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2 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

3

4 IN THE MATTER OF:)

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5 PROPORTIONATE SHARE LIABILITY)R97-16
6 (35 ILL. ADM. CODE 741))Rulemaking-Land

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11 REPORT OF PROCEEDINGS had at the

12 hearing of the above-entitled cause, commencing

13 on May 12, 1998, at 160 North LaSalle Street,

14 Chicago, Illinois, at the approximate hour of

15 10:00 a.m.

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ILLINOIS POLLUTION CONTROL BOARD HEARING

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15 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

16 Mr. John Sherrill

17 Mr. Gary King

18 Mr. Mark Wight

19 Mr. Bill Ingersoll

20 Mr. Larry Eastep

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ILLINOIS POLLUTION CONTROL BOARD HEARING

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John Knittle
Joe Yi
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1 MS. ERVIN: We will go on the record.
2 Good morning and welcome. My name is Cynthia
3 Ervin, and I am the named hearing officer in this
4 proceeding originally entitled In the Matter of?
5 The Proportionate Share Liability, 35 Illinois
6 Administrative Code, Part 741, docketed as
7 R97-16.

8 I am present today on behalf of the
9 Illinois Pollution Control Board as a presiding
10 board member of the rulemaking, to my right,
11 Chairman Claire A. Manning, to her right is Board
12 Member Kathleen Hennessey.

13 MS. HENNESSEY: Good morning.

14 MS. ERVIN: To her right is Marili
15 McFawn. To her right is Board Member Tanner
16 Girard.

17 MR. GIRARD: Good morning.

18 MS. ERVIN: And to his right is Board
19 Member Ron Flemal.

20 Also today with us from the Board is
21 John Knittle, Board Member Joe Yi's attorney
22 assistant; Chuck King, Board Member Marili
23 McFawn's attorney assistant; Amy Hoogashian,
24 Chairman Manning's attorney assistant in Chicago,

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1 and Anand Rao from our technical unit.

2 As I said, in the back of the room we
3 have documents related to this proceeding,
4 pre-file testimony, the Agency's proposal,
5 et cetera, if anybody would like a copy.

6 I have also placed a list for those who
7 would like to be added to the service list or
8 notice list. Please note if your name is on the
9 service list, you will receive copies of the
10 Board's opinions and orders and all hearing
11 officer orders as well as all documents filed in
12 this proceeding.

13 If your name is on the notice list, you
14 will only receive copies of the Board's opinions
15 and orders and all hearing officer orders.

16 Please keep in mind, if your name is on
17 the service list, you are required to serve all
18 persons on the service list with all documents
19 that you file with the Board.

20 As background, on February 2, 1998, the
21 Illinois Environmental Protection Agency filed a
22 rulemaking proposal with the Board to add a new
23 part 741 to the Board's waste disposal
24 regulations. These proposed rules were

1 established procedures for the implementation of
2 the proportionate share liability scheme
3 established by Public Act 89-443.

4 This amendment to our legislation
5 appealed joint and several liability in an
6 environmental action and replaced it with
7 proportionate share liability.

8 In addition to establishing
9 proportionate share liability, Section 58.9 of
10 the Act directed the Board to adopt rules
11 implementing Section 58.9 by December 31, 1997.
12 The statutory deadline was later extended until
13 January 1, 1999.

14 According to Section 58.9, such rules
15 shall provide criteria for the determination of
16 apportion responsibility upon the degree to which
17 a person directly caused or contributed to a
18 release of regulated substances on, in or under
19 the site identified and addressed in the remedial
20 action, procedures to establish how and when such
21 persons may file a petition for determination of
22 such apportionment and any other standards or
23 procedures which the Board may adopt.

24 On December 5, 1996, the Board opened a

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1 docket to solicit proposals to assist the Board
2 in the promulgation of rules and procedures
3 implementing the proportionate share provisions
4 of Section 58.9. Proposal filed by the Agency is
5 in response to that request.

6 The first hearing was held in this
7 matter on May 4th in Springfield. At that
8 hearing, the Agency presented testimony in
9 support of the proposal. The purpose of today's
10 hearing is to allow the Agency to first address
11 issues that were left remaining from the previous
12 hearing, and then to hear testimony from the
13 other people who have pre-filed testimony in this
14 matter.

15 That testimony will be presented in the
16 following order: Testimony of Matthew Dunn,
17 Sidney Marder, David Rieser, and then David Howe.

18 Browning-Ferris Industries of Illinois
19 had also pre-filed testimony in this matter;
20 however, they have informed me that they will not
21 be attending the hearing today and would like a
22 pre-file testimony considered by the Board as a
23 public comment.

24 After the Board hears a pre-file

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1 testimony, anyone who would like to testify will
2 be given the opportunity as time allows. This
3 hearing will be governed by the Board's
4 procedural rules for regulatory proceedings.

5 All information which is relevant and
6 not repetitious or privileged will be admitted.
7 All witnesses will be sworn and subject to
8 cross-questioning. During this questioning
9 period, I prefer that during -- all persons with
10 questions raise their hand and wait for me to
11 acknowledge them. After being acknowledged,
12 please state your name and organization that you
13 represent, if any.

14 Also please note that any questions
15 asked by a Board member or staff member are
16 intended to help build a complete record for the
17 Board's decision and does not express any
18 preconceived opinion on the matter.

19 Are there any questions on any of the
20 procedures that we will be following today?

21 Seeing none, I would then ask Chairman
22 Manning or any of the board members if they would
23 like to say anything?

24 MS. MANNING: Welcome to all of the

1 participants.

2 MS. ERVIN: Thank you.

3 We will then turn it over to the
4 Agency.

5 Mr. Wight, do you have any opening
6 statements?

7 MR. WIGHT: I will just start again
8 with the introduction of the witnesses, and then
9 we will go right to the responses to the
10 questions.

11 My name is Mark Wight. I am an
12 assistant counsel with the Illinois Environmental
13 Protection Agency. With me today is the same
14 panel that appeared at the May 4th hearing in
15 Springfield. On my immediate right is Gary King,
16 who is the manager of the division of remediation
17 management within the Bureau of Land. To Gary's
18 right is John Sherrill, who is the supervisor of
19 a unit within the Bureau of Land's remedial
20 project management section. On my immediate left
21 is Bill Ingersoll, who is an associate counsel in
22 the Agency's division of legal counsel and
23 manages a unit of enforcement attorneys, and to
24 Bill's left is Larry Eastep, who is the manager

1 of the remedial project within the Bureau of
2 Land.

3 Also with us today is Vicky VonLanken,
4 who is a legal assistant, and Vicky is helping
5 with the Agency documents which you can find at
6 the table in the rear.

7 Also, if you have any questions with
8 regard to receipt of any of those documents, if
9 we happen to run out, there is a sign-up sheet or
10 you can talk to Vicky about that.

11 So, I think the format that we will
12 follow today in responding to the follow-up
13 questions and the questions that were deferred is
14 that Gary King will begin with a brief opening
15 statement. Once Gary completes that statement,
16 we will go to the questions. I will repeat the
17 question or paraphrase the question with
18 reference to where it was found in the list of
19 questions compiled by the Board. If the question
20 is a follow-up to one of those questions, I will
21 try to give you a reference to the transcript
22 from the first hearing so that you can find the
23 follow-up question.

24 I believe that's all of the preliminary

1 remarks, so if the Board is ready, we will begin
2 with Mr. King's introductory remarks.

3 MS. ERVIN: You were already sworn in,
4 but if we could have the court reporter just
5 swear the panel in.

6 (Panel sworn.)

7 MS. ERVIN: When you are ready to
8 proceed, Mr. King.

9 MR. KING: As Mark was saying, what we
10 wanted to do, at least initially this morning, is
11 pick up on some of the issues that were left
12 unresolved at the last hearing, and then go back
13 and look at the questions that either were not
14 answered because we deferred them or there were
15 follow-up questions.

16 I wanted to pick up the discussion from
17 late in the afternoon on May 4th, and Chairman
18 Manning raised a series of questions -- it's
19 about Pages 136 to 138 of the transcript -- that
20 really focused on how the Board would -- I think
21 the point of it was the Board exercising some
22 judgment with regard to these cases. And the
23 concluding comment there was -- I will just quote
24 it. It says, she commented to me, it seems to

1 me, our job is maybe not all that complicated. I
2 think that was a very, very good comment in light
3 of what we had been discussing throughout the
4 hearing on May 4th. I think Chairman Manning is
5 right in terms of that this is not complicated.
6 It's going to be difficult, but it's not
7 complicated.

8 What we are talking about with these
9 proceedings is the Board exercising its judgment,
10 and, in that sense, this is much different than
11 what we went through with the TACO hearings and
12 the TACO-type proceeding where you are really
13 talking about how you apply scientific
14 principles.

15 When you are talking about
16 proportionate share liability, we are not talking
17 about how we apply scientific principles. We are
18 talking about how the Board exercises its
19 judgment with respect to the parties before it in
20 these cases, because the Board is just -- it's
21 always going to come down to, the Board is going
22 to have to exercise a measured judgment with its
23 assigning a share to a responsible party. And
24 that's going to be particularly the case when the

1 evidence is incomplete. And if you recall that,
2 we talked about these scenarios on May 4th, and
3 those scenarios reference the fact that there
4 will be occasions -- maybe it will be
5 frequently -- that the evidence is incomplete.

6 What we meant by "incomplete" was that
7 the evidence is not conclusive, that it has not
8 been proven by a preponderance of the evidence
9 what the results should be. And in those
10 situations, the Board -- as we outlined in those
11 scenarios, the Board is going to have to be in a
12 position to exercise its judgment.

13 Now, we see that -- we see that being
14 much different from joint and several liability
15 because under joint and several liability --
16 except in the situation where you have proved
17 divisibility -- the decision is not so much of an
18 exercise of judgment. It is just the share is
19 100 percent. That's what joint and several
20 liability means.

21 Our scenarios point out, I think, and
22 did point out pretty well that that's not the
23 case under proportionate share liability as we
24 have proposed it, that there is an exercise of

1 judgment, not just assigning 100 percent shares
2 like joint and several liability frequently does.
3 It's been argued, and I think SRAC
4 argued that before we filed a proposal and has
5 continued to argue that our provision in there,
6 we have included a -- what I would call a safety
7 valve procedure, so the Board can exercise its
8 judgment, and it's contained in 741.210(d)(3).
9 And I think the point that was being made through
10 some of the hypotheticals that were being raised
11 was that you could get a result where
12 proportionate share liability will approximate
13 joint and several liability, and I think that's
14 probably true, that you probably can come up with
15 a set of -- kind of a hypothetical with a weird
16 set of facts that has a certain set of
17 presumptions that may occur, but certainly are
18 not going to be a norm, and the result that once
19 you get through the decision-making process under
20 that, yeah. It would kind of look as if it might
21 be joint and several liability. But that doesn't
22 make what we have proposed in proceeding joint
23 and several liability.
24 I mean, it's one of the reasons why we

1 brought in some specific case studies. We talked
2 about the Steagall landfill site, where we have
3 had some serious environmental problems,
4 contamination of the lake, contamination of the
5 creek. We have talked about Logan landfill site
6 where it is almost completely an orphan share
7 there.

8 We did that to give the Board a sense
9 of what the problems are that we really face,
10 rather than just thinking about this in a
11 hypothetical concept. So, to the extent that --
12 so, saying to the extent that you have -- there
13 might be some situations where the Board could
14 apply its judgment in a way that looks like it
15 leans to one side, toward the joint and several
16 side, it doesn't mean that that's the presumptive
17 norm.

18 Under Part 741, the presumptive norm is
19 that there is a proportionate share liability.
20 The respondent, as we have proposed it -- the
21 respondent who has been established to be liable
22 has the burden of showing his proportionate
23 share. But the presumption is still
24 proportionate share. Presumption is not that he

1 is joint and severally liable.

2 As I was saying, the fact that we have
3 this kind of safety valve provision to give the
4 Board, the discretion to exercise its judgment
5 does not mean this is not a proportionate share
6 liability proposal. In fact, it would be
7 difficult for me to believe that a defense
8 attorney wouldn't find what we have put together
9 as far as proportionate share liability much more
10 favorable than what -- how joint and several
11 liability is applied in federal courts.

12 Board Member Hennessey asked some
13 questions about what we meant by the terms
14 "orphan share" and "unallocated shares" and
15 "unapportioned costs," that we left those terms
16 undefined. What we tried to do is create kind of
17 a definition. When we say "unapportioned cost"
18 or "unallocated shares," we mean essentially
19 that's the same thing. And what we mean -- I
20 will just kind of read a definition that we have
21 come up with, and I don't know if there is
22 something that the Board thinks should be in the
23 rules itself, but it's something that we have
24 come up with to kind of explain the concept a

1 little more.

