  
23 allocations are going to be what the proof has shown,  
24 then I am not understanding why it makes a difference  
25 if you say that the State has to come up with numbers



1 and prove them.

2 MR. RIESER: Okay. No matter what the Board says  
3 about this process, it is an enforcement process. It  
4 has to be -- it will be adversarial. And because we  
5 are talking about enforcement, we are talking about  
6 violations being alleged and the State of Illinois  
7 seeking my clients, whomever, to pay money or to do  
8 something. And for them to prevail, they have to show  
9 that it is more likely than not that what they think  
10 about the situation is accurate.

11 So the idea that it would be a nonadversary  
12 process, I can't -- well, I can't understand it. But  
13 no matter what you say it will be adversarial. The  
14 State's lawyers will be fighting tooth and nail to say  
15 that this is what all of the this information means,  
16 that my guy had a 60 percent, somebody else had 30 and  
17 somebody had 20 percent. My guy will be saying, no,  
18 it is not 60 percent. It is 30 or 20 percent.

19 The Board has to weigh all of the -- not only the  
20 factual information but how people describe the  
21 factual information and what it means, and there are  
22 certain data gaps and what those data gaps mean. And  
23 people will be making suppositions and making  
24 inferences and all of the rest of it. And the  
25 question the Board will have to decide is whether the

1 information supports those suppositions and

2 inferences.

3 And at some level there has to be a decision that

4 if -- that the suppositions and inferences presented

5 by the State, those have to be -- those have to be

6 looked at, and if they are not supported, then that

7 can't be the way it is. It might be some other way,

8 but it can't be the State's way if they don't have

9 support for what they are trying to present.

10 So it may be that there is a choice between 60 and

11 30, and because the suppositions and inferences don't

12 meet the burden of proof you can go with 30. Or the

13 suppositions and inferences on either side may not

14 make any sense and you go to 40, and that happens to.

15 But it can't be a situation where the trier of facts

16 says there is no burden of proof, because there is

17 always a burden of proof. There has to be.

18 This is an adversary proceeding where the State is

19 seeking to force people to pay money or to do

20 something. Before that happens, they have to prove

21 their case. They have to prove their case as to how

22 much they are supposed to pay and what they are

23 supposed to do.

24 HEARING OFFICER ERVIN: Assuming that we agree

25 that at some point the State has to come up with some

1 numbers, throw some numbers out there to be proved or  
2 whatever, do we need to include such a provision in  
3 these that rules that say within 30 days prior to  
4 hearing the Agency has to file --

5 MR. RIESER: Well, you know, if this would help  
6 the situation, certainly, it wouldn't hurt. I mean,  
7 it wouldn't hurt to say, you know -- and I think this  
8 was part of our original proposal, so that people  
9 could file with the Board -- so that people can file  
10 proposed resolutions with the Board. And we did that  
11 exactly to take care of this issue, even though we had  
12 a disagreement internally about what was the burden of  
13 proof and what wasn't. It still made sense that  
14 people were going to be making proposed resolutions to  
15 the Board.

16 HEARING OFFICER ERVIN: But it is not  
17 discretionary? It wouldn't be required?

18 MR. RIESER: Well, it -- yes. I mean, I think --  
19 but I think in most cases that is what people are  
20 going to do anyway. I mean, the Board does not have a  
21 procedure in general for pretrial orders to narrow the  
22 facts and things like that. I don't know, just as a  
23 general principle, whether that is a good idea or  
24 not. I mean, pretrial orders can get real ugly and  
25 hairy, and it may not be necessary to having something

1 as elaborate as what the federal rules require.  
2 But it may also be useful because the process of  
3 arriving at pretrial orders helps people -- the  
4 adversaries focus their discussion in terms of what  
5 they know, what they don't know, what they are going  
6 to agree to and what they are not going to agree to.  
7 And so it tends to focus the issues that are brought  
8 before the court. So something like that would  
9 certainly make sense in all types of enforcement  
10 cases, not just this one. But, certainly, for this  
11 one, having some touch point where people are  
12 proposing resolutions makes some sense and that's one  
13 of the things that we proposed.

