

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VOLUME I

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM,) R97-11
35 ILL. ADM. CODE 740) (Rulemaking - Land)

The following is a transcript of a rulemaking hearing held in the above-entitled matter, taken stenographically by LORI ANN ASAUSKAS, CSR, RPR, a notary public within and for the County of Cook and State of Illinois, before Amy Hoogasian, Hearing Officer, at 100 West Randolph Street, Room 9-040, Chicago, Illinois, on the 25th day of November, 1996, A.D., commencing at the hour of 10:00 o'clock a.m.

** ** * * * * *

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

2 HEARING TAKEN BEFORE:

3 ILLINOIS POLLUTION CONTROL BOARD,
4 100 West Randolph Street
5 Suite 11-500
6 Chicago, Illinois 60601
(312) 814-4925
BY: MS. AMY HOOGASIAN,
HEARING OFFICER.

7 ILLINOIS POLLUTION CONTROL BOARD MEMBERS PRESENT:

- 8 Mr. Kevin Desharnais
- 9 Mr. Chuck Feinen
- 10 Mr. Tanner Girard
- 11 Ms. Kathleen Hennessey
- 12 Ms. Marili McFawn
- 13 Ms. Jennifer Moore
- 14 Ms. Diane O'Neil
- 15 Ms. K.C. Poulos
- 16 Mr. Anad Rao
- 17 Mr. Hiten Soni
- 18 Ms. Marie Tipsord
- 19 Mr. Joseph Yi

20 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS
21 PRESENT:

- 22 Ms. Shirley Baer
- 23 Mr. Lawrence Eastep
- 24 Mr. Gary P. King
- Mr. Rick Lucas
- Mr. Bob O'Hara
- Mr. Todd Rettig
- Ms. Vicky L. VonLanken
- Mr. Mark Wight

OTHER AUDIENCE MEMBERS WERE PRESENT AT THE HEARING,
BUT NOT LISTED ON THIS APPEARANCE PAGE.

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9 E X H I B I T S

10 Marked for Identification

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1 THE HEARING OFFICER: Before we begin,
2 I just wanted to say a couple things off the record.

3 (Whereupon, a discussion
4 was had off the record.)

5 THE HEARING OFFICER: Good morning. My
6 name is Amy Hoogasian. I'm the named hearing officer
7 in this proceeding originally entitled, "In the
8 Matter Of: Site Remediation Program, 35 Illinois
9 Administrative Code 740."

10 Present today on behalf of the
11 Illinois Pollution Control Board are the presiding
12 board members of this rulemaking, which are Kathleen
13 Hennessey, to my left, and Marili McFawn, also to my
14 left.

15 MS. McFAWN: Good morning.

16 THE HEARING OFFICER: We also have
17 Dr. Tanner Girard to my right. Mr. Joseph Yi is
18 also here with us today. We anticipate board member
19 Theodore Meyer to be coming in a couple minutes.
20 Today, we also have Marie Tipsord, who is the
21 attorney assistant to Board Member Girard.

22 In the back, we have Kevin
23 Desharnais, who is the attorney assistant to Marili
24 McFawn. We have Chuck Feinen. He is the attorney

1 assistant to Joe Yi. Anad Rao is here with us. He
2 will be coming back shortly. He is here from our
3 technical unit.

4 We have Hiten Soni in the back
5 with us, who is also part of your technical unit.
6 We have Diane O'Neil, who is an attorney with the
7 board. Jennifer Moore is Ted Meyer's secretary.
8 She is here with us today as well. I don't think
9 I have missed anyone.

10 The format of the hearing will
11 go as follows: The hearing is governed by the
12 board's procedural rules for regulatory proceedings.
13 All information which is relevant and not repetitious
14 or privileged will be admitted and this is according
15 to 35 Illinois Administrative Code 102.282.

16 Also, all witnesses will be sworn
17 and subject to cross-questioning. This proposed
18 rulemaking was filed on September 16, 1996, by its
19 proponent the Illinois Environmental Protection
20 Agency pursuant to Public Act 89-431, which was
21 effective December 15, 1995.

22 Pursuant to that public act, the
23 board must adopt a final rule on or before June 16,
24 1997.

1 The purpose of today's hearing
2 is to allow the agency to present its testimony in
3 support of this proposal and to allow questioning of
4 the agency.

5 Procedurally, this is how I plan
6 to proceed. We will take each of the five prefiled
7 testimonies as if read and mark each testimony as an
8 exhibit. We then will allow the agency to present a
9 brief summary of each testimony and subsequently
10 allow for all questioning after all testimonies have
11 been summarized.

12 I would prefer that each of the
13 prefiled questions is first read into the record and
14 subsequently answered by the agency. We will then
15 allow for follow-up questions first by those who have
16 prefiled their questions and then by those who have
17 questions which have not been prefiled.

18 We will proceed with all questions
19 which have not been prefiled as time permits. During
20 the follow-up question period, I would like all
21 persons with questions to first raise their hands and
22 wait for me to acknowledge them. When I acknowledge
23 you, please stand and state in a very loud and clear
24 voice your name and the name of the organization that

1 you represent, if any.

2 Are there any questions at this
3 point regarding the procedures we intend to go forth
4 with this morning?

5 Hearing none, then, at this time
6 I would like the agency to present its opening
7 statement.

8 MR. WIGHT: I do have an opening
9 statement. Before I get to that, I will introduce
10 myself again. My name is Mark Wight. That's spelled
11 W-i-g-h-t. I'm an assistant counsel with the agency
12 and I work with the Bureau of Land.

13 With me today are Todd Rettig,
14 who is associate counsel with the Division of Legal
15 Counsel, and Vicky VonLanken, who is our legal
16 assistant, who will be helping and managing the
17 documents on the back table.

18 Also, we have with us today five
19 witnesses who will help present the proposal. To
20 my left is Mr. Gary King, who is the manager of the
21 Division of Remediation Management. On my immediate
22 right is Larry Eastep, who is the manager of the
23 remedial project management section. To Larry's
24 right is Rick Lucas, who is manager of the state

1 sites unit within the remedial project management
2 section.

3 Back here and to my right is
4 Robert O'Hara. Bob is an environmental protection
5 specialist in the state sites unit and he will be
6 responsible for administration of the site
7 remediation program. Directly behind me is Shirley
8 Baer, who also is an environmental protection
9 specialist within the state sites unit.

10 As the hearing officer pointed
11 out, the agency has brought along documents, at
12 least the significant documents that we filed in
13 this proceeding so far. They are available on the
14 back table. There is a sign-up list. If we do run
15 out of the documents that we brought along, we can
16 mail those out to you sometime next week if you
17 put your name on the sign-up list.

18 We are here today in support of a
19 proposal for Part 740, the site remediation program.
20 I think this is a good proposal and one that deserves
21 to be passed without substantial change. It's the
22 result of approximately nine to ten months of work
23 by the agency's project work group and working in
24 conjunction with the site remediation advisory

1 committee.

2 The proposal is consistent with
3 Title XVI of the act. It provides the necessary
4 framework for investigation, remediation, and
5 oversight while allowing the flexibility that's
6 necessary for the wide variety of sites coming
7 through this program.

8 I want to emphasize the need for
9 flexibility because we will have a large variety of
10 sites coming through the program which encompasses
11 everything from small spills to large industrial
12 sites of several acres and years of historic
13 contamination.

14 Keeping that in mind, we have a
15 proposal that is sort of a one size fits all. For
16 that, we need flexibility to be able to work with
17 the applicants to get the best plan together for
18 their sites.

19 As I said, we have worked closely
20 with the site remediation advisory committee.
21 All the people on the committee have put in a
22 substantial amount of time and effort. I think
23 that everyone has approached and would agree
24 that we have approached the process in a spirit

1 of cooperation.

2 I think every one also approached
3 it with a willingness to compromise and that has
4 resulted in substantial agreement in the proposal
5 before you today.

6 Once again, we would like to
7 thank Chairman Harry Waldman and the members and
8 participants of the site remediation advisory
9 committee for their efforts on this project.

10 With that, I think we are ready
11 unless you have other business that you need to take
12 care of at this time. I think we are ready to swear
13 in the witnesses.

14 (Witnesses sworn.)

15 WHEREUPON:

16 LAWRENCE W. EASTEP, RICK LUCAS, GARY P. KING,
17 SHIRLEY BAER, and ROBERT O'HARA,
18 the witnesses herein, have been first duly sworn and
19 testifies as follows:

20 MR. WIGHT: Okay. I think at this
21 point, what we would like to do, then, is begin by
22 identifying the testimony as exhibits. It's going
23 to be kind of awkward here working across the table.
24 I think what I need to do is come around here in

1 front and work across the table so I can also hand
2 out copies to the board. We will first begin with
3 the Subpart A.

4 Mr. Eastep, I'm going to hand
5 you this document. Please look over that for a few
6 moments while I hand out the copies.

7 (Document tendered
8 to the witness.)

9 MR. WIGHT: Mr. Eastep, do you recognize
10 the document that I have handed to you?

11 MR. EASTEP: Yes, I do.

12 MR. WIGHT: Would you please tell us
13 what the document is?

14 MR. EASTEP: That's my testimony
15 regarding Subpart E.

16 MR. WIGHT: Is that a true and
17 accurate copy of your testimony that has been
18 submitted to the board?

19 MR. EASTEP: Yes, it is.

20 MR. WIGHT: Could we have this marked
21 as an exhibit?

22 THE HEARING OFFICER: Are there any
23 objections to Mr. Wight's motion to mark this as
24 Exhibit 1?

1 If there are no objections, we
2 will mark this document as if read and enter that
3 document as Exhibit No. 1.

4 Hearing none, I will mark this
5 testimony as Exhibit No. 1.

6 (Document marked as Hearing
7 Exhibit No. 1 for
8 identification, 11/25/96.)

9 MR. WIGHT: Ms. Baer, please look the
10 document over.

11 (Document tendered
12 to the witness.)

13 MR. WIGHT: Ms. Baer, have you had a
14 chance to look over the document that I have handed
15 to you?

16 MS. BAER: Yes.

17 MR. WIGHT: Do you recognize the
18 document?

19 MS. BAER: Yes.

20 MR. WIGHT: Can you tell us what that
21 is?

22 MS. BAER: It's my prefiled written
23 testimony of proposed Subparts B and C.

24 MR. WIGHT: Is that a true and accurate

1 copy of the testimony that was submitted to the board
2 earlier in the fall?

3 MS. BAER: Yes.

4 MR. WIGHT: I will present this copy of
5 the testimony to the hearing officer to be marked
6 as an exhibit and I will move that the testimony be
7 admitted into the record if there are no objections.

8 THE HEARING OFFICER: Are there any
9 objections to the agency's motion to present the
10 testimony of Shirley Baer on proposed Subparts B and
11 C as Exhibit No. 2?

12 Hearing none, I will enter this
13 testimony as Exhibit No. 2.

14 (Document marked as
15 Hearing Exhibit No. 2 for
16 identification, 11/25/96.)

17 MR. WIGHT: Okay. Mr. O'Hara, do you
18 recognize the document that I just handed to you a
19 few minutes ago?

20 (Document tendered
21 to the witness.)

22 MR. O'HARA: Yes.

23 MR. WIGHT: Tell us what it is,
24 please.

1 MR. LUCAS: Yes, I have.

2 MR. WIGHT: Could you please tell us
3 what it is?

4 MR. LUCAS: This is my prefiled
5 testimony concerning Subpart E.

6 MR. WIGHT: Is this a true and accurate
7 copy of the testimony that was submitted earlier to
8 the board?

9 MR. LUCAS: Yes, it is.

10 MR. WIGHT: I give to the hearing
11 officer the testimony of Rick Lucas to be marked as
12 an exhibit and to be entered into the record if
13 there are no objections.

14 THE HEARING OFFICER: Are there any
15 objections to the agency's motion to present the
16 testimony of Rick D. Lucas on proposed Subpart E?

17 Hearing none, I will mark, as if
18 read, this testimony as Exhibit No. 4.

19 (Document marked as
20 Hearing Exhibit No. 4 for
21 identification, 11/25/96.)

22 MR. WIGHT: Mr. Eastep, have you had a
23 chance to look over the document that I handed to you
24 a few moments ago?

1 (Document tendered
2 to the witness.)

3 MR. EASTEP: Yes.

4 MR. WIGHT: Would you please identify
5 it?

6 MR. EASTEP: This is a copy of my
7 testimony regarding Subpart F of the proposed
8 ruling.

9 MR. WIGHT: Is that a true and accurate
10 copy of the document that was submitted earlier to
11 the board?

12 MR. EASTEP: Yes, it is.

13 MR. WIGHT: Again, I present this to
14 the hearing officer to mark this as an exhibit and
15 move that it be admitted to the record if there are
16 no objections.

17 THE HEARING OFFICER: Are there any
18 objections to the motion?

19 Hearing none, I will mark, as if
20 read, the testimony of Lawrence Eastep on proposed
21 Subpart F as Exhibit No. 5.

22 (Document marked as
23 Hearing Exhibit No. 5 for
24 identification, 11/25/96.)

1 MR. WIGHT: Mr. King, do you recognize
2 the document that I have placed before you?

3 (Document tendered
4 to the witness.)

5 MR. KING: Yes, I do.

6 MR. WIGHT: Would you please describe
7 what it is?

8 MR. KING: This is a document entitled,
9 "Agency's Errata Number One."

10 MR. WIGHT: Is that a true and accurate
11 copy of a document that was filed earlier with the
12 board?

13 MR. KING: Yes, it is.

14 MR. WIGHT: I present this document to
15 the hearing officer to be marked as an exhibit and
16 admitted to the record if there are no objections.

17 THE HEARING OFFICER: Are there any
18 objections at this time to the agency's motion to
19 submit its first errata sheet?

20 Hearing none, I will mark as if
21 read the agency's errata sheet number one as Exhibit
22 No. 6.

23

24

1 (Document marked as
2 Hearing Exhibit No. 6 for
3 identification, 11/25/96.)

4 MR. WIGHT: I think we are ready to
5 begin now with the summaries of the testimony.

6 Before we do that, we would like
7 to start with a brief explanation of the errata sheet
8 submitted, the reason for those changes, and to
9 handle that, we will start with Gary King.

10 MR. KING: Thank you. Before I just go
11 through discussion on the errata sheet, I just wanted
12 to echo Mr. Wight's words from his opening statements
13 about the very positive nature in which the agency
14 and site remediation advisory committee worked
15 together on formulating this proposal.

16 We started meeting back in March
17 of this year. Actually, we obviously had begun
18 preparation of Part 740 considerably before that.
19 In fact, we had done much of that work before even
20 the law became effective in December of '95.

21 We started meeting in March of
22 this year. We ended up -- through a combination of
23 meetings on 742 and 740, we ended up meeting ten
24 times, which I think represents a significant effort

1 on the agency's part and by the people on the
2 committee. It was a very intense period of time.

3 We had three meetings where we
4 were devoted fully to talking about Part 740.
5 Obviously, we touched on Part 740 as we had our
6 other Part 742 discussions.

7 In addition, we continued to
8 meet with the advisory committee after we filed the
9 proposal. Part of the result of why we are filing
10 the errata sheet now is because of those further
11 discussions. We continue to have a good interchange
12 with them as far as ideas and things they pointed out
13 that might be better stated as far as the proposal.

14 So with that brief introduction,
15 let me discuss the -- some of the specific things
16 that we have in errata sheet number one.

17 First, just following along, the
18 change in 740.105(c), one of the comments that we
19 got from the advisory committee on our initial
20 proposal was that we had perhaps had narrowed the
21 scope of who could come into the side remediation
22 program in a way that we really didn't fully intend.
23 So we made this change here to work with that
24 difficulty.

1 The second change on 740.115 is
2 just more of a typographical omission.

3 The change on 740.120 is to
4 include a definition of groundwater management zone,
5 which is a concept that we had already put into the
6 rules, but did not have as a definition.

7 The next three changes on 210,
8 210 a second time, and on 225 are basically just
9 typographical changes.

10 On 410, we made that change in
11 410(b)(4) because of a comment of the advisory
12 committee. Again, it seemed like our proposal was
13 a little bit narrower than it needed to be. So we
14 changed the language around a little bit to make it
15 broader in the context that we have here.

16 Then, most -- just about all of
17 the remainder of the errata is discussing the concept
18 of groundwater management zones. A number of the
19 changes we made here are to address concerns that
20 were brought up by the advisory committee.

21 The first one on A is where we
22 talk about the subject of the remedial action plan.
23 We thought that was language that would be a little
24 less confusing than the language that we eventually

1 delineated there.

2 The same thing is true on
3 Subsection B. Again, we wanted to -- there was --
4 in fact, you will see in a couple of questions that
5 are raised. There was an issue about what does
6 remediation site mean in the context of GMZ's. We
7 thought we could clarify the language here to some
8 extent.

9 One of the things that are the
10 issues that we did have come up with the advisory
11 committee was that they had suggested some additional
12 changes which we really have not followed through
13 because we didn't agree with them and that was
14 related to what to do with off-site -- where
15 contamination is off-site and how goes the GMZ
16 extend off-site.

17 We have continued with the
18 principal that we have outlined here as that was
19 for GMZ to extend off-site and there needs to be an
20 approval by off-site landowners.

21 On C, you will see no change on
22 Subsection C, but you will see a couple or at least
23 one question from the advisory committee that that
24 section touches upon and that's really related to

1 outlined.

2 For the most part, a lot of
3 Subpart A is based on the language of the statute
4 itself. With any applicability section, one of
5 the areas that we deal with are the exceptions
6 and who is allowed in the program and who is not
7 allowed or prohibited from the program and who
8 may be there is a question with.

9 Typically, the programs that are
10 excluded from applicability are programs which have
11 their own rules such as the, for example, sites
12 listed in Super Fund under the National Priority List
13 where they are required to follow the National
14 Contingency Plan. Those are very specific and very
15 detailed requirements anyway.

16 In some cases, some of these
17 sites might come up under Super Fund or under
18 RCRA, for example. The closer remediation of
19 those sites wouldn't really fit under these rules
20 anyway.

21 There are also provisions there
22 that deals with what I call the transitional period,
23 that period of time where we have people who have
24 been under the voluntary program and are undergoing

1 some sort of remediation at the time the legislation
2 was enacted or the rules were enacted.

3 Those folks have an option of
4 either proceeding under the old voluntary prenotice
5 program or coming in under the new program.

6 For the most part, what we have
7 seen so far is really up to the applicant. It kind
8 of depends on the specific situation they are in.
9 They can get a lot more specific remediation release
10 under the NFR letter than they can under the
11 provisions of Section 4(y).

12 If persons want to do that, they
13 are certainly welcome to come in. Some people just
14 want to get their clean up done, get out of it, and
15 then it makes it easier to get the release that they
16 would get under the prenotice program.

17 So we have tried to make it
18 flexible and generally we have talked to people and
19 just let them kind of make up their own minds. One
20 provides a list. If they get into the new program,
21 they have to follow the rules of the new program,
22 though.

23 The applicability section also
24 deals with permit waivers and rather programs that's

1 basically a statutory exemption that was provided.
2 Right now, we are looking into more specifically
3 what types of permits would be required and what
4 types would be exempted for persons providing
5 remediation under this program.

6 There is another area that we came
7 up with that really wasn't dealt with in the statutes
8 and that's the use of Section 4(y) as a mechanism for
9 providing a release. I'm referring to Section 4(y)
10 under the act.

11 That's the way we have done things
12 up until Section 58 or Title 17 was passed. There
13 are many situations where it's more practical for
14 persons to just get a release from the agency, who
15 are doing clean up by using Section 4(y).

16 We point out, I think, as
17 an example, where there has been a
18 transportation-related incident and somebody spills
19 something on a piece of property and they don't want
20 to mess with developing site inspection plans and
21 doing a lot of reporting and dealing with the NFR
22 letter, they just want to get in, clean it up, do
23 some confirmation sampling to confirm if things are
24 cleaned up and get out of the program. For those

1 types of persons, it makes a lot more sense to use
2 4(y) as a release.

3 We also have a relationship
4 with the federal government, with the Department
5 of Defense and Department of Energy, to provide
6 oversight on remediation of federally-owned
7 facilities. We have a grant with them and they
8 pay us for our oversight services under the grant.

9 So while it may be appropriate
10 to use part of the provisions of this rule for them,
11 the actual release and part of the provisions would
12 be more appropriate under 4(y). It's a very
13 complicated agreement and arrangement we have with
14 them. Suffice it to say, we need a lot of
15 flexibility.

16 Regarding definitions, I just
17 wanted to touch briefly on one definition and that's
18 the definition of remediation site. Our intention
19 has been -- and let me step back. I think the actual
20 definition is property for which review or evaluation
21 and approval of plans and reports are requested.

22 The intention here was that the
23 remediation site are the sites being cleaned up for
24 which you want an NFR letter. Now, this can be a

1 subset of a larger piece of property. We deal with
2 that fairly frequently where there might be a 50-acre
3 parcel of property and within there, there was a
4 unit or something within this parcel and someone
5 could come in and they could identify just that unit
6 as their remediation site.

7 On the other hand, you could have
8 a site that extends beyond the boundaries of your
9 property and goes to another piece of property. If
10 you have the owner's approval to do investigative
11 services and maybe remediation services and the owner
12 signs the application, then, the remediation site can
13 extend across the property boundaries.

14 I think you have the flexibility
15 of going either way. One of the things that has
16 come up, and we will deal with this in some of the
17 questions, is where the owner doesn't give approval.
18 The agency wrote these rules with the intention that
19 we didn't want to get involved in disputes between
20 the owners of two different pieces of property
21 regarding what types of access or what capabilities
22 they have on each other's properties.

23 So we have tried to stay away
24 from getting in the middle of disputes. If a person

1 wants to come in and clean up just part of an area
2 of contamination that's on one piece of property,
3 that person has that ability as well.

4 I think with that that concludes
5 my synopsis.

6 MR. WIGHT: Thank you, Larry. The next
7 of the synopses will be Shirley Baer summarizing her
8 testimony of Subparts B and C.

9 MS. BAER: Subpart B addresses
10 requirements for applying --

11 THE HEARING OFFICER: Let me just --
12 would you please speak louder or stand up? They
13 are having a hard time hearing in the back. Do
14 you mind stepping up to the microphone?

15 MS. BAER: Okay. Subpart B addresses
16 requirements for applying for acceptance into the
17 site remediation program and enter into the site
18 remediation program service agreements and
19 termination of service agreements by the remedial
20 applicant or the Illinois EPA.

21 Section 740.205 identifies how
22 a remediation applicant applies into the program.
23 Section 740.210 describes the minimum information
24 that must be contained into the application for

1 a remediation site to enroll into the program
2 and the conditions that may be included into the
3 agreement.

4 Section 742.215 gives Illinois
5 EPA thirty days from the receipt of the application
6 to meet its determination of acceptance or denial.
7 Reasons for denial are set forth in this section
8 as well as the appeal of rights and a waiver of
9 deadline provisions for the remediation applicant.

10 Section 740.220 identifies that
11 an agreement becomes effective upon the application
12 being approved by the Illinois EPA and the receipt
13 of the advance partial payment. The agreement may
14 be modified by mutual consent of both parties.

15 Section 740.225 specifies that
16 the agreement can be terminated by remediation
17 applicant at any time if the notice of termination
18 is made in writing. There is a 180-day deadline
19 for Illinois EPA to provide the RA with a final
20 invoice for services provided.

21 Section 740.230 provides for
22 termination of an agreement by the Illinois EPA.
23 Four reasons are provided in the rule for the
24 termination.

1 Section 740.235 is the last
2 section. This section authorizes the use of
3 private licensed professional engineers for the
4 review and evaluation of plans. The use of review
5 and evaluation licensed professional engineer,
6 known as a RELPE, has been successfully utilized
7 in prenotice site cleanup programs.

8 In Subpart C, there is a
9 description of Illinois EPA's recordkeeping practices
10 and the types of costs for which the Illinois EPA
11 may bill the remediation applicant and manner and
12 method of payment.

13 This subpart is essentially
14 identical, except for board of appeals, to Illinois
15 EPA rules promulgated at Illinois Administrative
16 Code 859.

17 MR. WIGHT: Thank you, Shirley. The
18 next synopsis will be provided by Bob O'Hara on
19 Subpart D.

20 MR. O'HARA: Subpart D is intended to
21 provide an administrative record to the Illinois EPA
22 sufficient to support decisions and determinations.

23 Subpart D sets for criteria for
24 completing site investigations, proposing remediation

1 objectives to Illinois EPA for approval for
2 preparation and approval of remedial action plans
3 and for agency approval for remedial action
4 completion reports.

5 Subpart D establishes a system
6 of professional accountability wherein Illinois
7 licensed professional engineers are required to
8 certify the accuracy, completeness, and quality
9 of each required plan or report submitted to the
10 agency.

11 Subpart D establishes a level
12 of acceptable data quality for agency approval
13 sufficient to support the agency's decisions.

14 Subpart D identifies standard
15 document formats and document content necessary
16 to facilitate preparation and agency review for
17 evaluation approval.

18 The types of investigations that
19 are proposed under Subpart D include comprehensive
20 and focused site investigations. We feel this
21 reflects the true voluntary nature of the program.
22 The comprehensive site investigation provides an
23 investigation for all identified environmental
24 conditions at the site and a potential release

1 of liability for all of those conditions.

2 A Focused site investigation
3 allows remediation applicant to identify only those
4 identified environmental conditions that they choose
5 to remediate.

6 MR. WIGHT: All right. Thank you,
7 Bob. The next synopsis will be provided by Rick
8 Lucas on Subpart E.

9 MR. LUCAS: Subpart E contains the
10 procedures and standards of review for the agency
11 or the review and evaluation licensed professional
12 engineer, which we referred to as the RELPE. We
13 will use the review in processing the plans and
14 reports that are required to be submitted under
15 this program.

16 In addition, a portion of this
17 subpart addresses the groundwater management
18 zone. These plans and reports consist of site
19 investigation, remediation objectives, reports,
20 remedial action plans, and remedial action completion
21 reports.

22 The agency has the exclusive
23 authority to approve the plans and reports for
24 purposes of making the no further remediation letter

1 from the agency. Additional parts of this subsection
2 identify the regulatory time frames in which the
3 agency or the RELPE are required to review and
4 respond to waiver provisions and resubmission by
5 the applicant.

6 All notifications or final
7 decisions by the agency are required to provide
8 detailed reasons for the decision in writing and
9 accomplished by registered certified mail.

10 The agency rejects the submittal
11 or requires modification and notification in detail
12 for specific information needed to complete the
13 review.

14 Appeals to the board will be
15 in the manner provided for the review of permit
16 decisions in Section 4(d) of the act.

17 Section 58.5(e) of the act as
18 far as the site remediation program regulations
19 provides for the establishment of duration of
20 groundwater management zones, referred to as GMZ's,
21 by rule.

22 This subsection, plus errata
23 sheet number one, clarifies the duration effective
24 GMZ's, the relationship between groundwater quality

1 standards under 35 Illinois Administrative Code 620
2 and the groundwater remediation objectives.

3 GMZ is to be considered as
4 co-extensive with the groundwater within the
5 remediation site. The GMZ shall remain in effect
6 until the NFR letter becomes effective or the
7 service agreement is terminated.

8 This subsection also clarifies
9 the relationship of the GMZ provided for under
10 the groundwater protection and accepting certain
11 requirements for continuing post-remediation
12 review reporting and listing.

13 That concludes my summary.

14 MR. WIGHT: Thank you, Rick. We
15 have one last synopsis again from Larry Eastep on
16 Subpart F.

17 MR. EASTEP: Subpart F deals with the
18 issuance of no further remediation letters. There
19 are a couple key things I would like to point out.

20 One, the no further remediation
21 letter can't be issued until the remediation is
22 actually all completed. The contents of that letter,
23 we
24 have taken almost directly from the statute in

1 most cases. There are a couple things that I would
2 like to point out.

3 The significance of this letter
4 is -- and this is the end of the process, and this
5 is what's the key to many of our activities, and
6 it's of critical importance to most of the people
7 that are site owners or bankers or lenders or persons
8 doing remediation.

9 The issuance of the letter
10 signifies that when the clean up is done, there
11 is no threat to human health or the environment.
12 We think that's a fairly important statement to
13 be making.

14 The letter also, in order to be
15 effective, has to be filed with the local recorder
16 of deeds or registrar of titles. The importance
17 of this, of course, is it's going to notify everybody
18 concerned that a site has been cleaned up and does
19 meet all of the standards appropriately.

20 Finally, we have identified on
21 the letter those potential reasons for voidance of
22 the letter with one of them being that the site
23 must not be disturbed from the condition which it's
24 left under remediation.

1 Thank you.

2 MR. WIGHT: Thank you, Larry. That
3 concludes the synopses of testimony. I think that
4 covers our formal presentation. If the board is
5 ready to move ahead, I think we can proceed to
6 the questions.

7 THE HEARING OFFICER: Thank you.
8 Thank you for all of that testimony.

9 If the agency has nothing else
10 at this time, then, I will ask that we now proceed
11 with the questions for the agency's witnesses.

12 We shall first proceed with all
13 of the prefiled questions as filed by the four
14 groups. Those four groups include the site
15 remediation committee, by Whitney Wagner Rosen,
16 with the Illinois Environmental Regulatory Group,
17 and David Rieser, of Ross & Hardies.

18 Also, we have prefiled questions
19 today by Gardner, Carton & Douglas. Those are filed
20 by John Watson. We have prefiled questions from the
21 Metropolitan Water Reclamation District of Greater
22 Chicago. Those were filed by Emmett Dunham. We also
23 have prefiled questions submitted by Mayer, Brown &
24 Platt. Those were filed by Pat Sharkey.

1 We shall proceed with the
2 questions in numerical sequence of the agency's
3 proposed rule. I have grouped the questions
4 accordingly and we will try to eliminate any
5 duplicate questions.

6 If anyone else has a question
7 pertaining to that particular section that we are
8 discussing, and you have not prefiled your question,
9 you may ask your question as a follow-up question
10 after the agency has considered the prefiled
11 questions pertaining to a particular section.

12 Again, I just want to reiterate
13 that we will proceed with the questions which have
14 not been prefiled as time permits. Again, if you
15 have a question in the back or if any participant
16 has a question, please raise your hand and wait until
17 I first acknowledge you. Then, you will stand and
18 speak in a very loud and clear voice. If necessary,
19 please step up to the podium and state your name and
20 the organization you are representing, if any.

21 Does anyone have any further
22 questions at this time as to how we will proceed with
23 the questioning?

24 All right. Hearing none, let's

1 start with the first question as filed by Gardner,
2 Carton & Douglas that pertains to Section 740.100.

3 MR. WATSON: Good morning. My name,
4 for the record, is John Watson. I'm an attorney
5 at Gardner, Carton & Douglas. We are here today
6 on behalf of a coalition of clients including
7 Woodward Governor Company, Northern Illinois Gas
8 Company, Commonwealth Edison Company, Inks
9 International Company, B.F. Goodrich, and William
10 J. Wrigley Company.

11 With me today is Linda Josepait,
12 senior environmental engineer at Northern Illinois
13 Gas Company, Katherine Tolley, environmental engineer
14 at Commonwealth Edison, and Linda Huff, president of
15 Huff & Huff.

16 I will begin with my first
17 question. I have a prefatory comment and that is
18 the question that I ask in here in response to the
19 comments as it relates to Part 740.100 where it
20 talks about Part 740.100 repeating the statutory
21 purpose for the site remediation program.

22 My question is does the agency
23 agree with the intent of the site remediation program
24 legislation that a central purpose of Part 740 and

1 Part 742 rules is to create a risk-based remediation
2 system premised on the present and future uses of a
3 site?

4 THE HEARING OFFICER: Initially, can
5 I interject something? Could we state for the record
6 what Part 742 rules are? I might also just add that
7 it's the tiered approach to corrective action
8 objectives filed with the board as R97-12.

9 You can proceed.

10 MR. WATSON: Thank you.

11 MR. KING: The answer to that question
12 is yes, generally. I would quibble a little bit
13 about the question as being a little too broad
14 because it talks about present uses.

15 Really, T.A.C.O. is looking at
16 long-term remediation once the final cleanup goal
17 is complete. It isn't so much looking at what
18 might be the present use of present level of
19 contamination.

20 MR. WATSON: So the site remediation
21 program really is designed to ensure that clean up
22 of contaminated sites in Illinois is based on risk
23 analysis consistent with reasonably anticipated
24 future uses of a site then?

1 MR. KING: Right. That is certainly an
2 option under this system.

3 MR. WATSON: Subquestion B is does
4 the agency believe that the proposed Part 740
5 regulations are consistent with the intent expressed
6 by the Illinois General Assembly when it enacted the
7 site remediation program legislation?

8 MR. KING: Yes.

9 MR. WATSON: Sub C, does the agency
10 agree that completion of a clean up under site
11 remediation program and receipt of no further
12 remediation letter discharges any other applicable
13 liability under the Illinois Environmental Act?

14 MR. KING: I think because of how
15 broadly the question is stated, the answer to that
16 is no.

17 MR. WATSON: Can you clarify that for
18 me?

19 MR. KING: The rules, as we have set
20 them out, really attract what the statute says and
21 the statute doesn't say you are discharged from any
22 applicable liability. It's a very specific set of
23 language that governs what happens. I mean, that's
24 what you get.

1 MR. WATSON: So consistent with the
2 terms of the no further remediation letter itself,
3 that would discharge clean up obligations under
4 the Illinois Environmental Protection Act?