2 Unallocated shares are shares of
3 remediation or response costs that may be
4 attributable to one or more PRPs whose
5 liability -- excuse me -- to one or more
6 responsible parties whose liability has been
7 established but who have been unable to
8 demonstrate a specific percentage of cost by a
9 preponderance of the evidence.

10 Now, we need to distinguish that from
11 orphan share. Now, the Board may want to choose
12 to put a definition of unallocated shares in the
13 rules, but I don't think the Board should put a
14 definition of orphan share because, in my mind,
15 orphan share is more of a term in -- term of art.
16 Generally, an orphan share is a share of costs
17 for which a responsible party is either
18 unidentified, is unlocated, is defunct or
19 deceased or insolvent, such that you may or may
20 not be able to establish liability, but you know
21 that that responsible party is not going to be
22 able to assume any kind of financial
23 responsibility for a share, at least at this
24 specific time in the proceeding.

1 There is a temporal aspect to orphan
2 share status in that somebody who is thought to
3 be an orphan share could end up having the
4 resources later on, and then that can be applied
5 to them. Conversely, a person who has had a
6 share allocated in a formal proceeding may become
7 an orphan share later if the responsible party
8 becomes unable to pay.

9 As you recall, we talked about the
10 Logan landfill site, and there was a site where
11 the -- you know, the orphan share there was
12 just -- was almost the entire cleanup. And we
13 understand that under proportionate share
14 liability that it's going to be the
15 responsibility of the state to pick up these
16 orphan shares in order for a project to be
17 complete, but we don't think it's appropriate for
18 the state to be bearing the burden of absorbing
19 shares of proven liability -- shares of proven --
20 excuse me. We don't think that the state should
21 bear the burden of absorbing shares of persons
22 who have been proven to be liable and are
23 financially viable just because we are not able
24 to prove what their shares should be with, you

1 know, that being our burden of proof.

2 I think I was going to talk about one
3 other site, but it may come up later on. John
4 Sherrill talked about on May 4th a couple of
5 sites as good examples of how we face these
6 problems and how we resolve them. And,
7 obviously, there are other ones, and maybe we can
8 talk about another one of those later on.

9 With that, I think we can start in on
10 responding to the direct questions, and we will.

11 MS. ERVIN: Are there any questions
12 regarding his introductory statements?

13 Okay. Thank you.

14 MR. WIGHT: As we said, we owed a
15 number of responses based on questions that had
16 been pre-filed with which we requested deferral,
17 and that we also requested deferral on some of
18 the follow-up questions to questions which we
19 were able to respond to at the last hearing.

20 So, again, I will start with these,
21 just try to take these in the order in which they
22 occurred in the last hearing. I will try to give
23 a reference to where the question can be found if
24 it's in the list that the Board supplied at the

1 last hearing. Again, if it's a follow-up
2 question, I will try to give a reference to the
3 transcript so you can find the follow-up.

4 The first question that we had was the
5 question that was Question No. 1 on the Board's
6 list of questions. It was actually a series of
7 questions, and I will just read through the
8 series, and then John Sherrill will respond.

9 The questions were, with respect to the
10 cost recovery litigation described on Page 11 of
11 Gary King's testimony, what types of sites were
12 these? Were these consent orders or litigated
13 actions? How many separate actions were
14 involved? How do these figures compare with
15 prior years? And then a follow-up question at
16 Page 85 of the transcript, how much of the 2.5
17 million of cost recovery from fiscal year 1997 is
18 voluntarily paid through the billing process?

19 John?

20 MR. SHERRILL: So, this one referenced
21 Page 11 of Gary King's written, submitted
22 testimony where he was describing monies coming
23 in for us to perform cleanup activities.

24 There were 28 different sites involved

1 in this cost recovery for this \$2.5 million that
2 Gary King had referenced. There were 14
3 manufacturing sites, 6 landfills, 2 metal
4 platers, 2 agri-chemical dealers, 1 waste-oil
5 recycler, 1 railroad, 1 refinery, and 1
6 mining-type site.

7 Of those 28 sites, 2 were of the
8 multiple PRP-type, the landfill and the drum oil
9 recycler.

10 Then the second part of that question,
11 were these consent orders or litigated actions?
12 These were consent orders. And how many separate
13 actions? There were 28 sites. How do these
14 figures compare with prior years? And the
15 "figures," meaning -- we took that to mean the
16 \$2.5 million. The 2.5 million is in the range of
17 the previous four years, and it ranges from \$1.5
18 million to approximately \$3 million.

19 How much of the 2.5 million of cost
20 recovery is voluntarily paid through the billing
21 process during that fiscal year '97? I don't
22 believe none was. That was through a
23 voluntary -- none was.

24 MR. WIGHT: That's the Agency's

1 response.

2 MS. ERVIN: Mr. Rieser, I think this
3 was a response to your question. Do you have a
4 follow-up?

5 MR. RIESER: Yeah. Just a couple of
6 clarifications. Could you -- with respect to the
7 range of how 2.5 fit within the other years,
8 could you give the specifics of what the other
9 four years were and what the amounts were per
10 year?

11 MR. SHERRILL: I have got it in some
12 other paperwork that I have but not right here in
13 front of me.

14 MR. RIESER: Okay, when you say I think
15 you testified that all of these costs were as a
16 result of consent orders -- filed in consent
17 orders; is that correct?

18 MR. SHERRILL: Correct.

19 MR. RIESER: These were consent orders
20 in cases filed before the Board or a court?

21 MR. SHERRILL: That, I don't know.

22 MR. RIESER: Do you know if they were
23 at the end of long litigation or were the
24 complaints and the consent orders filed at the

1 same time?

2 MR. SHERRILL: That, I don't know.

3 Thank you.

4 MS. ERVIN: Continue, Mr. Wight.

5 MR. WIGHT: Second question is found at

6 No. 2 of the Board's list. I believe this is a

7 paraphrase, but I believe it references Page 5 in

8 the statement of reasons. The gist of the

9 question is Part 741 -- excuse me -- Part 741 is

10 limited in the case of, quote, Friedman Storage

11 Disposal sites for which a current permit has

12 been issued with emphasis on the issued or that

13 the -- or that are subject to closure

14 requirements in the federal or state solid

15 hazardous waste laws. The question is, does this

16 exemption encompass sites where due to

17 applicability of regulatory exemptions were based

18 on the Agency's discretion, closure under

19 applicable federal or state laws will not be

20 required. I think Larry Eastep is going to

21 respond to this one.

22 MR. EASTEP: Looking at the key words

23 for me, being subject to closure in relating that

24 to the exemptions, a lot of the exemptions rely

1 on your maintaining that exempt status to
2 eliminate your requirement from some other RECRA
3 items, particularly these exemptions are related
4 to permitting.

5 In some cases, for example, with a
6 person storing waste less than 90 days, in order
7 to maintain that exemption, there are other
8 operating requirements that would go along with
9 that. Part of those operating requirements are
10 such things as having a contingency plan to deal
11 with releases and also having a plan to ensure
12 proper closure of the facility.

13 So, in essence, those types of
14 facilities that may be exempt in part in
15 permitting can still have a closure element, so
16 they would be subject to RECRA.

17 Other types of the facilities like
18 small quantity generators don't necessarily have
19 that requirement, so you have to deal with the
20 small quantity generator on a little bit
21 different basis than some of those might be
22 eligible for proportionate share liability.

23 I don't know if that got to the
24 question.

1 MR. WIGHT: We will see if there are
2 any follow-ups.

3 MS. ERVIN: Do you have a follow-up.

4 MS. ROSEN: Just one second.

5 MR. RIESER: Is it your position that
6 if there is any element with relation to this
7 site that would subject it to RECRA closure, even
8 if the site could easily be addressed through
9 site remediation programs?

10 MS. ERVIN: Could you speak up? They
11 can't hear you in the back.

12 MR. RIESER: I am going to start over
13 and -- strike that and start over.

14 Is it your position that if there is
15 any element with relation to a site that could
16 subject it to RECRA closure, even if the site of
17 this nature would typically be otherwise
18 addressed to the site remediation program, that
19 it would not be subject to proportionate share
20 liability application?

21 MR. EASTEP: How are you using the word
22 "site"?

23 MR. RIESER: I am using the term "site"
24 as defined in this proposal in the Act. In a

1 generic sense, the site.

2 MR. INGERSOLL: Is that broader than
3 the RECRA unit that's involved with the closure
4 requirement?

5 MR. RIESER: Yes.

6 MR. EASTEP: I am having -- we are
7 having a little bit of difficulty because of the
8 site -- under the SRP a remediation site means a
9 site you are specifically dealing with; whereas,
10 under RECRA, site could encompass things other
11 than the particular unit where the activity
12 occurred.

13 One scenario is if a unit becomes --
14 loses its exemption and becomes subject to the
15 permitting requirements for a more formal closure
16 procedure, that unit could undergo closure under
17 RECRA, and the rest of the facility would
18 probably go through the SRP.

19 MR. RIESER: In that example, wouldn't
20 the rest of the facility also be subject to RECRA
21 investigation in remediation?

22 MR. EASTEP: I believe it would be
23 subject to -- if you get to the point where you
24 have lost your exemption, and the EPA would deem

1 you -- USEPA would deem you as pursuing a permit,
2 then that subjects all of the solid waste units
3 to corrective action.

4 And I am not sure that we address that
5 here. I am really -- I don't know if we have
6 done enough research to answer that kind of
7 question.

8 MR. RIESER: I think we had some
9 specific examples among the questions that remain
10 to be answered, and maybe the best way to
11 approach that is to work from the specific
12 examples that we have already put forward and see
13 how that plays out.

14 MS. ERVIN: Fine. Mr. Wight, would you
15 like to continue on to the next answer?

16 MR. WIGHT: Okay. The next question --
17 actually, I believe it was a follow-up to
18 Question 4 on the Board's list, and it can be
19 found in the transcript at Page 94. The gist of
20 the follow-up was a request for the agency to
21 provide a table of the breakdown and types of
22 sites that had been involved in 4(q)s and how
23 many of those were part of the 35 multiple PRPs
24 identified by John Sherrill on May 4th.

1 We do have that table. I would like to
2 introduce that as an Exhibit now. There are
3 copies of this table back on the back table for
4 those of you who haven't received them, and I
5 have copies for the Board with me.

6 Mr. Sherrill, I am handing you a
7 document that has been labeled Exhibit 8 for
8 identification. Would you please take a look at
9 it.

10 (WHEREUPON, the document
11 above-referred to was
12 marked Exhibit No. 8 for
13 identification.)

14 MR. WIGHT: Do you recognize the
15 document?

16 MR. SHERRILL: Yes.

17 MR. WIGHT: Would you please tell us
18 what it is?

19 MR. SHERRILL: It's a document that I
20 created. I went through our -- all of our
21 administrative records on all of the 4(q)s that
22 we issued historically through 1997, and I have
23 divided them up by the type of site that we are
24 dealing with and divided them up by multiple PRP

1 scenarios.

2 I will describe it a little bit more

3 after you hand it out.

4 MR. WIGHT: I request that this

5 document be admitted into the record as Exhibit

6 No. 8.

7 MS. ERVIN: Are there any objections as

8 to the admission of this document?

9 MR. RIESER: I would like to see it,

10 please.

11 Thank you. No objection.

12 MS. ERVIN: This document entitled 4(q)

13 notice summary 1984 through 1997 will be admitted

14 into the record as Exhibit No. 8.

15 MR. SHERRILL: I would like to spend a

16 couple of minutes just describing what we have

17 just handed out. This follows along with

18 Attachment 1 in my written testimony. I had

19 stated that we -- the Agency has issued a total

20 of 85 different sites, have warranted it 4(q)

21 from 1984 through 1997. And there was a

22 follow-up in last week's hearing regarding -- or

23 on the May 4th hearing regarding what kind of

24 sites were these. And so I do want to state

1 these are all of the 4(q)s that the Agency has
2 issued through 1997, so there are a total of 85
3 as you can see here, and I came up with these
4 site types and I will just go through these.

5 Agri-Chemical dealers, there have been
6 four 4(q)s -- excuse me -- five 4(q)s issued to
7 these types of sites, and then the question would
8 be, are any of these multiple PRP-type scenarios,
9 in other words, subject to proportionate share?
10 And I did not identify any that would follow
11 under proportionate share.

12 I do want to say that the column on the
13 far right, the multiple PRP scenario, that this
14 is a professional judgment, that I did not
15 believe that it would be a multiple PRP scenario.
16 Various manufacturers, the second site type, 21
17 4(q)s, multiple PRP scenario, we identified four.
18 When I say "various manufacturers," anything from
19 lubricants, chemicals, paints, furniture, circuit
20 boards, metal boxes, just various manufacturing
21 plants.