14 CHAIRMAN MANNING: Of course, that could be done  
15 at the discretion of the hearing officer, too. It  
16 does not need to be set into a rule.

17 MR. RIESER: That's true. That is absolutely  
18 true.

19 HEARING OFFICER ERVIN: As far as the liability in  
20 Section 741.225, we have asked everybody so far and we  
21 will ask you as well. Is this something that should  
22 be kept in the rules?

23 MR. RIESER: This gets into another, hopefully not  
24 too long speech. I think one of the central issues  
25 that I have, and it is one of the key differences, is

1 that I don't see a huge difference between liability  
2 and allocation. And I think that a distinction is --  
3 and, again, this has to do with how new -- that we are  
4 dealing with something new.

5 When you are talking about CERCLA, there is a big  
6 difference because CERCLA liability is founded purely  
7 on status, the owner or operator of a site, the former  
8 owner or operator of the site. By decision of the  
9 court, causation is not an issue in making a  
10 determination as to whether somebody is liable or not  
11 liable under CERCLA.

12 And so you can have a liability determination that  
13 is based on a certain set of relatively narrow facts  
14 in terms of whether somebody was an owner or operator,  
15 or whether somebody arranged for the disposal of  
16 material at a given site in which there was a  
17 release. That is a separate set of facts than having  
18 proved liability what you do about it, once you prove  
19 liability.

20 Here causation is part of the liability  
21 determination. So I don't believe that there is  
22 really in all cases a real quantum difference between  
23 the type of information that goes into documenting  
24 liability and the information that is needed to  
25 document allocation. It is more or less the same

1 information. The information is what did this  
2 individual do at the site? How long did they own it?  
3 Did they own it? How long? What did they do when  
4 they owned it? Did they generate material? What was  
5 it? Where did it get disposed? What happened to it?  
6 All of that information is the same type of  
7 information.

8 So there really is not a distinction between the  
9 information needed to show liability on the one hand  
10 and the information needed to show allocation on the  
11 other. I can see why there might be in some cases,  
12 but I am willing to bet that it is not that often.

13 And so what you have, especially if you have  
14 different burdens of proof with respect to liability  
15 and allocations, then you open up the possibility of  
16 having a lot of debates about whether what you are  
17 deciding is liability or whether what you are deciding  
18 is allocation. But it is the same information. What  
19 did they do at the site? How long were they there?  
20 What did they do when they were there?

21 And so that is my issue with 225. I don't know  
22 that you can -- if you are going to have a regulation  
23 like this having something that talks about what your  
24 liability is, as long as it doesn't have fail to  
25 mitigate in there, I don't know that it makes sense or

1 doesn't make sense. But I do have an issue of  
2 divorcing it from your allocation decisions and  
3 setting the things up as two different things.

4 BOARD MEMBER HENNESSEY: Mr. Rieser, are you  
5 suggesting that we should -- that somehow 225 should  
6 be combined with 741.140, which is allocation  
7 factors?

8 MR. RIESER: Well, that was something of what we  
9 had proposed, what SRAC had proposed in its proposal,  
10 was a connection -- actually SRAC's proposal was an  
11 attempt to take the statute as it was and sort of  
12 rewrite it into the regulation, and to closely connect  
13 the same type of factors, simply because of this  
14 issue.

15 I mean, I don't know what it does for you to --  
16 again, I don't know what it means to say that somebody  
17 caused or contributed, but not say what the extent of  
18 that was. So some type of combining, yes, is going to  
19 go on. Because those are the factors that you are  
20 going to -- to the extent you need to.

21 The other issue that is more closely implicated in  
22 142 is the extent to which whatever was done caused  
23 cost to be incurred, because that is really the  
24 central issue under proportionate share. Did they  
25 cause these costs? Did what happened cause the costs

1 to be incurred? So I think that's basically the same  
2 discussion.