5 MR. KING: No. I don't see that's what
6 the statute says. It says you get prima facie
7 evidence that the site does not constitute a threat
8 to human health and the environment. It doesn't
9 require a further remediation. I don't know if that
10 constitutes a discharge of liability.

11 MR. WATSON: With respect to one more
12 follow-up question, and that is, with respect to
13 consistency of this cleanup program with the Illinois
14 EPA or the Illinois Super Fund Program is it fair to
15 say that the risk-based remediation or cleanup that
16 you get under the site remediation program is
17 consistent with the cleanup that you would get
18 under -- if you were conducting a remedial action
19 under the Illinois Super Fund Program?

20 MR. KING: The answer to that would be
21 yes.

22 THE HEARING OFFICER: Are there any
23 other follow-up questions to that particular
24 section?

1 MR. RIESER: My name is David Rieser.
2 I'm an attorney with the law firm of Ross & Hardies.
3 I'm here representing the Illinois Petroleum Council
4 and Illinois Steel Group. I'm also a member of the
5 site remediation advisory committee on behalf of
6 the Chemical Industry Council.

7 I just want to follow up with
8 one of those answers that Gary King gave with respect
9 to liability. I want to ask the question is the
10 liability that you are referring to liability for,
11 say, regulations violations that may have lead to
12 original release rather than further clean up
13 obligations?

14 MR. KING: I think that's part of it.
15 What I was trying to do with my response to the other
16 question was really to be careful in not saying
17 that -- I was concerned about the use of the words
18 discharges any liability.

19 I guess that's kind of a legal
20 concept. I'm not sure what that means overall in
21 the context of what the statute really says.

22 Mr. Wight and I were just
23 conferring and the other issue -- again, it's sort
24 of related to what's being said and that is there

1 may be an issue between two parties where the agency
2 is not involved. There might be an allocation of
3 liability.

4 In that context, this doesn't
5 say anything about that. So the NFR letter would
6 not be discharging any kind of liability as far as
7 allocation between people.

8 MR. RIESER: With respect to the
9 first answer that you gave, and I'm focusing on
10 the word discharge, is the issue, then, the agency's
11 ability to issue a release of liability as opposed
12 to the attorney general's representation of the
13 state and its ability to issue a release of
14 liability?

15 MR. KING: Really, I guess I was not
16 focusing anymore than what the statute specifically
17 says. The statute has certain terms in it and I
18 don't see that the term discharge of any liability
19 is in there. I was just being careful in stating
20 that you really -- the extent of release from
21 liability that you get is governed directly by the
22 words of the statute.

23 THE HEARING OFFICER: Is there anything
24 further pertaining to this?

1 MR. WATSON: Yes. I have just one more
2 question.

3 Nonetheless, the clean up that
4 you would conduct and get approval for under the
5 site remediation program would be consistent with the
6 clean up that you would conduct and get approval for
7 under the Illinois Super Fund Program?

8 MR. KING: That's our intention as far
9 as how procedurally it would work.

10 THE HEARING OFFICER: Ms. Sharkey?

11 MS. SHARKEY: Not to beat this thing
12 too much, but are we saying that clean up under this
13 act, however, would constitute compliance -- under
14 these regulations would constitute compliance of the
15 provisions under the site?

16 THE HEARING OFFICER: Excuse me.
17 Ms. Sharkey, would you please identify yourself for
18 the record.

19 MS. SHARKEY: I apologize. I'm Pat
20 Sharkey from Mayer, Brown & Platt. I'm here
21 representing a number of clients and property owners.

22 Really, I would just like to make
23 sure we are clear if one performs clean up under
24 these regulations that one can expect to be

1 considered to have achieved compliance with the basic
2 land pollution requirements of the Environmental
3 Protection Act.

4 MR. KING: Again, I think that's an
5 overstatement of what this is doing because you're
6 saying that that's in compliance with all the
7 requirements related to land pollution.

8 I don't think that's what that NFR
9 letter says. I mean, the words in the letter -- the
10 statutory phrasing is that it signifies release from
11 further responsibilities under the act relative to
12 what was approved for remedial action and it's
13 considered prima facie evidence that the site does
14 not constitute a threat to human health or the
15 environment.

16 It does not require further
17 remediation under the act if utilized in accordance
18 with the terms of the NFR letter.

19 So to use the phrase that it
20 puts you into compliance with all land pollution
21 requirements or it discharges from all liability,
22 I think that is too broad a conclusion to draw
23 from the words of this section.

24 MS. SHARKEY: I understand, I think,

1 what you are saying. I wasn't really intending to
2 make it too broad, but, in fact, to narrow it to
3 the general land pollution and water pollution
4 promulgations in the Environmental Protection Act.

5 My assumption is that the letter
6 is basically stating, as Mr. King read it, that if
7 we don't have a threat to public health or the
8 environment anymore and that basic provisions of
9 that act have been met, which is not to say every
10 detail of all of the regulations have been complied
11 with necessarily, but that we are not going to have
12 a situation allowing land pollution or, say,
13 water pollution, is that correct?

14 MR. KING: I think that's much closer
15 to it. The only thing I would throw in is if the
16 statute has the term prima facie evidence. So there
17 would be an opportunity for somebody to rebut that
18 initial conclusion.

19 MS. SHARKEY: Thank you.

20 THE HEARING OFFICER: Are there any
21 further questions on this particular section?

22 Let's proceed, then, to the first
23 of the prefiled questions of Mayer, Brown & Platt as
24 it pertains to the next numerical section, which is

1 Section 740.105.

2 MS. SHARKEY: Thank you. Section
3 740.105 describes applicability and it goes on
4 to talk about scenarios in which the rules may
5 not be applicable.

6 I know some examples have been
7 given, but we would like to request some additional
8 application as to the scope of Part 740 and we have
9 gone ahead and listed in our prefiled questions
10 areas that we particularly would like some more
11 application on in the record.

12 I'm wondering if you could
13 provide -- and I'm not frankly sure who is the
14 appropriate agency witness to respond -- but in
15 particular, whether or not 740 is designed to
16 cover, for example, landfill closure requirements.

17 MR. KING: The answer on that is no.

18 MS. SHARKEY: Are you saying that a
19 party who is involved in a landfill closure would
20 not be using any of the procedures in Section 740,
21 could not elect to use those?

22 MR. KING: That's correct based on the
23 way that the board's rules governing landfill
24 closures reads.

1 MS. SHARKEY: Can you explain why those
2 rules would -- it's my understanding under this rule
3 that unless a rule is in conflict with requirements,
4 that it may be allowed under these rules.

5 Do you consider it to be in
6 conflict with landfill closure requirements?

7 MR. KING: It is in conflict in the
8 context that there was a specific procedure set up
9 for how you go through landfill closure. That's
10 laid out in Parts 807 and Parts 810 through 817.
11 That's the procedure you violate when you have a
12 landfill.

13 MS. SHARKEY: Okay. If one is
14 undertaking -- maybe we need to break it down a
15 little bit.

16 If one is undertaking a closure,
17 for example, pursuant to -- if this is a landfill
18 that is an existing landfill of long duration and
19 under a Part 807 landfill and that landfill is in
20 closure, but has ongoing remedial activities going
21 on, is there an opportunity to use the procedures
22 in these rules.

23 I'm really thinking along the
24 lines of steps involved in going through and

1 addressing the remediations -- remedial work,
2 doing site investigations and going through and
3 submitting remedial action plan, submitting remedial
4 action completion report, and getting to a no
5 further action letter.

6 MR. KING: No. Those other board rules
7 would still control in that context.

8 MS. SHARKEY: Am I correct in
9 understanding Part 742 may apply in that context,
10 however?

11 MR. KING: I think that's something that
12 we will be talking about next week. That's one of
13 the points of our testimony there.

14 MS. SHARKEY: All right. If it were a
15 case in which there were an aspect of the closure
16 for activities under a landfill closure that were
17 not specifically addressed by procedures in
18 prohibiting regulations on the closure regulations,
19 might those appropriately fall into this program
20 or utilize these procedures?

21 MR. KING: I guess we see those rules
22 as being broadly applicable to landfills and that
23 the board intended those to be broadly applicable to
24 landfills.

1 Absent a change in the rules
2 dealing with landfills, those would be the procedures
3 that would apply. You wouldn't go to 740 as far as
4 procedural matters.

5 MS. SHARKEY: I guess what I'm trying
6 to figure out is if there are no aspects, in other
7 words, of these rules that might be imported into
8 that context.

9 In other words, maybe during
10 closure under a permitting regulation, but that
11 there are aspects of these rules that may be usable.
12 I guess maybe the first question might be has the
13 agency considered that at all.

14 MR. KING: We have looked very
15 closely -- I sound like a broken record here. We
16 have looked closely at those rules and during the
17 process where we developed the 740 rules, we had a
18 lot of consultation with our people who administered
19 that part of the program.

20 Their conclusion, based on their
21 reading of those parts of the board's rules, was that
22 740 would not apply. You would follow the
23 requirements applicable to landfills when you are
24 dealing with landfills whether it's a closure or a

1 post-closure situation.

2 MS. SHARKEY: Okay. Thank you.

3 A second area, then, of question
4 crosses a facility or site that may have received
5 a section 4(q) notice and going forward with
6 remediation under that program. Might that
7 remediation applicant opt to use these procedures
8 to fulfill those requirements?

9 MR. KING: The answer there is
10 clearly yes. That would be something that we would
11 anticipate.

12 MS. SHARKEY: My second two examples
13 on areas of concern are RCRA facilities and
14 facilities that, in other words, are either in
15 the interim status or Part B. I would ask you to
16 just help me distinguish those and hope it might
17 make a difference.

18 MR. KING: I don't think it makes a
19 difference whether its a RCPH interim status facility
20 or it's a RCRA Part B facility. In either case, you
21 would not be under 740. You would be under RCPH
22 interim status facility. The requirements there are
23 under Part 725.

24 For a Part B facility, they are

1 under Part 724. This doesn't mean that T.A.C.O. --
2 the Part 742 procedures, those presumably could
3 help as far as the process of setting up clean up
4 objectives, but you would not handle procedural
5 aspects under Part 740.

6 MS. SHARKEY: Is there any problem
7 with a facility that is involved in a RCRA facility
8 closure or has a facility closure going on or has
9 otherwise had interim status or has a Part B also
10 utilizing these procedures for other remedial
11 work at those sites?

12 MR. KING: If it is a situation where
13 the areas of the site do not fall within the scope
14 of the RCRA program, then, that would become a
15 feasible option.

16 MS. SHARKEY: Okay. I think that takes
17 care of the interests I have in mind. I'm wondering
18 if there are any other instances in terms of
19 applicability where there are questions that have to
20 do with the conflict question by federal law or
21 federal authorization or by other federal approval?

22 My question is whether or not
23 that's the same thing as saying that these procedures
24 may be used except to the extent they are in conflict

1 with federal statutes or regulations. I think that
2 language was actually used in some of the prefiled
3 testimony.

4 I just wanted it clear that we are
5 not going to be looking at federal regulations for
6 anything that specifically allowed the use of these
7 procedures necessarily, but simply that there are no
8 conflicts with these regulations.

9 MR. KING: When we put together B --
10 actually, B is drawn from language that's in the
11 statute. What we were trying to do is not to
12 preserve specific sites, if you will, going into
13 this Part 740, but to reserve the possibility
14 that we could work out agreements with the federal
15 government under which we could put whole classes
16 of sites into the 740 program.

17 MS. SHARKEY: I'm just wondering if
18 I'm correct, then, that it's not in conflict with
19 the federal requirements or a federal authorization
20 that one could assume the program requirements could
21 apply to that situation.

22 MR. KING: Well, any site that would
23 fall within one through four under Subsection A of
24 Section 740.105 would not fall, then, within 740.

1 MS. SHARKEY: Whether or not the
2 provisions of those programs were in conflict?

3 MR. KING: One of the difficulties we
4 have is that where there is -- for instance, with
5 the underground storage tank program, where there
6 is very clearly a set of procedures that have to
7 be followed, whether or not there is a conflict
8 with Part 740, we have to follow those procedures
9 and not follow the 740.

10 MS. SHARKEY: Okay. Thank you.

11 THE HEARING OFFICER: Just one minute.

12 We have more prefiled questions by
13 the site remediation advisory committee.

14 MS. ROSEN: I'm Whitney Rosen. I
15 represent Illinois Environmental Regulatory Group.
16 We participated with others to create some questions
17 for the site remediation advisory committee.

18 The first question that I'll
19 ask is pursuant to Section 740.105. What is the
20 status of agency efforts to enter into a memoranda
21 of agreement with the United States Environmental
22 Protection Agency, which would allow the use of
23 Part 740 and those areas excluded from Part 740
24 applicability in Section 740.105(a)(1)-(4)?

1 MR. KING: Let me initiate our answer
2 on that by just providing the board with a little
3 bit of background relative to where we are at as far
4 as the MOA's we do have with USEPA.

5 In the spring of 1995, IEPA and
6 USEPA negotiated an agreement, which was an addendum
7 to our Super Fund Program. It was the first one of
8 its kind in the nation, which basically provided
9 that if the state approved a remediation under its
10 voluntary clean up program, that that site, for
11 purposes of USEPA looking at it, was going to be a
12 site of no further action.

13 Of course, they have certain
14 caveats, but it was a clear statement of public
15 policy that where we had gone through and approved
16 a site clean up taking place, the federal government
17 was going to take a hands-off approach to that site.

18 We thought that was really a good
19 concept. We were pleased to be the first state in
20 the country to have that kind of agreement with the
21 federal government.

22 Pursuant to their invitation,
23 we have sought to expand that concept beyond the
24 relationship we had relative to the Super Fund

1 Program to the relationship that we had with the
2 Federal RCRA Program as well.

3 We submitted a proposed MOA to
4 USEPA back in June of '96. It's now November of
5 '96. We still have not gotten a formal response
6 to that. So they are having some -- they are
7 continuing to review it and take it into
8 consideration, but we don't have a final response
9 from them on that at this point.

10 MS. ROSEN: Okay.

11 THE HEARING OFFICER: You can proceed
12 with your questioning on this section.

13 MR. RIESER: I am David Rieser again.
14 I think the second question, will the agency
15 clarify that anyone in the current pre-notice site
16 remediation program can elect to enter the 740
17 program unless they have actually received a Section
18 4(y) letter, has clarified by the errata change to
19 740.105(c). So that takes care of my question.

20 THE HEARING OFFICER: Did you want to
21 continue with the questioning with regard to this
22 section?

23 MR. RIESER: Sure, sure.

24 THE HEARING OFFICER: I believe it's

1 questions three, four, five, six and seven.

2 MR. RIESER: Number three, if a site
3 proposed for consideration or enrolled under the site
4 remediation program is facing an enforcement action
5 with respect to releases at the site, would that be a
6 basis for not accepting the site or for terminating
7 the site's enrollment in the site remediation program
8 or Site remediation program under this section? If
9 so, how would this program be used for sites where
10 there is an issue?

11 MR. KING: We would see the Site
12 remediation program program being used in conjunction
13 with enforcement primarily where there is a consent
14 order.

15 Normally, what we see, in most
16 cases, is the result of enforcement cases that there
17 was an order that's entered and the order specifies
18 that the respondent will proceed to perform a series
19 of activities to remediate a site and we think that
20 one of the useful functions of the Site remediation
21 program program will be to create a place to look to
22 and to formulate as part of the consent order so that
23 there was mechanism to deal with the remediation part
24 of the consent order in a fairly clear way.

1 MR. RIESER: Would the -- let's call
2 it the defendant, for lack of a better term, or
3 alleged defendant, if you will, would that party
4 be required to execute a contract with the agency
5 and pay for the agency's evaluation time as would
6 any other applicant?

7 MR. KING: Yes. Now, we would not
8 expect that -- normally, the way we set up consent
9 orders is that we provide for that provision in the
10 consent order. Obviously, a person isn't going to
11 have to pay twice for the same services. It's
12 either controlled by the Site remediation program
13 program directly or by the consent order itself.

14 MR. RIESER: So it would be an item of
15 negotiation between the parties?

16 MR. KING: There wouldn't be much
17 negotiation from our standpoint on that one.

18 MS. ROSEN: I have some further
19 follow-up on that. You just basically addressed
20 a situation where -- an enforcement situation
21 where you have reached closure and you are dealing
22 with a consent order being negotiated.

23 How do you envision enrollment
24 in this process or this process to be utilized on

1 situations that are more pre-enforcement where the
2 agency is considering or has potential evidence from
3 an alleged violation, but it has not been referred
4 to the attorney general's office, would you envision
5 the same sort of use of the program?

6 MR. KING: I think in that case, it
7 might be a little bit different in terms of it
8 could be something that's a meaningful way to go
9 about remediation.

10 On the other hand, if we think
11 that somebody is really forum shopping because they
12 don't want to deal with the specific program and they
13 are trying to get out of certain requirements, we
14 certainly would not look at that kind of situation
15 very favorably.

16 MS. ROSEN: But for those sites where
17 there is clearly not an applicability issue, this
18 would be the sort of program you would envision
19 people utilizing to address their problem?

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

21 MS. ROSEN: That would be the option
22 of the remediation applicant, is that right.

23 MR. KING: That's right.

24 MR. WATSON: The other alternative

1 would be going through the formal Super Fund
2 Program?

3 MR. KING: Well, I hate to just throw
4 out words like formal Super Fund Program without
5 giving it a definition. So I'm not quite sure what
6 you mean when you said that.

7 MR. WATSON: Under the requirements of
8 Part 750?

9 MR. KING: Well, Part 750 normally
10 results in -- one of the things that results there
11 is that there is a 4(q) notice issue. We discussed
12 that earlier. That would be at the court of appeals
13 issue during the site remediation program. That
14 would be an option.

15 MR. RAO: I have a follow-up to
16 question three about the issue of reinforcement.
17 Would your answer change depending on who is
18 bringing the enforcement action, whether it's a
19 private citizen or the agency?

20 MR. KING: A situation where there has
21 been an order issued?

22 MR. RAO: No. The question about what
23 would be the basis for either accepting or releasing
24 a site if there is any enforcement action with

1 respect to the release of the site, you know, would
2 there be any difference in who is bringing that
3 enforcement action?

4 MR. KING: I think we apply the same
5 kind of logic because we have seen that in certain
6 circumstances, for instance, where a site is about
7 to be listed on the federal national priority list,
8 which is a serious action that the federal government
9 is taking. People will then try to defer that action
10 from going forward and enlisting in our voluntary
11 cleanup program.

12 Well, we kind of -- that's not
13 really the purpose of the voluntary cleanup plan
14 to provide a mechanism for somebody to get out of
15 dealing with the federal government on NPL sites.
16 So we really try to stay away from those situations.
17 I think it's more -- you really have to look at
18 things in that context on a case-by-case basis.

19 MR. RIESER: I'm sorry. If I could
20 follow-up, what would be the basis for rejecting a
21 site in the situation you just provided?

22 MS. SHARKEY: Excuse me. What was your
23 question?

24 MR. RIESER: What would be the

1 basis for rejecting or determining that a site
2 was inapplicable in a situation where Gary just
3 described.

4 MS. SHARKEY: Meaning the pre --

5 MR. RIESER: No. Somebody being
6 concerned that they are about to be enlisted on
7 the NPL.

8 MR. KING: I mean, once they are
9 on the NPL, this clearly does not apply although
10 I suppose somebody could come in on a preliminary
11 basis and be entered into the program. If they,
12 then, appeared, on the NPL list, you know, I think
13 we would seek to terminate them from being in the
14 program because it is no longer having any
15 applicability.

16 MR. RIESER: Thank you.

17 MS. McFAWN: Have you thought about
18 that in the context of a citizen?

19 MR. KING: We have been thinking about
20 it right now, but I'm not really sure prior to now
21 that we have thought about it in enough detail to
22 be able to provide a clear answer to that question.

23 MS. McFAWN: All right. Thank you.

24 MR. WATSON: It would be the view of

1 the agency, though, would it not, that remediation
2 under this program and a receipt of a no further
3 remediation letter would resolve the issue of the
4 existence of an imminent and substantial endangerment
5 of human health and the environment at a site at
6 least as far as the Illinois EPA was concerned?

7 MR. KING: Well, hopefully that would
8 have been addressed a long time before you got to the
9 NFR letter stage.

10 If you are really anticipating
11 that you have an imminent hazardous site, you move
12 right away on that, and you don't wait until you are
13 involved with a formal program with the state or
14 anyone else. You need to take care of that situation
15 as quickly as possible.

16 MR. WATSON: Right. I understand that.
17 I'm just saying in the context of citizen supervision
18 under RCRA, the standard is whether or not there is
19 an existence of an imminent and substantial
20 endangerment of human health and the environment,
21 it would be your view that cleanup under this program
22 would dissolve any kind of threats to human health
23 and the environment?

24 MR. KING: Yes. I think that's true.

1 That's one of the questions raised under Part 742.

2 MR. WATSON: Okay. Thank you.

3 THE HEARING OFFICER: Were there
4 any other follow-up questions to this particular
5 question?

6 Does the site remediation
7 committee or advisory committee want to proceed
8 with the next question?

9 MS. ROSEN: How will the agency
10 determine and how will a remediation applicant
11 demonstrate whether a document is comparable to the
12 purpose of Section 740.105(c)?

13 MR. EASTEP: We are treating comparable
14 as being a document that meets substantive
15 requirements.

16 As a practical matter, I think
17 we have spent a lot of time discussing these issues
18 with the remedial applicant and/or the applicant's
19 engineer.

20 MS. ROSEN: Okay. Just to continue,
21 will documents that have been accepted by the agency
22 for use in the pre-notice site cleanup program be
23 deemed comparable for the purpose of the SRP?

24 MR. EASTEP: If they are comparable,

1 as long as they are still applicable, and nothing
2 has changed, generally, yes.

3 MS. ROSEN: I'll just kind to
4 paraphrase question six. It would be okay as long
5 as the relevant information is included in the
6 document, but on a different form that is required?

7 MR. EASTEP: I would say yes, but I
8 caveat that by saying with the submission of relevant
9 information. It doesn't necessarily mean they don't
10 have to submit something else.

11 Relevant information could come
12 in in many different forms and it doesn't mean
13 that it would necessarily fulfill all of the other
14 requirements and be complete by itself.

15 MS. ROSEN: All right. Well, assuming
16 that you have documents that have been prepared
17 previously and they contain all of the substantive
18 information that you need, the fact that you are not
19 submitting a form would not cause you to deem them
20 not comparable?

21 MR. EASTEP: Generally, that's
22 correct.

23 MS. ROSEN: Okay. And question number
24 seven, is it correct that these proposed regulations

1 do not change existing reporting responsibilities
2 which property owners or operators may have under
3 other laws or regulations?

4 MR. KING: The answer to that is yes.

5 THE HEARING OFFICER: Okay. I believe
6 we did have a hand raised in the back pertaining to
7 this section, sir.

8 MR. GOBELMAN: My name is Steve
9 Gobelman. I represent the Illinois Department of
10 Transportation. Just to clarify that, dealing with
11 applicability on landfill, if the landfill wasn't
12 a permanent landfill or recognized by the agency
13 as a landfill, would that landfill be applicable
14 under this? For example, I'm talking about an old
15 dump, city dump, or something that the agency didn't
16 recognize as landfill.

17 MR. EASTEP: We would probably have
18 to know more about it. Some landfills, whether we
19 recognize -- I'm not sure what you mean by whether
20 we recognized it.

21 If you had an open dump situation,
22 you could certainly probably come in if your action
23 was to go in and clean up the dumpster, for example.
24 Other landfills, while they may not have been

1 permitted, nonetheless, are subject to Part 807 and
2 perhaps 811 through 815 requirements.

3 The fact that they were laying
4 out in the weeds and haven't identified themselves
5 doesn't mean that they would escape the requirements
6 of 811 through 815 or 807.

7 MR. GOBELMAN: But if they weren't
8 subject to 807 or 811 through 815, that would
9 definitely fall under these proposed --

10 MR. EASTEP: At that point, they could
11 fall under these, yes.

12 MR. GOBELMAN: Okay.

13 THE HEARING OFFICER: Ms. Sharkey?

14 MS. SHARKEY: I would like, if I
15 could, to just follow-up with one more question.
16 I'm trying to get some clarification on Subpart B
17 of 105.

18 Subpart B states any person
19 whose site is excluded under Subsections (a)(1)
20 through (a)(4) above may utilize the provisions
21 of this part to the extent allowed by federal
22 law, federal authorization, or by other federal
23 approval?

24 I think earlier, I may have

1 asked this question and then charged ahead and
2 didn't let you answer it.

3 Could the agency provide for
4 us or explain the meaning of this section which
5 would appear to say that although excluded under --
6 that a site may be excluded under those specific
7 categories one through four, they may be allowed
8 to utilize these provisions to the extent allowed
9 by federal law, federal authorization or, federal
10 approval.

11 What does that mean?

12 MR. KING: Well, as I was saying
13 earlier, the language of this is taken out of
14 the statute, out of Title 17. Where it appears
15 in the statute, it's really not distinguishing
16 between 740 -- between what we now have as 740
17 and what we have as 742.

18 I think the predominant intent
19 when this appeared in the statute was that to the
20 extent you could, you would end up using risk-based
21 remediation objectives for whatever type of sites
22 you have even if you don't exactly have -- even if
23 it's not directly under the procedural aspects of
24 Title 17, which have now become Part 740.

1 I suppose we could have gotten
2 away with not even putting this provision in a
3 Subsection B, but we thought it was important to
4 put in because of the fact we got this phrase in
5 there or by other federal approval because we
6 were -- we have been hopeful that we could broaden
7 the context of 740 to include some categories of
8 sites which are not currently included. That's
9 why it's in there the way it is.

10 MS. SHARKEY: For the language for
11 other federal approvals, you are looking for
12 something -- we would need to be able to identify
13 a specific approval allowing the use of these rules,
14 is that correct?

15 MR. KING: Right.

16 MS. SHARKEY: How about to the extent
17 allowed by federal law or federal authorization?

18 Would we have to see a specific
19 reference in the federal rules or these rules in
20 order to be able to use them?

21 MR. KING: You have to see some kind
22 of specific -- as we say, a federal law or federal
23 authorization, or other federal approval, it says
24 that's an acceptable way to proceed.

1 MS. SHARKEY: Are you expecting that
2 we actually see a federal law referencing the
3 Pollution Control Board's site remediation rules?

4 MR. KING: Do you mean a federal
5 statute?

6 MS. SHARKEY: Or, I suppose,
7 regulation.

8 MR. KING: No. I wouldn't expect to
9 see a set of federal rules. Again, there are all
10 sorts of legislation that's before Congress. One
11 of the bills that has been actively pursued is a
12 bill to establish -- give recognition on a federal
13 level to state voluntary cleanup programs.

14 Depending on how that legislation
15 came out, it might have a broad approval of the types
16 of things that are contained in Part 740. So there
17 might not be a direct reference, but at some point in
18 the future, we may see some that is generically
19 referring to it.

20 MR. EASTEP: I might amplify that a
21 little bit. One example might be last year, I
22 believe, it was the Lott bill, which was a senate
23 bill that provided for management of certain
24 remediation wastes, and I think it was called the

1 remediation waste bill.

2 That would have allowed you to
3 manage -- pursuant to a state approved voluntary
4 cleanup plan, you could manage certain RCRA wastes
5 or hazardous wastes without being subject to all
6 of the requirements with that being a type of federal
7 statute as being federal approval under this part.

8 MS. SHARKEY: Thank you.

9 MR. WATSON: I've got one more question
10 on this. It's clarification of the record.

11 Is it your position that the
12 existing memorandum of agreement that is in place
13 between the USEPA and IEPA and the voluntary cleanup
14 program is applicable to this site remediation
15 program without revision?

16 MR. EASTEP: Yes, sir.

17 THE HEARING OFFICER: Are there any
18 other follow-ups?

19 MS. HENNESSEY: I have a follow-up
20 question.

21 Are there any situations in which
22 it would be appropriate to refer to -- expand the
23 language of Section B to refer to state law, state
24 authorization, or state approval?

1 MR. KING: The answer to that is no
2 because that was something we suggested that the
3 legislation provide for when it was first discussed.
4 We were told no. We had to say federal. That's why
5 the rule is really reflecting the language of the
6 statute on that point.

7 MS. HENNESSEY: Thank you.

8 MR. WIGHT: I might expand on that a
9 little bit. It may help clarify this. I think the
10 issue here is really federal delegations.

11 If you look at programs that have
12 been excluded under the applicability section, they
13 are programs that are primarily subject to federal
14 law or they are operating under state regulations,
15 but the state regulations have been accepted by the
16 federal government or the USEPA in lieu of federal
17 regulations.

18 The whole point of this is to
19 keep us from getting cross-waves from the federal
20 government where programs have already been
21 delegated.

22 For that reason, it would be
23 inappropriate for a state law to authorize the
24 use of these regulations if it would jeopardize

1 the federal delegations.

2 MS. HENNESSEY: Thank you.

3 MS. TIPSORD: I have a follow-up.

4 There was just a discussion -- forgive me. I have
5 lost your name.

6 MR. WATSON: John Watson.

7 MS. TIPSORD: Mr. Watson asked about
8 that memorandum of agreement. Is that memorandum a
9 part of this record in this proceeding?

10 MR. EASTEP: That's attached to my
11 testimony on Subpart A.

12 MS. TIPSORD: So it's a attached to
13 Exhibit 1?

14 MR. EASTEP: Yes.

15 MS. TIPSORD: All right. Thank you.

16 THE HEARING OFFICER: Do we have any
17 other follow-up questions.

18 Why don't we proceed, then, to
19 Section 740.110 and we will start with the site
20 remediation advisory committee.

21 MR. RIESER: How will the permit waiver
22 work? Is a person seeking to operate a remedial
23 system with a discharge or air emission still
24 required to obtain approval of the agency division

1 responsible for that discharge or emission?

2 MR. KING: The language in 740.110 is
3 taken directly from Title 17 of the Environmental
4 Protection Act and that concept is drawn from
5 amendments to the Federal Super Fund law that
6 occurred in 1986 where there was a permit waiver
7 provision put in there.

8 So we have been operating with a
9 permit waiver provision relative to the federal Super
10 Fund Program since 1986. So far, we have ironed out
11 most of the kinks relative to that over ten years,
12 but again there aren't that many of those kind of
13 sites.

14 We really are going to be going
15 through a process and we have begun to do that as
16 far as communicating internally with various bureaus
17 within the agency to figure out which permits are
18 federally required and which are not federally
19 required because there is an exemption relative to
20 this waiver for permits that are required by federal
21 law or regulation.

22 So the context of a discharge
23 of an air emission, the applicability of a permit
24 relative to air emissions, we're still in the process

1 of discussing that issue with the agency's Bureau of
2 Air. It really will come down to how broad is the
3 applicability of the Federal Clean Air Act in terms
4 of calling permits that the agency issues, federal
5 or not federal.

6 So we're still in a position of
7 discussing that and we want to make sure that we are
8 clearly coordinating this because we don't want to
9 somehow inadvertently impact authorization issues for
10 the Bureau of Air.

11 MR. RIESER: Is that your answer?

12 MR. KING: Yes.

13 MR. RIESER: Okay. If there are --
14 assuming there is a type of air emission that would
15 require a state permit, which is not considered a
16 federal permit, how do you envision the system
17 working?

18 Would somebody have to -- would
19 somebody simply work with your project manager
20 through the 740 process or would they also have
21 to go through the Bureau of Air to have some
22 discussion or get some authorization from them?

23 MR. EASTEP: We would probably initiate
24 discussion, I think, at the project manager level

1 with the other affected bureaus. If it were the
2 case that there was a permit that was waived under
3 the circumstances, we would probably try to get
4 all of the parties together with the particular
5 bureau as well as the remedial applicant and find
6 out what the substantive requirements were and
7 insure that the substantive requirements were met
8 even though the permit wasn't.

9 MR. RIESER: At what time does the
10 agency feel they will have an answer to this question
11 so that the community will know what types of permits
12 are applied?

13 MR. EASTEP: We are currently
14 discussing this with the other bureaus right now.

15 MR. RIESER: I understand that. When
16 do you expect those discussions to be complete?

17 MR. EASTEP: Soon. I'll probably have
18 a lot better feel after we get back from these
19 hearings where they are at.

20 MR. RIESER: All right. I just think
21 that would be useful for the purposes of making this
22 record to find out how extensive the agency --

23 MR. EASTEP: I agree. The more we can
24 find out now, the better off we will be.

1 MR. RIESER: Thank you.

2 THE HEARING OFFICER: Is there anything
3 further on this section regarding permit waivers?

4 MS. ROSEN: I have one. This is based
5 on the federal Super Fund waiver, which is allowed.
6 I'm not familiar with that, so excuse me if this
7 is a question not going anywhere.

8 Have you considered discussing
9 with USEPA whether the terms of the memorandum of
10 agreement could be broadened to allow us to extend
11 our permit waiver under this program to include the
12 items that are -- federal items that are waived
13 under the Super Fund waiver? I mean, would that be
14 something that would be possible to provide relief
15 from the federal permits?

16 MR. EASTEP: What permits?

17 MR. KING: We have not considered
18 that and I don't think we are going to consider
19 it. We are having enough trouble getting the
20 extension -- getting a broadening of the Super
21 Fund MOA and to dealing with RCRA sites and to
22 somehow to try to get an exemption relative to
23 federal permits. I'm not sure that would go
24 very far at this point.

1 MS. ROSEN: Okay.

2 THE HEARING OFFICER: Is there anything
3 further at this time? Okay. Why don't we go off the
4 record, please.

5 (Whereupon, after a short
6 break was had, the
7 following proceedings were
8 held accordingly.)