22 Landfills, the next category, as you
23 can see, that's the most number of 4(q)-type
24 sites is for landfills. The multiple PRP

1 scenario is 14. That again is the highest
2 number. Drum and or waste-oil recyclers, this is
3 our second largest category. There are 14 of
4 those type of sites that have been issued 4(q)s,
5 and the multiple PRP scenarios, we identified 12;
6 almost a one-to-one there.

7 And then going down, it almost becomes
8 a finger-counting exercise. The lead and coal
9 mine quarry, feedmill, metal finisher, plater,
10 refinery, pipeline, railroad, tractor trailer,
11 transformer facility, and wood treater.

12 So the total number of unique sites,
13 the different sites across the state that have
14 been issued a 4(q) is 85, and the multiple PRP
15 scenarios that we identified were 35.

16 I thought that was a good question. It
17 kind of gives us an idea of where we think 4(q)s
18 or 58.9-type notices may give us an indication of
19 what they would be issued to in the future.

20 MS. ERVIN: Is there a follow-up
21 question?

22 MR. RIESER: With respect to the 28
23 consent orders in '97 that you just talked about,
24 how many of those consent orders involve sites

1 that were -- to which 4(q)s were issued?

2 MR. SHERRILL: I could have that
3 information after lunch. I don't have it with me
4 now.

5 MR. RIESER: If we could, that would be
6 great. Thank you.

7 MS. ERVIN: Mr. Wight, would you like
8 to continue on?

9 MS. ROSEN: Could I have a moment --
10 just a second.

11 MR. RIESER: And if you have the
12 information, how many of the 85 total resulted in
13 consent orders.

14 MR. SHERRILL: That, I do not have.

15 MR. RIESER: Okay. Thank you.

16 MS. ERVIN: Mr. Wight, if you would
17 like to continue when you are ready?

18 MR. WIGHT: Okay. Fourth response that
19 we --

20 MS. ROSEN: I am sorry to interrupt.
21 May we ask one more follow-up?

22 MS. ERVIN: Sure.

23 MS. ROSEN: This is along the lines of
24 the questioning that Mr. Rieser just pursued.

1 How many of these -- just wait one
2 second. How many of the sites included in the 85
3 on this sheet resulted in recovery of all of the
4 costs that were associated with remediation at
5 those sites? And perhaps the way to address it
6 is to first let us know how many of these
7 resulted in a complaint being filed and
8 subsequent recovery?

9 MR. SHERRILL: I would say that I don't
10 have the answer to both of those. I would say,
11 though, when you say how much -- some of these
12 4(q)s like the example of the Steagall landfill
13 was issued in the mid-80s, and we are still
14 seeking cost recovery from it, so it is a
15 fluid-type answer, but that I don't know.

16 MS. ROSEN: Thank you.

17 MR. WIGHT: The next question for which
18 we owed a response was the question to which
19 Mr. Rieser referred a few moments ago. It was on
20 the Board's list as Question No. 5, and it's a
21 series of four hypothetical situations with the
22 question being would proportionate share
23 liability apply at the following sites.

24 Mr. King will respond to that.

1 MR. KING: Okay. The first
2 hypothetical listed as A was described as a site
3 containing underground storage tanks where the
4 site is not owned by owner operator of the UST
5 who left the site years ago.

6 In answering this -- actually with all
7 of these, there is a presumption that there has
8 been a release of a hazardous substance or a
9 pesticide related to one of the sites, and that's
10 kind of -- that's the assumption of the ongoing
11 end of this, and I assume that's correct. And I
12 think A presumes that this is a registered tank;
13 is that correct?

14 MS. ROSEN: Yes.

15 MR. KING: The PSL Rule would not apply
16 in this context.

17 Okay. The second example --

18 MS. ERVIN: Do you have a question?

19 MS. ROSEN: Yeah. I would like to
20 follow up.

21 Let's change the presumption that the
22 tank is not registered in example 5A, would your
23 response still be the same?

24 MR. KING: Are you distinguishing that

1 from B? Do you see A? Do you say your new
2 hypothetical in A being different than B?

3 MS. ROSEN: Yes.

4 MS. HENNESSEY: Are you asking about a
5 tank that was eligible to be registered but was
6 not registered?

7 MS. ROSEN: Yes. Let's go with that
8 one first.

9 MR. KING: I think you get the same --
10 I would think the same result should apply
11 because now you are talking about a site that
12 should have been registered but is not
13 registered, so they're not in compliance. It
14 wouldn't seem that somebody should get an
15 advantage from being in noncompliance. So, I
16 would think that PSL would still not apply in
17 that situation.

18 Okay. In the second one. The example
19 is a site containing USTs that were taken out of
20 operation prior to January 2, 1974. There PSL
21 could apply.

22 MS. ROSEN: You say "could," could you
23 explain an instance why you might be making the
24 distinction that it might not apply?

1 MR. KING: I think because if you look
2 at the rule, there are triggering mechanisms.
3 There has to be a complaint on file and those
4 sort of things.

5 MS. ROSEN: Assuming those triggering
6 mechanisms are fulfilled, then, yes, the site
7 would be eligible for PSL?

8 MR. KING: Right.

9 MR. RIESER: What distinguishes that
10 from the site where there is a registered tank
11 but owner isn't there?

12 MR. KING: Because, in the former
13 one -- 741.105(c)(3) says, sites that are subject
14 to state or federal Underground Storage Tank laws
15 and implementing regulations. So, the example A
16 would fall within that, and example B would not.

17 MR. RIESER: Okay.

18 MR. KING: Okay. The third one, to an
19 arranger for the disposal of material at a site
20 where there has been a release of hazardous
21 substances which may allow the Agency to
22 characterize the site.

23 Now, there I was assuming that when we
24 use the term "hazard substances," we are not

1 using it in a way that includes a RECRA regulated
2 hazardous waste. And in that context, then the
3 answer would be that it could apply, and it would
4 be the same kind of triggering requirements as
5 any other parts of 741.105.

6 MS. ERVIN: Were there any follow-up
7 questions for that example?

8 MR. KING: Okay. Then the last example
9 was described as a site where the Agency allows a
10 RECRA-like closure without requiring a RECRA
11 permit, i.e., where hazardous waste has been
12 accumulated in a container for more than 90 days.

13 I think I was struggling with what was
14 intended there in the same way that Larry was
15 struggling with the response on No. -- on
16 question -- the previous question. I think I
17 was -- No. 2, as far as the Board's questions. I
18 think it's -- I think they are the same question.
19 I think the answer is the same for both.

20 MS. ERVIN: Follow-up?

21 MR. RIESER: No.

22 MS. ROSEN: No.

23 MS. ERVIN: Mr. Wight, if you would
24 like to go to the next question.

1 MR. WIGHT: The next response which we
2 owed was for Question No. 6 on the Board list.
3 Why does Section 741.105(c) discuss the
4 non-applicability of Part 741 in terms of sites,
5 while Section 58.1(a)(2) of the Act discusses the
6 non-applicability in terms of persons?

7 MR. KING: We just paralleled the
8 language that's in 58.1(a)(2). 58.1(a)(2) does
9 have the introductory phrase "any person," but
10 then it goes down and describes the exemptions --
11 rather than in terms of persons, describes the
12 exemptions and terms of sites, so we just -- we
13 just chose the word "site" because that was in
14 the statute, and that was also the term that we
15 used when we drafted part 740, so I think we were
16 being consistent with the description in the
17 statute and also consistent with our previous
18 regulatory proposal and the Board's adoption of
19 that proposal.

20 MR. RIESER: So, that's the statutory
21 language that says, any person may elect to
22 proceed under this title unless the site meets a
23 certain condition?

24 MR. KING: That's correct.

1 MS. ERVIN: Are there any follow-up
2 questions?

3 MS. ROSEN: No.

4 MS. ERVIN: If you would like to
5 proceed to the next response --

6 MR. WIGHT: Next response, this is in
7 response to Board Question No. 8. Why does
8 Section 741.105(c)(2) delete the requirement that
9 a permit must have been issued under federal or
10 state solid or hazardous waste laws for a site to
11 fall within the applicability exclusion of
12 Part 741? What is the Agency's support for
13 relieving this requirement?

14 MR. KING: The language that we have
15 used here is -- it's not identical, but it's
16 almost identical to the language that is --
17 appears in a similar applicability provision in
18 Part 740. It's conceptually the same concept.

19 The notion here whether you have the
20 permit or not, even if there is no permit, a
21 person is operating without -- he is operating
22 illegally without a permit, they're still subject
23 to closure requirements, so that concept is still
24 embedded in the language of the statute already,

1 and so we haven't really expanded that.

2 We did narrow our language here by
3 putting the word "current," and I don't believe
4 that's in the 740 draft; although, it's implicit
5 within it. And the word "current," in essence,
6 narrows the scope of the exemption because -- so
7 that you would have old sites that are not --
8 that are no longer subject to permit or closure
9 requirements. They could then take advantage of
10 the PSL Rule.

11 If you didn't have the word "current"
12 in there or if that was not implied to be in
13 there, then you would have a situation with
14 anyone who had ever gotten a permit or anyone
15 that was required to get one or go through
16 closure would fall outside of the PSL Rule, and
17 we thought that would be too broad of an
18 exemption.

19 MS. ERVIN: Is there a follow-up
20 question?

21 Seeing none, Mr. Wight, if you would
22 like to proceed with the next response.

23 MR. WIGHT: The next response, there
24 was -- excuse me just a minute. The next

1 response is on follow-up to Board's Question 14.
2 The follow-up, I believe, can be found in the
3 transcript at Pages 112 to 113. This was a
4 series of three questions asked by Mr. Rieser, I
5 believe, regarding the incentive to produce
6 information --

7 MS. ERVIN: Excuse me, Mr. Wight.

8 MS. ROSEN: I am sorry. It's because
9 of the manner that we are proceeding. We
10 couldn't tell if you were ready to move from the
11 applicability or -- we do have some follow-ups
12 that pertain to applicability, so should we
13 address that now?

14 MS. ERVIN: For sake of keeping a
15 consistent record, let's go ahead and have you
16 ask the follow-up question to the applicable
17 sections.

18 MS. ROSEN: Okay. At the last hearing,
19 there were a number of questions asked in regard
20 to just whether the Agency was in concurrence
21 that the applicability section that precluded
22 applicability to owners and operators rather than
23 certain sites might satisfy the Agency's concern
24 regarding continued enforcement of their

1 federally authorized programs. And at that time,
2 Mr. King, you said that you agreed that, yes, the
3 section -- the applicability section could stand
4 more narrowing, and we would not without
5 threatening federal approval. Would that -- is
6 it correct to say that the Agency and the Board,
7 in fact, encountered a similar situation when we
8 were adopting the Part 742 regulations, which the
9 concern at that time was whether the TACO
10 regulations could, in fact, be used for LUST
11 sites and whether there would be a concern in
12 that regard to program approvability of the
13 state's LUST program. Do you agree that that's
14 the similar concern we are trying to address at
15 this time?

16 MR. KING: Yes. There are some
17 similarities to the situations, not entirely,
18 obviously, but there are some similarities.

19 MS. ROSEN: Well, I guess the point of
20 the question is that where the USEPA had
21 expressed concern with Title 17 and its use in
22 the LUST situations, we were able to put our
23 heads together and identify a compromise that
24 would allow the use of TACO in appropriate

1 situations. And what we are doing here now would
2 be to also narrow applicability in a manner that
3 would preserve the State's approval of -- USEPA's
4 approval of the State's other authorized
5 programs.

6 MR. KING: I think that's correct.
7 Now, you have to remember there is a difference
8 between the two in terms of how the federal
9 procedures work. There is no federal cleanup
10 standard. Okay. There is no federal TACO
11 equivalent, so we were very confident because of
12 the way we had structured that in consistency
13 with the guidance that they have created that
14 that was going to be okay. There are federal
15 liability provisions, and so it's -- this is a
16 more difficult task in this context to draft
17 something that is more narrow and still is
18 consistent with those federal liabilities. And I
19 think in my direct testimony on May 4th I think I
20 discussed what those concerns were, at least as I
21 saw it.

22 MR. RIESER: At the last hearing, one
23 of the questions that was asked -- and forgive me
24 if I am hopping ahead -- was whether the language

1 that was proposed by SRAC with respect to
2 applicability, addressed the Agency's concerns,
3 and that was one of those things that I think you
4 were going to get back to us, and I was wondering
5 whether you were prepared to do so now?

6 MR. KING: No.

7 MR. RIESER: Thank you.

8 MS. ROSEN: That's it.

9 MS. ERVIN: Will you be prepared by the
10 next hearing to address this issue?

11 MR. KING: Yes.

12 MS. ERVIN: Sir, could you state your
13 name?

14 MR. NEWCOMB: My name is Christopher
15 Newcomb from Karaganis & White. I gave the court
16 reporter my card.

17 My question is, actually there are two
18 follow-up questions. You may have addressed this
19 in the May 4th hearing, but has the USEPA given
20 you any indication, formally or informally, that
21 this is a similar type of situation where the
22 federal authorization may be taken back for any
23 part of the program?