3 HEARING OFFICER ERVIN: As for private party  
4 allocations, I know you testified that you don't  
5 believe we should be getting into that in these  
6 rules. As we have asked the A.G.'s office, given the  
7 language of Section 58.9, how do we get around it?

8 MR. RIESER: Well, as the Board held, 58.9 does  
9 not create any additional causes of action. The Board  
10 is clearly correct that enforcement actions can be  
11 brought by individual citizens. So I don't see 58.9  
12 as requiring private cost recovery actions. I mean,  
13 since I am involved in enforcement action, private  
14 enforcement action now, I think several things have  
15 come out in handling that that need to be addressed  
16 here.

17 And enforcement actions, again, are driven by  
18 violations. You can't have enforcement -- some people  
19 are alleging that regulations were violated and as a  
20 result something ought to be happening, remediation or  
21 something like that. And if the remediation is --  
22 again, as I think I said, if that's -- if that's the  
23 only thing you are dealing with, forcing this type of  
24 remediation, then there is probably a way to do deal  
25 with that more simply than is dealt with here.



1 I think when it gets to be private cost recovery  
2 there is a whole other set of issues that get brought  
3 in because private cost recovery is not provided for  
4 in the statute. You don't have the same limitations  
5 for private cost recovery that you do under CERCLA.  
6 You don't have a requirement to comply with the  
7 national contingency plan and things of that nature.  
8 And what that means is that you open the specter that  
9 somebody could do what you might call a Cadillac  
10 cleanup at a given site, turn around and recover from  
11 somebody for taking a piece of their industrial  
12 property and turning it into a playground when it is  
13 never in a million years going to be a playground.  
14 The Board does not have any way of saying to that  
15 plaintiff seeking that money that you can't have that  
16 money. And tying it to the site remediation program  
17 is not enough because under TACO you have the whole  
18 range of things. There is nothing prohibitive about  
19 TACO that says you have to do one thing or another.  
20 You can do a whole variety of things. I certainly  
21 have had the experience where we have had liability  
22 ensue because the owner wants a very, very significant  
23 cleanup and refuses to sign off on a delimitation even  
24 if the delimitation is appropriate to the nature of  
25 their property.

1 And so that's why private cost recovery does not  
2 work in this context. You don't have the types of  
3 limitations that are necessary to be able to review  
4 the nature of the costs that are incurred. And the  
5 statute does not tell you what those limitations are  
6 or should be. And without that legislative direction,  
7 I don't know how you run a cost recovery program that  
8 is not specifically provided.

9 HEARING OFFICER ERVIN: All right. Does anybody  
10 have any additional questions for Mr. Rieser at this  
11 time? Maybe one more question, Mr. Rieser. Section  
12 741.210, of the pleading, would SRAC favor the Board  
13 amending the proposed rules to include a provision say  
14 imposing pro rata distributions in the event of lack  
15 of evidence.

16 MR. RIESER: I am sorry. What was the question  
17 again?

18 HEARING OFFICER ERVIN: For Section 741.210, would  
19 SRAC favor the Board amending the proposal as it is  
20 now written to include a provision imposing pro rata  
21 shares or pro rata distribution in the event that  
22 there was a lack of evidence?

23 MR. RIESER: No, because that is joint and -- that  
24 is another form of joint and several liability.

25 MR. CHARLES KING: How do you figure it is joint

1 and several if no one is getting more than at most the  
2 proportionate share.

3 MR. RIESER: Well, but there might be 100 people  
4 at a site and two people did all the work, two people  
5 caused all the damage. So the other 98 people, if you  
6 split up the shares 100th then the other 98 people are  
7 paying significantly more than their share.