9 THE HEARING OFFICER: All right.
10 Let's proceed. We're back on the record.

11 I believe we were working on
12 Section 740.115. The site remediation advisory
13 committee may proceed with question number nine.

14 MS. ROSEN: In light of Lawrence
15 Eastep's testimony regarding Section 4(y) letters,
16 will the agency confirm that the choice of the
17 RA, spills or other immediate releases can also
18 be resolved through focused site remediation as
19 provided for in these rules and that the various
20 reports required under the SRP may be combined
21 under one document?

22 MR. EASTEP: Generally, we can do
23 that. There might be some exceptions. For example,
24 releases that would be covered under RCRA or subject

1 to RCRA permit or directive active closure obviously
2 would not.

3 MS. ROSEN: But for things that
4 otherwise met the applicability, you could have
5 a choice to --

6 MR. EASTEP: Typically, yes.

7 MS. ROSEN: Does the agency believe
8 that utilization of the Site remediation program and
9 Part 742 provisions would be appropriate in every
10 instance where a reportable release has occurred
11 which may potentially impact groundwater and soil?

12 MR. EASTEP: Not necessarily. Every
13 release -- as I mentioned, RCRA -- covered RCRA unit
14 releases would not be. In some emergency situations,
15 we would want to react fairly quickly and get things
16 cleaned up. It might not necessarily be in some
17 emergencies. I guess if you have a reported release
18 of a gas, that would not be subject, for example,
19 chlorine.

20 MS. ROSEN: Page six of your testimony,
21 Larry, is addressing Subpart A which outlines an
22 example where a tank truck hauling petroleum is
23 involved in an accident and releases a small amount
24 of petroleum. The testimony further indicates that

1 in those circumstances, it would be burdensome to
2 utilize the provisions of Part 742 to secure a
3 release, and the limited procedures and release
4 obtained under Section 4(y) may be more appropriate.
5 Would your position be the same if the small release
6 had occurred as a result of a spill at a facility?

7 MR. EASTEP: Again, with the caveat
8 that I mentioned before.

9 MS. ROSEN: Maybe I could clarify
10 why we were asking about that. It just appeared
11 that there may have been a contradiction between
12 Mr. Eastep's testimony regarding what may or may
13 not enter the program and Mr. O'Hara's testimony
14 as to what could come under a focused site
15 investigation.

16 We just wanted the record to
17 be clear that there was the 4(y) option, but you
18 can resolve similar things assuming you meet
19 applicability under a focused site investigation,
20 is that correct?

21 MR. EASTEP: I think we designed
22 the program so it could be flexible enough so that
23 certain people could come in using a focused site
24 investigation. With others, it might be appropriate

1 with 4(y). In some instances, even with a release,
2 they might want to come in formally under the SRP
3 program. I think the flexibility is there and it
4 depends really on the applicant and the applicant's
5 needs.

6 MS. ROSEN: Thank you.

7 THE HEARING OFFICER: Mr. Rieser?

8 MR. RIESER: Yes. If I could ask
9 just a follow-up question. It has to do probably
10 with that answer and also probably with the addition
11 to errata sheet number one of the language and the
12 recording requirements with respect to 4(y).

13 Is it your intention that 4(y)
14 letters also be recorded or I should say that every
15 4(y) letter be recorded?

16 MR. EASTEP: It may be in some
17 instances if you are cleaning up at a Tier 1
18 level, reporting may be appropriate.

19 MR. RIESER: So in those instances
20 where there is some type of deed restriction or
21 restriction on the use of the property or restriction
22 on certain activities on the property, in those
23 instances, you would want to record a notice, but
24 if you had, say, a -- is that correct?

1 MR. EASTEP: This is going to -- I
2 don't know whether we have actually faced this yet.

3 MR. LUCAS: I don't think so.

4 MR. EASTEP: I think it's just going
5 to depend on the circumstances when the case comes
6 up. We can envision circumstances where it may not
7 be necessary to record a 4(y) or we can -- if there
8 are necessary institutional or engineering controls
9 that are necessary to protect human health and to
10 maintain the character of the release, so to speak,
11 then, it would be important.

12 MR. RIESER: If this release was
13 remediated to Tier 1 residential levels and no
14 further restrictions on the property were necessary,
15 would you still envision recording a 4(y) letter as
16 necessary?

17 MR. EASTEP: Probably not.

18 MR. RIESER: I think it's an issue
19 that may come up because of the differences that
20 people see between the two that you record one and
21 not record the other. I think it would be important
22 to know in those instances where there would be no
23 need for future restrictions on the property, if
24 you want, under a 4(y), that would not have to be

1 recorded.

2 MR. EASTEP: So far, we have never
3 recorded any 4(y) and we don't envision a major
4 change in that procedure.

5 MR. RIESER: Thank you.

6 MR. WATSON: Have you approved any
7 4(y) letters with institutional controls or
8 engineered barriers?

9 MR. EASTEP: I think there have
10 been controls that we have put on some of the 4(y)s.

11 MR. WATSON: Can you give me an
12 example?

13 MR. LUCAS: Not off the top of my
14 head, but it would be a similar institutional
15 control, which is the same concept as the NFR
16 letter. It seems like the examples that Larry
17 and I are discussing is like the remaining of
18 a parking lot remaining in place. That could be
19 the only one.

20 MR. RIESER: Well, to put to you
21 kind of another side of the question, in
22 the circumstance where there was no future
23 restrictions or requirements for maintaining
24 an engineered barrier such that a 4(y) letter,

1 in the agency's opinion, it would not have to
2 be recorded, could the applicant still do it
3 at his or her own option?

4 MR. EASTEP: Is that a different
5 question?

6 MR. RIESER: Yes. On the one hand,
7 does the agency -- when would the agency require
8 it and then the other is even if the agency didn't
9 require it, could the applicant still do it?

10 MR. EASTEP: Could the applicant
11 still record it?

12 MR. RIESER: Yes.

13 MR. EASTEP: I don't know if we would
14 have any say in the matter.

15 I was just informed that they
16 could do it. I guess my point is I don't know
17 because I don't practice real estate law.

18 MR. WIGHT: There is nothing in
19 the program that would stop them from doing that.

20 MR. RIESER: Thank you.

21 THE HEARING OFFICER: Ms. Sharkey,
22 you also had a couple questions pertaining to
23 this section?

24 MS. SHARKEY: Yes. I think my

1 question is to just sum up one general one.

2 What I would like is an
3 explanation as to how a Section 4(y) release
4 differs from the release provided under the
5 no further remediation letter available under
6 section 58.10 and these rules?

7 Particularly, I would like
8 for you to address the procedural differences,
9 the differences in scope and effect of the two
10 releases.

11 MR. EASTEP: Well, there are going
12 to be a lot more conditions on the formal NFR
13 letter. Now, most of those are outlined under
14 Title 17 in the statute.

15 The things that we are going
16 to have on there -- there will be an indication
17 that it signifies that the site does not represent
18 a threat to human health or the environment and it
19 specifically will identify institutional engineering
20 controls.

21 There will be an identification
22 of reasons for why that letter can be voided.
23 So there are a number of formal requirements that
24 will be attached to the NFR letter. It's pretty

1 clear that the NFR letter applies to the remedial
2 applicant, to the owner, the operator, and to
3 subsequent owners and operators. So all of that
4 is clear with the NFR letter.

5 The 4(y) letters could be
6 much briefer. There could be typically a lot
7 fewer conditions attached to them, but then again,
8 they don't carry the same significance.

9 As we have discussed, typically,
10 you would not see a 4(y) letter attached to the
11 deed. So the implication being is that the 4(y)
12 might only be good to the remedial applicant or
13 the person that got it. Although I'm not exactly
14 sure about that, but that certainly could be
15 implied. So those are some of the general
16 requirements.

17 Also, I'm not sure if we start
18 talking about some of the releases that we grant
19 to units being remediated at the federal facilities,
20 it's not really appropriate for them to come to
21 the formal site remediation program and end up
22 with an NFR letter.

23 The way we handle those is
24 governed by a lot of federal law and federal

1 policy. So we thought that we really needed
2 the flexibility inherent with the 4(y) to deal
3 with sites being cleaned up with the federal
4 sites.

5 MS. SHARKEY: How might a 4(y) be
6 used at a federal site? What would it look
7 like, that letter? How would you tailor it
8 to the federal site?

9 MR. EASTEP: The 4(y) might just
10 say that the site has been cleaned up in accordance
11 with the approved remedial action plan or whatever
12 we might call it for that branch of the service that
13 we will be dealing with.

14 It might be very unit-specific
15 on a closing base. We would call that a finding
16 of suitability to lease, which is like a -- it's
17 called a fossil.

18 In closing military bases such
19 as Chenute or Savannah in Illinois, those are
20 closing sites. As they close those off, these
21 sites were typically very, very large. Usually,
22 they end up closing small units or portions of
23 units or parcels of units.

24 So it gets fairly complicated.

1 In a lot of them, they end up selling off or
2 a lot of them they end up leasing.

3 There is federal guidance for
4 transfer of facilities or units and there is federal
5 guidance for leasing them.

6 Our letters would be specific
7 with whether it was actual transfer or just a lease.
8 Of course, we would consider the future use, whether
9 it was industrial use or residential use. The
10 way the federal government characterizes that would
11 be slightly different than how we might normally
12 within the real estate community within Illinois.

13 MS. SHARKEY: I'm wondering about the
14 procedures that the agency will use for somebody
15 who is choosing to go under one of these. It sounds
16 like a more simplified approach to getting a 4(y)
17 letter than necessarily going through all of the
18 procedures outlined in these rules to get to a no
19 further remediation.

20 What procedure do you anticipate
21 somebody who is getting a 4(y) letter using?

22 MR. EASTEP: Well, we ask them to do
23 many of those same procedures that they would
24 unless we approve something otherwise. For example,

1 we would expect that they were doing Phase 1 to
2 follow ASTM references for Phase 1 investigations.

3 Again, we follow them for use
4 of -- the rest of the investigation in the sampling
5 to use the same sampling procedures, but it is
6 depending on the nature of the 4(y) they would be
7 requesting and how they might want to modify that.

8 Again, if it's just for a 4(y)
9 and it's just for a spill from some transportation-
10 related incident and they have just one specific
11 chemical, then, your investigative procedure might
12 only be regarding this particular spill in question
13 and you wouldn't have to do necessarily all of the
14 historical workup or looking at the surrounding area.

15 I mean, there could be a lot of
16 differences that depend on what happens with the
17 applicant and what they want to see with their 4(y).

18 MS. SHARKEY: In other words, the
19 procedures for a 4(y) letter are basically flexible?

20 MR. EASTEP: I would say at the start,
21 they would be very much the same, but they could be
22 very flexible depending on the nature of the 4(y).

23 MS. SHARKEY: I think that's all that
24 I have right now.

1 THE HEARING OFFICER: Mr. Rieser?

2 MR. RIESER: Mr. Eastep, might another
3 key difference with respect to a 4(y) letter is you
4 wouldn't have deadlines on the agency time when it
5 had to act and you would have no right to appeal
6 agency decisions of the Illinois Pollution Control
7 Board?

8 MR. EASTEP: That's correct.

9 MR. RIESER: Thank you.

10 THE HEARING OFFICER: Are there any
11 other follow-up questions to this section?

12 Let's proceed, then, to 740.120.
13 That's the section on definitions. Ms. Sharkey,
14 why don't you proceed, please, with your question
15 number three?

16 MS. SHARKEY: I noted that the
17 definition of contaminant of concern in these
18 regulations is taken from the definition of
19 regulated substance of concern in Section 58.2
20 of the act. It means any contaminant that is
21 expected to be present at the site based upon
22 past and current land uses and associated releases
23 that are known to the remediation applicant based
24 upon reasonable inquiry.

1 My first question is whether
2 this definition is intended to include contaminants
3 other than those that are known to be associated
4 with a specific release? For example, is it
5 intended to include pre-existing contamination?

6 MR. EASTEP: I wasn't really sure
7 what you were talking about with regard to specific
8 releases, but maybe you can clarify that. I guess
9 you could look at that a couple of different ways.

10 MS. SHARKEY: I think what I was
11 thinking about is if one knows one has a spill, as
12 we were talking about a few minutes ago, a simple
13 spill, a petroleum spill, for example, and one knows
14 that it's -- let's go even further and say we know
15 it's gasoline, is it possible that the contaminants
16 of concern would be actually broader than the
17 constituents of that known release, the gasoline,
18 and, in fact, require the remediation applicant
19 to look for pre-existing contamination of soil?

20 MR. EASTEP: We would expect if you
21 are referring to a focused investigation, we would
22 expect that they could focus their release to that
23 particular spill site, but depending on the
24 situation, they may have to look for other things

1 that might be related to either management of the
2 waste or to treatability, for example.

3 If you had a release on an area
4 that was otherwise contaminated and you were going
5 to pick this soil up and carry it off, well, you
6 picked this contaminated material up and it would
7 matter. You would have to know more than just it
8 was contaminated with gasoline.

9 If there were electroplating
10 sludge in the area where the spill was, then,
11 the waste would be hazardous. So you would have
12 to also identify that.

13 MS. SHARKEY: But isn't that --

14 MR. EASTEP: If you were going to
15 treat the waste, then, the nature of the
16 treatability -- you would have to have a more
17 complete identification of all of the constituents
18 in the waste for purposes of treatability.

19 MS. SHARKEY: For purposes of a
20 general definition, though, the general definition
21 here of contaminant of concern, I believe, becomes
22 the trigger for your Phase 1 and Phase 2 work, and
23 that is ultimately those contaminants for which one
24 looks for remediation objectives, is that not the

1 case?

2 MR. EASTEP: When you start out --
3 are you getting away from the concept of the focused
4 investigation now?

5 MS. SHARKEY: Well, I'm really trying
6 to figure -- it appears to me that this definition,
7 even in the focused investigation, would require one
8 to look at past land uses, any contamination
9 suspected to be present at the site based upon
10 past land uses.

11 MR. EASTEP: In a comprehensive, you
12 would certainly have to look at past land uses. I
13 think that's very clear and that is somewhat of a
14 standard, I think, for the industry, so to speak,
15 in doing these types of investigations.

16 As I mentioned, in a focused
17 one, in some instances, you might not have to
18 look at past use. You might just be able to look
19 at a particular circumstance at hand, but in other
20 circumstances, it might be necessary for the reasons
21 I just mentioned.

22 MS. SHARKEY: All right. So
23 contaminants of concern for a focused investigation
24 at least would not necessarily have to look at

1 anything beyond the contaminants specified by the
2 remediation applicant, contaminants of concern
3 would not be broader than those specified by the
4 applicant?

5 MR. EASTEP: Contaminants of concern
6 might not be, but their investigation might have to
7 consider other things.

8 MS. SHARKEY: And for the non-focused,
9 then, for a comprehensive investigation to take
10 place, would one need to look at past and existing
11 contamination?

12 MR. EASTEP: Yes.

13 MS. SHARKEY: Okay. Should others
14 ask questions on that definition before going on
15 to other definitions?

16 THE HEARING OFFICER: I don't
17 believe there were any other questions with regard
18 to the definition of contaminant of concern that
19 was prefiled.

20 You may proceed.

21 MS. SHARKEY: Thank you.

22 MR. WATSON: If I could ask one
23 follow-up, what would be the circumstances under
24 which you would know that you would have to go

1 out and do additional sampling?

2 I mean, is it site observation
3 that would make you aware of additional contaminants
4 because you know you are only doing the analyticals
5 for your contaminant of concern? I'm just saying --
6 I just want to add some clarification as to when
7 the agency's mind would trigger an obligation to
8 proceed beyond looking for that one contaminant.

9 MR. EASTEP: Well, it somewhat depends
10 on the case. If you are -- just a second. Let me
11 confer.

12 We have a site currently in the
13 voluntary program now where there are two parties
14 that are going to be involved in the remediation.

15 The site was an industrial site
16 for years. There has been a series of different
17 owners of the property. One applicant wants to
18 do a focused site investigation and they are going
19 to be dealing with asbestos.

20 In this case, they might only
21 have to look at asbestos, but we had to know a lot
22 more about the site because the other person --
23 the other party is going to be doing -- when they
24 get the asbestos done, they are actually hand-in-hand

1 because they are taking out the rest of the
2 contamination.

3 So if the one party was doing
4 the remediation on the site excluding the asbestos,
5 they would still have to know that asbestos was
6 there because there are different rules for dealing
7 with it.

8 So if you were focusing on, say,
9 creosote, and somebody had torn down a building
10 and left a bunch of asbestos there, you couldn't
11 complete your cleanup investigation without knowing
12 the asbestos was there because you have rules that
13 apply to that. There are a lot of circumstances
14 where it's necessary to know what's going on just
15 to know how to manage the waste.

16 MR. WATSON: Those obligations would
17 arise based on site observations and reasonable or
18 good engineering practices?

19 MR. EASTEP: Right. And they are
20 typically outlined in the Phase 1 and Phase 2
21 requirements. I think we mentioned that those
22 could be modified depending on the circumstances
23 of any site coming into the program.

24 MS. SHARKEY: I would just like to

1 make sure I understand this. I think you are making
2 a distinction that involves management of the waste,
3 however, rather than establishment of remediation
4 objectives.

5 MR. EASTEP: I think that's correct.

6 THE HEARING OFFICER: Mr. Rieser?

7 MR. RIESER: If you look ahead, not
8 to look too far ahead, but in Section 740.430(c),
9 I think there is language that allows you to make
10 the -- narrow the contaminants of concern for a
11 focused site investigation and requires you to
12 characterize characterization of sources and
13 potential sources of recognized environmental
14 conditions and the related contaminants of concern.

15 Is that the language in the
16 focused site investigation that you are referring
17 to?

18 MR. EASTEP: I haven't looked at
19 that, but that sounds reasonably correct. That's
20 Section 430?

21 MR. RIESER: 430(c).

22 MR. EASTEP: Were you assisting me in
23 answering this question?

24 MR. RIESER: Yes.

1 MR. EASTEP: I thank you very much.

2 MR. RIESER: With this language,
3 that would allow you to narrow the focus of what
4 types of contaminants of concern you would look
5 at based on your characterization of sources and
6 what you have identified as your recognized
7 environmental conditions at the site -- in a
8 focused site investigation?

9 MR. EASTEP: Correct. Maybe
10 Ms. Sharkey did say it best. A lot of it has to
11 deal with how you are managing waste as opposed
12 to what your specific release is going to be for
13 in the NFR letter.

14 MR. RIESER: Thank you.

15 THE HEARING OFFICER: Are there
16 any other further questions on this particular
17 definition?

18 Why don't we proceed, then,
19 with Mayer, Brown & Platt's question on the
20 definition of pesticide.

21 MS. SHARKEY: I just noticed that
22 there is a definition of pesticide included both
23 in these rules and in Section 58.2.

24 My understanding is that that

1 definition was taking from the Illinois Pesticide
2 Act. I guess I would just like some clarification
3 on the record here. Do you know if that definition
4 is intended to include substances not covered under
5 the definition of hazardous substance or regulated
6 substance under these rules?

7 MR. KING: The definition was put
8 in there because there is a requirement under the
9 applicability section in Title 17 that Title 17
10 also applied to pesticides as well as hazardous
11 substances.

12 MS. SHARKEY: I figured that was the
13 reason it was in there. I'm just wondering, though,
14 if you could answer my question, or maybe you are
15 not prepared to do it right now, as to whether that's
16 intended to be broader or different from the
17 definitions of hazardous substance or regulated
18 substance.

19 MR. KING: There are pesticides that
20 are not hazardous substances.

21 MS. SHARKEY: Or regulated substances?

22 MR. KING: Right, that's correct.

23 MS. SHARKEY: Do you know if this
24 definition includes herbicides?

1 MR. KING: As far as whether a herbicide
2 also is included as a pesticide or what is a plant
3 regulator, I guess if there is a question about
4 whether something -- a specific chemical or group
5 of chemicals is a pesticide, I think the appropriate
6 place we would be looking to is the Department of
7 Agriculture.

8 MS. SHARKEY: All right. The
9 definition of plant regulator, that would be the
10 case as well?

11 MR. KING: That's right.

12 MS. SHARKEY: Thank you.

13 THE HEARING OFFICER: Ms. Sharkey,
14 why don't you proceed again with the recognized
15 environmental condition definition.

16 MS. SHARKEY: I would just like to
17 read for the record if I could the definition in
18 the rules for recognized environmental condition.

19 It means the presence or likely
20 presence of any regulated substance or pesticide
21 under conditions that indicate a release, threatened
22 release, or suspected release of any regulated
23 substance or pesticide at, on, to or from a
24 remediation site into structures, surface water,

1 sediments, groundwater, soil, fill, or geologic
2 materials.

3 Is this definition from the ASTM
4 Phase 1 site investigation standard?

5 MR. KING: In general, that's true.
6 We took the Phase 1 definition and then we tailored
7 it and paraphrased it for purposes of this program.

8 MS. SHARKEY: How has it been tailored
9 or paraphrased for this rule?

10 MR. KING: Well, I guess we would
11 have to get out the Phase 1 definition and look
12 specifically at the words in it. I guess we can
13 get that out if it's pertinent.

14 MS. SHARKEY: I guess I'm really
15 wondering if there is something specifically that
16 you attempted to do with this definition that
17 would distinguish it or that would make it different
18 from the ASTM definition.

19 MR. WIGHT: We don't have extra copies
20 to admit as an exhibit, but the document has been
21 submitted to the board as one of the incorporations
22 by reference. We could go ahead and refer to our
23 draft copy for purposes of answering this question
24 if that would be acceptable.

1 THE HEARING OFFICER: That would be
2 admitted at this time.

3 MR. KING: The definition of recognized
4 environmental conditions that appears in the document
5 we are talking about is found in a document that
6 is entitled, "E1527-94, Standard Practice for
7 Environmental Site Assessments: Phase 1
8 Environmental Site Assessment Process."

9 Section 1.1.1 is the definition
10 of recognized environmental conditions. This may
11 not be an exhaustive list of the differences.
12 Obviously, there is a little bit of difference
13 in the wording between the two.

14 We did add the word pesticide
15 in there whereas the ASTM document only refers
16 to hazardous substances of petroleum products. We
17 added pesticides obviously because that's an issue
18 under our statute.

19 We also included -- at the end
20 of our definition, there are some descriptions of
21 what a release can be going into and we give a
22 series of samples; structure, surface water,
23 sediments, groundwater, soil, fill and geologic
24 materials.

1 The ASTM definition does not
2 include all of those. We have included those
3 just to pick up some other examples that we thought
4 were appropriate.

5 MS. SHARKEY: Okay. So those are the
6 differences then?

7 MR. KING: Well, like I said, there
8 are -- those are the major differences we were
9 just picking up in doing a quickre-review of the
10 two. I think there are some other small word
11 changes throughout here. It's not exactly the
12 same. Like I said, it's tailored for our program.

13 MS. SHARKEY: Does the language
14 presence or likely presence come right out of the
15 ASTM standard?

16 MR. KING: Yes. The ASTM standard
17 say the term recognized environmental conditions --
18 I might as well go on and read from this directly.
19 It says, the term recognized and environmental
20 conditions means the presence or likely presence
21 of any hazardous substances or petroleum products
22 on a property under conditions that indicate an
23 existing release, past release, or material threat
24 of release of any hazardous substances or petroleum

1 products into structures on the property or into
2 the ground, groundwater, or surface water of the
3 property.

4 MS. SHARKEY: So the concept of
5 presence or likely presence comes out of the ASTM
6 definition then?

7 MR. KING: Yes, it does.

8 MS. SHARKEY: Could you describe
9 for us what likely presence means in this context?

10 MR. EASTEP: Well, if you had looked
11 at historical records and you found that the facility
12 had conducted a particular type of activity in the
13 past and you knew the waste associated with that
14 activity, then, you might -- there would be a
15 likely presence of those materials being on-site
16 and you might want to investigate those particular
17 materials.

18 MS. SHARKEY: Okay. So this would
19 go to knowing something about past activities and
20 operations on the site?

21 MR. EASTEP: Yes.

22 MS. SHARKEY: All right. How about
23 the phrase under conditions that indicate a release,
24 threatened release, or suspected release? I guess

1 that modifies the concept of likely presence?

2 MR. EASTEP: It could.

3 MS. SHARKEY: It might not?

4 MR. EASTEP: It might not.

5 MS. SHARKEY: Okay. Would a recognized
6 environmental condition indicate -- excuse me --
7 environmental condition be likely to be present --
8 which is likely to be present, as you said, due to
9 one's knowledge of past operations on a plant, for
10 example, knowledge that a certain regulated substance
11 may have been used in the past on the property, would
12 that be environmental condition -- a recognized
13 environmental condition in and of itself if one
14 didn't have a condition that indicated a release,
15 threatened release, or suspected release?

16 MR. EASTEP: Do you want to repeat the
17 question?

18 MS. SHARKEY: I'm trying to figure
19 out whether the phrase "under conditions that
20 indicate a release, threatened release, or suspected
21 release" modifies the words "presence or likely
22 presence" meaning that you only have a recognized
23 environmental condition.

24 MR. EASTEP: If you had enough

1 information that indicated that even though a
2 particular chemical were used, that there was
3 never any evidence of any release, then, that
4 might be evidence -- if it was high quality data,
5 that might be evidence that would not be a
6 recognized environmental condition.

7 MS. SHARKEY: Okay. Just the use
8 of a chemical without any evidence of release
9 means that it is not a recognized environmental
10 condition?

11 MR. EASTEP: In some instances, it
12 could. In other instances, we might require further
13 investigation.

14 MS. SHARKEY: Could you describe what
15 those instances might be?

16 MR. EASTEP: Well, if a company didn't
17 keep very good records and there was evidence that
18 they had produced a certain chemical for years and
19 they didn't keep any records of any maintenance and
20 their maintenance maybe was known to be poor, and
21 they said we don't have any record of ever having a
22 release, we might ask the remedial applicant to
23 investigate further.

24 MS. SHARKEY: Where would the authority

1 for that request come from?

2 MR. EASTEP: Well, I would say that
3 there would be conditions that indicated a potential
4 release or suspected release.

5 MS. SHARKEY: All right. The suspected
6 release in that instance would be based upon the fact
7 that the chemical was handled and no records exist
8 or maybe I should reword that because I think you
9 said poor recordkeeping habits or something like
10 that.

11 MR. EASTEP: Well, you are asking me
12 to kind of speculate a lot here.

13 MS. SHARKEY: I'm fearing we are all
14 going to be asked to speculate under the rule.
15 That's what's disturbing me about the definition.

16 MR. EASTEP: In that instance, probably
17 yes, if no or poor records were kept and that maybe
18 other persons, you know, relayed to us or there might
19 have been problems at the plant where they didn't
20 have good maintenance.

21 There could be a lot of reasons
22 to indicate -- plus the fact that the way industries
23 operated several years ago, even though they were
24 operated legally, maybe it wasn't a problem if you

1 had a little spill from the valve in 1950. If they
2 went ahead and fixed it just to keep down product
3 loss, that might not have been illegal. They might
4 not have kept a record, but that, nonetheless, would
5 have been a release.

6 MS. SHARKEY: In the term release as
7 used in here, is that intended to be the -- are you
8 looking to a CERCLA definition of release?

9 MR. EASTEP: I think we're looking --
10 the definition we have comes out of the Environmental
11 Protection Act.

12 MS. SHARKEY: What section of the
13 Environmental Protection Act?

14 MR. KING: 3.3.3.

15 MR. EASTEP: 3.3.3.

16 THE HEARING OFFICER: Are there any
17 follow-up questions at this time?

18 MR. WATSON: I have a couple.

19 When you talked about recognizing
20 environmental conditions, however, it is true that
21 the presence or likely presence relate to past or
22 an examination of past or present uses, is that
23 correct?

24 MR. EASTEP: What do you mean by uses?

1 MR. WATSON: I mean, the presence or
2 likely presence of contamination has to arise from
3 some information. What you have said is that when
4 you look at the presence or likely presence of
5 contaminants, you are focusing on past or present
6 uses of a site or known releases --

7 MR. EASTEP: Right.

8 MR. WATSON: is that correct?

9 MR. EASTEP: I have lost the question
10 in there.

11 MR. WATSON: The definition of
12 recognized environmental condition, that is
13 necessarily an examination of past and present
14 uses of a site, is that correct?

15 MR. EASTEP: That is certainly part
16 of it, yes.

17 MR. WATSON: Part of it? Is there
18 anything else?

19 MR. EASTEP: Well, just what we have
20 been talking about. It would be uses of the site
21 and the presence of a release or suspected release.

22 MR. WATSON: But the presence of
23 suspected release would arise out of past or
24 present uses of the site or known spills from

1 another source?

2 MR. EASTEP: Yes, yes.

3 MR. WATSON: Are there any other bases
4 for identifying a past or present --

5 MR. EASTEP: Usually, if you follow
6 the Phase 1 requirement -- let me just step back.
7 I think it's been our experience that if you deal
8 with a competent professional engineer consultant
9 that's been working in the field and has some
10 experience, you become trained in how to look for
11 these types of things.

12 If you follow the ASTM or the
13 Phase 1 procedures, then, you are going to be able
14 to identify these a lot more readily. It's really
15 very hard to sit and specify right now exactly what
16 to do and exactly what every circumstance is going
17 to come up to you.

18 There are certainly a lot of
19 judgment calls. The better consultants you get out
20 there, the better judgment they are going to have,
21 and the more they are going to know where to look
22 for records, how to look for records, how to look
23 for evidence of past releases, and that type of
24 thing.

1 MR. WATSON: It's your understanding
2 that the ASTM Phase 1 guidance does examine past
3 and present uses of the site as it relates to
4 recognized environmental conditions?

5 MR. EASTEP: Yes.

6 MR. WATSON: I have one more follow-up
7 on the ASTM standard.

8 In the definition of recognized
9 environmental conditions, there is a term on the
10 bottom, and I'll read it into the record. It says,
11 "the term is not intended to include de minimis
12 conditions that generally do not present a material
13 risk of harm to public health or the environment
14 and that generally would not be the subject of an
15 enforcement action if brought to the attention of
16 appropriate governmental agencies."

17 Is it true that the agency
18 recognizes that de minimis exemption concept as
19 incorporated into the ASTM standards as applicable
20 to an identification of recognized environmental
21 conditions under this program?

22 MR. EASTEP: I think it would be --
23 that concept would be -- would come to play when
24 you develop your Phase 1 and do your Phase 1. I

1 think we have indicated in there that something --
2 that you have to follow the Phase 1 until we have
3 agreed on something else. I forget exactly what
4 the language is in the rule, but that could come
5 into play.

6 MR. WATSON: But the fact that this
7 de minimis exemption, I'll call it, is not included
8 in the definition of recognized environmental
9 conditions under the site remediation program
10 does not mean that that concept is not applicable
11 to an identification of recognized environmental
12 conditions under ASTM and as it applies to the
13 site remediation program, right?

14 MR. EASTEP: I'm not sure. Your
15 question got awful complicated.

16 MR. WATSON: Sorry.

17 MR. EASTEP: Yes, even though we
18 didn't have it in the definition, the concept
19 of de minimis releases might come into place.

20 MR. WATSON: But it does apply to this
21 program?

22 MR. EASTEP: Yes.

23 THE HEARING OFFICER: Ms. Rosen?

24 MS. ROSEN: Also, on this issue, I

1 just wanted to clarify that the types and the
2 numbers of the recognized environmental conditions
3 that an RA might expect -- that a remediation
4 applicant might be expected to address is going
5 to vary depending on whether he is doing a focused
6 versus a comprehensive investigation and it will
7 vary depending on the type of no further remediation
8 letter what relief the no further remediation letter
9 will address, is that correct?

10 MR. EASTEP: That would be true.
11 It would vary depending on whether it was focused
12 and comprehensive and whether it was 4(y) or NFR.

13 MS. ROSEN: Okay. So if I was doing --
14 performing a focused site investigation, I could
15 basically pick and choose my recognized environmental
16 conditions that I would identify and address?

17 MR. EASTEP: You could pick and
18 choose your -- the limits and the scope of your
19 investigation and your contaminants of concern,
20 but I -- I would have to go back and look, but
21 I want to say off the top of my head that an
22 environmental condition kind of exists whether
23 we know all about it -- everything about it or
24 not, it's still there.

1 You might choose that there
2 is an environmental condition, yet you are only
3 going to focus on one part of that condition,
4 and that would certainly be the remedial applicant's
5 option.

6 MS. ROSEN: My resulting of a further
7 remediation letter would be tailored to that which
8 I had addressed?

9 MR. EASTEP: That is correct.

10 THE HEARING OFFICER: Ms. Sharkey?

11 MS. SHARKEY: Mr. Eastep, when we
12 were talking about this language of suspected
13 release earlier and you noted that you might be
14 speculating in even talking about what might be
15 out there, what condition might fulfill that
16 suspected release definition, isn't it true that
17 this definition does require one to speculate
18 or would it require a consultant who is out
19 in the field looking for the recognized environmental
20 conditions to speculate?

21 MR. EASTEP: In the context of your
22 question, I would call that professional judgment.

23 MS. SHARKEY: In your experience,
24 have you seen consultants who would, in fact, pick

1 up on different things and some may find a situation
2 is a release or a suspected release and others may
3 find it's not?

4 MR. EASTEP: I have found that the
5 better consultants would identify almost all of
6 the situations and be able to address them. I
7 mean, you can find evidence of stuff. That doesn't
8 automatically mean that there was a release. The
9 more you dig and the more you find out, the better
10 you can characterize that particular circumstance.
11 I think your better consultants do that for you
12 more effectively.