24 MR. KING: What I said at the May 4th

1 hearing was that we had not communicated with
2 USEPA relative to this concern because it wasn't
3 right to do it yet. The concern -- I mean, the
4 Board has got to make a decision as to how this
5 operates, and if it doesn't impinge the liability
6 issues related to what -- how the RECRA program
7 and the Subtitle C, D and I programs operate,
8 then there is really no point in discussing it
9 with them.

10 If it does, then we will have to
11 address it at that point. I think we have been
12 cognizant of that issue, and I think SRAC has
13 been very cognizant of that issue and saw it as
14 something that they did not want to -- they
15 didn't want to disturb the underlying structure
16 of the relationship between the state and the
17 federal government relative to those programs,
18 and, so they have been -- I think they were very
19 careful with their proposal to try to make sure
20 that that was not a problem.

21 So, we don't want to -- you know, I
22 think it would have been very simple to have
23 somebody from USEPA, RECRA enforcement program to
24 attend these hearings, and they could pose their

1 view. But I don't think -- it is kind of
2 extraneous to what we are really trying to do --
3 accomplish as part of this hearing.

4 MR. NEWCOMB: And then the second
5 follow-up that I had is concerning the same
6 applicability questions of proposed 741.105(c)
7 says, unless allowed by federal law. Do you
8 intend that would be some specific allowance and
9 apply the allowance by reasonable negotiations,
10 when a client may meet with the IEPA. Can you
11 give us some clarification of what you intended
12 by those words?

13 MR. KING: We use the same words in the
14 Part 740 Rule, and it applies to situations
15 where -- and we described in this rule as we
16 described in the Part 740 Rule three ways that we
17 saw that federal approval could occur, so to
18 speak. One was matters if it's in the law or the
19 regulations; secondly, there could be some formal
20 authorization; or, third, there could be another
21 type of written federal approval.

22 And one of the ways we followed through
23 on that was under the 740 Rules was to establish
24 a memorandum of understanding relative to the

1 Underground Storage Tank Program, and so we used
2 that mechanism.

3 MS. ERVIN: Any other questions
4 regarding the applicability sections?

5 Seeing none, then we will move on to
6 the pre-file questions regarding information
7 orders. Section 741.115. I believe, Mr. Wight,
8 you said you had a response to Question No. 14?

9 MR. WIGHT: Actually, it was a series
10 of follow-up questions to Question No. 14. The
11 follow-up questions are found in the transcript
12 in the vicinity of Pages 112 and 113. I believe
13 there was a series of three questions asked by
14 Mr. Rieser, and Mr. King will respond to those.
15 I will read the questions individually, and
16 Mr. King will give the response.

17 The first question was, in a joint and
18 several liability system, is the information that
19 an individual brings forward regarding how much
20 stuff they sent to the site, is that relevant to
21 how much they have to pay under that system?

22 MR. KING: Our view is that it is, and
23 it's particularly relevant if you're looking at
24 issues related to divisibility. There is a line

1 of federal cases under CERCLA, and they go back
2 to the case of United States versus Chem-Dyne --
3 and do you want me to go ahead and put in the
4 citation?

5 MS. ERVIN: Please.

6 MR. KING: The citation is 572 F. Supp.
7 802, and Southern District of Ohio (1983), and
8 that case and a series of cases following that
9 have ruled that where a defendant can demonstrate
10 a harm on a site is divisible, then the principle
11 of joint and several liability can be -- there is
12 under the joint and several liability system, an
13 incentive, even in that situation, for a person
14 to bring forth information about materials they
15 managed at a site.

16 MS. ERVIN: Follow-up question?

17 MR. RIESER: I will wait for the
18 whole -- the whole play, and we will see how it
19 goes.

20 MR. WIGHT: The second question, in a
21 proportionate share system where liability is
22 based only exactly the issue of how much they
23 sent to the site or how much they contributed,
24 wouldn't there be a larger incentive for that

1 person to bring that information forward under
2 that system as opposed to a joint and several
3 liability system?

4 MR. KING: As we see it, it really
5 depended on how the system is structured. If the
6 system is structured so a respondent who cannot
7 or will not establish its share of a liability by
8 a preponderance of the evidence gets no
9 allocation, then there's little evidence for the
10 respondent to do everything in its power to
11 establish its share or the shares of others.

12 That type of respondent is going to see
13 that the worst it's going to get is a share of
14 the liability, and in the absence of sufficient
15 information to establish that share, it may end
16 up with a good deal less than a share or maybe
17 even no share. That's part of the reason why we
18 proposed that inclusion of Section 741.210(d)(3),
19 which I discussed in my opening comments.

20 Under that, the prospect is that the
21 Board is going to assign some share of liability
22 to demonstratively liable respondents, even
23 though there is not a specific numeric share that
24 has been demonstrated. It's doubtful that even

1 with 741.210(d)(3), the incentive is as great as
2 it would be under the CERCLA joint and several
3 liability, but there is some incentive created by
4 that.

5 MR. WIGHT: Shall we go on to the third
6 as well?

7 The third question, is there a separate
8 issue regarding the incentive for individuals to
9 try and bring together people into the liability
10 mix, in other words, the number of persons
11 potentially responsible? That's a different
12 issue than demonstrating their own individual
13 shares, and whether the incentive concern has to
14 do with bringing other people in as opposed to
15 bringing one's own information forward.

16 MR. KING: We don't necessarily see
17 these as being separate issues, rather, they are
18 going to operate along the continuum of reducing
19 one's liability exposure.

20 One way to reduce liability exposure
21 under either joint and several liability or under
22 proportionate shares is to demonstrate the
23 involvement in contribution of others. The
24 motive and timing may be different under the

1 different systems, but ultimately the goal is the
2 same. Under what becomes critical -- I think,
3 under the joint several -- the incentives are
4 greater because, particularly, if you are in a
5 situation where people are negotiating out
6 settlement, because under joint and several
7 liability, if you are the last one left behind,
8 then the exposure to cost share can be enormous,
9 and so there is a built-in incentive there.

10 The incentive under the proportionate
11 share liability, we think our proposal has
12 certain incentives, but the incentive to produce
13 such information is not as strong as liability --
14 joint and several liability because one is not
15 going to be -- end up with that entire harm of
16 100 percent where there is more than one
17 liability, even if the absence of a proof of
18 divisibility. However, the incentive to produce
19 information is still greater than it would be
20 under a proportionate share system where none of
21 the costs of remediation are allocated to a
22 liable party unless its share can be proven by a
23 preponderance of the evidence.

24 MR. WIGHT: That concludes our

1 responses to that series of questions.

2 MS. ERVIN: Follow-up questions?

3 MR. RIESER: In the Steagall landfill

4 situation you have described, am I correct that

5 many -- obviously, not all -- but many of the

6 responsible parties that you identified came

7 forward with information and entered into consent

8 orders with the state regarding their share of

9 the costs?

10 MR. KING: That's correct.

11 MR. RIESER: And that share was based

12 on how much they contributed to those sites?

13 MR. KING: By contributed do you mean

14 as generators or are you talking --

15 MR. RIESER: In any fashion,

16 contributed as generators or operated at the

17 site. I understand the operator, the owner was

18 named in some of the lawsuits.

19 MR. KING: Yeah. In essence, that's

20 correct.

21 MR. RIESER: So the state entered into

22 settlement agreements with these persons based,

23 in some respect, on the amounts that they

24 contributed to the site but did not recover from

1 them the entire cost of the remediation expended
2 by the state?

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

4 MR. RIESER: That's it. Thank you.

5 MS. ERVIN: Mr. Wight, do you have
6 other responses under information orders?

7 MR. WIGHT: Let me see. I think that's
8 all.

9 I think the next question we go to is
10 No. 18 on the Board list, which, I believe, is --
11 yeah. That's under burden and standard of proof.

12 MS. ERVIN: I am going to ask a
13 question as to information orders, and why these
14 were limited specifically to the agencies used,
15 and wouldn't these be a useful tool under
16 Subpart C? Do you have any response to that at
17 this time?

18 MR. WIGHT: Yes.

19 MR. KING: We were -- other than we
20 didn't want to outrage too many people with
21 extending things too far, we were modeling our
22 provision of what's in the federal Superfund Law.
23 By the Superfund Law, that information order
24 authority does not extend to private parties, so

1 we just paralleled that.

2 MS. ERVIN: Do you think they would be
3 a useful tool under Subpart C Action?

4 MR. KING: I think it would be a very
5 useful tool. I -- it would then tend to
6 change -- it could tend to change the nature of
7 the dynamics of what happens in those kinds of
8 proceedings because it would be a tool -- tool
9 not available under any other court or, you know,
10 federal administrative system that I think a lot
11 of people would take advantage of.

12 MS. ERVIN: Are there any other
13 questions?

14 MR. MARDER: I have a couple of quick
15 questions.

16 When you talk about Item C, how do you
17 envision the Board imposing penalties for failure
18 to comply? Would that be an enforcement
19 proceeding before the Board? How would that
20 happen, and would there be limits on the
21 penalties?

22 MR. KING: The limits would be the
23 limits as they would apply under Section 42.

24 MR. MARDER: 50,000 or 10,000?

1 MR. KING: Right.

2 Okay. The procedure -- wait a second.

3 I think we would like to take a little
4 time and confer on that rather than just do that
5 while the hearing is in process, and hopefully we
6 can come back and respond to that a little bit
7 later.

8 MR. MARDER: That's fine. It's fine
9 with me. I mean, specifically, I posed the
10 hypothetical that I am ordered to comply and I
11 send back information -- I send back a letter
12 saying I have no information, and if the Agency
13 has reason to believe I do, how would you proceed
14 on that path?

15 MR. KING: I think that's a fair
16 question.

17 MR. MARDER: Another question, Item D
18 states nothing in the section shall prevent the
19 Agency from obtaining information of an unlawful
20 manner. Can you list other lawful manners that
21 you think you would utilize or have the ability
22 to utilize?

23 MR. KING: You mean in this section?

24 MR. MARDER: Other lawful manners that

1 you could use to gather information in lieu of a
2 Board information order.

3 MR. KING: Well, one example -- and
4 this was a -- something we discussed at the last
5 hearing -- and that was related to use of our
6 abilities to go onto a property and do a search
7 at the site of the release, and that authority
8 comes under Section 4D of the Act. That would be
9 one example. That would be the clearest example
10 to me right now.

11 MR. MARDER: Would the use of a 4(q)
12 notice be another means to request information?

13 MR. KING: Well, that's not really --
14 it's not an information -- it's an information
15 request in a broad situation, but it's not an
16 information request relative to things that have
17 happened. I mean, the 4(q) notice is requesting
18 information frequently as to what has happened
19 environmentally at a site. For instance, where
20 we are asking investigators to investigate the
21 site and report to us as to how far the
22 contamination has spread. And, in a sense,
23 that's a request for information, but it's not
24 the same kind of request that the information

1 order is talking about.

2 MR. MARDER: How do you get information
3 right now under the joint and several liability
4 if you have seven potentially responsible
5 parties, you first gather information to decide
6 how to proceed. What mechanism do you use?

7 MR. KING: It's -- in a lot of ways,
8 it's a real hit-and-miss kind of thing, but John
9 Sherrill talked about it in his testimony. We
10 will just kind of go over that.

11 The steps that we use include the
12 following: We review company records where we
13 can get them. For instance, if you go onto a
14 site, sometimes they will be -- particularly in
15 an abandoned site, there will still be records
16 left there. We will review those. Manifests
17 that the agency might have. Courthouse records,
18 there might be some information on a chain of
19 title. Tax report records, property titles all
20 could show the same thing. Secretary of state
21 records could show who's being, you know --

22 MR. MARDER: Aren't there cases where
23 you identify someone who may be a PRP or who you
24 think is a PRP, you just send them a letter and

1 ask them to give you information? That would
2 seem like an obvious way.

3 MR. KING: Well, normally we don't like
4 to just send letters out of the blue without some
5 kind of context of what the letter means.

6 MR. MARDER: Basically, the 4(q) comes
7 after you have gathered information by these
8 other means; is that what you are saying?

9 MR. KING: Right.

10 MS. ERVIN: I believe Mr. King had a
11 question in the back.

12 MR. CHUCK KING: Getting back to
13 Subsection C of that, something else that you
14 gentlemen might want to think about as you are
15 deliberating is, does that subsection -- or,
16 actually, doesn't the Board already have that
17 power, and is that section necessary? Section 42
18 says, the party that violates the court order --
19 et cetera, et cetera. Does this subsection do
20 anything that isn't already part of the law?

21 MR. KING: We will address that
22 question with the other one.

23 MR. FLEMAL: I have an organizational
24 question here. My understanding is that this

1 would apply to only Subpart B being premised
2 there.