8 BOARD MEMBER McFAWN: But under that scenario,  
9 wouldn't you have that evidence in hand? You said 2  
10 out of 100 did all the work. That is adding something  
11 to the scenario, to the example. If you just have an  
12 example where -- and you know at a really old site  
13 this can happen. You don't have anything other than  
14 being at the site, period. And so the question was if  
15 you have that scant of evidence, would you favor pro  
16 rata? It is unlikely, but it could happen.

17 MR. RIESER: See, again, I have an issue with  
18 drafting a regulation to a real narrow thing that I  
19 don't see as happening all that often. I think people  
20 ought to do the best they can with the information  
21 that they have. Again, the whole point of  
22 proportionate share is why do you impose these costs  
23 on people simply because they have some type of  
24 connection to a site that under CERCLA is deemed  
25 liability even under regular normal forms of

1 common-law would not be an issue at all. Again, you  
2 are imposing responsibility on people who did not  
3 cause or contribute to the problem.

4 BOARD MEMBER McFAWN: So you would not favor such  
5 a rule?

6 MR. RIESER: No.

7 BOARD MEMBER McFAWN: Okay.

8 HEARING OFFICER ERVIN: Are there any other  
9 additional questions at this time?

10 Seeing none, thank you very much for your  
11 testimony and your continued participation in this  
12 rulemaking.

13 MR. RIESER: Thank you.

14 HEARING OFFICER ERVIN: We will take just a short  
15 recess and we will reconvene in ten minutes. Is there  
16 anyone at this time, though, who has not prefiled  
17 testimony who would like to testify? Okay. We will  
18 reconvene in ten minutes.

19 (Whereupon a short recess was taken.)

20 HEARING OFFICER ERVIN: Back on the record.  
21 Again, is there anyone else here today who would like  
22 to testify?

23 Okay. Seeing none, I would note that there is a  
24 sixth hearing scheduled for tomorrow. I have not been  
25 notified that there is anyone who is wanting to

1 testify. Anybody that did call I encouraged them to  
2 come today, as I was not sure that there would be a  
3 hearing tomorrow. We really can't cancel the hearing  
4 tomorrow, as they were separately noticed. However, I  
5 anticipate just opening the record and keeping it open  
6 for a half hour and if no one comes closing it. So  
7 that is at least how we anticipate doing that  
8 tomorrow.

9 The Board has requested an expedited transcript,  
10 and the transcript should be available Friday, if  
11 maybe not Thursday in the Chicago office. We now have  
12 a web person so we are on the web again, so you will  
13 be able to down load the transcript from there. You  
14 can also ask the court reporter to make arrangements  
15 if you are wanting the transcript. You can do that as  
16 well. Are there any other matters that need to be  
17 addressed at this time? Seeing that there are no  
18 further matters, this matter --

19 MR. RIESER: Did you have a date for filing post  
20 hearing comments?

21 HEARING OFFICER ERVIN: November the 4th.

22 MR. RIESER: Thank you.

23 HEARING OFFICER ERVIN: All right. Any other  
24 matters? Seeing none, the hearing is adjourned.

25 Thank you again for your attendance.

1 STATE OF ILLINOIS )  
                                  ) SS  
2 COUNTY OF MONTGOMERY)

3           C E R T I F I C A T E

4

5    I, DARLENE M. NIEMEYER, a Notary Public in and for  
6 the County of Montgomery, State of Illinois, DO HEREBY  
7 CERTIFY that the foregoing 157 pages comprise a true,  
8 complete and correct transcript of the proceedings  
9 held on the 19th of October A.D., 1998, at 600 South  
10 Second Street, Springfield, Illinois, In the Matter  
11 of: Proportionate Share Liability, in proceedings held  
12 before the Honorable Cynthia I. Ervin, Hearing  
13 Officer, and recorded in machine shorthand by me.

14    IN WITNESS WHEREOF I have hereunto set my hand and  
15 affixed my Notarial Seal this 21st day of October  
16 A.D., 1998.

17

18

19           Notary Public and  
              Certified Shorthand Reporter and  
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21 My Commission Expires: 03-02-99

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