13 MS. SHARKEY: How about the phrase
14 threatened release? I noticed that the definition
15 in the ASTM recognized environmental condition
16 definition uses the term of material threat of
17 release. Is there some reason that the agency
18 has chosen to use the word threatened release as
19 opposed to material threat of release?

20 MR. EASTEP: I think threatened
21 release is a term that's used in the Environmental
22 Protection Act.

23 MS. SHARKEY: Do you see these two as
24 differing?

1 MR. EASTEP: Practically speaking?

2 MS. SHARKEY: Right.

3 MR. EASTEP: I'm not sure if there
4 is a big difference practically speaking. If
5 there was an enforcement program, I mean, little
6 words like that mean a lot more, but this is pretty
7 much a voluntary program.

8 MS. SHARKEY: What I'm trying to get
9 at, I suppose, is if a consultant were to read this
10 or if the remediation applicant were to read this
11 as an instruction to their consultant to go out --
12 their Phase 1 consultant to go out and just dig up
13 anything they possibly could out there and go ahead
14 and exercise that discretion to speculate about what
15 a stain might be or whether or not there has been
16 a release or whether there is a threatened release,
17 this definition would at least require them to
18 have that term material implied require that that
19 speculation at least involve a material threat,
20 not a highly speculative minor situation.

21 MR. EASTEP: Again, I'm not sure
22 what your question is there. I mean, I have
23 indicated that I don't think for purposes of this
24 program that a threatened release or material

1 threat -- I'm not sure I know what the difference
2 is.

3 THE HEARING OFFICER: Is there
4 anything further on this particular definition?

5 MR. GIRARD: Amy, I have a question.

6 THE HEARING OFFICER: Sure.

7 MR. GIRARD: I have a question on
8 the definition of release, which we have been going
9 to quite often in these questions.

10 The definition of release,
11 which was taken from Section 3.3.3 of the act
12 has some exclusions in there and the last
13 exclusion, D, which is the normal application
14 of fertilizer being excluded from the definition
15 of release.

16 I was wondering if we need to
17 insert two words there "and pesticides" at the
18 end of that definition. The reason why I wonder
19 that is because the target compound list in
20 Appendix A, which is the starting point for
21 determining contaminants of concern, includes
22 many pesticides now. Under this definition, it
23 looks like a farmer applying pesticides would
24 be releasing.

1 MR. EASTEP: I don't know that we
2 have ever had a circumstance where someone who
3 has used anything in accordance with label
4 instructions, any types of pesticides or herbicides
5 or anything like that, I don't recall ever having
6 anybody come in.

7 With regard to your question,
8 I suppose that would be -- I don't think we have
9 treated that under -- we have never treated that
10 under RCRA. I think RCRA specifically deals with
11 pesticides.

12 MR. GIRARD: Why is there an exclusion
13 for fertilizer and not pesticides?

14 MR. EASTEP: The fertilizer thing comes
15 from our act.

16 MR. KING: I believe it also parallels
17 with federal law. I don't believe there is any
18 difference between our state law with the definition
19 of release and the federal law that defines release
20 under the Super Fund law.

21 I guess we have to be a little --
22 if we add the word pesticide there, I guess I would
23 be a little bit concerned if we do that. If we then
24 end up making the use of this as a forum, in using

1 740 as a forum, whereby somebody gets their release
2 managed and approved. If somebody chooses -- is
3 applying pesticides and for some reason the situation
4 where they want to come in and get some kind of
5 approval relative to that situation and end up with
6 some kind of no further remediation letter, I think
7 we have to make sure that we don't somehow
8 restrict -- end up doing something with the
9 definition which restricts them from being able
10 to do that.

11 One of the provisions when we
12 were initially going through the negotiations
13 on this statute, in 1995, it was the Agra Chemical
14 Industry that requested inclusion of the term
15 pesticides in the applicability provisions of this.
16 They put a specific provision in Subsection 58.1(c)
17 so that they would have an option to use pesticides
18 in our 740 and 742 provision.

19 It's something to think about.
20 I would hope we wouldn't end up doing the converse
21 of what we are intending to do by putting additional
22 language in there.

23 MR. GIRARD: So what you're saying is
24 that the farmer who is applying pesticides properly

1 would not be considered to be releasing pesticides
2 into the environment?

3 MR. KING: In this case, I think he
4 could be considered to be doing that. I'm not
5 sure if there is any other exception.

6 MR. EASTEP: I don't know -- the fact
7 that there's a release, I don't know what that means
8 in this context. I don't know that that type of
9 release violates any other state or federal rules.

10 The only circumstances that we
11 have had with pesticides would have been where there
12 actually have been spills that are far in excess.

13 MR. KING: Also, if you look at some
14 of the enforcement provisions under the Environmental
15 Protection Act relative to if there is a situation
16 where there is a release of pesticides, I'm going to
17 struggle trying to find it right off the top of my
18 head, but there are provisions which, in essence,
19 even if it is a release, here's how you handle it
20 if it's considered a release.

21 MS. HENNESSEY: I think under CERCLA,
22 there is a specific definition for exemption for
23 liability from the normal application of pesticides.
24 I don't know whether that's duplicated in the

1 Illinois --

2 MR. KING: Yes, there is. This is
3 under Section 22.2(j)(4). It is considered a
4 release, but then there is an exemption that
5 takes it out of liability relative to this.

6 THE HEARING OFFICER: Ms. Sharkey?

7 MS. SHARKEY: I would like to go
8 back, if I could. I'm sorry if I continue to beat
9 this. Regarding the definition of recognized
10 environmental condition where there is a suspected
11 release, I am noticing that the ASTM standard
12 refers to past release and we have indicated a
13 suspected release. Is that suspected release,
14 I assume, going to past releases.

15 Is that a suspected past
16 release as the phrase is used here?

17 MR. EASTEP: Yes, probably.

18 MS. SHARKEY: When we say suspected --
19 indicate a suspected past release, is the term
20 suspected adding anything or is indicating a past
21 release, in fact, what you were talking about in
22 your examples?

23 MR. EASTEP: I think there would
24 be a difference between the two; past release

1 and suspected release, I think.

2 MS. SHARKEY: If --

3 MR. EASTEP: Suspected at least
4 gives me the connotation that we don't exactly
5 know at the time that we are doing an investigation
6 and that's why we are doing an investigation.
7 Something is suspected. I think there is a slightly
8 different connotation.

9 MS. SHARKEY: So there would be
10 more -- a consultant who is out there looking
11 for an indication of suspected release would not
12 be somebody looking for an indication of past
13 release, but would be looking for indications
14 that would lead him to suspect a past release?

15 MR. EASTEP: Or it could be a current
16 release.

17 MS. SHARKEY: Yes. I recognize that.
18 I'm trying to focus on this one. So it could be a
19 suspected current release?

20 MR. EASTEP: It could.

21 MS. SHARKEY: Rather than indications
22 of a release? I guess what I'm trying to get to is
23 you must have indications to get there and
24 whether an --

1 MR. EASTEP: Yes.

2 MR. SHARKEY: -- indication of a
3 release isn't what really is meant and suspected
4 is adding something that becomes difficult in
5 that people may be given a feel as a mandate
6 for them to guess --

7 MR. EASTEP: No.

8 MS. SHARKEY: -- beyond indications.

9 MR. EASTEP: I don't think so, not
10 with the context of the investigatory requirements
11 that we have outlined under the SRP. It tells you
12 how to deal with those in terms of how you go out
13 and conduct your investigation.

14 MS. SHARKEY: But you only go after
15 conditions from which there is an indication, in
16 any event, correct? You have a likely presence
17 and an indication of a release or I'm trying to
18 determine if a suspected release is something
19 different than past release.

20 MR. EASTEP: A suspected release
21 would cover a past release, certainly. It could
22 also cover an ongoing release.

23 You might have an impoundment,
24 for example, although there are not too many

1 impoundments left, you might have an impoundment
2 where there is a release from the impoundment,
3 it's ongoing and it's occurred in the past. It's
4 either that or I'm not getting your question.

5 MS. SHARKEY: In either instance,
6 you would need an indication, however, of that
7 release before it would become a recognized
8 environmental condition?

9 MR. EASTEP: We would start with
10 an indication, yes.

11 MS. SHARKEY: Okay. I think that's
12 all I'm getting at. You have to have some
13 indication. You can't simply have a suspicion.
14 It would be something that would leave one to
15 suspect that it indicates that release; past or
16 present, it could be either.

17 MR. EASTEP: That is part of the
18 purpose of the investigation, to follow-up on
19 that.

20 MS. SHARKEY: Okay. Thank you.

21 THE HEARING OFFICER: All right.
22 Does anyone have any further questions regarding
23 this particular definition?

24 Okay. It's five after 1:00

1 right now. Let's go off the record, please.

2 (Whereupon, after a short
3 lunch break was had, the
4 following proceedings were
5 held accordingly.)

6 THE HEARING OFFICER: Why don't we
7 have everyone take their seats so we can begin
8 again, please.

9 The agency has informed me
10 that they had a couple of follow-up points that
11 they wanted to make with regard to the definition
12 we were discussing earlier on the recognized
13 environmental conditions.

14 So with that, Mr. Wight, do
15 you want to proceed with your witnesses?

16 MR. WIGHT: Yes. I think we just
17 wanted to give Mr. Eastep an opportunity to
18 amplify a little bit on the answers to these
19 series of questions by Ms. Sharkey on the idea
20 of the suspected releases and threatened releases
21 and how the agency approaches that and indications
22 and so on.

23 Mr. Eastep, if you want to, you
24 may add a little bit more to the previous answer.

1 MR. EASTEP: Yes. It's real difficult
2 to kind of break it down and look at the specific
3 words, but I think part of our intent is to make
4 sure that the concept is broad enough to allow us
5 to be able to identify anything that might represent
6 a threat to human health or the environment with
7 basically -- because this is the starting point.

8 So you have to have a pretty
9 good basis from where you start to make sure that
10 you are able to identify everything that might
11 be there because at the end, the agency is issuing
12 a letter stating the site no longer represents a
13 threat to human health or the environment.

14 Secondly, it's difficult to
15 distinguish in the context of this hearing the
16 differences between those words. When you get
17 out and you are at the actual site, every site
18 that we have dealt with practically is different
19 than every other site.

20 We even have a lot of sites,
21 for example, coming in that are old manufactured
22 gas plants. You might think that they would be
23 all the same. They are not all the same. For
24 the most part, they are all a little different.

1 I don't know if the example
2 is real good. The point I'm trying to make is
3 it all depends on the actual conditions at any
4 given site. What you might not be able -- you
5 know, to be able to tell someone to look for
6 something that's likely or something that's
7 suspected, that's kind of difficult if it's five
8 degrees below zero and you are out looking for
9 actual physical characteristics.

10 That kind of gets lost somewhere
11 between the hearing setting here and actually being
12 in the field and actually looking for things that
13 might be likely or suspected.

14 Finally, and I think I mentioned
15 this a little bit before, these differences don't
16 become quite nearly as significant or as important
17 if you have professionals engaged in the conduct
18 of your Phase 1 and your Phase 2 investigations.

19 A lot of the problems that we
20 see tend to come from consultants maybe they aren't
21 quite as good or quite as experienced. I think we
22 get better results from more experienced and more
23 qualified consultants.

24 With that, I hope I have clarified

1 this a little bit for you.

2 THE HEARING OFFICER: Thank you.

3 Does anyone have anything as a follow-up on that
4 point?

5 Okay. Then, let's proceed to
6 the definition of remediation applicant and Mayer,
7 Brown & Platt has a question with regard to that
8 definition.

9 MS. SHARKEY: Thank you. I just
10 would like to clarify whether or not a remediation
11 applicant has to be an owner or operator of the
12 property or the remediation site. Particularly,
13 I'm focused on situations where the contamination
14 may extend off-site, for example, with an underground
15 plume.

16 Does the remediation applicant
17 remain the party who originally applied for the
18 site remediation even though the plume may be
19 discovered to extend off-site subsequently?

20 MR. EASTEP: You have several questions
21 there. Basically, we have provided rules for
22 situations where the remedial applicant does not have
23 to be the owner of the site.

24 If the remediation site is going

1 to extend -- is going to cross property boundaries,
2 then, we do ask for the owner of each particular
3 property to sign off on the application.

4 MS. SHARKEY: That does not change who
5 the remediation applicant is, though?

6 MR. EASTEP: The remediation applicant
7 can be different, yes.

8 MS. SHARKEY: Is it possible to be a
9 remediation applicant entirely on somebody else's
10 property, then?

11 MR. EASTEP: That would be possible if
12 that person agreed to it.

13 MS. SHARKEY: I have some questions
14 later about that person agreeing, but it's probably
15 appropriate to ask those later. Thank you.

16 THE HEARING OFFICER: Would you like
17 to proceed with the the remediation objective
18 question?

19 MS. SHARKEY: Yes. My only question
20 there really was that the language seemed to me to
21 be a little contorted unless I misunderstood it.
22 It seems to suggest that the -- that an engineered
23 barrier or institutional control is a goal to be
24 achieved in performing the remediation action. I

1 just wondered if there is something I missed in
2 understanding that or if it is indeed contorted or
3 what is meant by that.

4 MR. EASTEP: I'm sorry. I guess --
5 I wasn't sure I really understood the question.

6 In certain circumstances,
7 when you do your -- when you get done with your
8 investigation and you develop your remedial
9 objectives, all that might be required is an
10 institutional control or engineering cap. That
11 might be a goal.

12 MS. SHARKEY: So an engineered barrier
13 could actually be your remediation objective? Would
14 you not have a numerical objective in addition to
15 that?

16 MR. EASTEP: Well, probably you could
17 or you couldn't. I mean, does that answer this?

18 MR. KING: We discussed that quite a
19 bit in the context of the T.A.C.O. rules. So,
20 I mean, it's a potential for the barrier to be the
21 goal.

22 MR. EASTEP: Practically speaking,
23 as you run through the program, it's easy at
24 some point to calculate what an objective might

1 be in the absence of an engineered barrier.

2 I think the way it happens is
3 people elect then to say I have either a choice
4 of meeting some number over here or deciding my
5 goal which is really this institutional control
6 or this engineered barrier. The rules allow for
7 that flexibility, I believe.

8 MS. SHARKEY: I want to make sure
9 I understand what you are saying. You're saying
10 it is possible that the remediation objective
11 would not have a numerical component and there
12 would not be a concentration of contaminants --

13 MR. EASTEP: It's possible for
14 you to go through the program and end up --
15 the goal for your remedial action plan would
16 be an engineering control or institution control.

17 MS. SHARKEY: All right. Without
18 there being any numerical concentration?

19 MR. EASTEP: That's correct.

20 MR. SHARKEY: Thank you.

21 THE HEARING OFFICER: Is there anything
22 further on that point?

23 Seeing none, let's proceed to
24 the definition of remediation site. Ms. Sharkey,

1 you may continue with your questioning.

2 MS. SHARKEY: The language of the
3 definition of remediation site makes it a little
4 unclear as to whether the locations must be
5 contiguous. It seems to say they must be contiguous.

6 Is it required that sites be
7 called a remediation site being contiguous or
8 divided by public way?

9 MR. EASTEP: You could have
10 non-contiguous locations within a remediation
11 site.

12 MS. SHARKEY: I take it from your
13 answer to the prior question that common ownership
14 is not required?

15 MR. EASTEP: That's correct.

16 MS. SHARKEY: Okay. I think you
17 have answered that the remediation site can be
18 defined by the applicant?

19 MR. EASTEP: Yes. Actually, the
20 applicant is the one who is supposed to define
21 the remediation site.

22 MS. SHARKEY: If an applicant comes
23 in with one definition of a remediation site and
24 the application is looking for, let's say, a focused

1 remediation, is it possible that the agency will
2 take a look at it and say, gee, we think you ought
3 to include this additional tract of land or something
4 else to expand the definition of the site?

5 MR. EASTEP: We might advise that,
6 but I don't think we have the authority to enforce
7 that.

8 MS. SHARKEY: Would that be true for
9 a comprehensive assessment as well?

10 MR. EASTEP: This is another one
11 of those circumstances that gets very case-by-case
12 or site-specific.

13 If a person wants to do a
14 comprehensive investigation, by its nature, that
15 means the person has addressed everything. If
16 they want an NFR letter for a 20-acre tract of
17 land and only proposed to address 15 acres of it
18 for one reason or another, then, you would probably
19 tell them they couldn't get an NFR letter if they
20 didn't address the other acreage.

21 MS. SHARKEY: So if I came in and
22 said my remediation site is these 15 acres and
23 not the full 20 acres, but these 15 acres, and I
24 would like a comprehensive letter on these 15

1 acres --

2 MR. EASTEP: Then, you could probably
3 do that.

4 MS. SHARKEY: And if I came in and
5 said I've got 15 acres and the agency would not
6 be in a position of saying, and by the way, you've
7 got to tack the rest on, you're saying they might
8 advise it, but probably don't have authority to say
9 you have
10 to take on these other five?

11 MR. EASTEP: If only the 15 is the
12 subject of the NFR letter, that is correct.

13 MS. SHARKEY: Would the applicant have
14 the ability to reduce the size of the site after the
15 application process is already done?

16 MR. EASTEP: Essentially, they would
17 be modifying their application, yes.

18 MS. SHARKEY: But they could?

19 MR. EASTEP: They could.

20 MS. SHARKEY: That's all I have on
21 that.

22 THE HEARING OFFICER: Why don't you
23 proceed ahead to the definition of residential
24 property.

1 MR. WATSON: Excuse me. Before she
2 goes there, I have a couple of questions. I had
3 a series of questions, but I think I can ask now
4 just a couple of follow-up questions.

5 MS. McFAWN: Would this be your
6 question number two? Is that what you are going
7 under?

8 MR. WATSON: Yes.

9 MS. McFAWN: Okay.

10 MR. WATSON: I guess my follow-up
11 question would be if you would like a no further
12 remediation letter for off-site contamination,
13 must the boundaries of your remediation site
14 necessarily extend off-site?

15 MR. EASTEP: Yes.

16 MR. WATSON: Are there distinctions
17 that you can make between contamination from
18 groundwater versus soil in terms of defining a
19 remediation site?

20 MR. EASTEP: Generally, I think we
21 treat them the same.

22 MR. WATSON: I guess one of the
23 questions that I have would be the circumstance
24 where you would have soil contamination on-site

1 and you have groundwater migrating off-site. It's
2 in the City of Chicago, for instance, so there
3 is an ordinance that says you can't use your
4 groundwater for drinking water supplies.

5 At that point presumably, there
6 is no obligation to address groundwater remediation,
7 yet at the same time, you have a problem with your
8 adjacent site owner.

9 Now, I'm wondering in that
10 circumstance, could you not rely on the ordinance
11 to address the off-site issue without having to
12 define your remediation site?

13 MR. EASTEP: Before we talk about the
14 ordinance, I'm not sure we concur that the ordinance
15 prohibits --

16 MR. WATSON: Okay. Speak in generic
17 terms, then, about an ordinance that would, in fact,
18 satisfy your obligations.

19 MR. EASTEP: Well, you have to go
20 back further into the rules and determine whether
21 or not there was a pathway exclusion that could
22 be associated with groundwater.

23 Let's say there is not, even
24 though the ordinance is there, you could not exclude

1 the pathway. Your remediation site would be wherever
2 you wanted that site to be, you would have to have
3 the owner's concurrence with all the property that's
4 involved. Otherwise, you might have to reduce it.
5 Say, if you owned a piece of property and you are
6 the applicant and your neighbor won't sign the
7 application for whatever reason, then, you are
8 limited to what you can get the NFR for.

9 MR. WATSON: At that point, if I wanted
10 to get a comprehensive no further remediation letter,
11 then, it would have to only go up to the boundaries
12 of my site?

13 MR. EASTEP: It would be limited by
14 that, right.

15 MR. WATSON: Would your answer be
16 different if we excluded a groundwater pathway, then,
17 would the --

18 MR. EASTEP: Then, if you excluded
19 the pathway, it would be moot. You wouldn't need
20 to be addressing the groundwater off-site in your
21 NFR letter.

22 MR. RIESER: If I could follow-up,
23 in the circumstance where you exclude the pathway
24 by virtue of an ordinance, which only requires

1 you to notify the adjoining landowner at the end
2 of the process, in that circumstance, you could
3 get a comprehensive NFR letter even though there
4 was contamination extending off-site and the
5 remediation site didn't extend off-site because
6 you excluded the pathway by virtue of --

7 MR. EASTEP: That was my answer.
8 You could get an NFR letter, yes.

9 MR. RIESER: Okay. But I wanted
10 to make sure that you were saying that you could
11 get an NFR letter with respect to the entire
12 area of contamination even if it was off-site
13 by virtue of the exclusion of the pathway and
14 following the requirements for handling that type
15 of exclusion?

16 MR. EASTEP: No. I don't know if
17 I understood you correctly. Your NFR letter would
18 still be defined by the boundaries of the remediation
19 site. That's what we would issue the NFR letter
20 for.

21 THE HEARING OFFICER: Does anyone
22 have any further follow-up?

23 MR. WATSON: Yes. I can't leave
24 this point. So that would mean even though to get

1 a groundwater exclusion by virtue of ordinance only
2 requires notification of the adjacent landowner,
3 you would still have to get up front the permission
4 of the adjacent landowner to define your remediation
5 site?

6 MR. EASTEP: No. You would only have
7 to get their permission if they were part of the
8 remediation site.

9 MR. WATSON: Okay.

10 MR. EASTEP: You could get a
11 groundwater exclusion -- for all I know, you don't
12 have to necessarily have any contamination. I
13 mean, I think that's possible the way the rule is
14 structured.

15 If you have contamination that
16 goes off-site, if you get a GMZ, you might have
17 to get -- to go off-site, you have to get the
18 other landowner's permission. I think we addressed
19 that in another answer.

20 MR. RIESER: But you wouldn't need a
21 GMZ in a circumstance where there was an ordinance
22 which was the basis for excluding pathway. If it's
23 an excluded pathway, that's excluded by an ordinance
24 according to the 742 rules that we have talked about.

1 That pathway is excluded and
2 that landowner -- that adjacent landowner has no
3 right to access that groundwater and has no risk
4 with respect to that groundwater.

5 So in that context, it would
6 surprise me that you would have to get their
7 permission because their ability to be exposed
8 to that risk has already cut off by the ordinance.
9 So there is no pathway. There should be no
10 requirement that you get their permission in
11 that context because the municipality has already
12 dealt with that issue.

13 MR. KING: And sure, you are not
14 extending those concepts in a way that restricts
15 the ability to use this. If you are leading to the
16 conclusion that you apply that NFR letter off-site,
17 then, you are getting to the conclusion that you
18 have to record it.

19 Okay. If you can't record it,
20 are you, then, rendering the whole procedure that
21 you set up ineffective? What we were envisioning
22 is that your remediation site -- you control that,
23 you have an ordinance. So now the off-site -- the
24 groundwater issue has been addressed. So you can

1 clearly get an NFR letter for your site.

2 Now, if you are to get
3 something beyond that and record it against his
4 chain of title, it seems to me you're going to
5 have to have some ascent to that from the off-site
6 guy or he is not going to want that on his chain
7 of title.

8 MR. RIESER: But that would be
9 something between you and that off-site guy,
10 not something that would necessarily come from
11 the agency?

12 MR. KING: Right, that's correct.

13 MR. RIESER: So as long as you could
14 record a document with respect to that property and
15 show the agency evidence that that was recorded,
16 then, you could issue that letter?

17 MR. KING: For that off-site area?

18 MR. RIESER: Yes.

19 MR. KING: Yes, I would think so.

20 MR. WATSON: But it would be --

21 MR. EASTEP: Excuse me. Can we clarify
22 this?

23 MR. RIESER: Sure.

24 MR. KING: Maybe we are getting beyond

1 the scope of 740 and into what 742 is dealing with,
2 it seems like.

3 MR. RIESER: Yes, except this -- I
4 mean, they are so interrelated in terms of what
5 is a remediation site and what is not and how
6 this works when you have that situation, and
7 this directly goes -- it may not go to the definition
8 of remediation site, which is where we are at, but
9 it goes -- it certainly goes to how that concept
10 works in the context of the 740 program.

11 MR. EASTEP: I think if you have
12 excluded -- under the rules, if you have excluded
13 the groundwater pathway, and you come in for your
14 parcel of property, and you are calling your parcel
15 of property the remediation site, then, we would
16 issue an NFR letter that had a legal description
17 attached to it on your particular parcel of property.

18 Okay. It would not define
19 anything else. It would define your parcel of
20 property as the remediation site. You wouldn't
21 need to have any kind of release, for example,
22 for the next piece of property because the
23 groundwater pathway has already been excluded.

24 So the NFR letter, the way

1 this is set up, would only apply to the remediation
2 site. If you wanted to expand that site, you
3 probably could, and you could file the NFR on the
4 deed if you wanted, but initially, I think it's
5 only going to apply to how you define the site
6 and the fact that the owner signed up. That's
7 the way we have set it up.

8 MR. RIESER: So with respect to
9 that, that situation you just described, an NFR
10 letter was issued to that single property which
11 had the legal description, that would mean that
12 the NFR letter would be a documentation that
13 there were no 12(a) violations for the release
14 which came from that site?

15 MR. EASTEP: Just a second.

16 THE HEARING OFFICER: At this
17 time I would just inject one suggestion, and
18 possibly consider discussing this aspect in the
19 seven-forty-six-hundred section with regard to
20 the NFR letter section, or if you feel that there
21 might be a more pertinent section later on down
22 the line, would this be a more appropriate discussion
23 at that time?

24 MR. RIESER: Yes. I'm willing to let

1 this sit for a while. I think it's going to need
2 some more thought and discussion on all sides. I
3 think we have talked about what the agency means
4 by remediation site as far as the definition is
5 concerned.

6 I certainly don't have a problem
7 with moving forward and by the time we get to 600,
8 we will have thought it through and have discussed
9 it a little bit more and we may get a better answer
10 at that time if that's agreeable with you guys?

11 THE HEARING OFFICER: Is that fine with
12 the agency?

13 MR. WIGHT: It's fine with us, yes.

14 THE HEARING OFFICER: Okay. And
15 your question, Mr. Watson, was finished with the
16 definition of remediation site?

17 MR. WATSON: That's correct.

18 THE HEARING OFFICER: Then, we had
19 one more question on definitions and that was
20 Ms. Sharkey's question as to the definition of
21 residential property.

22 MS. SHARKEY: Right. I noticed
23 these regulations have a definition of residential
24 property and I don't believe I have any definition

1 of industrial, commercial, or agricultural. I
2 believe they -- I'm checking back here to see
3 if we have a definition of conservation, but I
4 thought not. No.

5 I believe these three additional
6 terms are defined in Section 742, and my question
7 is why is just one defined here and can we look at
8 742 for the other definitions?

9 MR. KING: As I recall, the only one
10 of the definitions that appeared in the statute
11 was the definition of residential property that
12 had language in it.

13 I'm just double-checking right
14 now. That's why we put that language for residential
15 property in 740. It's our intent that you look to
16 742 relative to the definitions to the other types
17 of property.

18 MS. SHARKEY: So I guess we will come
19 to this a little later also, but we could look to
20 those other definitions and you would have the same
21 default that you have under those other definitions
22 where, I believe under 742, if you don't fall into
23 one of the other specific definitions, you default
24 into industrial/commercial?

1 MR. KING: That's correct.

2 MS. SHARKEY: Could you tell me whether
3 under these rules -- I believe that the definition
4 of residential here -- maybe I just ought to just
5 read it into the record so it's all in one place.

6 It means any real property that is
7 used for habitation by individuals or where children
8 have the opportunity for exposure to contaminants
9 through ingestion or inhalation, educational
10 facilities, health care facilities, child care
11 facilities, or playgrounds.

12 From looking at the rule as
13 printed in my copy, it appears that the first
14 phrase there came out of the statute, that is,
15 any real property that's used for habitation
16 by individuals. The second portion did not come
17 out of the statute, is that correct?

18 MR. KING: Yes and no. I mean, the
19 definition that's in the act at 58.2 provides that
20 residential property means any real property that
21 is used for habitation by individuals and other
22 property uses defined by board rules such as
23 education, health care, child care and related
24 uses.

1 So it clearly was -- it is
2 clearly provided for in the statutory definition
3 that the board would be authorized to adopt
4 additional uses as residential.

5 MS. SHARKEY: Okay. I guess I'm
6 focused really on those additional uses, then,
7 that the agency apparently has specified here
8 in the second half of this definition, which
9 appears to focus only on areas where children
10 would have an opportunity for exposure.

11 Is the concept only being
12 children modify all of these types of facilities that
13 are listed here?

14 MR. KING: Yes.

15 MS. SHARKEY: Why is that.

16 Why are we more focused on
17 children in that context than adults?

18 MR. KING: Well, children are more
19 sensitive to these exposure issues than adults are.

20 MS. SHARKEY: Okay. Would this
21 definition include any other kind of recreational
22 facilities other than a playground, park, forest
23 preserve, golf course, those kinds of recreational
24 facilities?

1 MR. KING: For any one of those, that's
2 really going to -- we are going to be called upon
3 to make a site-specific conclusion on those. It's
4 really going to depend on the facts of each situation
5 as to what really the predominant exposure is there,
6 what's the intended use, and factors such as that.

7 MS. SHARKEY: I guess maybe we will
8 get into this in 742 some more as well. We have all
9 the definitions to work on this. I have nothing else
10 on that.

11 MR. WATSON: I have one follow-up.
12 Would you agree that hotels and
13 motels would be considered industrial commercial
14 uses pursuant to your definition?

15 MR. KING: Hotel or motel wouldn't
16 fit in with that part of the provision when it
17 talks about any real property habitation by
18 individuals, but whether there is an exposure
19 to children, that necessitates looking at an
20 individual context as a residential property.
21 We have to look at that site specifically.

22 MR. WATSON: That would be like a
23 playground or a pool or something?

24 MR. KING: Right. There might be a

1 situation where at a motel, there is intended to
2 be extensive use of a playground where there is
3 direct contact with the soil by children. I
4 think you need to think about that differently
5 because of that potential exposure.

6 MR. WATSON: Okay. Thank you.

7 THE HEARING OFFICER: Are there any
8 further questions on the definition section?

9 MR. RAO: I have a follow-up on this
10 definition of residential property.

11 As proposed by the agency, when
12 it comes to exposure and the children, it's limited
13 to educational facilities, health care facilities,
14 child care facilities, or playground sites, are there
15 any other kind of facilities where children
16 may be exposed to these chemicals?

17 MR. KING: I suppose there could be.
18 We thought that these were the primary types of
19 facilities to be concerned about. The first three
20 come directly out of the statute and we have added
21 playgrounds.

22 MR. RAO: Would it be acceptable to
23 you to say including, but not limited to these
24 kinds of facilities? That way, if there is some

1 other situation on a site-specific basis, we could
2 deal with that?

3 MR. KING: That was a discussion that
4 we had with the site advisory committee when we were
5 putting this definition together and that was the
6 way we had initially drafted it.

7 They raised some concerns about
8 the open-ended nature of that kind of definition,
9 which it would be more open-ended. We felt that
10 with the type of definition we had here, that that
11 was sufficient flexibility for us without having
12 that open-ended kind of terminology.

13 MR. RAO: Okay.

14 THE HEARING OFFICER: Is there anything
15 further, then?

16 Okay. Let's proceed to Section
17 740.125, the incorporations by reference section.
18 Ms. Sharkey, I believe you have the first question
19 on that.

20 MS. SHARKEY: Thank you. I guess my
21 first question is whether future changes to any of
22 these incorporated documents would be allowed to be
23 used by remediation applicants even though they are
24 explicitly excluded in the incorporation?

1 MR. KING: No.

2 MS. SHARKEY: The second question is
3 why is the incorporation by reference necessary or
4 desirable?

5 MR. KING: Well, I guess it's a
6 convenience mechanism because then we didn't have
7 to file a whole file cabinet full of material.
8 So it's a way of easing some of the paperwork for
9 everybody involved.

10 MS. SHARKEY: I'm sorry. I'm pausing
11 just to think about what you said. So you are
12 saying, in other words, that you feel it's essential
13 that they be a part of the regulation and you
14 otherwise would have had to file them and actually
15 have them as part of the regulatory proposal?

16 Am I right, Mr. King, that you
17 are saying these are essential to the proposal?

18 MR. KING: If we didn't incorporate
19 them by reference, we would have to specifically
20 write all of that material into the rule.

21 MS. SHARKEY: Is it the case, Mr. King,
22 that the agency uses a number of test methods and
23 methodologies and, in fact, probably uses some of
24 these in a variety of contexts even though they are

1 incorporated into the rules specifically in other
2 contexts?

3 MR. KING: If I understand your
4 question, I don't think so.

5 MS. SHARKEY: So, for example, the
6 agency would not use -- maybe I should ask the
7 question directly.

8 Are these incorporated directly
9 into the permitting rules or remediation of sites
10 during a closure activity?

11 MR. KING: Well, there are various
12 incorporations by reference in the rules applicable
13 to landfills.

14 MS. SHARKEY: All right. So you are
15 saying these have been incorporated by reference in
16 other rulemakings then?

17 MR. KING: These specific incorporations
18 by reference, no, we have not incorporated in the
19 ASTM Phase 1 methodology in any other rulemaking.

20 MS. SHARKEY: Maybe we ought to go
21 through each document and talk about what the
22 document is actually doing in the context of this
23 rulemaking.