3 MR. KING: We were referring to Section
4 741.115. Right?

5 MR. FLEMAL: Yes.

6 MR. KING: That's correct.

7 MR. FLEMAL: What's the purpose in
8 placing this in the general portion of the
9 regulations in Subpart A? Why not put it where
10 it --

11 MR. KING: Well, you know, that's an
12 interesting question, because when we were doing
13 the drafting, I think we originally had to here,
14 and we moved it to Subpart B, and we moved it
15 back to here. And the reason why we moved it
16 back where we did, the -- if you look at Subpart
17 B, it really talks about the title. It is a
18 determination of liability and allocation of
19 proportionate share where a complaint was filed
20 by the state. And this is -- you know, so we are
21 seeing -- the trigger there for Subpart B is that
22 a complaint has been filed, and now we are moving
23 on forward to Subpart B.

24 This is something that comes before the

1 filing of that complaint, so we thought that it
2 would be better understood if it was in Subpart
3 A.

4 FLEMAL: Are you envisioning scenarios
5 other than are present in B and C where this
6 might at some future time apply or --

7 MR. KING: No.

8 MS. ERVIN: Kathleen Crowley from the
9 Board has a question from the back.

10 MS. CROWLEY: I would like some
11 additional information on the information order.
12 Are you contemplating that the Agency would ask
13 the Board to issue a particular order and that
14 the Board would issue the order, and if the
15 source had any problem, they would challenge it
16 after it was issued, or how would this work?

17 MR. KING: We kind of -- we discussed
18 some of that. That question came up at the May
19 4th hearing, and we discussed those things. We
20 are kind of looking or -- are kind of looking
21 through the transcript now. Can we find that and
22 just provide a reference to that? Would that be
23 okay.

24 MS. CROWLEY: I thought that was not

1 conclusive. I don't have it with me, but if it
2 is, fine.

3 MS. ERVIN: Are there any other
4 questions regarding information orders?

5 Seeing none, then we will move on to
6 Subpart B -- Mr. Howe.

7 MR. HOWE: In connection with the
8 information orders, for clarification, my
9 understanding is that you would be able to
10 initiate this with an information order or an
11 information request prior to the filing of a
12 complaint. There are procedures where after the
13 filing of a complaint, any party would be able to
14 request information as a part of the procedures
15 after a complaint has been filed. Is there -- do
16 you see that there are going to be situations
17 where an information order is issued but no
18 complaint is filed for a significant period of
19 time?

20 MR. KING: When you use the term
21 "significant period of time," what were you kind
22 of thinking about there?

23 MR. HOWE: A period of months, years or
24 perhaps even better.

1 MR. KING: Well, I think those are
2 probably all correct. I mean, you could have a
3 situation where the information order is issued,
4 the information comes in, and then based on
5 evaluating that information, you conclude that a
6 complaint should not be filed against that
7 person. So, it would never be filed in that
8 situation.

9 MR. HOWE: I guess the point that I am
10 trying to clarify is if somebody is a PRP and
11 receives an information request and provides that
12 information, that person may want to find out if
13 there are other PRPs around, but prior to the
14 filing of the complaint, would have no
15 opportunity to get that information or at least
16 no means available through this procedure. Do
17 you have any thoughts on how that would or should
18 be addressed?

19 MR. KING: Well, I would expect that
20 the first thing -- one of the first things a
21 responsibility party would request to know is who
22 else were these information orders issued to. I
23 think they would be entitled to obtain that
24 information, and I think that would be, you know,

1 a first step down the road to identifying other
2 responsible parties.

3 MR. HOWE: And I understand that. I
4 guess what my concern is that prior to the filing
5 of the complaint, I don't see that there is any
6 availability of that option to a private party is
7 what my concern is.

8 MR. KING: I mean, there are -- I mean,
9 once you have a public record, which the order
10 would be, I mean, that would -- you know, we
11 would have a copy of that, the Board would have a
12 copy of that, and, you know, those are public
13 records, and they can be obtained through freedom
14 of information at request, you know. So, in
15 essence, we don't specifically mention that here,
16 but I think it is -- it would be governed by
17 those other procedures.

18 MR. HOWE: Then the responses would
19 also be a part of that public record, is that --

20 MR. KING: Yes.

21 MR. HOWE: I see. Thank you.

22 MS. ERVIN: Yes. State your name for
23 the record.

24 MR. SARGIS: I am Mark Sargis of Mauck,

1 Bellande & Cheely. I had a follow-up question on
2 the information order. In the testimony, there
3 was reference to this section being comparable to
4 Section 104(e) CERCLA, and this question has been
5 addressed before. There is no statutory basis in
6 the Illinois Act for an information order, and if
7 we are talking about issuing an information order
8 prior to the complaint being filed, that would
9 seem to perceive the applicability of Subpart B,
10 which would be the Board's proceeding. So, what
11 is the statutory recording that you are referring
12 to other than the broad -- I think you referred
13 to the broad rulemaking power of the Board, but I
14 still don't see a response to the statutory
15 authority for this information order, which would
16 seem to precede the whole Subpart B proceeding
17 itself.

18 MR. KING: Well, again, that was an
19 issue we talked about at the May 4th hearing. As
20 I said then, you will not be able to look through
21 58.9 and find the words "information order"
22 spelled out. They are not there. But we think
23 that the purpose of an information order fits
24 within the Board's broad rulemaking authority,

1 which it's been assigned to accomplish for
2 purposes of developing a proportionate share
3 liability rule, and so that's where we see it
4 fitting.

5 You know, I don't know what else to say
6 as far as a basis for this other than what we
7 have said that's part of the record already.

8 MR. ERVIN: Mr. Rieser?

9 MR. RIESER: I am sorry. One more
10 question going back to Mr. Howe's question. The
11 responses that are filed in response to the
12 Board's order, are they filed with the Board, or
13 are they filed directly with the Agency?

14 MR. KING: I think if you look at
15 741.115(a), it describes the information as being
16 furnished to the agency.

17 MR. RIESER: Thank you.

18 MS. ERVIN: Board Member Flemal?

19 MR. FLEMAL: I believe you indicated in
20 response to an earlier question that I had that
21 you would see these information orders being
22 issued prior to the filing of an action of the
23 Board; is that correct?

24 MR. KING: It would be issued prior to

1 the filing of a complaint under Subpart B, yes.

2 MR. FLEMAL: So, as well, that would be
3 prior to that complaint arriving at the Board --
4 be someplace in your investigation efforts before
5 you do a referral at some stage in that.

6 Mr. KING: It would be at some stage
7 before filing of a complaint.

8 MR. FLEMAL: You would be asking the
9 Board to issue an order, but there would be no
10 proceeding before the Board?

11 MR. KING: Well, there would be a
12 proceeding before the Board in terms of us filing
13 a petition to request the Board to issue that
14 order.

15 MR. FLEMAL: That would be the nature
16 of the action that you would consider?

17 MR. KING: Yes.

18 MR. FLEMAL: The first sentence says,
19 upon request and demonstration, I assume that you
20 mean upon request and demonstration by the
21 Agency? That's a passive voice construction. We
22 need to identify, perhaps, in there such a rule.

23 MR. KING: Your construction, that is
24 correct. We intended that would be by the

1 agency.

2 MS. ERVIN: Now, you said this would
3 only be used before you filed a complaint under
4 Subpart B. Is there any situation in which you
5 would use it after a complaint has been filed?

6 MR. KING: I think once the complaint
7 has been filed, then the normal discovery process
8 would take care of information requests.

9 MS. ERVIN: So, this is limited
10 strictly to before?

11 MR. KING: That's correct.

12 MS. ERVIN: Ms. Crowley?

13 MR. KING: If I can just amplify that
14 one -- just one point. It could still apply for
15 people that were outside of the process. For
16 instance, if the complaint could be filed, but
17 there might be some other persons who are not
18 named in the complaint or that were subsequently
19 identified, and then -- and then an information
20 order could be issued with regards to those.

21 MS. ERVIN: Do you have a follow-up
22 question to what he is saying?

23 MR. RIESER: Yeah. Couldn't you just
24 handle that scenario by means of the subpoena to

1 non-parties I believe the Board is powered to
2 issue?

3 MR. KING: That seems to be correct.

4 MS. ERVIN: Ms. Crowley?

5 MS. CROWLEY: Mr. King, I was able to
6 review the May 4th testimony that I alluded to
7 earlier, and I had read that as your department
8 might be coming out with some additional
9 language, am I reading that incorrectly?

10 MR. KING: I think -- it's one of those
11 things that we will be happy to come up with more
12 language to flesh this out all out, if it turns
13 out -- we don't want to spend a tremendous amount
14 of time doing this, you know, without some kind
15 of recognition that it's going to be part of the
16 Board's rule I guess is -- we would be more than
17 happy to do that.

18 MS. CROWLEY: I guess that's why I was
19 a little surprised that that's all you had for us
20 today. That was the way I was reading that.

21 MR. KING: Right.

22 MS. ERVIN: Yes. Mr. Sargis?

23 MR. SARGIS: Under the scenario, you
24 described the information order was preceding

1 the complaint, and is it conceivable that the
2 agency could request the Board to issue an order
3 without there ever being a proceeding under
4 Subpart B later on such that that information
5 order could really apply to some -- any kind of a
6 site that would be completely outside the realm
7 of a liability application proceeding? In other
8 words, could this -- is this provision intended
9 to be a basis for the Board to issue orders
10 that -- where they have never had the authority
11 or authorization to issue orders before along
12 this in non -- in cases not involving allocation
13 of liability?

14 MR. KING: No. It's not. It's
15 intended to be used in this context.

16 MR. SARGIS: In the context of
17 Subpart B?

18 MR. KING: Right.

19 Let me just -- just so it's -- I don't
20 want to leave too many things hanging. One of
21 the results of issuing an information order would
22 be that you identify parties, and then as a
23 result of that identification, we work out a
24 remedial action, we issue a 4(q) notice, the

1 parties proceed to do the cleanup, and there's no
2 further litigation before the Board. That can
3 certainly be a result.

4 So, that's the context -- that's the
5 context in which we were using this provision.
6 It was not -- it's not intended to expand the
7 board's authority to deal with things that are
8 not releases of hazardous substance or pesticides
9 which are related to, you know, cleanup
10 activities.

11 MS. HENNESSEY: What if you had a site
12 that you suspected was subject to RECRA closure
13 but you weren't sure, would you be able to ask
14 the Board to issue an information order in that
15 situation? And, obviously, those are sites that
16 the Agency contends are not -- cannot be
17 remediated or can't be addressed under the PSL
18 Program.

19 MR. KING: Again, you would have to
20 look back at the applicability provisions of
21 Subpart A. And if the -- if it's a site where
22 the applicability provision would not allow, you
23 know, the information order to attack that
24 problem, then you couldn't use it. You could not

1 use it there.

2 So, you know, we were going through
3 various scenarios earlier where the PSL Rule
4 would not apply, while if the PSL Rule would not
5 apply, then the information order provisions
6 would not apply either.

7 MS. HENNESSEY: But there certainly
8 might be sites where you couldn't tell whether
9 the PSL Rule would apply or not?

10 MR. KING: Well, I suppose that's true.
11 I think that obviously would have to be a
12 decision that would have to be made.

13 MS. HENNESSEY: Would the Agency have
14 to have a good faith belief that the PSL Rule
15 would apply in a situation where they were asking
16 the Board to issue an information order?

17 MR. KING: I guess I am struggling with
18 good faith belief. I think we probably would
19 have to show more than a good faith belief on
20 that score, but at a minimum, yeah, we would have
21 to do that.

22 MR. NEWCOMB: I have a question. Chris
23 Newcomb again.

24 If an information order has been issued

1 and a party has responded to that order, wouldn't
2 there be a presumption then that the PSL would
3 apply? Wouldn't that be a strong presumption?

4 MR. KING: Well, I guess that I would
5 hate to kind of speculate. I am not sure what
6 you mean by "presumption" in that context, if you
7 are talking about a legal presumption or are we
8 just kind of figuring that that would be the kind
9 of site that would fall within the context. If
10 it's the latter, I think that's true. If it's
11 the former, I am not sure how that fits.

12 MR. NEWCOMB: I would construe that as
13 a legal presumption. I presume the Agency
14 perhaps issuing information orders to collect
15 information, then claiming after they collected
16 the information, PSL doesn't actually apply.
17 They are going to get it all from you. So, in
18 order to prevent that kind of negative policy,
19 should there then be a legal presumption if you
20 used this tool, and that now you have to overcome
21 a presumption to show that you were authorized to
22 use this?

23 MR. KING: We hear the proposal you are
24 making. I guess I would like to -- I mean, if

1 you are suggesting that that be a proposed
2 language or a proposed concept that would be put
3 in, I think it would have to be thought out a
4 little more fully, you know, and we don't really
5 have time to do it right here.