24 We are incorporating by reference

1 all of the standards in each of these documents, am
2 I correct, and all the procedures of each of these
3 documents?

4 THE HEARING OFFICER: Ms. Sharkey,
5 I just want to interject at this point that what
6 you are requesting is actually beyond your prefiled
7 question at this time. If possible, if we have
8 time at the end, perhaps we could go down that road.
9 At this point, I believe that's beyond the scope of
10 your prefiled question.

11 MS. SHARKEY: I guess I would like
12 to follow-up my prior question, then, which is
13 what we are saying, though, that any changes in these
14 documents that may come down the road will
15 not only not be incorporated, but will not -- is
16 it true that the agency cannot allow them to be
17 used even under its discretion -- discretionary
18 allowing other approvable methodologies?

19 MR. WIGHT: If I can interject here,
20 I think as a matter of law, that's the case. The
21 Secretary of State's rules prohibits subsequent
22 editions of incorporated documents from being used.
23 I can't cite you to the exact citation on that.
24 There was a restriction. It's not up to the agency's

1 discretion.

2 MS. SHARKEY: Would these same
3 documents or approaches be used in, for example,
4 approving a remediation pursuant to Section 4(y)?

5 MR. KING: They could be.

6 MS. SHARKEY: What I'm getting at,
7 I guess, is I'm trying to understand why they are
8 needed here. I understand it's a matter of -- by
9 incorporating them, it certainly saves having to
10 put them entirely into the record.

11 Some of the difficulties that
12 we all have is we don't have a thorough explanation
13 on the record, and I'm quite sure we're not
14 ultimately going to be able to get to where
15 we have a thorough explanation in the context
16 of these hearings as to what these are. So the
17 question comes down -- and we are prohibited from
18 using anything different apparently in the future
19 or at least adding an amendment to these in the
20 future.

21 The question comes as to the
22 desirability of placing these into the document --
23 with incorporation by reference and what actual
24 benefit to the agency's view does it have to

1 incorporate these documents?

2 MR. KING: It's very simple. If people
3 are going to use testing methodologies that are not
4 considered consistent with SW-846, they wouldn't be
5 considered to be quality data. It's a way of making
6 sure that the proper methods are followed in the
7 review work that we do.

8 MS. SHARKEY: Are you saying the
9 agency would not have any other means of assuring
10 that proper work was done if these were not
11 incorporated such as what you have in your 4(y)
12 program?

13 MR. KING: Well, I think part of
14 the process of coming up with a set of rules and
15 drafting a set of rules is to provide to as great
16 an extent possible the procedures by which the
17 agency is administering the program for which the
18 rules are intended to account for. That's what
19 we are trying to do.

20 I suppose we could strike
21 out these things and then nobody would be clear
22 about what the procedures were that were being
23 followed.

24 MS. McFAWN: So are you saying that

1 you believe by incorporating these that the record,
2 it will be helpful to the regulating public?

3 MR. KING: Absolutely.

4 MS. SHARKEY: It reduces flexibility
5 on the agency's part and the applicant's part
6 particularly if these rules should change in the
7 future?

8 MR. KING: Is that a question?

9 MS. SHARKEY: Yes.

10 MR. KING: Well, yes, certainly.

11 MS. TIPSORD: Mr. King, there is
12 nothing to prohibit the agency, however, from
13 amending this section to include later additions
14 or amendments if the agency so desires and the
15 same, the regulating public could bring a request
16 to the board to do that as well, is that correct?

17 MR. KING: Oh, I would agree, yes.
18 They could certainly do that.

19 THE HEARING OFFICER: You have a
20 question, Mr. Rieser?

21 MR. RIESER: Well, I was just thinking
22 most of these apply to the way -- the method of a
23 site investigation. Under 415(d)(1), with respect
24 to field sampling, and (4), with respect to field

1 and laboratory measurements of samples, (5),
2 laboratory and quantitative analysis, all of these
3 have provisions that they are either, according to
4 these reference documents or as approved by the
5 agency.

6 I'm wondering if this is
7 the language that would let the agency look at
8 methodologies that came under alternatives or
9 amendments to the ones you are incorporating by
10 reference?

11 MR. KING: Yes. One of the things
12 that we were conscious of and trying to be careful
13 with regards to is that there are provisions in
14 the state law as far as incorporating things that
15 are not currently in effect at the time the rules
16 are proposed.

17 We did intend to create
18 some flexibility here where there is an issue
19 of equivalency relative to a standard or
20 procedure.

21 MR. RIESER: So under this 415
22 section, which is really where you get into the
23 issue of testing methodologies specifically,
24 there is a provision for the agency to use

1 discretion to consider alternative equivalent
2 methods?

3 MR. KING: Right. For instance, under
4 (d)(1), it's within the context of the references
5 to SW-846. Again, that would put anyone in a
6 position where if they were suggesting that something
7 other than SW-846 be followed, then, as it currently
8 exists, they would have to be demonstrating why or
9 what's being suggested is, I think, equivalent to
10 what's there.

11 MR. RIESER: Okay. Thank you.

12 THE HEARING OFFICER: Ms. Sharkey, did
13 you have any further questions?

14 MS. SHARKEY: Yes. I guess I wanted
15 to ask a question about ASTM 1527-94. Would you
16 agree that this is a different type of standard
17 than the other one, two, three, four, five that
18 are references here as methods?

19 MR. KING: Yes, it's different.

20 MS. SHARKEY: And do you know the
21 context in which that standard was adopted.

22 Was it adopted a regulatory
23 proceeding by anybody?

24 MR. KING: I don't think I understand

1 the question.

2 MS. SHARKEY: The ASTM -- I guess
3 I'm just trying to get on the record, Mr. King,
4 how the ASTM proceeds and how this standard
5 which you are incorporating by reference is actually
6 adopted.

7 MR. KING: Do you mean the whole
8 methodology in which ASTM develops its standards?

9 MS. SHARKEY: No, I don't mean
10 particulars, but this is not a federal government
11 agency, is it, the ASTM?

12 MR. KING: No.

13 MS. SHARKEY: In other words, it's a
14 private organization?

15 MR. KING: Yes.

16 MS. SHARKEY: Okay. They adopted
17 this procedure. Are you aware whether any other --
18 whether this procedure has been incorporated in
19 any other regulatory context in Illinois?

20 MR. KING: I believe -- let me check
21 here real quick.

22 Well, I was checking the
23 Environmental Protection Act to see if there was a
24 cross-reference to it in Section 22.2. There is not

1 a direct cross-reference, but it does -- in Section
2 22.2(j)(6), it discusses the whole concept of Phase 1
3 and Phase 2 environmental audits. Maybe the concepts
4 there are drawn from the ASTM standard 1527-94.

5 MS. SHARKEY: And that is the term
6 Phase 1 or Phase 2 defined in the act?

7 MR. KING: Yes. There is a definition
8 of a Phase 1 environmental audit. That's in that
9 same subsection that I was talking about.

10 MS. SHARKEY: Okay. Could you read
11 that for us?

12 MR. KING: This is Section
13 22.2(j)(6)(E)(V). It says, for purposes of this
14 Subparagraph E, the term Phase 1 environmental
15 audit means an investigation of real property
16 conducted by environmental professionals to
17 discover the presence or likely presence of a
18 release or a substantial threat of a release of
19 hazardous substance or pesticide at, on, to or
20 from real property, whether release or a substantial
21 threat of release of hazardous substance or pesticide
22 has occurred or may occur at, on, to, or from real
23 property. It goes on to talk about all the things
24 the investigation has to include.

1 MS. SHARKEY: I take it, then,
2 what we are saying is that the ASTM that's being
3 incorporated here has been selected to work within
4 these regulations and that we believe it's supported
5 in terms of using it in a regulatory context by
6 this use in Section 22.2, am I correct about that?

7 MR. KING: No.

8 MS. SHARKEY: I guess my prior question
9 is is there any other context in which the ASTM, to
10 your knowledge, has been used in a regulatory context
11 and then I thought the answer was this was an example
12 of that.

13 MR. KING: That's correct. It was an
14 example.

15 MS. SHARKEY: Am I correct in saying,
16 though, that Title 17 does not require the use of
17 this ASTM?

18 MR. KING: I'm not aware of any
19 reference in Title 17 to the ASTM process or the
20 ASTM Phase 1.

21 MS. SHARKEY: Do you know the context
22 in which the ASTM developed that regulation? I
23 guess I was trying to gather whether it was in a
24 regulatory context, but I would like for you to

1 answer whether that was developed to be used in
2 these types of regulations or if you are aware
3 of it being used in a site remediation program
4 in any other state so that we could look to it to
5 understand how they are using it?

6 MR. KING: I'm not familiar with it
7 being used by any other state. That doesn't mean
8 that it has not been. I'm just not familiar with
9 it.

10 MS. SHARKEY: Okay. That's all the
11 questions I have right now.

12 MS. McFAWN: Ms. Sharkey of Mayer,
13 Brown & Platt had some questions that really weren't
14 addressed.

15 Her last question was under the
16 proposed regulations about inconsistencies between
17 the ASTM and the proposed regulation between the
18 control. Would you address that?

19 MR. KING: I'm not sure that -- I
20 don't think we have -- as we were developing these
21 regulations, we went through the ASTM Phase 1 and
22 I don't believe we see there is any inconsistency
23 between the two. We don't know of any inconsistency
24 between the two.

1 MS. McFAWN: If you found that there
2 was, how would you deal with that?

3 MR. KING: The rule would have to
4 control, but hopefully, by the time we get through
5 this process, we will see if there is any
6 inconsistency and we would make those consistent.

7 MS. McFAWN: Thank you.

8 THE HEARING OFFICER: Does anyone have
9 any further follow-up questions with regard to that
10 section on incorporation by reference 740.125?

11 MS. HENNESSEY: I would just note that
12 the definition of recognized environmental condition
13 is different in ASTM than it is in the rule -- than
14 the rule is to pesticide in the ASTM definitions.
15 That is one inconsistency. I take it from your
16 answer that the rules would govern the definition
17 of recognized environmental condition, is that
18 correct?

19 MR. KING: I'm not sure we saw that
20 as an inconsistency.

21 MR. WATSON: And I think I would just
22 clarify that the deminimis exception issue, that has
23 been removed from the definition of ASTM and has not
24 made it into the rules, but it is correct that you

1 recognize that diminimus exception is being a concept
2 that is relevant to your site remediation program
3 activities?

4 MR. EASTEP: On a site-specific basis.

5 MR. WATSON: On a site-specific basis?

6 MR. EASTEP: Yes.

7 MR. WATSON: Meaning what?

8 MR. EASTEP: Well, meaning that
9 diminimus is a very subjective term and it could
10 vary from site-to-site. What some people consider
11 site-specific on one side may be different than
12 another.

13 MR. WATSON: Would you say that the
14 application in ASTM is really a site-specific
15 application?

16 MR. EASTEP: Yes, I think so.

17 Okay. I guess, for purposes of
18 clarification, you could have a circumstance where
19 you might have very small quantities, but because
20 of the other contaminants of concern, there might
21 be some possible synergistic effect. So with one
22 site, with all other things being equal, it might
23 be important with that one site as with another
24 site.

1 MR. WATSON: Is it your understanding
2 that that's different than how that exception is used
3 in the ASTM standards?

4 MR. EASTEP: I'm not exactly sure if
5 it is. That's what I meant. It's really a
6 site-by-site kind of thing.

7 MR. WATSON: I'm satisfied with that.

8 THE HEARING OFFICER: Is there anything
9 further then?

10 Seeing nothing, let's proceed to
11 Subpart B. The first question is actually Gardner,
12 Carton & Douglas' third filed question. Let's start
13 with that.

14 MR. WATSON: I would preface this
15 question by saying I think we have established
16 today that the site remediation program is a
17 risk-based program and the focus being on defining
18 risks relative to past and present reasonably
19 anticipated -- defining risk as it relates to
20 present and reasonably anticipated future uses.

21 The question that I have is
22 how will the agency ensure the cooperation of
23 these site owners in defining remediation site
24 boundaries? I guess more specifically, based

1 on the intent of the program, what are the
2 circumstances under which an adjacent property
3 owner or a site owner who is not the remedial
4 applicant, under what circumstances would those
5 properties be able to deny permission consistent
6 with the intent of the statute?

7 MR. KING: We simply don't think
8 it's our responsibility to make sure that site
9 owners cooperate with each other with respect
10 to remediation.

11 I mean, that's their job to
12 deal with contamination that may be migrated
13 from one site to another. We don't think that's
14 our responsibility to ensure that that takes
15 place.

16 MR. WATSON: Should these site owners
17 be required to show that their current use or
18 reasonably anticipated future use of a property
19 would somehow be impacted before they deny this
20 kind of permission?

21 MR. KING: I don't think we should be
22 in the business of telling people how they can use
23 or not use their property. If they don't want to
24 let somebody on their site to do an investigation

1 or to do a cleanup, I don't think that's our
2 responsibility to try to force somebody to accept
3 somebody from off-site to come on to his property.

4 MR. WATSON: So the agency recognizes,
5 then, that this program could lead in many instances
6 to a demand by property owners for cleanups that
7 are unnecessarily costly and protective of the
8 environment?

9 MR. KING: That could be the end
10 result in certain situations. Again, as I was saying
11 before, if somebody owns a piece of property and they
12 don't want somebody coming from off-site to enter
13 their piece of property, I think that's part of our
14 American system of juris prudence.

15 If it forces the off-site
16 person to do more remediation to get a no further
17 remediation letter, then, that's the choice he is
18 going to have to make.

19 Now, we have set up -- we have
20 included procedures to create some flexibility
21 so that the on-site person can get a no further
22 remediation letter with regards to the site that
23 he has in the remediation program.

24 MR. WATSON: But you are offering

1 no help with respect to adjacent property owners?

2 MR. KING: No. We just don't see
3 that's our responsibility.

4 MR. WATSON: I mean, obviously, this
5 is going to come up in the context of -- we have
6 seen it on many occasions already where regardless
7 of the industrial/commercial nature of the property
8 and the fact that it's been that way for fifty years
9 and is anticipated to be that way for the next fifty
10 years and when you knock on your neighbor's door,
11 he's going to say I want Tier 1 residential standards
12 and I want you to clean up my groundwater to those
13 standards which are fifty feet below the building.

14 I mean, really, there is nothing
15 in that circumstance -- what we are stuck with is the
16 fact that we have an adjacent property owner
17 insisting upon a cleanup that is insufficient with
18 what the state has determined to be appropriate
19 cleanup consistent with risk-based remedies that it
20 has established.

21 MR. KING: We fully understand the
22 nature of your comment. It's just we don't see
23 that we have the authority to force somebody to
24 accept something else.

1 MR. WATSON: Okay.

2 MR. EASTEP: We have a case right now.
3 To show that example that you brought up, that cuts
4 both ways. One of our cleanup sites extends across
5 property boundaries and the company has come in and
6 proposed to clean it up to an industrial level, which
7 is what their site is.

8 The other site is occupied by a
9 retail establishment and the company has said no,
10 we want it cleaned up to cleaner and more stringent
11 levels. We want everything removed.

12 On the face of it, that sounds
13 unfair given the risk involved except the company
14 says we are going to expand in a couple of years
15 and I will have to pay to get rid of contaminated
16 soil and that's the real reason I want this. It's
17 not a risk-based issue, but it's the cost of
18 construction type issue.

19 Here, you have to clean it up
20 and I have to pay instead of \$3 a yard to get rid
21 of it, it's clean fill, to maybe \$50 a yard to haul
22 it and get it to a site for special waste. That
23 situation can kind of cut both ways.

24 As much as they might try, we

1 have tried to avoid being in the middle of that
2 and we have encouraged the two parties to work it
3 out amongst themselves. I think they will come
4 to some conclusion. We didn't feel that was our
5 role to be in the middle of that.

6 MR. WATSON: The end result is,
7 though, you have developed a program that allows
8 parties to insist upon more protective cleanups
9 than what the state as determined as protective,
10 is that true?

11 MR. KING: Well, yes and no. If you
12 have off-site groundwater contamination and the
13 off-site person says I want to have the opportunity
14 to use that groundwater as a drinking water source,
15 it may be at some point in the future he does want
16 to do that. If he wants to preserve his rights
17 as a property owner to use that groundwater as a
18 resource, then, he should be entitled to do that.

19 MR. WATSON: If there are institutional
20 controls in place that would prohibit him from doing
21 that, then, you are still creating a system that --

22 MR. KING: Well, if there is an
23 institutional control, then, it's not an issue.

24 MR. WATSON: Is it true that by

1 setting up the system this way, you are also
2 establishing a system where parties could impose
3 cleanup requirements that are more stringent than
4 what the state would determine to be protective
5 of human health and the environment under the
6 Illinois Super Fund Program as well?

7 MR. KING: Again, I guess that would
8 be a matter between private litigants as to what
9 they could establish in any kind of private
10 litigation as to what additional cleanup levels
11 should be.

12 MR. WATSON: Again, though, if you
13 are prohibiting the use of institutional controls,
14 perhaps, or imposing a requirement to obtain
15 permission to use institutional controls or allowing
16 private parties to dictate application of residential
17 standards in commercial settings, you are -- in
18 effect, the result is that you would be allowing
19 cleanups that would even be inconsistent with that
20 which would be required under the Illinois EPA Super
21 Fund Program?

22 MR. WIGHT: I think that question has
23 been answered several times as to what our position
24 is on that point.

1 MR. WATSON: Can you answer that? Is
2 it yes?

3 MR. KING: I don't think I have
4 anything to add.

5 MR. WIGHT: I don't know what you
6 want him to say other than what he has already said.

7 MR. WATSON: Well, what is the answer?
8 Is it yes?

9 MR. WIGHT: Well, there is some problem
10 with the phrasing of the question. Generally, the
11 answer is that as a matter of policy in this rule,
12 we don't want the agency in the middle of private
13 property disputes.

14 MR. WATSON: As a result --

15 MR. WIGHT: There is nothing in the
16 act that says that a property can't be cleaned up
17 to the higher standard and certainly those options
18 are available for the property that you control.
19 There is nothing in the act that says for the
20 property you don't control, you can impose a certain
21 standard or level of cleanup on that individual and
22 we have chosen not to wade into that as a matter of
23 the regulatory proposal.

24 If you have some language or

1 if you want to suggest that to the board, that's
2 probably fine, but I think it's clear what our
3 position is on that. I think Mr. King has made
4 it clear two or three times now.

5 MR. WATSON: If the state were
6 cleaning up that site under the Illinois Super Fund
7 Program, would commercial/industrial uses be relevant
8 to determining the cleanup objectives for that site?

9 MR. KING: I guess in some situations,
10 that's been true. I don't know if that's been true
11 in all situations.

12 MR. WATSON: It certainly is
13 something that would be -- parties could argue that
14 commercial/industrial uses could influence or be
15 considered as part of a determination of remediation
16 objectives under the Illinois Super Fund Program.

17 MR. KING: See, you have to -- you can't
18 jump from this program to the Super Fund Program the
19 way you are doing because with this program, you are
20 looking at a context where you have a final remedy.
21 You have a document called a no further remediation
22 letter that is issued. We are not really talking
23 about that kind of -- that's not the context for the
24 Illinois Super Fund site where the state is doing the

1 remediation.

2 MR. WATSON: The process of defining
3 risk and determining remediation objectives is the
4 same under the Illinois Super Fund Program, is it
5 not?

6 MR. KING: I don't know that in the --
7 excuse me for a minute, please.

8 MR. EASTEP: Again, it's hard to
9 make that link. There is an aspect of the Super Fund
10 Program particularly under the federal program --
11 under the national contingency plan and to a certain
12 extent, under the state plan, where we were
13 conducting the cleanup or the feds were where you
14 have the feasibility study aspect, which you don't
15 have in this program.

16 In this program, you get in
17 and you, as a volunteer, you can do whatever you
18 want to clean it up. If we do it, we have to do
19 a feasibility study and we do the same type of
20 risk analysis. In other words, it's a risk-based
21 number associated with the Super Fund cleanup which
22 has the feasibility thing where you have to match
23 the acceptable risk to the lowest possible
24 technically feasible cost. That's an aspect that

1 you don't have here.

2 MR. WATSON: Right. Based on current
3 and reasonably anticipated future uses, correct?

4 MR. EASTEP: Land use would be a
5 consideration, that's correct.

6 MR. WATSON: Okay.

7 THE HEARING OFFICER: Is that number
8 three? Are you done with that entire section?

9 MR. WATSON: Well, let me just ask a
10 portion of Section 3(c) and that is a lot of times
11 we will be dealing with the Illinois Department of
12 Transportation in terms of getting permission to
13 go onto their properties.

14 Has the agency developed a
15 procedure or spoken with the folks at DOT regarding
16 how they are going to coordinate these programs?
17 Is there going to be a person there that we can
18 contact and get our questions answered regarding
19 this?

20 MR. KING: Yes. We have had a
21 number of conversations with the Department of
22 Transportation. As far as the contact person,
23 Steve, are you it or what?

24 MR. GOBELMAN: Well, as far as

1 permission or getting access to right-of-way,
2 there are already established setup conditions to
3 allow participants to get on to DOT right-of-way
4 for adjoining purposes and they are required --

5 THE HEARING OFFICER: Excuse me.

6 MR. GOBELMAN: My name is Steve
7 Gobelman.

8 THE HEARING OFFICER: You need to be
9 sworn in by the court reporter.

10 (Witness sworn.)

11 WHEREUPON:

12 STEVE GOBELMAN,
13 the witness herein, has been first duly sworn and
14 testifies as follows:

15 MR. GOBELMAN: As I said, there is
16 already -- if we are allowing participants to go
17 on to DOT property to access for drilling purposes
18 and stuff like that, there is already in the
19 district offices requirements to get a permit to
20 do so.

21 The document says we allow
22 you to come on for purposes of an investigation
23 or whatever. As far as a centralized data base
24 or centralized area, we can call a central office

1 to speak with either myself or John Washburn.

2 MR. WATSON: Are you suggesting that
3 the decisions, then, would be made on a district
4 office basis?

5 MR. GOBELMAN: For allowing you access
6 to the property, yes. It would require a permit to
7 get on the property.

8 THE HEARING OFFICER: Along these
9 same lines, I believe the Metropolitan Water
10 Reclamation District had a couple of questions.

11 MR. DUNHAM: Thank you. I'm Ed Dunham
12 on behalf of the Metropolitan Water Reclamation
13 District of Greater Chicago.

14 THE HEARING OFFICER: Excuse me.
15 Mr. Dunham, could you step forward to the microphone
16 for the court reporter? She is unable to hear you.

17 MR. DUNHAM: To the extent that the
18 remediation applicant and the site owner may be
19 different parties with widely dispersed interests,
20 why is there no provision in the proposed regulations
21 for the continued participation in the owner in the
22 process? Please note, I do not intend to create a
23 duty for the owner to participate.

24 MR. EASTEP: This is still a

1 voluntary program. Given your statement that there
2 are different parties with different interests, we
3 focused the program on the remedial applicant as
4 the person who comes in and that could be the owner
5 of the property or that could be a third party.

6 In some instances, we have had
7 financial institutions that maybe contracted with
8 consultants to do something because somebody
9 defaulted on a loan or something like that and they
10 are trying to sell the property.

11 You could have a lot of different
12 scenarios. All we are asking for is that they
13 agree. If we can get persons that own or represent
14 the owner of the property to agree on this, then,
15 we have one party coming in and hopefully, whatever
16 agreements they had to have, they would work out
17 between themselves.

18 MR. DUNHAM: I'll get to my second
19 question. The regulations as proposed are
20 necessarily flexible -- because obviously when you
21 turn dirt, you don't know what you're going to find
22 initially -- allowing for a very broad range of
23 changes as the remediation process progresses, but
24 the consent of the owner is only requested once.

1 Why is there no provision for the owner to withdraw
2 consent should the remediation applicant proceed
3 with modifications that are unacceptable to the
4 owner?

5 MR. EASTEP: Again, we view that as a
6 dispute between the owner and remedial applicant if
7 that's different. We leave them to resolve that.
8 We don't think we want to be involved in that.

9 MR. DUNHAM: To the extent that --
10 the way the proposed regulations read, the
11 remediation applicant and the agency are the only
12 two parties negotiating what will be the final
13 cleanup of the site, what will be the final use
14 of the site, and what the no further remediation
15 letter will say.

16 MR. EASTEP: That's correct.

17 MR. DUNHAM: The owner of the site
18 signs off one time granting his permission for the
19 initial scope of work in the initial application.

20 To the extent that there is a
21 great deal of flexibility allowed in the rules and,
22 in fact, you can change the focus of your -- you
23 can change the scope of work from a comprehensive
24 study to a focused study in midstream with consent

1 of the RA and the agency, no one is asking the site
2 owner's consent in this process.

3 To the extent that the site owner
4 may end up with something very, very different than
5 what he initially agreed to, why is there no further
6 participation by the site owner in the process
7 allowed or no provision for the site owner to be part
8 of the process?

9 MR. KING: What we had anticipated was
10 that the remediation applicant and the site owner
11 would have an agreement and that agreement would
12 control as to those kind of future uses.

13 If the site owner left those
14 issues wide open and the remediation applicant then
15 proposed a remediation methodology that the owner
16 didn't like at all, I mean, that's kind of the site
17 owner has made a mistake. That's something that
18 the site owner should have perhaps had a little
19 more foresight with regards to what he had provided
20 as far as that agreement was concerned.

21 If that process has been closely
22 controlled by the site owner, then, I think the site
23 owner has a tremendous amount of control on the back
24 end because if he has been -- if he has the ultimate

1 decision as to what kind of form of remediation is
2 going to go forward, he can simply say, look, I
3 don't want you to come on my site doing that kind
4 of cleanup. I want a different type of cleanup
5 done.

6 Well, unless the remediation is
7 eventually performed, the remediation applicant is
8 not going to get an NFR letter from us. If he
9 doesn't get the NFR letter, he has really gone
10 through -- gone down the starting end of the process
11 without having any kind of way out at the end.

12 The end conclusion, from my
13 perspective, is that the site owner has a lot of
14 control relative to the agreement he initially
15 enters and can control through whatever agreement
16 he has with the remediation applicant and he can
17 control how things are done on his piece of property.

18 We just don't want to be --
19 it's not our goal to be intricately involved in
20 that process. We want to know that there has been
21 an initial agreement up front and then we go from
22 there.

23 MR. DUNHAM: I have two things, then.
24 First, specifically, is your plan that the site owner

1 and remediation applicant contract for consent, that
2 they have some written or at least verbal agreement
3 as to the terms of that consent?

4 MR. KING: I think that's -- if a site
5 owner is going to allow somebody to come on to their
6 property to do any kind of activity, there has to be
7 some form of consent.

8 MR. DUNHAM: That's a different issue
9 because in some instances, the remediation applicant
10 could be a tenant on the land and the landlord does
11 not have control whether his tenant is present on the
12 land and may or may not have very intimate control
13 as to what the tenant does with the land.

14 So that does not work well
15 in a landlord/tenant situation as it might in a
16 remediation applicant from off-site going on-site.

17 MR. KING: I would still think that
18 the site owner -- before he signed the initial
19 application allowing the remediation applicant
20 to come into this program, he would require some
21 kind of an agreement with the remediation applicant
22 with regards to the circumstances under which any
23 remediation would move forward.

24 MR. DUNHAM: So it is not your --

1 you do not envision the site remediation application
2 itself to be the contract that should control the
3 behavior of the remediation applicant and the site
4 owner?

5 MR. KING: That's correct.

6 MR. DUNHAM: I believe my other
7 questions come under a different section.

8 THE HEARING OFFICER: Yes.

9 MR. DUNHAM: Thank you.

10 THE HEARING OFFICER: Thank you.

11 Mr. Rieser?

12 MR. RIESER: Aren't there actually two
13 points where the site owner's permission essentially
14 for sign-off is required? The first would be at the
15 application stage and the second would be with the
16 recording of the no further remediation document?

17 MR. KING: I think that's true.

18 MR. RIESER: As you said, the site
19 owner does have the control both coming in and
20 at the end of the process to dictate if there are
21 any restrictions that the remediation objectives
22 would be based on that the land owner could emphasize
23 the control at that point to either agree to those
24 land use restrictions or not agree to those land use

1 restrictions at the end of the process?

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

3 MR. DUNHAM: I would disagree, though.

4 The way the no further remediation letter is issued
5 to the remediation applicant is that the remediation
6 applicant must file within forty-five days. The
7 appeal time to the board runs thirty-five days.
8 There is at least the potential that the appeal
9 time has run before the letter is filed and that
10 does not need to be filed by the landowner according
11 to the rule, but could potentially be filed by the
12 remediation applicant.

13 MR. RIESER: I guess I would submit
14 that the remediation applicant would face certain
15 liability for slander of title if they filed a deed
16 restriction which included restrictions on the land
17 to which the owner had not agreed and would do so
18 at his peril.

19 MR. DUNHAM: Perhaps, but I would
20 rather -- I'm wondering why we can't address this
21 in the rules while we promulgate them.

22 MS. SHARKEY: I would like to state
23 something. I think some of this may go to the
24 question of whether the agency, by these regulations,

1 isn't, in fact, inserting the neighboring property
2 owner or the tenant, the non-RA, into the process
3 that way.

4 While we are hearing that the
5 agency would like not to be in the middle, the
6 agency has maybe put itself in the middle with
7 these regulations.

8 If, in fact, a party needs
9 an access agreement normally in order to get on
10 somebody's property and do any work, like I
11 understand the scenario with a tenant, the tenant
12 has other -- may have access, but is also definitely
13 constrained by a lease and other requirements, and
14 if there are indeed other laws and regulations that
15 will basically require a remediation applicant to
16 meet with and get an agreement from another party
17 before they can actually file something on their
18 property and reports on another property anyway,
19 aren't these regulations actually asserting the
20 property owner into this process rather than taking
21 them out?

22 I guess, as a follow-up on that,
23 a sort of correlary question is, does the neighboring
24 property lose any rights -- the neighboring property

1 owner lose any rights by virtue of the remediation
2 going on, for example, to groundwater under their
3 property if they subsequently object to the level
4 of cleanup under there, are they prohibited in any
5 fashion in seeking some sort of relief in the courts
6 under the Environmental Protection Act or otherwise
7 in getting additional cleanup by virtue of the no
8 further remediation letter issued to the RA?

9 I know I have two questions
10 there. The first one is maybe second to the second
11 one and that is if the other neighboring property
12 owner really has not lost any rights by the
13 remediation that has gone forward, why are we
14 inserting them into this process?

15 MR. KING: I don't know if you think --
16 really, it seems to me what you are implying is that
17 somebody can just go willy-nilly onto somebody else's
18 piece of property and do whatever they want and we
19 should be approving that as something that's okay to
20 do.

21 MS. SHARKEY: I think what I'm implying
22 is that there are all sorts of reasons why someone
23 cannot go willy-nilly on someone else's piece of
24 property quite apart from these rules. One cannot

1 go out, without violating trespass laws, onto
2 somebody else's property, even walk on it, let
3 alone begin investigating and taking samples.

4 MR. KING: If we don't have that
5 agreement up front, that means we are putting
6 resources into working on a site and the remediation
7 applicant is putting resources into working on a site
8 and we certainly don't know whether there is going to
9 be any kind of positive culmination as a result of
10 that work unless there is at least some indication
11 up front that the site owner is allowing that to go
12 forward.

13 We have plenty of sites to work
14 on. We want to deal with the ones that are most
15 likely to be successful. If we just have a system
16 set up where we don't require any kind of site owner
17 approval, there is a great potential that we will
18 just be working on meaningless sites. I don't think
19 we want to do that.

20 MS. SHARKEY: The applicant, of course,
21 could be working on a meaningless site in that case
22 as well?

23 MR. KING: Yes.

24 THE HEARING OFFICER: At this point,

1 let's just break for about five minutes and please
2 be back here at 3:20.

3 (Whereupon, after a short
4 break was had, the
5 following proceedings were
6 held accordingly.)

7 THE HEARING OFFICER: All right. Why
8 don't we go back on the record.

9 Mr. Rieser and Ms. Rosen, you
10 filed several questions on Section 740.210. I
11 believe your initial questions twelve and thirteen
12 may have possibly been answered?

13 MR. RIESER: Yes, that's correct.

14 MS. ROSEN: Yes.

15 THE HEARING OFFICER: Let's proceed.
16 Do you have a specific question pertaining to page
17 eight, Larry Eastep's testimony on proposed Subpart
18 A? Do you want to start with that?

19 MS. ROSEN: Could we go off the record
20 for one second?

21 THE HEARING OFFICER: Sure.

22 (Whereupon, a discussion
23 was had off of the
24 record.)

1 THE HEARING OFFICER: Let's go on the
2 record.

3 MS. ROSEN: This is question fourteen.
4 Page eight of Larry Eastep's testimony on proposed
5 Subpart A states remediation site specifically means
6 the area to be remediated regardless of property
7 boundaries. Would it be more correct to state that
8 although the remediation site may encompass the area
9 to be remediated regardless of property boundaries,
10 the designated remediation site does not have to
11 include the area to be remediated nor does the site
12 have to be co-extensive with the recognized
13 environmental conditions and related contaminants
14 of concern which are being addressed by the RA
15 pursuant to its SRP agreement?

16 MR. EASTEP: I guess the first part
17 to that is assuming that the no further remediation
18 letter is to be issued, then, the site has to
19 include the area to be remediated.

20 The applicant could address
21 contamination off-site and -- I'm losing myself
22 in my notes here. If you had contamination off-site,
23 the applicant should be in a position to address
24 that off-site contamination and they could even

1 remediate it.

2 If they didn't remediate it,
3 then, they could still get an NFR for the site
4 which the applicant originally came in for for
5 the first piece of property.

6 MS. ROSEN: And is it correct that
7 there might be an area that is not included within
8 the remediation site that has contaminants of
9 concern that relate back to the remediation site
10 that you are, in fact, addressing that the no further
11 remediation letter would extend to that contamination
12 and the release -- without actively going onto the
13 property?

14 MR. EASTEP: Let me go back to my other
15 answer.

16 If you have adjoining parcels of
17 property and contamination has moved from the first
18 parcel off-site to the other parcel, you could do
19 that in a number of different ways.

20 If you define Parcel A as your
21 remediation site and you intend to get an NFR letter,
22 then, the NFR letter would be limited to Parcel A,
23 which is what you defined, even though contamination
24 has gone off-site.

1 As part of your investigatory
2 requirements, you would have to address the off-site
3 contamination. How you address that would be handled
4 on a site-by-site basis and what the conditions were
5 of each site.

6 So you are in a position where
7 your sight, if the owner would not let you on, you
8 could still get an NFR for Site A, which was the
9 site or the source where the remediation was.

10 You would also have the
11 alternative of including the second site in your
12 application and calling that part of the remediation
13 site and remediating contamination on the off-site
14 portion as well. So you have the option of going
15 both ways. You could get an NFR for your property
16 in either case.

17 MS. ROSEN: Okay. I don't have any
18 further on that right now.

19 MR. WATSON: Excuse me. Did you say
20 that if you decided that the site remediation would
21 be conducted solely on your property, that you would
22 still have an obligation to do sampling on the
23 adjacent property?

24 MR. EASTEP: No, I did not say that.

1 MR. WATSON: Okay.

2 MR. EASTEP: I said that you would
3 have to address the off-site contamination and how
4 you address that would be determined by a
5 site-by-site basis.

6 MR. WATSON: Wait. Why would you
7 have to address it if your site -- if your no further
8 action letter is limited to your site only?

9 MR. EASTEP: Because the nature of the
10 NFR might be dependent on that knowledge.

11 MR. WATSON: I'm sorry. I'm confused.
12 You're saying that you would have an obligation
13 even if you have defined the remediation site as
14 your property boundary and you are allowed to do
15 sampling on that without getting approval from
16 anybody else?

17 MR. EASTEP: Uh-huh.

18 MR. WATSON: You would still have an
19 obligation under these regulations to go out and
20 further characterize --

21 MR. EASTEP: I didn't say that. I
22 didn't say that. I said you would have to address
23 the off-site conditions and that would be -- how
24 you addressed it would be determined by a

1 site-specific basis?

2 MR. WATSON: Where in the regulations
3 does it say you have to address the off-site
4 conditions?

5 MR. EASTEP: I don't know offhand.
6 Let me give you an example. What if you were
7 to propose that you are going to eliminate the
8 groundwater pathway?

9 All right. Now, you would have
10 to know something about the off-site to eliminate
11 the groundwater pathway, correct?

12 MR. WATSON: That may be right.

13 MR. EASTEP: And the only way you
14 are going to get your NFR, in this instance, in
15 this hypothetical instance that I just brought
16 up is eliminate the groundwater pathway. So you
17 have to know something about the off-site.

18 MR. WATSON: Can you address the
19 site without having to go on that neighboring
20 property?

21 MR. EASTEP: In some instances, you
22 can. We have seen over the years a lot of cases
23 where property owners -- they don't like their
24 neighbors and they just aren't going to let them

1 do anything on it. They aren't even going to hear
2 them. They won't even talk to them.

3 In some cases, you can address
4 it by modeling, perhaps. You know, if you can
5 collect enough information on your site that you
6 can model groundwater flow, but you have to be
7 able to address it at least in that context.

8 THE HEARING OFFICER: Ms. Sharkey?

9 MS. SHARKEY: If you have a site
10 where you have -- if we are talking about
11 groundwater, for example, and you have a plume
12 that extends over -- under the neighbor's property,
13 I take it from our discussion that the agency
14 considers that to be affected property although
15 it is only groundwater under the property that
16 appears to be impacted?

17 MR. EASTEP: Well, that would be
18 off-site contamination.

19 MS. SHARKEY: All right. I guess I
20 would like to get an answer, though. Is it affected
21 property if we have a groundwater contamination and
22 no soil contamination on that property?

23 MR. WIGHT: Let me ask this first.
24 I'm not sure if this was your question or not, but

1 there were other questions about what the agency
2 meant by the term affected property and in the
3 context of obtaining owner's permission in an
4 application, is that what you are talking about?

5 MS. SHARKEY: I'm following up on
6 this particular one, yes.

7 MR. EASTEP: I think in the case of
8 the other question, our answer is affected property
9 is property for which an NFR is being sought. So
10 that would not be -- in that sense, that would not
11 be affected property.

12 MS. SHARKEY: If I'm seeking to
13 remediate groundwater on my property and a plume
14 extends underneath a neighboring property, that
15 neighboring -- that's the only contamination that
16 we are aware of related to this site remediation
17 at least is that groundwater plume under that party's
18 property and my property, I can remediate under that
19 property, then, and I guess some of the question is
20 if I define my site as including that property, do I
21 need to get approval of that property owner just for
22 the groundwater?

23 MR. EASTEP: Yes.

24 MS. SHARKEY: Secondly, if I defined

1 it as not including that, but indeed ending at my
2 property boundary, and I put in a groundwater
3 monitoring well at my property boundary, and I
4 monitor and remediate to appropriate levels at my
5 property boundary, do I need to address in any
6 other fashion the contaminant plume on that party's
7 property if it's not a part of my remediation site?

8 MR. EASTEP: It goes back to being a
9 very site-specific situation. If you were doing it
10 with a Tier 2 investigation, you may have to do more,
11 I guess, is that right?

12 MR. KING: Yes.

13 MR. EASTEP: If you were proposing an
14 alternate standard, that might complicate it. Wait.
15 Hold on a second.

16 MR. KING: Just to amplify what Larry
17 was starting to say, as far as giving an example,
18 if you look at this under 742, if you look at the
19 requirements for establishing an alternative standard
20 under Tier 2, you have to be able to model the fact
21 that off-site wells are not being impacted, which
22 means you need to know something about where off-site
23 wells are located.

24 Again, as Larry was saying with

1 regard to the earlier question, no, you may not have
2 to go off-site and sample, but you may have to go and
3 look at records as to where there might be additional
4 groundwater -- drinking water wells off-site. If you
5 found them on the neighboring property, you would
6 have to engage in a modeling exercise to make sure
7 that existing well is not being impacted.

8 MS. SHARKEY: So a Tier 2 or anywhere
9 where we need to look off-site, you might have to --
10 you have to find out what's out there at least and
11 include that in your discussion -- in your plans,
12 but if, in fact, I show I have remediated at my
13 property boundary and it's clean, in other words,
14 if I actually met objectives within a remediation
15 site, I'm done, am I not?

16 MR. KING: Yes. Let's just say it's
17 a -- you have a site and it's a class one groundwater
18 and you are meeting the Tier 1 number for a class
19 one groundwater at your boundary in the direction
20 of the flow of contaminants, you would be completed.
21 That would be -- you would be done relative to that
22 pathway.

23 MR. WATSON: Is there an obligation
24 under the program to define -- is there necessarily

1 an obligation under the program to define the nature
2 and extent of the contamination?

3 MR. KING: Yes.

4 MR. WATSON: That's for reasons other
5 than just filling in the pieces or the information
6 requirements of your model?

7 MR. KING: There is a requirement
8 that you characterize -- this is really covering
9 740.420 where it talks about under the comprehensive
10 site investigation and then under the focused
11 investigation section what characterization this
12 was to include.

13 THE HEARING OFFICER: Let me just
14 interject at this point. Part of the purpose in
15 filing the prefiled questions is so that we may
16 proceed with those prefiled questions and, of
17 course, have follow-up objection to these questions.

18 It seems, as Mr. King has
19 just indicated, we are getting into other sections.
20 I know I kind have made reference to this before.
21 Can we proceed ahead with the the site remediation
22 advisory committee questions on, I believe,
23 fifteen, sixteen, and seventeen, and then proceed
24 with everyone else's prefiled questions on this

1 particular section and take the follow-up questions
2 at the end of this section that all pertain to
3 740.210.

4 I know it's easy to tie everything
5 else into what we are talking about when we bring up
6 the NFR letters, but in the interest of expediting
7 the procedures here, I want to go forward.

8 Ms. Rosen or Mr. Rieser, would
9 you please proceed with question fifteen?

10 MS. ROSEN: How will the fact that
11 contamination being addressed by the RA as part
12 of its efforts under the site remediation program
13 agreement extends beyond the designated remediation
14 site impact an RA's ability to secure a no further
15 remediation letter under Part 740?

16 MR. EASTEP: Well, I think we have
17 indicated you can still get an NFR letter for
18 the remediation site. That's still possible
19 even though contamination may extend to another
20 site.

21 MS. ROSEN: Okay. Number sixteen,
22 we've kind of touched on this one as well. Does
23 the agency intend that the permission given by a
24 neighboring property owner to an RA pursuant to

1 Section 740.210(a)(3) automatically authorizes
2 the imposition of remedial action or restrictions
3 on the neighboring property upon which issuance
4 of the NFR letter might depend for either property?

5 MR. EASTEP: Well, we don't see --
6 again, this has to do with something between property
7 owners. We don't see anything being automatically
8 authorized.

9 MS. ROSEN: Okay.

10 MR. EASTEP: We assume that they
11 agree -- when the owner signs off on an application,
12 we assume they agree, but I don't think we are not
13 intending that anybody is authorized.

14 MS. ROSEN: You have answered, for the
15 most part, seventeen and eighteen.

16 THE HEARING OFFICER: Then, we have
17 question number four from Gardner, Carton & Douglas.

18 MR. WATSON: Is the agency requiring
19 that a remediation applicant perform site
20 characterization and investigation activities
21 to generate data on-site conditions before the
22 remediation applicant applies for entry into the
23 site remediation program or before the agency will
24 approve a site remediation program application?

1 MR. EASTEP: No, that's not necessary.

2 MR. WATSON: So it's sufficient really
3 for the remediation applicant to indicate a general
4 intent that they would like to address or conduct
5 a comprehensive site investigation or a focused site
6 investigation? You don't have to have any details
7 beyond that?

8 MR. EASTEP: Initially, that's
9 correct.

10 MR. WATSON: I'm troubled by the fact
11 that the regulations have a requirement that you
12 include a map that defines the site remediation
13 boundaries and to some extent, I think that's
14 depending upon more information than the site --

15 MR. EASTEP: You can always change
16 the remediation -- you can modify your application
17 to change your remediation site boundaries.

18 MR. WATSON: So if you have absolutely
19 no information and you just indicated an intent to
20 get into the program and address your site, generally
21 speaking, the application will not be rejected, is
22 that correct, as being incomplete?

23 MR. EASTEP: You have to somehow
24 tell us what the site was. You have to have some

1 indication what the site is. Given what you have
2 told me, it could be in Indiana. I know you laugh,
3 but sometimes we get some things in where people
4 assume an awful lot.

5 Part of this also -- coming
6 in, you should have enough of an idea to give
7 the agency a kind of a clue as to what we are
8 going to be dealing with particularly in terms
9 of resource demands on our part, whether the
10 project is going to be something you have a year
11 to work with or whether your sale is imminent
12 and you have to do it next week.

13 There really could be a lot of
14 information that you provide up front. We certainly
15 wouldn't expect a full site investigation. As a
16 matter of fact, in a lot of cases, we prefer to work
17 with the applicant in developing the work plan.

18 MR. WATSON: I mean, there may be
19 many instances where we have no information regarding
20 existence of recognized environmental conditions.

21 MR. EASTEP: That would be fine to
22 come in like that.

23 MR. WATSON: Okay. What kind of
24 information are you looking for on the schedule?

1 MR. EASTEP: We haven't, so far,
2 had a lot of people working -- in the pre-notice
3 program, we haven't worked a lot of these people
4 on schedules.

5 I think what we would like to
6 see -- there are a couple of things. One, again,
7 if there is going to be any efforts or any requests
8 for the agency to expedite the treatment. If you
9 are on a fast track, we need to know that before
10 they decide to close on the property sale.

11 If you are going to be dawdling
12 along and you want to do something in a phase
13 approach and, say, take three years, that might
14 be okay too.

15 If you have been threatened
16 with enforcement by the agency and this is part
17 of your agreement, you know, to stall off
18 enforcement, and you agreed to come into the
19 voluntary site remediation program, then, we
20 would want to see a schedule that is more
21 responsive to getting things cleaned up.

22 If you have an imminent health
23 hazard or something that represented some acute
24 threat, we think the schedule ought to be responsive

1 to that as well.

2 MR. WATSON: And obviously, as more
3 information becomes available from the site
4 investigation, the agency would be willing to
5 revise schedules based on information that's
6 generated, is that correct?

7 MR. EASTEP: That's correct.

8 THE HEARING OFFICER: At this point,
9 let's proceed to Ms. Sharkey's question.

10 MR. GIRARD: I have a question directly
11 off this. We are talking here about the contents of
12 application under 740.210, which says in (a) that the
13 application shall at a minimum contain the following
14 and then we have, you know, a lot of very specific
15 types of information that should be in the
16 application.

17 For instance, one of them is
18 (a)(5)(A)(ii), it says all recognized environmental
19 conditions and related contaminants of concern for
20 the remediation site as identified by a comprehensive
21 site investigation under Section 740.420 in this
22 part. You go back and that's the Phase 1 and Phase
23 2, which I think is very comprehensive.

24 It seems to me in your response

1 now is you're saying that the application doesn't
2 have to contain all of this information.

3 MR. EASTEP: I think what this means
4 is in five, the applicant is telling us that they
5 want to do comprehensive as opposed to (ii) is a
6 comprehensive investigation whereas (i) is a focused
7 investigation.

8 In other words, in your
9 application, you are saying you are giving us a
10 statement indicating whether your NFR is going
11 to be focused or comprehensive.

12 MR. GIRARD: Okay. I don't read it
13 that way.

14 MR. EASTEP: Well, that was our
15 intent.

16 MR. GIRARD: I get it.

17 MR. WATSON: That was the basis for the
18 questioning, to get an understanding as to whether
19 they are looking for that information or whether
20 there is just a statement that this is our intent
21 to do that kind of investigation.

22 THE HEARING OFFICER: Okay.

23 MR. EASTEP: That's all we ask for is
24 the statement.

1 MR. GIRARD: But the rest of the
2 information there in that whole subsection is
3 minimum information that you would expect?

4 MR. EASTEP: That's correct.

5 MR. GIRARD: We're not looking at
6 number five, but all the others, right?

7 MR. EASTEP: That's correct.

8 MR. GIRARD: Thank you.

9 THE HEARING OFFICER: All right. Go
10 ahead, Ms. Sharkey.

11 MS. SHARKEY: Thank you. My third
12 question under my question point number five goes
13 to 740.210(a)(7)(D), which relates to the site-based
14 and the sufficiency of detail and then it goes on to
15 prescribe certain details that need to be in there.
16 (D) goes to surrounding land uses. For example,
17 residential property, industrial/commercial property,
18 agricultural property, and conservation property.

19 My question here is what do we
20 look to to determine land use under this regulation
21 and particularly I'm wondering if zoning is
22 relevant?

23 MR. EASTEP: In some cases, certainly
24 zoning would be relevant and appropriate by itself

1 maybe. In other cases, I think people just tend to
2 identify it, you know. The application will show --
3 just put a notation of how the property is zoned. I
4 mean, if you are in a city and it's zoned industrial,
5 then, usually that's sufficient. If you get into
6 some areas, they will just block out a spot and write
7 in commercial or industrial or something of that
8 nature.

9 MS. SHARKEY: I guess what I'm really
10 asking is does the remediation applicant have a
11 choice here to designate it, for example, based
12 on current use as opposed to zoning or, for example,
13 the definition is in these rules in 742?

14 MR. EASTEP: I think they should
15 identify it accurately. If it's zoned one way and
16 used another way, I think it's up to them to probably
17 point out both of them to the agency.

18 MS. SHARKEY: It sounds like you are
19 saying there is a duty to investigate your site?

20 MR. EASTEP. Yes. Primarily for the
21 purposes of this program, we need to see how it's
22 actually used. If there is an issue with zoning,
23 and it might be germane to how you got your NFR,
24 then, you would want to let us know about that.

1 MS. SHARKEY: Under this section, is
2 the applicant supposed to designate it as falling
3 into one of these categories?

4 MR. EASTEP: That was an example of
5 the primary ones.

6 MS. SHARKEY: For example, I might say
7 the property is a golf course and not specify which
8 category it is under here?

9 MR. EASTEP: That is an acceptable
10 designation.

11 MS. SHARKEY: My next question is
12 just on the use of the term under (a)(9), which is --
13 have I jumped ahead? No, I guess I haven't. It's a
14 statement of the current use for a remediation site
15 and post-remediation uses.

16 Every time I came across
17 the term post-remediation use, I got a little nervous
18 that somehow we would be -- by virtue specifying a
19 post-remediation use -- in fact, limiting the use
20 of the property in the future.

21 MR. EASTEP: Potentially, I think
22 that's the implication. The implication is that
23 you indicate that your post-remediation use is
24 residential, then, that would certainly restrict

1 your NFR letter.

2 MS. SHARKEY: If it's your anticipated
3 post-remediation use, it's understood that it can
4 change at some point in the future?

5 MR. EASTEP: I think there are
6 provisions in the rule that deal with that.

7 MS. SHARKEY: So the post-remediation
8 use actually specified in the application, that
9 is going to be the trigger in the agency to look
10 for post-remediation objectives?

11 MR. EASTEP: Yes. That would also
12 come in when you are developing your remediation
13 objectives. You wouldn't want to develop your
14 remediation objectives and say the post-remediation
15 use or they are designed for one type of exposure
16 scenario when you described another as your
17 post-remediation. I mean, that would be a big
18 inconsistency.

19 MS. SHARKEY: Again, it begins as early
20 as this stage, though, with the application for
21 remediation?

22 MR. EASTEP: Yes.

23 MS. SHARKEY: That's all the I have.

24 Thank you.

1 THE HEARING OFFICER: Did you want to
2 omit the last two questions that you have on that
3 section?

4 MS. SHARKEY: Oh, I'm sorry. I guess
5 I do have more. Excuse me. I think the reason I
6 wasn't focused is because we already talked about
7 this notion of whether or not the -- I'm sorry. We
8 haven't.

9 My next question is related to
10 whether we need to obtain a list of all agency
11 permits that these other affected property owners
12 may hold?

13 MR. EASTEP: The answer is yes.

14 MS. SHARKEY: Finally, I guess I'm
15 looking at (b). Do you want to go on with my (b)?

16 THE HEARING OFFICER: Sure. Why don't
17 you start this.

18 MS. SHARKEY: I found it a little odd
19 that we have a situation where an applicant must put
20 in -- I should say has an option -- has the option to
21 put in a \$500 partial advance payment, but then they
22 may lose that if they are found ineligible. I guess
23 I wanted some substantiation of where that \$500 is
24 going and where that number came up and I wondered if

1 there isn't some way to determine eligibility before
2 someone pays money that they can't get back.

3 MR. EASTEP: Well, I have a couple
4 responses. One is, for the most part, those
5 eligibility criteria are pretty straightforward.
6 Somebody that's in one of those categories shouldn't
7 omit them.

8 Secondly, I think we make every
9 attempt to ensure that the applications are
10 sufficient. We work a lot -- we have a lot of
11 discussions with applicants before they come in
12 and people frequently ask us about this. So we
13 make every attempt not to put ourselves in that
14 situation.

15 MS. SHARKEY: Why is it that we have
16 to have an upfront payment before eligibility is
17 determined?

18 MR. EASTEP: You can get an eligible
19 determination by talking to us, first of all, but
20 secondly, it's in the statutes. We did that as,
21 I recall, to eliminate a step in the process so
22 that you could come in and speed things up.

23 We really did that as a
24 convenience to people so you could come in and

1 start off and instead of coming in and determining
2 eligibility and then getting a letter saying you're
3 okay and then coming back later and submitting your
4 application and submitting your money and losing
5 all that time in between, we thought it would be
6 more streamlined for people to come in.

7 MS. SHARKEY: Are there greater costs
8 associated with that streamline review?

9 MR. EASTEP: Pardon?

10 MS. SHARKEY: Are there greater costs
11 associated with that streamline review?

12 MR. EASTEP: In the long-run, probably
13 less.

14 MS. SHARKEY: I'm just trying to
15 understand that. I don't mean to belabor this. Most
16 of my clients who have paid me to come and talk about
17 it will have to pay \$500 anyway. If it's not clear
18 to me why somebody is paying \$500 up front for an
19 eligibility determination, that is not refundable if
20 they are not eligible?

21 MR. KING: We have provided two options.
22 This is in 210(b)(2)(E). One is that you submit
23 the \$500 and get into the program, you submit
24 your application to get into the program. If we

1 deny that for some reason, you are out the \$500.

2 The other option is you request
3 the agency to make a determination of what -- whether
4 it should be -- whether an advance partial payment
5 should be one-half of the total anticipated costs.

6 If you use that approach and
7 you don't make a payment up front, you don't make
8 a payment until you have been accepted into the
9 program or not. That situation may still be \$500
10 or some number above \$500, but there is an option
11 there.

12 Now, as Larry was saying, that
13 second option may have some additional delay on it
14 while whereas the first option wouldn't have a
15 delay.

16 MS. SHARKEY: I'll let it go.

17 THE HEARING OFFICER: Ms. Tipsord has
18 a couple of questions.

19 MS. TIPSORD: In the proposal, you
20 have inserted a board note that says statutory
21 restrictions prevent the agency from refunding
22 payments, could you give me a specific citation for
23 the statutory restrictions?

24 MR. WIGHT: Not at this point.

1 MS. TIPSORD: Could you check into that
2 for us?

3 MR. WIGHT: We have been doing some
4 checking into this. It's been difficult to pin
5 down. It seems to be universal throughout our
6 Department of Fiscal that they did not issue any
7 refunds unless there is an appropriation to do so.
8 There is not an express statutory provision that
9 says that.

10 They have insisted that they
11 will not cut any checks. The rule is that any
12 checks that come into the agency through one of
13 the programs must be deposited with the fiscal
14 people within twenty-four hours. Unless there
15 is an express authorization for a refund, no
16 refunds are issued.

17 We did attempt to find out on
18 what legal basis they make that interpretation.
19 They could not site us to specific provisions of
20 the law, but rather the general idea that the
21 agency cannot issue any checks unless there is
22 an express authorization to do so.

23 It's more rather because there
24 is not an express authorization than because there

1 is an express prohibition.

2 MS. TIPSORD: Could we consider
3 perhaps -- I asked you to take a look at that
4 phraseology and then perhaps you can come up with
5 something else.

6 MR. WIGHT: It's phrased that way
7 because that's the way it was represented to us.
8 When we asked the obvious question at a later
9 time, what we found out was what I just explained
10 to you. I agree that it is a little misleading at
11 this point.

12 MS. TIPSORD: The second question
13 relates to -- you referenced a form here. I think
14 there are references to forms. Have you provided
15 those to the board and have those forms been
16 approved?

17 MR. WIGHT: Excuse me.

18 We have not provided forms. We
19 have been working on draft forms. We have some draft
20 forms. We don't have forms finalized primarily for
21 the reason that we would be waiting to see the final
22 outcome of the regulations to know what the content
23 in the form should be. We do have some drafts, but
24 we didn't provide them because we didn't view them

1 as final.

2 THE HEARING OFFICER: Okay. I believe
3 the site remediation advisory committee had one
4 question on 740.210(b)(2)(E)(ii).

5 MR. RIESER: I think it has been
6 answered, but let me rephrase it a little bit,
7 which is 210(b)(2)(E)(ii) in that if somebody pays --
8 seeks an agency determination for the appropriate
9 amount of fee and then pays pursuant to that, they
10 will only pay after they have been deemed to
11 be eligible. So there won't be a circumstance where
12 they will be ineligible and where they won't be
13 able to get that money back, is that correct?

14 MR. KING: That's correct.

15 THE HEARING OFFICER: Are there any
16 follow-up questions to this section?

17 MS. McFAWN: I have one. Was this
18 \$500 fee discussed between the agency and the
19 committee?

20 MR. KING: Yes. I don't know if
21 we spent a lot of time discussing it. It was
22 something that was on the table from early summer
23 on.

24 MS. McFAWN: The \$500 is just a

1 figure?

2 MR. KING: Yes. We had to pick a
3 number and that was the number we picked.

4 MR. WIGHT: Just a minute.

5 MR. EASTEP: I don't want to say we
6 did a statistically valid study, but the general
7 consensus was that that figure would cover the
8 vast majority of the cases. I think the average
9 was around \$1,000 or \$1,200. The low sites were
10 somewhere between \$1,000 to \$1,200.

11 MS. McFAWN: That's what you project
12 your costs to be?

13 MR. EASTEP: In a lot of the cases that
14 come in. Of course, that's why we ask people to give
15 us some help on the front end in identifying the size
16 of the projects so we can tell. That just seemed to
17 be, from a general and historical prospective about
18 what the general cost might be.

19 MS. McFAWN: This is what you have
20 experienced under the voluntary program?

21 MR. EASTEP: Yes.

22 MS. McFAWN: Thank you.

23 THE HEARING OFFICER: Are there any
24 further questions on this point?

1 MS. SHARKEY: Yes. If I could just
2 clarify the \$1,200 is the cost for the entire review
3 process by the agency?

4 MR. EASTEP: We thought that for a lot
5 of the sites, that would be a representative figure.

6 MS. SHARKEY: But that's for the entire
7 project and not just the eligibility?

8 MR. EASTEP: That would be a minimum
9 for a lot of the sites. Most of the sites that
10 come in are relatively small sites. That is probably
11 a large number. That would be a good minimum figure
12 that would cover that universe of sites.

13 MS. SHARKEY: Okay.

14 MR. EASTEP: We didn't do a very
15 statistically-valid study. It covers the entire
16 review.

17 MS. SHARKEY: The entire review
18 process?

19 MR. EASTEP: Yes.

20 THE HEARING OFFICER: All right.
21 Then, let's proceed to Section 740.215. I will
22 defer to the site remediation advisory committee
23 on its question twenty.

24 MR. RIESER: How will potential

1 applicants become aware of the agency's lack of
2 resources to accept applications. Under what
3 circumstances will this occur? Will this be a
4 temporary condition, so that the agency could
5 advise the owners, obtain a waiver of the decision
6 date, and hold the applications until the resources
7 become available? Will the agency return the
8 application and the application fee in such
9 instances?

10 MR. KING: When we get to the point
11 where we are so overloaded that we can't take
12 any further applications, that's going to be a
13 significant issue for us, and we are going to
14 make that very clear in a broad sort of way to
15 a lot of different people.

16 The whole notion of this program
17 is that we want to see an increase. We want to have
18 more sites come into the program and we are trying
19 to take the appropriate administrative personnel
20 physical steps to make sure that we have sufficient
21 resources to deal with those.

22 I would guess that if we ever
23 get to the situation where we are going to cut off
24 further applications, we will probably do that based

1 on, we will say after such and such date, we're not
2 going to accept anymore applications.

3 A couple of the options we thought
4 about is maybe to extend the resources would be to
5 use our agency contractors or to have a little more
6 emphasis on the RELPE aspect.

7 As far as the issue on if somebody
8 has submitted the application fee, then, we were not
9 anticipating that we would stop working on those
10 projects. We would want to continue to work on those
11 projects. It would be more of an issue that we
12 wouldn't have other applications come in and be
13 processed.

14 MR. RIESER: So then what vehicle
15 would you use to announce this to the regulating
16 community?

17 MR. KING: I don't know that we have
18 really considered what kind of vehicle. I think
19 we have established a good working relationship
20 with the site advisory committee. I think we would
21 go back to the committee and say, hey, we are not
22 going to accept anymore after such and such time.
23 We would try to do it in a broad sort of way as best
24 we could.

1 MR. RIESER: Okay. I mean, you have
2 agency publications and you have the board's web
3 site.

4 MR. KING: Right, right. There would
5 be a number of informational options as far as --
6 regarding that information. We are certainly not
7 planning on that happening. In fact, we are planning
8 on the opposite. We are planning on having more
9 resources to make sure that we can continue with
10 this program.

11 MR. WATSON: Has the state taken any
12 specific steps to address anticipated staffing
13 needs?

14 MR. KING: We have taken internal
15 steps. I really can't talk about it any further
16 than that.

17 THE HEARING OFFICER: That was your
18 last prefiled question, wasn't it?

19 MR. RIESER: Yes.

20 THE HEARING OFFICER: Okay.
21 Ms. Sharkey, you had a question also pertaining
22 to this section?

23 MS. SHARKEY: Yes. Thank you.
24 I'm concerned about the the effect this results in

1 a denial if the agency doesn't have enough resources.
2 I guess I wanted to ask you why does this result
3 in denial and have you considered any other options
4 for what might occur here?

5 It's my understanding that --
6 it further goes on to say here that the denial will
7 not -- this denial wouldn't be appealable. So it's
8 clearly not so you could be in a position to appeal
9 it. My question, though, is why is it resulting
10 in a denial?

11 MR. KING: Well, we can't grant it.

12 MS. SHARKEY: Did you consider any
13 other options for handling it other than a denial?

14 MR. KING: I think we are going to
15 take a quick look at what the statute provides.
16 I think the statute is really governing on this
17 point.

18 Well, we are just not finding
19 anything directly on the point of denial, but we
20 just -- that was the way we thought it should be
21 set up. Otherwise, if you had a situation where
22 somehow it's considered to be an effective NFR
23 letter where there has been no approval, it seems
24 to be -- wait a minute. I'm not sure we have

1 anything else to add.

2 MS. SHARKEY: I guess some of
3 what had been mentioned was the opportunity to
4 continue using a registered licensed engineer
5 who was operating on behalf of the agency if
6 it's a matter of money and resources available
7 at the agency, have you considered that possibility?

8 MR. KING: Yes. That was one of
9 the options that I mentioned. That would be a
10 possibility.

11 MS. SHARKEY: That is a possibility?

12 MR. KING: Yes.

13 MS. SHARKEY: The regulations, I
14 don't think, currently reflect that, though, do
15 they?

16 MR. KING: Well, I think they reflect
17 that the opportunity to use a RELPE is generally
18 there.

19 MS. SHARKEY: This is an additional
20 context where you could use RELPE if it's not
21 specifically stated?

22 MR. KING: No. It doesn't specifically
23 say a RELPE here.

24 MS. McFAWN: Can I ask a question?

1 It's being suggested that more reliance be placed
2 in RELPE in this specific case. Would that upset
3 or affect the agreement with the the USEPA for this
4 program?

5 MR. KING: No, I don't think that would
6 because we would still, under these provisions, we
7 are still authorized to direct the activities.

8 MS. McFAWN: But if you don't have the
9 resources?

10 MR. KING: Well, if we don't have the
11 resources to even administer the RELPE part, then,
12 we are in big trouble. Then, that would not be an
13 option.

14 MS. McFAWN: You can't contract too
15 much of this out without them thinking you have
16 given up too much control?

17 MR. KING: Right, that's correct.

18 MS. SHARKEY: The sort of second
19 part of my question really goes to the effect
20 of the denial on the remediation applicants and
21 what alternatives they have. I guess we talked
22 about them possibly using a RELPE, but I'm not
23 clear if that would be after they had a denial.
24 Could they then come back and reapply with a

1 RELPE or how would you envision that taking place?

2 MR. KING: We haven't thought in too
3 much depth on these issues because we don't
4 intend for this to happen. We are really kind
5 of speculating on what procedural route we would
6 follow if this happened. We really have not
7 thought about it because we don't anticipate it
8 will happen.

9 MS. SHARKEY: My point in raising
10 this is not to be nitpicking, but at a point that
11 an applicant gets a denial on any of these bases,
12 it's the agency's position, I guess, that they
13 cannot go forward under the voluntary cleanup
14 program and does that mean that they -- or can
15 they proceed under some other program, for example,
16 4(y), if they are denied the ability to proceed
17 here?

18 MR. KING: The 4(y) would have the
19 same -- if we didn't have any resources to deal
20 with the issue, then, the 4(y) case would be in
21 the same circumstance. There would be nobody to
22 work on it.

23 MS. SHARKEY: Okay. My only point
24 is it puts the remediation applicants in a difficult

1 position in that they have something they would like
2 to take care of and its just that there is no program
3 where they can take care of it anymore.

4 MR. KING: You've got to remember that
5 this is a voluntary program. If the person chooses
6 to perform remediation activities on their own, they
7 don't have to have approval from the IEPA to do that.
8 It's only in the context where they want a state
9 approval relative to those activities.

10 MS. SHARKEY: Okay. They just proceed
11 at their own risk?

12 MR. KING: Yes.

13 THE HEARING OFFICER: Are there any
14 other further follow-up questions?

15 MS. TIPSORD: Yes.

16 THE HEARING OFFICER: Ms. Tipsord?

17 MS. TIPSORD: Mr. King, the way I
18 read this is if it should happen that the agency
19 does not have the resources and you were to receive
20 an application, under 742.215(c), can't the applicant
21 waive that thirty days and would that not then avoid
22 the denial based on (a)(3) if they were to waive it
23 until such time that the resources were available
24 again?