6 MR. NEWCOMB: Sure. And it's just a
7 concern that's raised when new powers are being
8 issued or created, one of the real consequences
9 down the line. That's really what I am trying to
10 get at.

11 MS. ERVIN: Are there any questions
12 regarding information orders?

13 MR. NEWCOMB: In terms of
14 clarification, I realize now the language or the
15 information orders, that there must be some sort
16 of nexus between the information that's being
17 requested and the release of a hazard substance
18 or pesticide. Under CERCLA the scope of it is
19 wider, has to do with collecting financial
20 information on the parties. There is no -- this
21 is going to remain a limited area of information
22 that may be requested under these orders; is that
23 right?

24 MR. KING: The -- what I had testified

1 to last week is that it's limited -- the scope of
2 the information order is limited by Items A1, 2
3 and 3. You're right. Under CERCLA 104(e)(2)(c),
4 it authorizes the seeking of information relating
5 to the ability to pay for a cleanup. We don't
6 include that type of request here.

7 I think some of that is -- may be
8 embedded within the share of responsibility for
9 the performance, but it's not -- it's not
10 inability to pay for the cleanup the way CERCLA
11 phrases it.

12 MR. NEWCOMB: Just to clarify then,
13 embedded in the share of responsibility, so that
14 means that you would then be able to ask for
15 information regarding apparent successors,
16 independent relationships, financial records; is
17 that what you mean?

18 MR. KING: No. We weren't intending
19 for it to operate that way.

20 MS. ERVIN: Mr. Sargis?

21 MR. SARGIS: Following up that second
22 to last question about -- I think it was referred
23 to as presumption of PSL applying, is maybe the
24 point that if you are going to use the

1 information order, that you would not use it in a
2 situation to issue an order to one person; in
3 other words, that it would be -- it would only be
4 used if there were two or more persons to send
5 that order to with the idea that PSL may apply
6 down the road, and that you would not have a
7 situation where you would be issuing it to simply
8 one person if the PSL is the idea that you have
9 in mind?

10 MR. KING: Are you suggesting that we
11 would always have to send these out to like two
12 people or more?

13 MR. SARGIS: Well, if you don't have
14 two or more persons, what would be the point of
15 having the PSL allocation process?

16 MR. KING: I think you obviously have
17 to have two people to have the PSL process, but
18 the initial -- the initial -- the first order you
19 issue may be just to one person because you are
20 trying to figure out who all can be brought in.

21 For instance, if you knew -- if the
22 only information you had was from a site
23 operator, but there were other persons who sent
24 information or sent material to that site, you

1 might just issue the information order to the
2 operator relative to who the people were that
3 sent material to the site, and that would lead
4 then to other identified responsible parties.

5 MS. ERVIN: Are there any other
6 questions?

7 At this time, why don't we take a quick
8 five-minute break to stretch our legs, and we
9 will come back and start with Subpart B.

10 (Whereupon, a recess was taken.)

11 MS. ERVIN: We will go back on the
12 record.

13 When Mr. Wight is referring to the
14 Board questions, what that is, is that's pre-file
15 questions by the Illinois Environmental
16 Regulatory Group and Illinois Steel Group which
17 the Board took and compiled section-by-section,
18 so that they are the pre-file questions that were
19 filed by the Illinois Environmental Regulatory
20 Group and Illinois Steel Group, and there are
21 copies on the table for those who didn't get one
22 earlier, and CICIS, they were part of that too.

23 We are waiting for Ms. Rosen and
24 Mr. Rieser.

1 We would like to continue, Mr. Wight.
2 We are going onto Subpart B. The first response?

3 MR. WIGHT: The next response that we
4 had prepared was a follow-up to Question No. 18
5 on the Board's list found in the transcript at
6 approximately Page 118. It was a follow-up
7 question asked by Mr. Rieser. The question was,
8 is there any instance under the Environmental
9 Protection Act where the burden shifts without
10 statutory authorization. Mr. King will handle
11 that response.

12 MR. KING: I think the thrust of the
13 question was that, you know, that type of thing
14 had never been done before, so we found an
15 example where it had been. And the Board looks
16 at Section 808.123. That's a provision dealing
17 with small quantity generators, and I will just
18 go through and read that and look it up at
19 another time.

20 But we thought it's particularly
21 relevant because it talks about enforcement
22 actions within the context of that provision and
23 how the burden of proof lies with the -- lies
24 with the defendant in that situation. The

1 provision reads as follows, any person who
2 generates a total quantity of special waste of
3 100 kilograms or 220 pounds or less in a calendar
4 month is not required to initiate a manifest when
5 delivering such special waste to a hauler,
6 provided that such waste shall not be accumulated
7 for more than 180 days prior to shipment. And
8 any actions to enforce requirements of that part,
9 in which the generator asserts applicability of
10 this section, the burden of proof shall be on the
11 generator to establish compliance with the
12 monthly quantity limitation and the time limit on
13 accumulation. The generator shall record and
14 maintain the quantities and dates of waste
15 generation and accumulation to establish
16 compliance with such quantity and time
17 limitations.

18 MR. RIESER: Isn't the burden of proof
19 under RECRA always on the generator to
20 appropriately document and characterize its waste
21 as a statutory matter?

22 MR. KING: Well, what I just read was
23 not at RECRA provision, so --

24 MR. RIESER: Isn't it part of -- it's

1 part of the special waste regulations?

2 MR. KING: Right.

3 MR. RIESER: Same question, though?

4 MR. KING: Yeah. There are other
5 provisions in RECRA that say the same thing, that
6 the burden of proof shifts to the defendant to
7 prove -- to establish -- to establish -- meet his
8 burden as to the specific factual item that's at
9 issue in the context of that regulation.

10 MR. RIESER: Were there other examples?

11 MR. KING: Yeah. How many did you
12 want? We have one, and I am not sure -- you
13 know, that was -- the question, I thought, was --
14 the question was whether the Board had ever done
15 this before, and here is an example. There are
16 certainly others.

17 MR. RIESER: I would be interested in
18 hearing what they were.

19 MR. KING: Well, you know, we didn't
20 do -- we found this one. We thought this was a
21 good one. We didn't keep going through -- at
22 least I don't have a list of them here. You
23 know, if it's relevant, I suppose we can continue
24 to go through all of the regulations and find

1 every place that this occurs. I mean --

2 MR. WIGHT: Actually, I don't think it
3 is all that relevant. I think that I -- whether
4 or not we had found such an example, I don't
5 think would be dispositive on the issue. We did
6 find one example. Certainly, if you would like
7 to find a counter-example, you are free to look
8 at them and present them. But one example should
9 illustrate the point, and that should be
10 sufficient.

11 MR. RIESER: Thank you.

12 MS. ERVIN: I would like to proceed to
13 the next response.

14 MR. WIGHT: The next question was in
15 response to the Board's Question No. 22. The
16 question generally was with regard to Page 24 of
17 Gary King's testimony of why is it a reasonable
18 assumption that an allocated share belongs to a
19 party that is unable to prove its share of the
20 harm at a site?

21 MR. KING: First, it's important to
22 remember the context of that statement, and the
23 context of that statement is that you have a
24 party, and the party has been demonstrated to be

1 liable in terms of the burden of proof that the
2 state would have to show liability. And so once
3 you have a party that's been established to be
4 liable, we think it's reasonable that the liable
5 party should be paid some share and, you know,
6 not totally escaping from any share.

7 MR. RIESER: So, that party's share
8 should be whatever share was otherwise
9 unallocated under the procedure?

10 MR. KING: Not "should be."

11 MR. RIESER: Isn't that what you're
12 asking the Board to decide, that if that party --
13 that liable party can't demonstrate a share, that
14 its share should be whatever is unallocated?

15 MR. KING: No. What we said -- this is
16 in D3. It says, any respondent unable to prove
17 the degree to which the respondent caused or
18 contributed to the release or substantial threat
19 of a release may be liable for all unapportioned
20 costs or response actions that are the subject of
21 the complaint.

22 MR. RIESER: And we went around and
23 around last time about how the Board made the
24 decision, so we don't need to do that again

1 today.

2 MR. KING: Thank you.

3 MS. ERVIN: Thank you.

4 Board Member Hennessey?

5 MS. HENNESSEY: Under CERCLA, the
6 government or another PRP can only recover if the
7 party's release of hazard substance has caused a
8 response cost to be incurred. Under what the
9 Agency has proposed here, however, somebody can
10 become a liable party even if the substances that
11 they released at a site have not caused the
12 incurrence of response costs. Was that -- I
13 mean, am I reading that correctly or --

14 MR. KING: Well, that would be --
15 from -- I think from a juris prudence type of
16 view, it is always easier with the cost recovery
17 because now we have got a number that's been
18 expended, and, you know -- and so now you are
19 going about looking at how -- what kind of
20 percentage of those costs should be recovered
21 from each party.

22 When you're talking about the front
23 end, it becomes a little more difficult because
24 now you don't know what all of the costs are

1 going to be included as your -- from our
2 standpoint seeking to enforce the cleanup to
3 occur. And I believe the same kind of thing
4 happens under Federal Superfund Laws as well,
5 that it is not just strictly a cost recovery-type
6 situation that they can also seek to have
7 remediation completed as well.

8 MS. HENNESSEY: But the way that the
9 system that proposed to set up, as long as
10 somebody sent hazardous waste, hazardous
11 substance to a site and it was released there,
12 whether or not that even now or in the future
13 will require response costs to be spent, that
14 person is then in the category of a liable party
15 and then has the burden of proving basically
16 that -- what they sent to the site is not going
17 to require any response costs to be spent either
18 now or in the future?

19 MR. KING: Well, they don't become a
20 liable party -- I mean, the phrase has always
21 been used potentially responsible party. They
22 are potentially responsible. They are
23 potentially liable. They only become actually
24 liable once there's been a determination by an

1 adjudicatory body that the standard of proof to
2 establish liability by the plaintiff has been
3 met.

4 MS. HENNESSEY: But the burden does
5 shift once the state shows that somebody sent,
6 caused or contributed to the release of a
7 hazardous substance at the site, then the burden
8 is going to shift to that party to show what its
9 proportioned share is whether or not those
10 substances are what are driving the cleanup?

11 MR. KING: Well, I don't -- I am
12 just -- I am waffling on this a little bit
13 because I think your question is kind of -- is
14 assuming that there's a lower standard of proof
15 that I think actually exists in what we have laid
16 out. We have a series of things that have to be
17 proven in order to establish liability. And
18 once -- it's only after those -- those
19 requirements have been met that now the burden of
20 establishing the proportionate share shifts.

21 MS. MANNING: You are referring to
22 741.210(b)?

23 MR. KING: Yes.

24 MS. HENNESSEY: Even looking at those

1 factors, although, that they require that you're
2 involved somehow with a release of hazardous
3 substances. There is no requirement that those
4 hazardous substances be shown to actually be
5 contributing to the problem at the site.

6 For example, in Mr. Rieser's example he
7 gave last week, we have a site where TCE is the
8 problem. You find someone that has sent lead to
9 the site. They are then considered one of the
10 potentially responsible parties, and the burden
11 does shift to them to show they only sent lead
12 there. They are -- then they shouldn't be --
13 they shouldn't get any share of liability?

14 MS. McFAWN: Wouldn't that be covered
15 by B2?

16 MR. KING: As we were saying, you know,
17 if you look at the introductory language, it says
18 the respondent caused or contributed to the
19 release.

20 Again, if we are talking about a
21 release of TCE, and the guy sent lead there, then
22 he didn't cause or contribute to the release of a
23 TCE.

24 MS. HENNESSEY: So the release doesn't

1 mean any release of hazardous substances?

2 MR. KING: Yeah. There has to be a
3 nexus with what we are focused on as far as
4 needing to be remediated or has been remediated
5 and not just the presence of the hazardous
6 substance set aside.

7 MS. HENNESSEY: And establishing that
8 nexus is part of the State's initial burden?

9 MR. KING: Right.

10 Now, we did -- and I think John
11 Sherrill talked about the issue of
12 fingerprinting, and, I mean, there is a
13 difference between fingerprinting and, you know,
14 what we were just talking about with this other
15 example.

16 I mean, if the person sent TCE to the
17 site, then we wouldn't have to show that the TCE
18 that we were actually remediating was the TCE
19 they sent. Okay. So, I mean, that we would not
20 be presuming as part of our burden under this.

21 MS. HENNESSEY: I understand.

22 MS. ERVIN: Mr. Newcomb, did you have a
23 question earlier?

24 MR. NEWCOMB: No. I am sorry.

1 MS. ERVIN: Are there any follow-up
2 questions?

3 MR. GIRARD: I have one that would
4 probably be best addressed at this spot.

5 Why is the preponderance of the
6 evidence standard more appropriate than another
7 legal standard for making decisions under this
8 proposal?