1 MR. KING: That would certainly
2 appear to be a valid option under the rules as
3 drafted.

4 MS. TIPSORD: Okay.

5 THE HEARING OFFICER: All right.
6 Then, let's proceed to the next, which is Section
7 740.220. The site remediation advisory committee
8 has a couple of questions on that. Let's start
9 with twenty-one, please.

10 MS. ROSEN: Suppose following
11 completion of site investigative activities under
12 the site remediation program, a remediation
13 applicant decides to either broaden its efforts
14 to address recognized environmental conditions
15 not included in its application or lessen its
16 efforts to only address a certain type of
17 contaminant spills on a portion of the property.
18 May the remediation applicant do so? If so, how?

19 MR. EASTEP: They are free to modify
20 their application and they may do that by notifying
21 us. The extent of notification would depend on
22 the extent of the modification.

23 MS. ROSEN: What sort of -- I
24 understand that you have to get an agreement

1 between the agency and the remediation applicant
2 to modify things. What grounds are you going
3 to be looking for to approve modifications?
4 How are you going to make decisions to agree
5 to propose modifications?

6 MR. EASTEP: What types of
7 modifications?

8 MS. ROSEN: Well, say, I want to
9 broaden my efforts to address more, is that something
10 you are just simply going to say yes, we will allow
11 you to as long as you pay the extra money or are
12 there going to be other limitations? How would
13 you --

14 MR. EASTEP: Well, probably, yes.
15 If you were on your own property and you own
16 the property and you were going to expand
17 the remediation site, you could certainly do
18 that. That would be at your discretion. I
19 suspect we would just probably expand the scope
20 of our oversight.

21 MS. ROSEN: If I was likewise in
22 the process and I wanted to better tailor or limit
23 my activities, would I have the same leeway to
24 submit a modification?

1 MR. EASTEP: Yes. You have that
2 discretion as well.

3 MS. ROSEN: And how would you
4 be evaluating whether or not my limitation was
5 appropriate or approvable by you?

6 MR. EASTEP: If you elect to go
7 to a focused site investigation for one particular
8 parameter, I think that's at your discretion to
9 allow that. Then, obviously, when you got your
10 release, your release would then go from
11 comprehensive to focused for the contaminant.

12 MS. ROSEN: The next question to modify
13 a schedule that I had submitted with my application,
14 would I do that the same way pursuant to the general
15 modification provisions?

16 MR. EASTEP: Yes. You have to do that
17 in writing.

18 MS. ROSEN: You would do that each
19 time you wanted to modify maybe a work plan or a
20 report?

21 MR. EASTEP: Yes. Most of the time,
22 we like to see it in writing. I suppose very minor
23 things, it might be all right if you just told the
24 project manager. Typically, we like to see all

1 modifications in writing.

2 MS. ROSEN: Again, for the most part,
3 you're not going to be -- as long as it's something
4 that is basically consistent with the other
5 provisions of the rules, you're not going to be
6 rejecting proposed modifications to schedules
7 and whatnot?

8 MR. EASTEP: Obviously, everything was
9 conditioned on being consistent with the rules. The
10 schedule stuff, I suppose, there could be instances
11 of where there may be some implement or acute threat
12 and you elected to put it off for a year, that might
13 necessitate some action on the agency's part. So
14 that may or may not be approved.

15 MS. ROSEN: Okay. In relation to
16 proposing modifications of your schedules, I know
17 one of the provisions under terminating the agreement
18 is that a party has not proceeded in a timely
19 manner. Would an appropriate way to resolve timely
20 issues be to come forward to the agency and propose
21 to modify your schedule and to slow it down somewhat
22 and that might be agreeable under certain
23 circumstances?

24 MR. EASTEP: Yes.

1 MS. ROSEN: In that way, you could
2 basically prevent the termination of your agreement?

3 MR. EASTEP: Yes, under those
4 conditions, yes.

5 MS. ROSEN: Okay.

6 THE HEARING OFFICER: Ms. Tipsord has
7 a follow-up question.

8 MS. TIPSORD: This goes back to some
9 of the information that was discussed earlier as
10 far as owner versus the remediation applicant.

11 One of the provisions you have
12 here is that modifications to the agreement shall
13 be by mutual agreement of parties. I want to be
14 clear does the agency mean by the use of the word
15 parties the remediation applicant and the agency
16 in that context?

17 MR. EASTEP: Yes.

18 MS. TIPSORD: Okay. Thank you.

19 THE HEARING OFFICER: Are there any
20 follow-up questions to this section?

21 MS. McFAWN: I have one. If you can't
22 reach a mutual agreement, is that appealable?

23 MR. WIGHT: We haven't provided an
24 express appeal for that.

1 MS. McFAWN: Excuse me?

2 MR. WIGHT: We haven't provided an
3 express appeal for that.

4 MS McFAWN: You have not?

5 MR. WIGHT: No. We actually haven't
6 discussed the issue either.

7 MR. WIGHT: Okay. Thank you.

8 THE HEARING OFFICER: Mr. Dunham?

9 MR. DUNHAM: At what point would a
10 modification be so substantial that you would
11 consider it essentially a new application requiring
12 new site owner permission?

13 MR. EASTEP: If they went beyond the
14 boundaries of their current site to expand their
15 remediation site, that would be a circumstance
16 or if they discovered that they didn't own all of
17 the property they were proposing to remediate,
18 that would require that the owner of the other
19 property sign up.

20 MR. DUNHAM: That assumes that the
21 remediation applicant is an owner of a property
22 involved. If the site owner is the owner of the
23 site upon which remediation is being performed,
24 the remediation applicant is not the owner, how

1 much can he expand or contract -- how much
2 modification will you allow him before requiring
3 the site owner's permission was sought again?

4 MR. EASTEP: Typically, we haven't
5 gone back to the original owner for any of these.

6 MR. DUNHAM: So any modification
7 would be acceptable?

8 MR. EASTEP: Well, with respect to
9 going back to the owner, there might be other
10 things wrong with the modification.

11 THE HEARING OFFICER: Is there
12 anything further at this time.

13 Can we just go off the record
14 for a minute, please?

15 (Whereupon, a discussion
16 was had off of the
17 record.)

18 THE HEARING OFFICER: Okay. Why don't
19 we go back on the record. Let's proceed with Section
20 740.225.

21 Mr. Rieser or Ms. Rosen, you may
22 proceed with number twenty-three.

23 MS. ROSEN: May a remediation applicant
24 withdraw from the site remediation program at any

1 time? If so, how?

2 MR. KING: Generally, that's correct.
3 That's what 22(a) provides. I just want to point
4 out that that might not be an entirely sensible
5 thing to do under all circumstances.

6 For instance, one example would
7 be if there is an outstanding court order in effect,
8 a person could still withdraw, but that could put
9 him in violation with the court order if the court
10 order is directed to be part of this process?

11 MS. ROSEN: But the explicit
12 provisions of Part 740 don't provide any requirements
13 that an RA must meet in order to withdraw aside from
14 notifying you?

15 MR. KING: That's correct.

16 MS. ROSEN: Okay.

17 THE HEARING OFFICER: Is there anything
18 further on that section.

19 Seeing nothing, let's proceed
20 to Section 740.230. Again, why don't the site
21 remediation advisory committee begin?

22 MR. RIESER: With respect to each
23 subsection of 230, one through four, what are
24 examples of the types of activities that would

1 cause the agency to terminate the agreement?

2 MR. EASTEP: Failure to correct
3 deficiencies that have been pointed out several
4 times. For example, we're talking about a bad
5 site investigation where the agency has pointed
6 out deficiencies repeatedly and they have not
7 been corrected. That would be one area.

8 Another area that might cause
9 us to terminate would be perhaps violating a
10 safety plan if that were part of the remedial
11 action plan. We had an instance where an inspector
12 went out and the site they were cleaning up was
13 ignitable waste and the workers were smoking next
14 to the excavation. That's bizarre, but it happened.

15 Also, another areas is where
16 undertaking actions such -- so as to preclude a
17 true determination of whether or not the cleanup
18 has actually been done. For example, somebody
19 covers up the hole and paves an area and wants
20 an NFR before they were able to document objectives
21 have been meet, those are the types of things that
22 might cause termination.

23 MR. RIESER: What's an example of
24 failing to comply with the requirements of Title 17

1 of the act?

2 MR. EASTEP: I think my last example
3 would be an example to comply with Title 17.

4 MR. RIESER: In that instance, would
5 you be able to identify the reasons and give the
6 opportunity to go out and do additional sampling
7 to support that?

8 MR. EASTEP: Yes.

9 MR. RIESER: How about (a)(4),
10 what's an example of failing to address imminent
11 and substantial threat to human life, health, or
12 the environment?

13 MR. EASTEP: I would think where
14 we had something that represented some sort of
15 a very immediate threat that was discovered
16 during the process that somebody -- and I'm trying
17 to bring up an example now. I guess if you have a
18 situation where there was perhaps a lot of flooding
19 and you had an impoundment full of things that were
20 very toxic and they were about ready to be breached
21 and go into a creek that was perhaps a water supply,
22 then, if the applicant didn't do that, then, the
23 agency might use its resources to go in and take
24 some or all of an action.

1 MR. RIESER: And that would be a basis
2 for terminating the agreement?

3 MR. EASTEP: It could be. I don't
4 know if we have had many of these situations come
5 up. That's why I hesitated for my examples.

6 MR. RIESER: Okay. Looking at
7 twenty-five, what factors will the agency use in
8 determining whether to terminate agreements for
9 review and evaluation services for failure to
10 proceed consistently with an established schedule?

11 MR. EASTEP: I guess the factors that
12 we would look at would include the reasons for any
13 delays, the extent of the delays, and the impact of
14 such delays.

15 MR. RIESER: And typically, you would
16 give an opportunity -- well, not typically, but you
17 would identify the deficiencies and you would give an
18 opportunity to cure them?

19 MR. EASTEP: Yes.

20 MR. RIESER: That sort of gets to my
21 item twenty-six, with respect to 742.230(b), under
22 what conditions would the agency not provide an
23 opportunity to correct deficiencies on which a
24 notice of intent is to be based?

1 MR. EASTEP: Normally, we would
2 take all reasonable attempts to get -- notify
3 the remediation applicant. Again, probably an
4 imminent threat to human health and the environment,
5 immediate threat.

6 MR. RIESER: Is there any chance with
7 respect to the last sentence of 230(b), the agency
8 could change that may to shall?

9 MR. WIGHT: I think we discussed
10 that.

11 MR. EASTEP: I had thought that was
12 something that we had discussed and we agreed to
13 leave it as an option.

14 MR. RIESER: Based on the one example
15 of imminent substantial threat?

16 MR. EASTEP: To the best of my
17 recollection.

18 MR. RIESER: Okay. Thank you.

19 THE HEARING OFFICER: Is there anything
20 further?

21 MS. McFAWN: When you say you discussed
22 that, do you mean you discussed that with the
23 committee or internally?

24 MR. EASTEP: I think we discussed that

1 with the committee.

2 MR. RAO: Would you explain why you
3 want that to be an optional requirement?

4 MR. EASTEP: I think the intent was
5 that we would try to notify people. If we did have
6 imminent threat or some other reason, we need to
7 take action for the option to be left open. I don't
8 think we have had any experience with doing that
9 type of thing. So it's real hard to point out
10 examples other than the imminent threat type of
11 thing.

12 MR. WATSON: Can you envision any other
13 examples right now?

14 MR. EASTEP: Well, not right now. If I
15 could, I would elaborate.

16 MR. WATSON: Could we revise that
17 to allow for putting the word shall in and then
18 allow for an exception to be made where there is
19 an imminent substantial threat to human health?

20 MR. EASTEP: If that's the case, what
21 difference would it make?

22 MR. WATSON: It allows us to -- it
23 assures us a duty to -- an opportunity to cure
24 absent an imminent threat to the environment.

1 MR. EASTEP: I think what I --

2 MR. WATSON: If you can't think of
3 any other reasons why would you do it, doesn't
4 that make sense to --

5 MR. EASTEP: Well, I can't think of
6 any right now. I think we could discuss this here
7 internally. I would like to think about what you
8 have asked before I respond.

9 MR. WATSON: I have one more follow-up.
10 An imminent threat would not exist, for instance, if
11 under circumstances where there was just a recognized
12 environmental condition that the remedial applicant
13 chose not to address on its focused site
14 investigations, is that correct?

15 MR. EASTEP: Generally speaking, that
16 would be correct.

17 THE HEARING OFFICER: Ms. Sharkey, you
18 also had a question on (a)(4). Did you want to ask
19 that right now?

20 MS. SHARKEY: Yes. It's really related
21 to what we have been talking about here with the
22 imminent and substantial threat.

23 My question is whether this
24 section is intended to be limited to the threat

1 related to the remedial work and contaminants of
2 concern that are the subject of remediation,
3 subject to the remedial application, et cetera.

4 MR. EASTEP: What question was that
5 of yours?

6 MS. SHARKEY: It's number seven.

7 MR. EASTEP: Okay. I think my answer
8 is generally.

9 MS. SHARKEY: Just as an example, I
10 guess I'm trying to figure out if the agency felt
11 there was an air pollution concern related to a
12 process source at a site that had an ongoing, you
13 know, site in the remediation program, is there a
14 possibility that the agency could terminate the
15 remediation based on this unrelated air matter?

16 MR. EASTEP: We might -- if we
17 terminated it, we would certainly argue it was a
18 related air matter.

19 MS. SHARKEY: So we wouldn't be
20 required to -- I'm assuming that this doesn't
21 mean that you could be required to address
22 unrelated matters in your site remediation program?

23 Part of the reason I ask this is
24 because it strikes me that that's counter-intuitive

1 to everything that we have been talking about in
2 terms of remediation applicants and finding the
3 scope of the remediation or remediation site of
4 the contaminants of concern. So on one level, if
5 we are talking about the focused site assessment,
6 intuitively, it would certainly seem to fall out
7 of it to, then, say we have an unrelated air/water
8 matter here.

9 MR. EASTEP: Well, I think I indicated
10 if we did something, we would probably conclude that
11 it's related. If you were doing an action during a
12 site investigation and you were excavating materials
13 that released a lot of odors even though you were
14 looking for one particular compound of what you
15 were excavating, nonetheless, caused odors in the
16 neighborhood, it wouldn't have been that particular
17 compound. It's the fact that the activities were
18 related to the action.

19 MS. SHARKEY: I think you are agreeing
20 with me that in other words, it needs to be related
21 to the subject of the site remediation?

22 MR. EASTEP: I think that was my
23 initial answer, yes.

24 MS. SHARKEY: Thank you.

1 THE HEARING OFFICER: Are there any
2 further follow-up questions on this section?

3 Seeing none, let's proceed to
4 Section 740.235. The advisory committee has question
5 twenty-seven.

6 MR. RIESER: What is the agency's role,
7 if any, in the selection of a RELPE?

8 MR. EASTEP: I think our role -- we
9 don't get involved in the actual selection of the
10 RELPE. That's up to the remediation applicant.
11 I think our role is to assure that the remediation
12 applicant has considered what tasks are to be
13 completed by the agency or by the RELPE and what
14 task the agency would do.

15 MR. RIESER: So the agency -- if the
16 person selected a consultant who the agency did not
17 believe was suitable for performing the role of the
18 RELPE, would the agency in any way let the
19 remediation applicant know that?

20 MR. EASTEP: I think our statutory
21 obligation is to discuss the selection of the
22 RELPE with the remediation applicant.

23 MR. RIESER: That might be a subject
24 for discussion?

1 MR. EASTEP: If we had concerns, I
2 think our obligation is to objectively outline
3 those concerns and that would be our role in that
4 circumstance.

5 MR. RIESER: Okay. It's not the
6 agency's intention to provide an approved list
7 of some sort?

8 MR. EASTEP: That's correct.

9 MR. RIESER: In preparing a RELPE's
10 contract, can the remediation applicant limit
11 the tasks or the costs of performing a RELPE's
12 review? Are these limitations reviewable by the
13 agency?

14 MR. EASTEP: Yes. I think they can
15 provide those limits and review both to the extent
16 that we would want to make sure that we discussed
17 them with the remediation applicant and understood
18 what they were.

19 We can envision bringing on
20 RELPE's for very specific tasks such as community
21 relations, for example. We would not want a
22 community relations resource used to go out and
23 collect groundwater samples.

24 MR. RIESER: Well, I think one of

1 the concerns is that since the RELPE is under the
2 direction of the agency that the agency would
3 direct them to do a lot of stuff that the remediation
4 applicant had not been interested in paying for even
5 if they were associated with the tasks that the
6 RELPE has already been required to do.

7 MR. EASTEP: And I think in the
8 day-to-day bustle of work, you know, conceivably
9 that could innocently come up where a project
10 manager perhaps gave the RELPE some task to do
11 without realizing that it was not in the contract.
12 I think it would be up to the RELPE at that point
13 to identify that.

14 MR. RIESER: I think that goes to my
15 next question. Although RELPE will take directions
16 for work assignments from the agency, it is correct
17 that the RELPE may perform only the work which
18 is within the scope or limitations of the contract
19 with the remediation applicant. What is intended to
20 happen if the agency directs the RELPE
21 to perform tasks which are outside the scope of its
22 contract with the agency?

23 MR. EASTEP: Again, the RELPE is
24 bound by the terms of its contract with the

1 remediation applicant. That's why we discuss it
2 with the remediation applicant up front and we
3 are going to endeavor not to ask -- I mean, our
4 policy, if you will, is that we are going to try
5 and make sure that we don't ask the RELPE to do
6 things beyond that contract.

7 There are always going to be
8 questions that come up. It kind of behooves
9 both us and the RELPE if the question does come
10 up to get back to the remediation applicant.

11 MR. RIESER: Is the agency provided
12 with a copy of the RELPE's contract?

13 MR. EASTEP: I think we would want
14 to see the contract at least as it regards -- at
15 a minimum, as it regards to the scope of the
16 activities to be provided.

17 MR. RIESER: Going to the next
18 question, please explain what is intended by the
19 language found at Section 740.235(c)(3), which
20 states that the agency shall not be liable for
21 any activities conducted by the RELPE or for any
22 costs incurred by the RELPE.

23 MR. EASTEP: If the RELPE does
24 things beyond the terms of their contract and --

1 there are a lot of times we may or may not know
2 about that. They have limited them to so many
3 hours of work, for example, doing a review and
4 the RELPE spends twice that much time, we don't
5 have any control over that. We have indicated
6 that we don't want to be responsible for it.

7 MR. RIESER: What if the agency
8 directs the RELPE to do work in the field that
9 results in injuries?

10 MR. EASTEP: I'm sorry?

11 MR. RIESER: What if the agency
12 directs the RELPE to do work in the field that
13 results in injuries or property damage?

14 MR. EASTEP: I think they are working
15 for the remediation applicant. They are just taking
16 direction from us. I'm not sure what the liability
17 would be. I think, and I haven't seen it, but some
18 of the information we look for is regarding the
19 liability insurance of the RELPE and things of
20 that nature.

21 MR. RIESER: When you say "the
22 information we look for," is that the Appendix B?

23 MR. EASTEP: Again, that's not
24 mandated as far as what levels of insurance they

1 have, but again, those are things that the
2 remediation applicant and the agency are to discuss.

3 MR. RIESER: Okay. Thank you.

4 THE HEARING OFFICER: Are there any
5 further questions?

6 MR. RIESER: Is there something
7 further?

8 MR. EASTEP: No.

9 MR. RIESER: Thank you.

10 THE HEARING OFFICER: Does anyone
11 have anything else pertaining to the RELPE section,
12 which is Section 740.235?

13 Let's proceed, then, to the
14 sixteenth question filed by Gardner, Carton &
15 Douglas. This is a general question to this
16 Subpart B.

17 MR. WATSON: Very impressive.

18 In the interest of time, I'll
19 strike that question.

20 THE HEARING OFFICER: It's stricken.

21 MR. WIGHT: Which question was that?

22 THE HEARING OFFICER: Number sixteen
23 of Gardner, Carton & Douglas. It's stricken

24 Let's proceed, then, to Subpart

1 C. Again, I'll defer to Gardner, Carton & Douglas,
2 Mr. Watson, which is your fifth question.

3 MR. WATSON: May a remediation
4 applicant appeal an agency's request for payment
5 on the grounds that the costs incurred and sought
6 by the agency are not "reasonable" in that accordance
7 with Section 740.210(b)(2)(D) or Section 740.235(d)?
8 If not, what safeguards are in place to ensure that
9 the costs for agency services are reasonable?

10 MR. KING: The answer to the first
11 question is no. The answer to the second question
12 is if you look at Section 305(a), it really
13 delineates the types of costs that we are billing
14 towards.

15 With each one of those, there
16 is an outside framework beyond the specific site
17 remediation program that determines what costs in
18 that area will be.

19 For instance, one of the items
20 we have there is agency travel costs. That's
21 defined by state rules. Another item is personnel
22 services and direct costs. Well, our personnel
23 costs again are defined -- for union personnel are
24 defined by contracts we have with the union.

1 The other items we have are
2 defined by a civil service code. Indirect costs
3 are determined based on agreements that we have
4 with the federal government. All of those things
5 are all part of controlling what agency costs would
6 be so that they are not unreasonable.

7 The other aspect from our
8 standpoint is if we are going to bill somebody
9 \$500, then, we have to go into a lengthy defending
10 of, for instance, the indirect costs that the agency
11 has incurred. You know, we will eat that up in a
12 short period of time. We're not recovering the costs
13 that we are not supposed to be recovering under the
14 program.

15 MR. WATSON: Is there a basis for
16 appeal that the agency took too much time in
17 reviewing plans and reports?

18 MR. KING: I think the only thing --
19 the request would have to be based on the fact
20 that the work was not actually performed.

21 MR. WATSON: So the agency has no
22 obligation to be efficient in its activities?

23 MR. KING: I don't think that's true.
24 I don't think that's the initial question. The

1 question was directed at safeguards. It talked
2 about safeguards. This is something that we
3 discussed
4 with the advisory committee.

5 For instance, if we have personnel
6 that appeared that they are taking way too long
7 working on a specific site or there is evidence
8 that they are not doing things that they say they
9 are doing from a management perspective, we want
10 to know that. That's important for us to control
11 and make sure our staff people are doing the job
12 that they are supposed to be doing.

13 MR. WATSON: Does an appeal of an
14 agency's request for payment suspend the deadline
15 for submitting such payment?

16 MR. KING: I believe it would under
17 the board's rules. It also would suspend the whole
18 process by which the person got the NFR letter.

19 MR. WATSON: What type of cost
20 documentation is the agency required to make
21 available to the remediation applicant under Section
22 740.310?

23 MR. KING: We have outlined that in
24 Section 305(a).

1 THE HEARING OFFICER: Mr. Rieser?

2 MR. RIESER: Is it possible to get
3 an interim bill, if you will, to find out where
4 the agency is after a period of time in terms of
5 costs?

6 MR. EASTEP: Yes.

7 MR. RIESER: How would one do that?

8 MR. EASTEP: Upon request, I guess,
9 we could send them out. When somebody wanted to
10 know -- I think we are going to try and start billing
11 more routinely on a quarterly basis for people that
12 are actually accumulating charges. I suppose there
13 might be some cut off as to how much -- some minimum
14 amount we will bill for. We are going to try and
15 bill out quarterly.

16 MR. RIESER: Is that the type of
17 thing that can be provided for in the contract an
18 agreement between the remediation applicant and
19 the agency?

20 MR. KING: I think what we have more
21 typically done would be to put some kind of ceiling
22 on it where we would agree that we incurred costs
23 up to a certain amount. We have done that.
24 Particularly, that's worked better with sites

1 where there has been a RELPE involved. Actually,
2 we put a ceiling on it. If it looks like we are
3 coming up to that amount, then, we have some kind
4 of renegotiation relative to that.

5 MR. RIESER: So the remediation
6 applicant can work with the agency to sort of
7 build in at least some controls on the agency's
8 costs as it works through the process?

9 MR. KING: Yes, that would be correct.

10 MR. WATSON: And you said there is
11 precedent for capping costs at a certain number?

12 MR. KING: Yes.

13 MS. McFAWN: If you reach that cap,
14 then, what happens?

15 MR. KING: Well, we stop work and
16 that's not really in the best interest of the
17 applicant because, then, they don't end up with
18 their project going forward any further.

19 MR. EASTEP: I think we just call
20 them and let them know that we are capped out.

21 MS. McFAWN: I just wondered.

22 MR. EASTEP: So far, the ones we have
23 had, I think we just ended up renewing contracts.

24 MR. WATSON: Really, it's not a cap

1 on costs from a cost control standpoint?

2 MR. KING: Well, it is in the sense
3 that you don't have an obligation to pay beyond
4 that amount.

5 MR. WATSON: But the site won't go
6 anywhere.

7 MR. KING: Well, that's your choice,
8 I guess.

9 MS. McFAWN: Those kind of ceiling
10 caps and things, would that be part of the original
11 agreement entered into and signed off on by the
12 remediation applicant?

13 MR. KING: I hesitate to bring in
14 Mr. Walt's name up, but I will since they were
15 really the first company that we did this with
16 several years ago. We negotiated an agreement
17 that applied relative to all of their sites.

18 So we put in a cap -- an annual
19 cap of costs that we would incur and then there is a
20 phasing of the work relative to the series
21 of sites that fall under that agreement. So it
22 was certainly up front and everybody understood
23 what the limitations were relative to what we were
24 doing in the remediation efforts.

1 MS. McFAWN: That way, his company
2 knew that they had funds on an annual basis to pay?

3 MR. KING: Right, correct.

4 MS. McFAWN: Now, you are going to
5 continue that kind of agreement with remediation
6 applicant's you have in the voluntary program?

7 MR. KING: That type of agreement, I
8 think, in that type of context has worked out
9 very well. So we would continue that kind of an
10 arrangement, yes.

11 MS. McFAWN: Was that a written
12 agreement?

13 MR. KING: Yes. It was probably six
14 or seven pages long, I think, once we defined all
15 of the sites and the schedule for it.

16 MR. WATSON: I hate to waste our time
17 on this point or this issue, but will the agency
18 consider putting something in the regulations that
19 gives a remedial applicant either through estimates
20 or requests for bill status, you know, an opportunity
21 to know what the costs are as you proceed through
22 the process?

23 I mean, you know, we can't
24 review them. There is no cap on them. Is there

1 a way that a remedial applicant can have some
2 information regarding what its costs. Are going
3 to be for this process?

4 MR. KING: I mean, we are talking
5 minuscule costs. We said before that an average
6 kind of site is like about \$1,000 for our costs
7 incurred. You know, you are looking at project
8 duration. I think it's -- I don't think we should
9 belabor this any further. I think what we have
10 here is sufficient. No, we wouldn't consider it.

11 MR. WATSON: Okay.

12 THE HEARING OFFICER: Is there anything
13 further then on this section? Is there anything
14 further on Subpart C?

15 Let's proceed, then, to Subpart D
16 and --

17 MR. RIESER: Excuse me.

18 MS. ROSEN: Could we have one moment?

19 THE HEARING OFFICER: Sure.

20 MS. ROSEN: Never mind.

21 THE HEARING OFFICER: Okay. Why don't
22 you go ahead, then, and proceed with your question
23 thirty-one, Ms. Rosen or Mr. Rieser?

24 MR. RIESER: Thank you very much.

1 Per Richard Lucas' testimony, why does the agency
2 believe that its authority to provide contractual
3 services is more limited under Title 17 than under
4 Section 22.2(m) of the Environmental Protection
5 Act?

6 THE HEARING OFFICER: I want to
7 interject and say that that might be a type. I
8 believe that is Robert O'Hara's testimony.

9 MR. EASTEP: It might be.

10 MR. WIGHT: Neither one is going to
11 answer that question!

12 MR. EASTEP: I think here we have --
13 limited means that it's more defined under
14 Section 58 or Title 17 than under Section 22.2(m)
15 where contractual services is less defined and
16 very broadly interpreted.

17 MR. RIESER: But you could do all the
18 things that you could have done under 22.2(m) under
19 these rules in that section of the act -- that title
20 of the act?

21 MR. EASTEP: I think our intent is
22 at least to carry on like we have before. Again,
23 the language is different.

24 MR. RIESER: Thank you.

1 MR. EASTEP: The eligibility criteria,
2 for example, is one thing that's pointed out. That's
3 fine here. It's very stringent whereas there was
4 no eligibility criteria, so to speak, defined under
5 22.2(m). So the types of people that could come in
6 or that we can contract with are limited now.

7 MR. RIESER: So you previously have
8 allowed RCRA sites and landfill sites to come
9 under --

10 MR. EASTEP: No. I'm just saying it
11 didn't say that before and now it does.

12 MR. RIESER: That's how you limited
13 the program before?

14 MR. EASTEP: Yes, that was one way.

15 MR. RIESER: Okay.

16 THE HEARING OFFICER: Is there any
17 follow-up to that question?

18 Seeing none, let's proceed, then,
19 with the remediation advisory committee's question
20 number thirty-two pertaining to Section 740.410.

21 MS. ROSEN: Okay. I believe that
22 this question has been resolved based on something
23 included in the errata sheet.

24 I'll read the question and

1 then someone can elaborate. The text of the licensed
2 professional engineer certification set forth at
3 Section 740.410(c) references all site investigations
4 and remedial activities. May the LPE limit its
5 affirmation to reference either site investigations
6 or remedial activities or both as appropriate and
7 applicable to the document being submitted?

8 MR. KING: We made the correction
9 that this question calls for referenced in our
10 errata sheet at 410(b)(4).

11 THE HEARING OFFICER: Are there any
12 follow-up questions to Section 740.410?

13 Seeing none, let's proceed to
14 Section 740.415. Mr. Watson, would you proceed,
15 please?

16 MR. WATSON: My question six references
17 740.415. It actually -- the question is really
18 related to 740.420. I think (a) has been answered
19 to say that the remedial applicant looks at
20 historical and past uses of the site when it's
21 looking to identify recognized environmental
22 conditions and contaminants of concern.

23 I'll go to (b) and ask for some
24 clarification on some confusion that I have and that

1 is, can a remediation applicant limit its Phase 2
2 sampling and analysis to those target compound list
3 constituents for which a past source has been
4 identified?

5 MR. EASTEP: We think on a
6 case-specific basis, yes, that's certainly possible.

7 MR. WATSON: When you say "on a
8 case-specific basis," what do you mean?

9 Would not that issue arise in
10 all sites where you look at past uses and problems
11 and then you go to your target compound list and
12 make the appropriate matches for further sampling
13 under Phase 2?

14 MR. EASTEP: What we -- let me find
15 that portion of the rule. Generally, what we have
16 indicated is that the target compound list is your
17 starting point.

18 Based on the information that you
19 find in your Phase 1, then, is a list of contaminants
20 that you start sampling for can be reduced. That
21 happens on a site-specific basis.

22 MR. WATSON: It happens on a
23 case-specific basis, but it happens in every case,
24 is

1 that correct?

2 MR. EASTEP: It can happen. It could
3 happen. I don't suspect it will.

4 MR. WATSON: I mean, are there any
5 circumstances under which the agency would simply
6 require someone to do the sampling for the complete
7 target compound list?

8 MR. EASTEP: Well, we would think if
9 they could not justify reducing the target compound
10 list, we would ask them to do the entire list.

11 MR. WATSON: Nonetheless, with respect
12 to every case --

13 MR. EASTEP: Every person has that
14 option.

15 MR. WATSON: And that would be
16 irrespective of whether or not you are going for
17 a focused site remediation or comprehensive site
18 remediation?

19 MR. EASTEP: I'm not sure. I'm
20 not sure that the target compound list -- the
21 concept starting with target compound list and
22 reducing that does not apply on the focused site
23 investigation.

24 MR. WATSON: Okay. You're right.

1 MR. EASTEP: In the focused, you can
2 start to deal with your compound. If you have to
3 deal with something else because of management, as
4 we mentioned this morning, we can focus immediately
5 on your compound.

6 MR. WATSON: Thank you.

7 THE HEARING OFFICER: Do you want to
8 proceed, then, with your question number seven also,
9 Mr. Watson?

10 MR. WATSON: How about (6)(c), what
11 site investigation activities will be required where
12 a remediation applicant intends to rely on engineered
13 barriers such as the presence of an existing building
14 at the site to obtain a no further remediation
15 letter?

16 MR. EASTEP: Well, the site
17 investigation activities would be the ones that are
18 outlined under the rules.

19 MR. WATSON: Would you -- are you
20 suggesting that you need to do a site investigation
21 necessarily if you have -- underneath an existing
22 building if you intend to use that as an engineered
23 barrier?

24 MR. EASTEP: Again, you would have

1 to -- this would be a case-by-case determination.
2 Certainly, in a lot of circumstances, you would not
3 have to investigate under the building. If your
4 building, for example, had wooden floors or a dirt
5 floor, or it had concrete sumps in it that would
6 crack and they were, say, used for treating
7 electroplating waste, and, say, the creek was
8 contaminated, you know, there could be situations
9 that would require that you go in and take core
10 samples out of a building.

11 MR. WATSON: Would the existence
12 of a building be a sufficient justification under
13 appropriate circumstances to limit site investigation
14 activities?

15 MR. EASTEP: Under appropriate
16 circumstances, yes.

17 MR. WATSON: Do you want me to continue
18 with seven?

19 THE HEARING OFFICER: Yes.

20 MR. WATSON: In Subpart D of the
21 proposed Part 740, the agency sets forth the
22 requirements for site investigation activities.
23 Are these requirements consistent with or comparable
24 to the site investigation activities required

1 under Section 750.465?