9 MR. KING: I mean, we are just seeing
10 that as being the standard that applies in a
11 typical civil action. I mean, there would be
12 other ways to do things.

13 You know, if you look at the Federal
14 System, what they have done is a much more
15 complicated process where they create a record
16 and then the record stands, unless it is -- it's
17 an arbitrator of capricious decision. So, that
18 would be a lower standard to do things.

19 We didn't do that -- do it that way
20 here. That would be another way to establish a
21 system and say whatever decision we made relative
22 to the remediation, you know, it would be -- that
23 would be it, only subject to arbitrator of
24 capricious review.

1 MR. GIRARD: Thank you.

2 MS. ERVIN: Mr. Sargis.

3 MR. SARGIS: When you are talking about
4 the legal standards there in the complaint, is
5 there a concept to try to get your hands on what
6 they mean in comparing to other people's
7 standards. But talking about preponderance of
8 the evidence, and I just note that earlier you
9 are addressing introductory statements. You are
10 talking about the evidence is not complete; in
11 other words, if it's not conclusive, show by a
12 preponderance of the evidence, because I was
13 sorry to hear some differing language there that
14 tends to -- of the legal standards, so I assume
15 that's not what you meant by that.

16 I also was looking at the allocation
17 scenarios, which -- some of which show under
18 Scenario 2, for example, where the proof shows
19 incomplete information. So, does incomplete mean
20 that if you deem the information to be
21 incomplete, that the party cannot show by a
22 preponderance of the evidence their share;
23 whereas, incomplete could mean that it's not
24 conclusive.

1 And those are two different legal
2 standards, so I am hearing a few different things
3 even though we are talking about preponderance.
4 I am hearing and seeing other things that might
5 suggest a standard that might be conclusive. So,
6 could you clarify that, please?

7 MR. KING: Well, I mean, what will
8 govern is what's in the rule, and the rule says
9 preponderance of the evidence.

10 In those scenarios, we use the word
11 complete. You know, there are little boxes, and
12 you can put some words in there. You know, I
13 think the concept is still -- I mean, we were
14 just trying to give an example of what we meant.
15 But the standard is preponderance of the
16 evidence.

17 MS. ERVIN: Are there any other
18 questions? Mr. Marder?

19 MR. MARDER. If we went over this after
20 I left, let me know.

21 But I am struggling with, if I have the
22 burden of proof, what exactly -- or generally
23 would I have to provide in the way of proof? For
24 example, if I looked at the exhibit and I was

1 handed -- that was handed in today, No 8, and I
2 looked at a drum or waste-oil recycler where
3 there are multiple PRPs, and the recycler is out
4 of business, he is bankrupt or whatever. I, in
5 fact, did send material to that site. I know
6 exactly how much I sent. I know when I sent it.
7 I have that information, and I provide it to the
8 agency. But how can I prove, or what do I have
9 to do to prove what my share is? I know that the
10 recycler is out of business. I know he had a
11 share. He is liable to some extent. I don't
12 know how much. I don't have the right to gather
13 information from other PRPs, so how would I
14 demonstrate something before the Board as to my
15 share being 10, 20, 30 percent; and if I
16 couldn't, and we didn't know anybody else who
17 sent stuff, would I then be 100 percent liable?

18 I guess if you could just talk a little
19 bit about how you would see a party coming before
20 the Board and saying, this is the evidence I have
21 to demonstrate my -- what my share is.

22 MR. KING: I think a large measure,
23 that's what happens as part of the hearing
24 process. That's part of the process of

1 litigation. That's part of the process of
2 discovery. And you accumulate all of those bits
3 and pieces of information and make a total, and
4 make a percentage off that total.

5 MR. MARDER: So, I as the PRP, have to
6 discover information through all of the other
7 parties or try and seek out other parties if I
8 don't know who they are in order to demonstrate
9 my share?

10 MR. SHERRILL: You know, if we were
11 doing a cleanup of a waste-oil site and we
12 cleaned up one-thousand gallons, and you showed
13 us you only contributed one gallon, I don't see
14 how you would have to know what all of those
15 other parties contributed. All you would be --
16 under this system, you would just be that one
17 gallon out of a thousand. And if you -- under
18 your scenario you said you would know how many
19 gallons you say you sent.

20 MR. MARDER: So, I would use the
21 Agency's information and whatever information I
22 had to allocate myself? Because, in addition to
23 just the cleanup, there is some liability
24 assigned to the owner of the site who didn't put

1 the stuff into the owner site, and he has a
2 liability, and if he is a lessee, he has
3 liability.

4 But I don't have the powers of the
5 state to gather information. I am just a little
6 lost as to how I would -- even if I were to
7 accept this burden, how I could prove it?

8 MR. KING: Well, again, let's -- you
9 know, let's just back up and make sure that --
10 first of all, you -- first of all, I think
11 it's -- you have kind touched of on this. The
12 first thing is you recognize this represents a
13 big difference from joint and several liability.

14 The situation you outlined, that guy is
15 looking at -- brings in that information, he is
16 looking at -- he can get tagged as 100 percent
17 liable. Whereas, here we are saying, no, that's
18 not the presumption. The presumption is that
19 there is going to be a share assigned to that
20 person. Okay.

21 It becomes -- and, again, I think this
22 is where it's been, you know, a big struggle
23 between the private side and the state, who
24 should have this burden of proof? You know, from

1 our perspective, if we have this burden of proof,
2 and we don't meet it, it means, you know,
3 essentially that because there isn't that
4 incentive to provide the information, that the
5 person who is liable now may escape paying any
6 share. That's our biggest problem.

7 You know, we have some information, and
8 we have some -- some tools to gather information,
9 but we don't have the kind of authorities that
10 the Federal Government has. You know, our
11 burdens are more difficult from a financial
12 standpoint. We have already agreed that we are
13 going to be accepting the orphan share concept.
14 It just seemed to us as just kind of as a general
15 matter of fairness that that's the way it should
16 operate.

17 Now, there is going to be -- it's not
18 going to be, in every case, real simple. And you
19 are talking about these recycling sites. Yeah,
20 there is some complexity to it, and it's
21 impossible to get around that. But, you know,
22 when you are talking about a site where you're
23 just talking about chain of title owners, that
24 shouldn't be quite as difficult. I think in

1 those situations, the responsible party has a lot
2 more control on things, and I don't think his
3 problem is going to be quite as difficult there.

4 Yeah -- in the situation you are
5 talking about, yeah, it's going to take some work
6 for the responsible party to fulfill that burden,
7 but I think that's appropriate given the
8 situation.

9 MS. ERVIN: Mr. Newcomb?

10 MR. NEWCOMB: I want to take
11 Mr. Marder's example one step further, and having
12 the burden of proof shifting over to an operator
13 where records don't necessarily exist to
14 determine, with any great degree of certainty,
15 the number of gallons that may have been released
16 at a site. The way that your proposal has been
17 set up is that they may become responsible for
18 the entire share, and I can't reconcile that with
19 the statutory language where it says in no event
20 may the state pursue somebody more than the
21 proportionate share under proximate cause.

22 I think you have identified this
23 conflict that the state has been going through by
24 the parties, but I think that, you know, you

1 reiterating that, that when the burden of proof
2 shifts over to the private sector, and then you
3 are forced to prove a negative or else you are
4 going to be held responsible for the entire costs
5 of the remediation, I think that probably should
6 be --

7 MR. KING: I wouldn't see that as
8 proving a negative at all. You're taking that
9 information and proving what your activities led
10 to. You're showing what your activities
11 accomplished and then asserting what your
12 responsibilities should be based on what your
13 involvement was.

14 I don't see that as being proof of a
15 negative. What we have said is that the Board is
16 going to have to exercise judgment, and if the
17 Board is exercising judgment as to what
18 somebody's share is, I don't see that that means
19 it's not a proportionate share. I mean, if the
20 information is incomplete, why does that mean the
21 guy is paying more than his proportionate share?
22 He is just paying a share, and it's just the
23 Board decided it based on the information that
24 they have.

1 MS. MANNING: If I might, Mr. King, ask
2 you, just to make sure that I understand how
3 741.210(d)(3) is going to work, because I think
4 that's the provision we are really talking about.
5 And using Mr. Sherrill's example of the
6 thousand-gallon spill and one of the respondents
7 clearly being able to prove that they were only
8 responsible for one gallon of that, as I
9 understand 741.210(d)(3), the scenario you are
10 setting up is that if the Board is convinced that
11 the respondent proved that he was only
12 responsible for one gallon of the thousand
13 spilled, and even though there is only one other
14 potentially responsible party who spilled the 999
15 other gallons, if that respondent is an orphan
16 share, or whatever we are going to call them, an
17 unidentified party, a party we can't reach, if
18 the Board is convinced that the respondent proved
19 just his one gallon, then the Board only assesses
20 the 1 percent share -- the one-gallon share, and
21 then the state would be liable for the rest of
22 the 99 -- am I correct?

23 MR. KING: I think that's absolutely
24 correct.

1 MS. MANNING: Whereas, if the Board
2 does not believe that enough proof is there to
3 ascertain just the one gallon, then the
4 respondent would share in the responsibility of
5 the entire cleanup; is that the scenario you are
6 setting up with this provision?

7 MR. KING: I think we said maybe, and
8 that's why -- your first scenario, I think
9 that's correct. And it is a maybe, and that's
10 going to be -- the Board is going to have to make
11 a decision based on the evidence it has before
12 it.

13 MS. ERVIN: Mr. Howe?

14 MR. HOWE: As a means of further
15 clarifying, let me pose to you another
16 hypothetical dealing with inadequate information.

17 You have a site that's been operating
18 for 20 years dealing with, let's say, exclusively
19 with waste oil. There are no records for the
20 first ten years of operation. Over the second
21 ten years of operation, there are records, and
22 some of those records are manifests, et cetera,
23 that shows that Company X has contributed or sent
24 waste oil there at specific times for specific

1 gallonages. It is estimated that there is
2 100,000 gallons of oil there. The waste-in
3 sheets that you have indicate that Company X,
4 over the second ten-year period, disposed of
5 1,000 gallons of that. There are 1,000 gallons
6 at that site, but there are no records whatsoever
7 for the first ten years of operation.

8 Company X comes in. They have a
9 witness on the stand or somebody comes in and
10 there is a witness that basically says, yes,
11 these manifests are accurate, et cetera. We have
12 no idea who contributed what during the previous
13 ten year period.

14 Somebody puts X on the stand and says,
15 well, could you have put -- could you have sent
16 something there? And Person X says, I really
17 have no idea whether we did or not. We simply
18 don't know, the person that was responsible is
19 dead or something like that, and we just don't
20 have any records.

21 In that situation, how would you see
22 the allocation against Company X working?

23 MR. KING: I think in that proceeding,
24 as you would in any proceeding, you have to judge

1 the credibility of the information. If Company X
2 was next-door to this site, and the second ten
3 years of records showed every single day for that
4 period of ten years, Company X sent material
5 next-door to that site, but there were no records
6 for the previous ten years, but the site was
7 in -- you know, they were in operation all that
8 time, and it seems like a very artificial thing
9 that that one day occurred, well, you know,
10 that's going to have to be a judgment as to
11 credibility. To me that -- in the additional
12 facts I have added to the hypothetical, it would
13 look to me as the fact that that next-door
14 neighbor probably should share some of the burden
15 relative to that first ten years.

16 MR. HOWE: Should he share just 1
17 percent of the burden or should he share the
18 entire burden? This is getting to the issue of
19 burden of proof and consequences if you don't
20 prove your portion.

21 MR. KING: Again, I think it's going to
22 be an issue of credibility. If, for that
23 second -- in your hypothetical, you are showing
24 that second ten years it's just that 1 percent

1 and now it -- all things being equal based on
2 site operations from the previous 10 percent,
3 then perhaps that 1 percent is the correct
4 number, the correct judgment to make based on the
5 facts of the situation.

6 MR. HOWE: Okay. Thank you.

7 MS. ERVIN: Mr. Sargis, do you have a
8 question?

9 MR. SARGIS: You mention the concern
10 that if the burden was not shifted back to the
11 PRPs, that there would not be an incentive for
12 PRPs to come forward with information; is that
13 right?

14 MR. KING: Right.

15 MR. SARGIS: Under the current practice
16 of enforcement proceedings, the Agency can name
17 one or a few PRPs selectively and then leave the
18 PRPs to kind of bring other people in under joint
19 and several liability. If the burden is shifted
20 to the PRPs, however, what would prevent -- or
21 what would be the incentive for the Agency to try
22 to name everybody rather than just simply
23 selectively name PRPs as the Agency votes on?

24 MR. KING: Well, I think if we are

1 naming -- if we are naming a person who has a
2 1 percent share, and he can prove he has a
3 1 percent share, then if we name only that
4 person, we are only going to get 1 percent;
5 whereas, under joint and several, obviously you
6 can force him to bring all of those people in.