2 MR. KING: If I recall correctly,
3 Part 750 is the old state contingency plan rules,
4 am I correct?

5 MR. WATSON: Correct.

6 MR. KING: We did not look at that
7 in formulating these procedures.

8 MR. WATSON: What was the source of
9 your Phase 2 requirements?

10 MR. KING: It was mainly based on our
11 experience in working with this program over the
12 last several years.

13 MR. WATSON: If I could refer you to
14 Exhibit 3, which is the testimony of Robert O'Hara,
15 at page ten, the comments at the bottom of the page
16 are, quote, these elements -- and they are talking
17 about the Phase 2 environmental site assessment
18 requirements -- these elements are derived from
19 a scope of work developed by the Illinois EPA
20 as an attachment to notices pursuant to Section
21 4(q) of the act, from the USEPA's Office of Solid
22 Waste and Emergency Response directive 9353.3-01,
23 (Guidance for Conducting Remedial Investigations
24 and Feasibility Studies under CERCLA), an ASTM

1 designation, E 1689-95.

2 Was that the source of the Phase
3 2 requirements?

4 MR. O'HARA: That was a source, but
5 that attachment was not incorporated into 750. It
6 was one that we used on an administrative level.

7 MR. WATSON: When it references the
8 Section 4(q), does that mean that this scope of
9 work for a site investigation is, in fact, the
10 site investigation requirements that one would
11 have to comply with under the Illinois Super Fund
12 Program?

13 MR. O'HARA: Not necessarily.
14 It's similar, but response actions identified in
15 the 4(q) notice are not always the same.

16 MR. EASTEP: The basic investigatory
17 requirements would be very similar.

18 MR. WATSON: So the requirements for
19 site investigation under this program are
20 fundamentally the same as the site investigation
21 requirements under the Illinois Super Fund Program?

22 MR. EASTEP: I don't know like the
23 use of the term Super Fund, but they would be very
24 similar to what we would use under 4(q). I don't

1 want anybody to get the impression that these are --
2 would in any way conform with the NCP requirements.
3 We haven't alleged that and I don't think they
4 would comply with the NCP. I think if you would
5 follow the NCP, you would follow these.

6 MR. WATSON: What did you say?

7 MR. EASTEP: If you comply with the
8 national contingency plan, I think you would
9 more than adequately probably comply with our
10 requirements.

11 MR. WATSON: There is a reference --

12 MR. EASTEP: I don't think if
13 you complied here, you would automatically comply
14 with the NCP.

15 MR. WATSON: There is a reference to
16 USEPA Guidance for Conducting Remedial Investigations
17 and Feasibility Studies under CERCLA as being used
18 to determine your site assessment activities. To
19 what extent did you use that document in developing
20 your site investigation activities under Phase 2?

21 MR. EASTEP: I put it in the class
22 as a reference and as guidance. I think if you
23 went to any number of other standards of how
24 people conduct investigation -- I mean, a lot of

1 things are comparable about how people do
2 investigations and a lot of elements are the same.

3 MR. WATSON: So you are saying that
4 site investigation requirements under this program
5 for Phase 2 investigations are comparable to what
6 you would find in the Guidance for Conducting
7 Remedial Investigation and Feasibility Studies
8 under CERCLA?

9 MR. EASTEP: We have tried to
10 draw from the sources that suit our needs
11 administratively. We have tried to use the
12 experience that we have gained over the years.

13 The goal of any investigation
14 is to determine the great extent of contamination,
15 for example. The way you do that might vary amongst
16 different programs. So we have relied on the history
17 of the agency over the past several years in coming
18 up with this proposal.

19 I might add that we have
20 solicited input from the advisory committee as well.
21 So we have tried to make this fit what is basically
22 a voluntary program.

23 You know, there are aspects to
24 the federal Super Fund Program and in our program

1 that deals with cost recovery. If you are thinking
2 in terms of cost recovery aspects, you might want
3 to do things a little bit differently whereas this
4 is voluntary. So we wouldn't necessarily require
5 that.

6 If you as a private party want
7 to -- if you are thinking about possible litigation
8 in the future, you might want to consider that. But
9 being a voluntary program, we wouldn't consider all
10 of that.

11 MR. WATSON: Do you know how the
12 requirements for Phase 2 investigations here
13 differ from the Guidance for Conducting Remedial
14 Investigation and Feasibility Studies under CERCLA?

15 MR. EASTEP: The data quality
16 objectives, the level to which you have to go
17 differ.

18 MR. WATSON: The data quality
19 objectives. Is there anything else that you are
20 aware of?

21 MR. EASTEP: Do you intend on doing
22 an item-by-item --

23 MR. WATSON: Well, I'm just asking
24 you do you have an understanding as to what the

1 differences are?

2 THE HEARING OFFICER: Let me just
3 interject at this point. Why don't we proceed
4 to the next section, which is 420, because that's
5 really what it seems like we are going into on
6 Phase 1 and Phase 2 issues. I think we are now
7 getting more so off the general questions.

8 MR. WATSON: I think I told you
9 when I was on my question six that this was all
10 dealing with 740.420.

11 MS. McFAWN: You did. Let's back
12 up a little bit and go to 740.420(a). Let's get
13 to 740.420(a) and we'll get to this question.

14 MR. WATSON: Okay. I'm sorry.

15 THE HEARING OFFICER: Okay. Why
16 doesn't the site remediation advisory committee
17 start with their question thirty-three.

18 MR. RIESER: Does the agency have a
19 template or checklist as to what tasks it expects
20 to be performed in a Phase 1 investigation?

21 MR. EASTEP: We don't have a formal
22 template or checklist. I think ASTM has the
23 checklist that's available and we probably reserve
24 the right to do something in the future, I would

1 hate to make -- right here today, I would hate to
2 make a formal requirement for such a checklist
3 because we do see a lot of sites with unique
4 characteristics and to kind of change, we have
5 to be flexible.

6 MR. RIESER: Which gets me to my next
7 question, which is if the remediation applicant has
8 legitimate reasons, these unique site characteristics
9 you are discussing, based on the site conditions or
10 prior reports for omitting a step typically performed
11 under an ASTM Phase 1, will that omission be
12 acceptable?

13 MR. EASTEP: Again, we try to be
14 flexible, but any variances from that would be on
15 a site-specific basis.

16 MR. RIESER: What factors would you use
17 in making that decision?

18 MR. EASTEP: Site characteristics,
19 previous data collected, the quality of that data,
20 the size of the site, the size of the clean up.

21 MR. RIESER: Would that also include
22 review of ASTM guidance as to how some of these
23 issues might be handled?

24 MR. EASTEP: That certainly would be a

1 fact or that might be considered.

2 MR. RIESER: Thank you.

3 THE HEARING OFFICER: Ms. Sharkey,
4 would you like to proceed on your question number
5 eight?

6 MS. SHARKEY: Just for the record,
7 I would like to know -- I know that we talked
8 about some of this when we talked about the
9 incorporation of the ASTM standard earlier.

10 I guess I would like to
11 get back to this point, which I think we kind
12 of deferred, and probably appropriately, to
13 this section.

14 As I understand it, we are
15 relying on the Phase 1 process for the comprehensive
16 site assessment on the ASTM E 1527-4, and that
17 basically, the site assessment, unless an
18 alternative is approved, is to be designed
19 and implemented in accordance with the procedures
20 set forth in that practice.

21 My question is whether or not
22 the agency has investigated whether or not there
23 is any evidence that the ASTM is developing this
24 procedure or it being used in a regulatory context

1 such as this?

2 Would you like for me to repeat
3 that?

4 MR. KING: No. We didn't investigate
5 that.

6 MS. SHARKEY: Okay. But wasn't this
7 procedure actually developed for use in a real estate
8 transactional context?

9 MR. KING: That's generally our
10 understanding.

11 MS. SHARKEY: I have no more questions
12 on that.

13 THE HEARING OFFICER: Ms. Sharkey,
14 why don't you also proceed with your questions on
15 740.420(b)?

16 MS. SHARKEY: Thank you. My next
17 question really is tied to the first -- the prior
18 one.

19 The way I understand it, the
20 next section regarding Phase 2, indicates that
21 sampling and analysis is required for any
22 contaminants whose presence is indicated by the
23 Phase 1 environmental assessment.

24 Given the broad scope of the

1 Phase 1 process, what does presence indicated
2 mean and then I have some subquestions there?
3 Is it anything above non-detect in prior sampling?
4 Is there any possible use of a regulated substance
5 on a property? What does that phrase "presence
6 indicated" mean here?

7 MR. EASTEP: It means the likelihood
8 of being present. Your consultants have to be able
9 to identify that in Phase 1. It doesn't necessarily
10 mean anything above non-detect. It doesn't really
11 mean that.

12 Whether or not use of regulated
13 substances may be, I guess if possible had showed
14 minimal use of things for routine maintenance, that
15 might be one thing. If they use, you know, normal
16 cleaning solutions and they bought five gallons a
17 year, if they used, you know, 500 gallons a week of
18 degreasing solvent as part of their process, that
19 might be something entirely different.

20 You have to use a little bit of
21 judgment for this. Hopefully, the target compound
22 list, I think history has shown us over the past
23 15 or 16 years that those will encompass most of
24 the things that we're going to run up against.

1 MS. SHARKEY: Okay. I'm sort of going
2 from the Phase 1 which we just talked about being
3 really developed for use in a transactional context
4 where a party may -- in fact, a task party, somebody
5 years ago on a piece of property may, I have said, go
6 out there and dig up everything you possibly can on
7 the site, and now our remediation contractor comes
8 along, he wants to get a comprehensive site
9 assessment, needs to do his own Phase 1, and of
10 course, needs to take into account the existence
11 of that prior document that turned up every mushroom
12 on the site, everything they could possibly find and
13 said this may be something, that may be something,
14 does that kind of information, in other words, now
15 become a document that could be interpreted as saying
16 presence is indicated, therefore, you must sample?

17 I know we may be able to
18 eliminate once we get into the sampling process.
19 The question that I have is really going into this
20 notion of how much sampling do we have to do under
21 the comprehensive site assessment to satisfy this
22 requirement as it comes out of Phase 1?

23 MR. EASTEP: If you have prior
24 information, it is our intention that that

1 stain on a piece of property that has to be sampled
2 under Phase 2?

3 MR. EASTEP: The answer to that is no.

4 MS. SHARKEY: I guess I was -- some
5 of my questions were going to some of these next
6 steps. If there were reasons to believe that the
7 contractor doing the Phase 1 and the Phase 2 had
8 to believe that an area of potential contamination
9 observed in a Phase 1 was not -- did not rise to a
10 level of contamination that would create a concern,
11 would they have the ability to eliminate it without
12 sampling?

13 MR. EASTEP: In some cases, they
14 might. It's hard to give you a precise definition
15 because we work through these all the time. It's
16 something that's fairly commonplace. We have to go
17 through and make an exercised judgment.

18 In some sites, if you only have
19 one area, it's distressed vegetation and it's the
20 only area, then, you would probably inspect it.
21 If you have a site contaminated all over the place,
22 then, we wouldn't expect every single discoloration
23 and stain to be sampled because we might have
24 thousands of samples. We would try to work

1 out some sort of sampling grid, perhaps.

2 You have to take everything into
3 context. You have to pull all of the facts together
4 in context and start to make the determination for a
5 couple of reasons. One, when you get to Phase 1, you
6 have to pull all the information together and make
7 decisions about your site investigation and you have
8 to make that in the back of your mind where you are
9 going with your remediation objective as well. You
10 have to think about this when you are doing Phase 1.

11 MS. SHARKEY: I appreciate what you are
12 saying as this is a complex situation. I guess what
13 I would like to do is just try to tie it up with
14 the concept of the presence indication does not mean
15 everything that have been observed and noted in the
16 Phase 1.

17 MR. EASTEP: I think I have tried to
18 answer that.

19 MS. SHARKEY: Thank you. I think we
20 have asked this second question in a couple of
21 different ways here today as far as whether or not
22 the likely past use requires one to assume that a
23 substance may have leaked or spilled.

24 Could you just reiterate for us

1 what your position is?

2 MR. EASTEP: Actually, I read that
3 answer a while ago.

4 MS. SHARKEY: Excuse me?

5 MR. EASTEP: I think I read that a
6 while ago.

7 MS. SHARKEY: It is true that a likely
8 use would require an assumption it may have spilled
9 and some sampling is required?

10 MR. EASTEP: I think you said something
11 different in that question.

12 MS. SHARKEY: I guess what I'm trying
13 to get at is whether or not sub-surface soil sampling
14 would be required based on simply past use. We
15 talked about this earlier, I think, under the whole
16 definition of recognizing environmental conditions.

17 MR. EASTEP: Well, in this question,
18 you add another factor. Likely past use is one
19 thing. You go from a level of likely past use to
20 now, we are assuming that it's spilled or leaked.

21 So if you had, like, a hierarchy
22 of logic or thought on this, then, the farther you
23 move along that, all the sudden, I'm saying now he
24 spilled or leaked that, so I really think we ought

1 to sample this. The likelihood increases of a need
2 to sample when you have an assumption that there
3 has been a spill or leak.

4 MS. SHARKEY: What I meant to do
5 with that is to say does the likelihood itself,
6 that a material has been used in the past, result
7 in the assumption that the material has leaked?

8 MR. EASTEP: Oh, I misunderstood.
9 I'm sorry. Likelihood of past use does not
10 necessarily result in that assumption.

11 MS. SHARKEY: Okay. Thank you.

12 MR. EASTEP: I'm sorry if that was
13 unclear.

14 MS. SHARKEY: We had some questions
15 about materials being used in the building with a
16 concrete floor. I think you indicated that could
17 be a reason that may not be of concern during Phase 2
18 sampling, the existence of a concrete floor, for
19 example, in a building?

20 MR. EASTEP: Again, that would depend
21 on if you have leaks or joints in the floor or if
22 you had a nice smooth concrete floor and they kept
23 good records, that might not happen.

24 MR. WATSON: Is it your view, then,

1 that if you have existence of concrete floor and
2 no evidence of spills, you would not have to
3 characterize the soils underneath that building?

4 MR. EASTEP: I didn't exactly say
5 that. As an example -- there are two examples
6 that I would like to point out. One, there might
7 be an underground tank on the building that would
8 be independent of a concrete floor.

9 Secondly, under the RCRA
10 program, where we have a lot of closure of RCRA
11 units inside of buildings with concrete floors,
12 where the applicant has identified the fact that
13 there was no evidence of cracks or spills, then,
14 we have not required them to sample underneath
15 the concrete in the RCRA program. That's been
16 going on for, like, ten years.

17 MR. WATSON: The situation comes up
18 all the time where -- and currently, some of our
19 clients are struggling with it at sites in the
20 program where the project manager at the site from
21 the Illinois EPA is requiring them to sample
22 underneath the building irrespective, at least
23 in our clients' views, of any causal connection
24 between the conditions on the property and the

1 potential for a significant release underneath
2 the building.

3 My question is can you identify
4 circumstances under which sampling would be required
5 and would not be required underneath buildings? I
6 mean, if you have contamination along the side of a
7 building and arguably, there is a chance that it
8 migrated underneath the building, is that in and of
9 itself sufficient evidence to sample underneath the
10 building? A lot of times, for site constraint
11 reasons and other reasons, that imposes a significant
12 burden on people to actually go ahead and try to
13 characterize underneath the building.

14 MR. EASTEP: There are a number of
15 factors that could come into play such as soil
16 type. For example, you're going to see a different
17 way things move through soils which may occur
18 differently. You may have some types of soils
19 where your movement is principally vertical
20 as opposed to getting some horizontal or lateral
21 type of movement.

22 Other than that, I would hesitate
23 to comment because I don't know all of the specifics
24 of what's going on.

1 MR. WATSON: I mean, if a company
2 was willing to live with the obligations to maintain
3 that structure as an engineered barrier, would it
4 be sufficient to simply sample around the building
5 itself to determine the extent of contamination?

6 MR. EASTEP: In some cases, that might
7 be appropriate.

8 MR. WATSON: Notwithstanding the
9 existence of a building as an engineered barrier,
10 you would still require people to sample underneath
11 their facility?

12 MR. EASTEP: No. I'm saying a
13 building -- that structure, we would envision in
14 many circumstances being treated as an engineered
15 barrier. The fact that that structure is there
16 and you can depend on that, that reduces or
17 eliminates risk. We certainly think that's an
18 appropriate engineered barrier in many cases.

19 MS. SHARKEY: But that's a second
20 level --

21 MR. WATSON: Right.

22 MS. SHARKEY: -- of analysis that's
23 usually after the sampling?

24 MR. EASTEP: That's correct.

1 MR. WATSON: It's something that
2 clearly can be anticipated fairly easily and the
3 question is if you anticipate the existence of
4 the engineered barrier, how does that affect
5 your sampling obligations under a Phase 2 site
6 assessment?

7 MR. EASTEP: In some cases, you're
8 going to have to still know what's there for that
9 to even be appropriate as an engineered barrier.
10 If you had a tank that's under the building and
11 you are proposing that there had been a release
12 and that stuff was moving laterally under the
13 building, it may or may not be significant, but
14 you would want to know before you make your
15 decision.

16 MR. WATSON: What would you want to
17 know?

18 MR. EASTEP: I would want to know if
19 the stuff was moving. Again, this kind of goes
20 back to being an appropriate barrier in terms of
21 exposure. Is the building going to -- is this
22 engineered barrier going to manage the potential
23 for exposure underneath it?

24 THE HEARING OFFICER: I just want to

1 interject at this point that we are getting into a
2 little bit of repetitious testimony here. I just
3 want to get back to the questioning with Ms. Sharkey
4 regarding the area she has been discussing as a part
5 of her prefiled questions.

6 MR. WATSON: Well, with all due
7 respect, I don't think this is something we have
8 talked about before. I think it's an important
9 point. I'm happy to --

10 THE HEARING OFFICER: Well, let's --

11 MR. KING: Can I just give one example
12 to make this real clear?

13 THE HEARING OFFICER: Sure.

14 MR. KING: We have provisions in 742
15 that talk about how you exclude pathways. One of
16 them, for instance, on the soil -- I believe it's
17 the inhalation exposure route -- talks about the
18 concentration of any contaminant of concern within
19 ten feet of a land surface or within ten feet of any
20 man-made pathway shall not exceed the Tier 1
21 remediation objective.

22 Well, in order to meet that
23 requirement, it could be a possibility that you
24 have to sample underneath the floor. You may not

1 have to do it in every case, but to make it clear
2 that you don't have that man-made pathway, you
3 might have to sample underneath that floor.

4 MS. SHARKEY: I guess I would like
5 to say some of it is going to what you should have
6 to do based on the Phase 1, whether you ever get
7 to the presence indication of the contaminant, and
8 that's sort of where I was.

9 I think possibly there was a
10 second level of concern once you have a stain on
11 a concrete floor in a building with no cracks,
12 do you need to be concerned about sampling under
13 that building based on that stain?

14 My assumption again is you are
15 following from the Phase 1 through the indications
16 to your second level sampling rather than immediately
17 jumping outside and sampling under or drilling
18 through the floor if your indications from your Phase
19 1 do not support doing so.

20 MR. EASTEP: I would say generally
21 that's accurate.

22 MS. SHARKEY: Unless there are
23 indications from the Phase 1 audit, the agency
24 isn't necessarily going to require that?

1 MR. EASTEP: Phase 1 drives the
2 development of your work plan for your site
3 investigation.

4 MS. SHARKEY: As you said before,
5 there may be some situations in which that concrete
6 floor and the amount of stain and the material used
7 and the whole picture is enough that it is not
8 being indicated that one needs to go forth and
9 sample?

10 MR. EASTEP: I think you see a lot
11 of Phase 1's that show that type of thing.

12 MS. SHARKEY: I would like, if I could,
13 to switch a little bit to this concept of potential
14 sources of regulated -- of recognized environmental
15 conditions.

16 Previously, I raised in our
17 discussion on the definitions some of what I
18 perceived as ambiguity in those regulation
19 definitions and we talked about that a little bit.

20 In Section (b)(2), we moved to
21 the characterization of sources and potential sources
22 of recognized environmental conditions and again,
23 under A, identified sources or potential sources
24 of contamination.

1 My question is this additional
2 level of looking at potentialities intended to
3 require the Phase 2 investigator to generate a
4 number of possible sources of contamination
5 during the Phase 2 characterization process?

6 MR. EASTEP: Yes.

7 MS. SHARKEY: So that is not a process
8 that would go on during Phase 1, then, because we
9 have a second level of looking at potential sources
10 under Phase 2? I'm talking about the Phase 2
11 contractor.

12 MR. EASTEP: Well, the Phase 1 might
13 have identified all of your sources and potential
14 sources and you develop your plan and then as part
15 of the Phase 2, you go in and sample identifying
16 sources and potential sources.

17 MS. SHARKEY: All right. Well, then,
18 going back, I guess, to Phase 1, is the contractor
19 required to generate more than one alternative source
20 for a contamination?

21 MR. EASTEP: Well, no. It's not a
22 make work type of thing. As the investigator goes
23 through, he may say I know this is a source and
24 here's a mound of something here and we suspect

1 something might be there, so we think that's a
2 potential source, you know, or they could
3 characterize it just as this is something
4 that needs to be investigated. I can see the
5 actual report coming out and characterizing these
6 things slightly differently.

7 The impact is this is going to
8 drive a Phase 2 investigation and this is going to
9 start identifying what remedial objectives need to
10 be developed as well.

11 MS. SHARKEY: Okay. So they are not
12 required to go out and develop more than one if
13 they think they know what the source is?

14 MR. EASTEP: That's correct.

15 MS. SHARKEY: Okay. We talked, I
16 think, already about this other one, whether there
17 are conditions that would allow the remediation
18 applicant or RELPE to eliminate a potential source
19 if it was considered unlikely and I believe your
20 answer was yes, they would be allowed to do that?

21 MR. EASTEP: In this particular
22 question, I qualify that the RELPE can't do that.

23 MS. SHARKEY: They could propose
24 it in a plan?

1 MR. EASTEP: I suppose if that were
2 the RELPE's job, they could make a recommendation
3 to the agency based on what the remediation applicant
4 proposed.

5 MS. SHARKEY: A RELPE may be involved
6 in Phase 2, may he not?

7 MR. EASTEP: That's correct.

8 MS. SHARKEY: And if the RELPE were
9 looking at Phase 1 that had indicated a potential
10 or a recognized environmental condition, the RELPE
11 would have the discretion to look at that, exercise
12 his professional judgment, and follow through or
13 not follow through in terms of sampling and analysis,
14 is that correct?

15 MR. EASTEP: The RELPE -- I think
16 if you picture the RELPE as being like an agency
17 employee, the remediation applicant submits something
18 and the remediation applicant says I don't think this
19 and this are sources that need follow-up because, and
20 they give a list of reasons, the RELPE'S job might be
21 to review that report and say, you know, I agree with
22 him and you shouldn't have to do that.

23 MS. SHARKEY: I apologize. I
24 understand what you are saying now. What I'm talking

1 about now is the remediation contractor as opposed
2 to the RELPE, which under these rules, I think, it's
3 the remediation applicant?

4 The remediation applicant would
5 certainly have the ability to exercise their
6 discretion in terms of what they felt was a potential
7 source?

8 MR. EASTEP: That's correct.

9 MS. McFAWN: Could I just have a
10 clarification here? So Phase 1 is done. You
11 identified a potential source. You're going into
12 Phase 2. The remediation applicant can say the
13 one item I find in Phase 1 I don't think is
14 applicable anymore so I'm not going to investigate
15 it in Phase 2?

16 MR. EASTEP: No. I would see them
17 saying we have looked at ten areas out here.

18 MS. McFAWN: During Phase 1 or Phase
19 2?

20 MR. EASTEP: During Phase 1, they have
21 identified, say, ten areas. They say, however, we
22 think we only need to sample eight of them and we
23 don't need to sample these two for the following
24 reasons, and they may justify not being in need to

1 further investigate those two areas. If we
2 concurred, then, they would only follow-up and
3 investigate eight areas.

4 MS. McFAWN: So that's kind of
5 like in between Phase 1 and Phase 2 --

6 MR. EASTEP: That would be the result
7 of Phase 1. The Phase 1, I think, would come in
8 and identify those areas that they thought were
9 significant and needed to be further addressed
10 and the areas they didn't.

11 MS. McFAWN: That's all that may
12 happen?

13 MR. EASTEP: Yes.

14 MS. McFAWN: Thank you.

15 MS. SHARKEY: Some concern is where
16 you already have a Phase 1 that was previously
17 performed and you are now picking it up and using
18 it in the context of a remediation that's been
19 applied for under this program or where you have
20 Phase 1 that has to account for a prior Phase 1.
21 In other words, under the ASTM standards, they would
22 be required to look at all pre-existing information
23 or available information on the site and they find
24 pre-existing Phase 1 that nobody may have had this

1 MR. WIGHT: So what is the question,
2 then?

3 MS. SHARKEY: Are we to a point where
4 you do get an ability to make that judgment and the
5 remediation applicant gets the ability to come in and
6 say Phase 1 isn't the only thing needing this, we are
7 going to make some recommendations as to what we do
8 in Phase 2?

9 MR. WIGHT: The question seems to have
10 earmarks of being directed towards a single existing
11 site?

12 MS. SHARKEY: No.

13 MR. WIGHT: This is purely
14 hypothetical?

15 MS. SHARKEY: Yes, definitely. What
16 I'm saying is that I can imagine there are many sites
17 coming into this program with pre-existing work done
18 on them.

19 If, in fact, they followed the
20 requirement of Phase 1 and its definition of
21 recognized environmental conditions dictates what
22 you must do in Phase 2, one could be required to
23 do a great deal of sampling based on those all Phase
24 1's that were not focused and not designed to be

1 used in a remediation context.

2 MR. EASTEP: To try and break this up a
3 little bit, if you are talking about previously
4 developed material, first of all, obviously, it's on
5 a site-by-site basis, we have provisions in there
6 for consultants submitting previously developed data.

7 It's incumbent on that consultant
8 to look at the quality of that data and the
9 assumptions that were relied upon, et cetera, because
10 the consultant has to make some sort of certification
11 here. He is not going to certify as to the accuracy
12 because maybe that consultant didn't do it, but he
13 would have to look at it and see what he thinks of
14 it. I think that's where we ended up basically.

15 Secondly, Phase 1 has to be
16 approved by us. So we have to evaluate it on its
17 face and see. Other than that, I don't know -- I
18 mean, really, your question does get fairly
19 hypothetical. I don't know if we are prepared to
20 answer it other than we just have to look at the
21 value of that data as it exists as to acceptability.
22 Maybe that's the answer you want.

23 MS. SHARKEY: All I want is that
24 when the remediation applicant turns in that Phase 1

1 result and picks it up and says I'm going to certify
2 it, that they have the ability to say we don't
3 believe X, Y and Z, that stain on that concrete
4 floor and is an area of concern that requires
5 follow-up.

6 Maybe that's just an addendum
7 to Phase 1 as far as that goes. Maybe what you
8 have as an old Phase 1 package within a set of
9 recommendations that comes in as new Phase 1.

10 MR. EASTEP: Again, I would just go
11 back and say we rely on the quality of the data
12 as well as the rationale from any recommendations.

13 THE HEARING OFFICER: Mr. Walton?

14 MR. WALTON: I'm Harry Walton. I'm
15 chairman of the site remediation advisory committee.

16 As one point of clarification to
17 Larry, isn't it the case where the remedial applicant
18 will determine the extent of his release by what
19 issues -- what recognized environmental conditions
20 he addresses and may only be a release for those
21 issues that he identifies they want to be released
22 for?

23 MR. EASTEP: It is up to the remedial
24 applicant to define the extent of remediation site

1 and that's under the NFR letter.

2 MR. WALTON: The goals and objectives
3 of the NFR letter will be determined by the remedial
4 applicant?

5 MR. EASTEP: That's correct.

6 MR. WALTON: If he chooses not to
7 address a recognized environmental condition, he
8 can choose to do that, but he will not be released
9 for that?

10 MR. EASTEP: That's correct.

11 MS. SHARKEY: I would just like
12 to clarify the issue that I'm getting at a
13 little different than that because we are under the
14 comprehensive site assessment right now. I'm trying
15 to determine whether a comprehensive site assessment
16 has to go after -- let me just take some hair-brained
17 idea that some consultant came up with at a site and
18 under the definition, it falls within recognized
19 environmental conditions, does the remedial
20 applicant, in order to get a comprehensive letter,
21 have to address that with sampling or maybe address
22 it with reasoning to the agency that explains why
23 one does not need to follow that in order to get the
24 comprehensive letter?

1 MR. EASTEP: We would review it and
2 it's subject to our approval.

3 THE HEARING OFFICER: Mr. Rieser had
4 a question.

5 MR. RIESER: I truly hate to beat
6 this thing further, but I think the situation that
7 Ms. Sharkey is positing, I think she is referring
8 to the prior Phase 1's being done by other people
9 and in the past and in the context of real estate
10 transactions, but wouldn't it be the agency's --
11 under what these rules propose, wouldn't it be the
12 situation that the remediation applicant would
13 retain a professional who would prepare a new Phase 1
14 in the context of these rules, which would review
15 past data as well as current data, and in the context
16 of this Phase 1, this new Phase 1 that he is creating
17 and now certifying to would make these judgments that
18 she is talking about with respect to the prior
19 information that's before you?

20 MR. EASTEP: I think that's how I was
21 trying to respond. You are going to have to have
22 your consultant evaluate that on its merits.
23 Notwithstanding all of that, if you have a recognized
24 environmental condition and for some reason, you just

1 don't want to do it, you don't have to, but then you
2 are getting away from the comprehensive aspect of the
3 investigation.

4 If you think a previous consultant
5 made an error of judgment or whatever regarding this
6 where they thought it was and you thought it wasn't,
7 well, then, that's certainly a recommendation and we
8 evaluate that.

9 MS. SHARKEY: Thank you. I think that
10 goes to some of the judgements that we talked about
11 that are involved in determining what is a recognized
12 environmental issue.

13 THE HEARING OFFICER: Let me just stop
14 at this point.

15 (Whereupon, a discussion
16 was had off of the
17 record.)

18 THE HEARING OFFICER: Back on the
19 record.

20 MS. SHARKEY: My question is
21 whether the agency would object to changing the
22 focus of the Phase 2 process to known or identified
23 releases based on reasonable inquiry, which is
24 really the standard under the definition for

1 contaminants of concern, as opposed to going with
2 the more speculative definition out of the ASTM of
3 recognized environmental condition?

4 MR. EASTEP: Yes. We would object
5 to that.

6 MS. SHARKEY: Okay. Could you explain
7 why?

8 MR. EASTEP: Well, because we find
9 things in the Super Fund -- under the site assessment
10 program, we find things that are not known to be
11 there all the time.

12 MS. SHARKEY: Okay.

13 MR. EASTEP: It's just typical that
14 we find stuff that people wouldn't necessarily
15 know for sure are there.

16 MS. SHARKEY: In the Phase 2, I
17 thought I understood earlier that the target
18 compound list may be narrowed with a known or
19 at least a suspected -- I guess we get into that
20 suspected area of recognized environmental
21 conditions -- the target compound list can be
22 limited based on the information developed in
23 Phase 1?

24 MR. EASTEP: Yes, it can.

1 MS. SHARKEY: But are you saying
2 could not be limited to known releases if we
3 have to account for possible releases as well?

4 MR. EASTEP: It might end up being
5 only for known releases, but you might account
6 for suspected releases too.

7 MS. SHARKEY: The regulations
8 provide for an approval alternative to the ASTM.
9 Can you provide examples of what some of the key
10 factors the agency would look at in approving an
11 alternative?

12 MR. KING: We did not have any other
13 examples in mind.

14 MS. SHARKEY: I guess I'm trying to
15 figure out if a phase -- if an alternative were
16 rejected, what would the applicant do?

17 What would the applicant look to
18 to figure out what they need to do to come up with
19 an approvable alternative or what standards do we
20 have?

21 MR. KING: Like I said, we didn't have
22 another example in mind. If we did, we would have
23 put it in the rules. This is what we knew about, so
24 we included it.

1 MS. SHARKEY: Okay.

2 THE HEARING OFFICER: All right.

3 MS. SHARKEY: Thank you.

4 MR. WATSON: Before we go off the
5 record, I would just like to say that there are
6 two issues that we deferred for this discussion
7 now that we got to. One of them is with respect
8 to looking at the Guidance for Conducting Remedial
9 Investigation and Feasibility Studies and based
10 on your understanding, what are the differences
11 between that guidance and the current site
12 investigation requirements.

13 The second question that was
14 deferred was what are the obligations of a remedial
15 applicant to define the extent of contamination at
16 a remediation site. If you recall, we talked a
17 number of hours ago about that issue and whether
18 or not if you are defining your site to -- your
19 remediation site to end at the property boundaries
20 whether or not you still had the obligation to
21 extend that or to take sampling or conduct sampling
22 off-site.

23 Those are two issues I would like
24 to start off with tomorrow.

1 MR. EASTEP: I can answer the first one
2 pretty easy.

3 MR. WATSON: Let's wait.

4 THE HEARING OFFICER: Remember your
5 answer.

6 We can go off the record.

7 (Whereupon, a discussion
8 was had off of the
9 record.)

10 THE HEARING OFFICER: All right. We
11 plan to start at 9:00 o'clock tomorrow morning and
12 there has been no objection. Thank you very much
13 and we'll see you then.

14

15 (Whereupon, the proceedings
16 were adjourned in the
17 above-entitled cause until
18 November 26, 1996, at 9:00
19 a.m.)

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