7 I mean, it's in our interest to
8 identify as many people as early in the process
9 as possible.

10 MR. SHERRILL: We talked about that on
11 May 4th, that even under the old system, we tried
12 to identify -- it's always in our best interest
13 to identify as many responsible parties as
14 possible.

15 MR. SARGIS: In practice, though, many
16 times it doesn't happen. I think there are a lot
17 of examples of that, but as a practical matter,
18 the Agency doesn't need to name all of the
19 parties because you can hook one or more and you
20 can get those parties to respond or try to get
21 them to respond.

22 MR. SHERRILL: I can't speak for every
23 4(q) we have issued. For the ones that have kind
24 of been under my watch, we have tried to identify

1 as many parties that we can that we believe are
2 potentially responsible.

3 MS. ERVIN: I think we have covered
4 this issue pretty thoroughly, if you would like
5 to move on to the next response?

6 MR. WIGHT: Let's see. That was -- the
7 next questions here, you know, again, we touched
8 on some of these in the expanded discussions we
9 have had as a result of the follow-ups. Many of
10 these kind of touch on the same issue.

11 I will go ahead and read the question
12 here, if we think we have already answered it, we
13 will just say so.

14 The next question for which we had a
15 response was the Board's Question No. 23 -- or
16 Question No. 23 on the Board's list, in the
17 instance where a party is unable to produce
18 adequate information for a proportionate share
19 determination, explain how the Agency proposal is
20 any different than the imposition of joint and
21 several liability.

22 MR. KING: I think I covered that
23 pretty well already -- at least our views on
24 that.

1 MR. WIGHT: No. 13 in the statement of
2 reasons on Page 11 -- oh, excuse me. This
3 relates to the Board's list of questions, No. 24.
4 And the statement of reasons on Page 11 says that
5 Section 741.210(d)(3) is necessary, quote, to
6 prevent liable parties from entirely escaping
7 responsibility in cases where there is
8 insufficient information to apportion harm or
9 where the harm is incapable of division, end
10 quote.

11 How can a party escape liability under
12 the proportionate share provisions if its
13 liability has already been demonstrated.

14 MR. KING: Yeah. I guess I really
15 don't have anything further to add to that. I
16 think we covered that subject matter already.

17 MR. WIGHT: The next response that we
18 had prepared was a follow-up to the -- No. 26 on
19 the Board's list. It's found approximately at
20 Page 154 of the transcript. The question is, how
21 much of a hazardous waste fund has been spent on
22 remediation in the fiscal year 1997?

23 MR. SHERRILL: This is difficult to
24 provide a quantitative answer because, for

1 example, on the Steagall case study that I
2 presented, the state started expending money on
3 that site over ten years ago, and we still have
4 hope to collect money.

5 With this in mind, though, for '97,
6 approximately \$5 million was toward remedial
7 expenses, and approximately 2 million of this
8 5 million, in my judgment, may be unrecoverable.

9 And then this kind of gets back to the
10 funding. I don't know if you want to talk about
11 the J and R at this point, because it talks about
12 the orphan-type shares.

13 MR. KING: Yeah, let me -- rather
14 than -- I hate to digress too much on this, but I
15 want to talk about -- you know, give you a flavor
16 of kind of the decision-making we have to go
17 through on how we allocate funds for these sites,
18 and these orphan sites really do become very
19 expensive, and we are trying to find different
20 ways to make the dollars stretch a little further
21 as far as remediation.

22 We have a site down in -- near
23 Belleville, Illinois, and it's called the J and R
24 Landfill, and we were out there, you know, early

1 part of April, and as soon as you had gone out on
2 the site, it was a windy day, but you could still
3 smell that nice pungent smell of leach-aid in the
4 air, and you could stand there and see the
5 leach-aid kind of flowing down these gullies, and
6 in that case, they are -- the leach-aid is
7 flowing toward a very nice manicured set of
8 soccer fields, which, obviously, in April there
9 weren't any kids playing there, but you could
10 certainly anticipate that in June or July you
11 would have ten soccer fields -- ten soccer fields
12 full of kids playing soccer right next to a site
13 where leach-aid is flowing down a hill toward
14 those soccer fields.

15 So, we really -- you know, we --
16 the site was such a concern to the local people
17 there that they're going -- the county itself is
18 going to commit over \$1 million to do remediation
19 there, and we are going to commit -- obviously,
20 we don't know what the costs all are. We are
21 looking at committing probably \$2 million,
22 \$3 million from the Hazardous Waste Fund to do
23 that cleanup, and we are going to attempt to
24 collect that.

1 We are in a real difficult
2 situation there because we have got a bankrupt
3 owner and operator, and, you know, so that's
4 going to be tough as far as collecting any funds
5 from that site, but I think that's kind of -- we
6 wanted to give that as an example as to something
7 that's beyond going in the -- during this fiscal
8 year and in the coming years as far as an orphan
9 site.

10 MR. SHERRILL: To follow-up too on some
11 questions that I found from Mr. Rieser, in fiscal
12 year '97, there are 28 different sites that we
13 were recovering money from. We identified 10 of
14 those sites had -- 4(q)s had been issued to them
15 some time in the past, and there are 3 -- if this
16 is a good enough answer for you -- 3 of them were
17 not sure if the 4(q) had been issued or not, so
18 the answer is 10 to 13.

19 And then following up on another
20 question earlier today on cost recoveries where I
21 gave the range of \$1.5 to \$3 million. In fiscal
22 year '97, we had said \$2.5 million. Fiscal year
23 '96, approximately \$3 million cost recovery
24 monies that go into the Hazardous Waste Fund.

1 1995, approximately \$1.9 million. 1994,
2 approximately \$1.5 million. And that's where I
3 would come up with this range of \$1.5 to \$3
4 million.

5 So, if that takes care of those --

6 MS. ERVIN: Are there any follow-up
7 questions in response to their statements?

8 Seeing none, Mr. Wight, would you like
9 to proceed?

10 MR. WIGHT: The next question for which
11 we had a -- well, actually, we are skipping one
12 here, No. 27 on the Board's list we perceive --

13 MR. RIESER: I am sorry. I think the
14 question was -- the question that Gary just
15 answered is how much was spent from the fund, and
16 I think the question I asked is what percentage
17 of the fund was spent on remediation activities
18 as opposed to other activities that are
19 authorized under the fund.

20 MR. SHERRILL: In '97, there were other
21 activities that --

22 MR. KING: Let me make sure that we are
23 understanding. I am not sure we got the details
24 here. We may have misunderstood the question.

1 You are talking about like we have
2 money coming out that goes to ground water
3 protection activities; is that what you are
4 talking about or are you talking about --

5 MR. RIESER: Yeah. That fund -- under
6 the statute those fund monies can be used for
7 other purposes other than direct investigation
8 and remediation of contaminated sites. And my
9 question is, what percentage of that money --
10 that fund for that year, what percentage does
11 that represent?

12 MR. KING: So that 5 million is a
13 percentage of what is what you are asking?

14 MR. RIESER: Right.

15 MR. KING: I don't think I have that
16 right here.

17 MR. RIESER: Thank you.

18 MS. ERVIN: Mr. Wight, if you want to
19 move on to the next response?

20 MR. WIGHT: The question on No. 27 on
21 the Board's list we believe is essentially the
22 same as No. 22 on the Board's list, which we have
23 already answered today. Both of those were
24 deferred, but they were the same question.

1 The next question was Board Member
2 Hennessey's question regarding orphan share and
3 allocated share in which Gary King answered in
4 his introductory remarks.

5 The next question was a question by
6 Chairman Manning about what "incomplete" meant on
7 Exhibit 7 of the Agency's scenarios. That has
8 been discussed in Mr. King's introductory
9 remarks, and the question, I believe, was also
10 asked by Mr. Sargis.

11 The next question for which we owe a
12 response is Question No. 29 on the Board's list,
13 for each year from 1991 to the present, how many
14 time-critical sites per year have been referred
15 to the USEPA. Excuse me. This was found at
16 approximately Pages 157 and 158 of the
17 transcript.

18 MR. SHERRILL: The context of this
19 question was, you know, when we try to conserve
20 the hazardous waste fund monies and stretch our
21 dollars, we can refer sites to -- for re --
22 immediately removal actions to USEPA.

23 And the records are sketchy prior to
24 1995, and some sites are referred to USEPA by the

1 City of Chicago. The USEPA refers sites also to
2 itself as well as the Illinois EPA. We had
3 stated in our testimony that the Illinois EPA
4 typically refers 15 to 20 sites per year.

5 Now, go on a little bit further on
6 that, in 1991, 7 sites had this immediate removal
7 actions. How many were referred, we don't know.
8 I am still under -- though, we believe it's
9 approximately 15 to 20.

10 11 sites had immediate removal in 1992.
11 These were USEPA actions. 11 sites had immediate
12 removals during 1993. 10 in 1994. 15 immediate
13 removals during 1995, and also in 1995 there were
14 9 additional sites referred, but the USEPA took
15 no removal action. In 1996 there were 19 sites
16 that had immediate removals, and there were 6
17 additional referred but no action. There were
18 13 that had immediate removals in 1997, and with
19 an additional 5 that were referred but had no
20 removal action.

21 Larry, did you want to follow-up on
22 that one?

23 MR. EASTEP: That's fine.

24 MR. RIESER: So, the information that

1 you have given us, this is the number of sites in
2 Illinois at which the USEPA performed immediate
3 removal actions?

4 MR. SHERRILL: Correct.

5 And like I said, before 1995, the
6 records are sketchy on the referrals, but we do
7 have some of the years that -- I went over,
8 actually, how many removal actions they
9 conducted.

10 MR. RIESER: Right. And some of those
11 referrals -- the City of Chicago could also send
12 out referrals to the USEPA at the same time?

13 MR. SHERRILL: Right. USEPA and also
14 other units within USEPA also refer it to this
15 branch within the USEPA.

16 MR. RIESER: So your gut sense of 15 to
17 20 referrals over this time, you have reviewed
18 the records, and you still think that's the
19 correct number?

20 MR. SHERRILL: Correct.

21 MR. RIESER: Thank you.

22 MR. WIGHT: Perhaps this is a good time
23 to take that lunch break that was discussed
24 earlier. It is certainly up to you, and we are

1 in kind of a natural break-point. Our remaining
2 responses have to do with the Board's questions
3 on Subpart C.

4 MS. ERVIN: We will break. We will
5 reconvene in an hour at ten until 2:00.

6 (Whereupon, a lunch break was
7 taken.)

8 MS. ERVIN: I think we are ready to
9 begin.

10 Mr. Wight, I think you were going to
11 start on answering some questions you had
12 remaining from the last hearing on Subpart C.

13 MR. WIGHT: Before we do that, Gary has
14 a couple of follow-up remarks on some information
15 regarding USEPA.

16 MS. ERVIN: Fine. Thank you.

17 MR. KING: At the close of the morning
18 and early afternoon session, we were discussing
19 the USEPA removal actions, and just so it's clear
20 on the record, that's not anything that they're
21 obligated to do. It's not a commitment that they
22 make to the state of Illinois. It's a
23 discretionary activity on their part, and that
24 could stop at any time, and it -- as John

1 described last week, last year when they had the
2 methyl parathion situation here in Chicago, that
3 consumed a lot of their efforts for the removal
4 program, of course, so we didn't have -- we
5 stopped referring cases during that time frame.

6 So, I just want to make that clear.
7 It's a discretionary thing on their part as far
8 as funding those things.

9 MS. ERVIN: Thank you.

10 Mr. Wight?

11 MR. WIGHT: There was a series of
12 questions at the end of the May 4th hearing
13 regarding provisions in Subpart C. Those
14 questions were not a part of the Board's list
15 which consisted of a compilation of the
16 questions -- of the pre-file questions; however,
17 I will repeat the question as provided by the
18 Board, and Gary King will provide the Agency's
19 initial response.

20 First of those questions was, what
21 would happen to a Subpart C proceeding if the
22 state initiated a Subpart B proceeding during the
23 pendency of the Subpart C proceeding?

24 MR. KING: First of all, we think that

1 would be an extremely rare case for that to
2 happen, because if there's a Subpart C proceeding
3 ongoing, it's an indication that a site is going
4 to be remediated voluntarily and without orphan
5 shares, and so there really would not be a reason
6 to initiate a Subpart B proceeding.

7 The only situation we could really
8 think of where there might be appropriate is if
9 the Subpart C proceeding was just -- you know,
10 nothing was going on, nothing was progressing, it
11 was just sitting there, it was more of a delaying
12 tactic than an honest effort to move forward
13 toward remediation.

14 Now, we were -- what we think --
15 however, to clarify that, what we were
16 contemplating doing in an errata sheet relative
17 to Subpart C -- because there are some other
18 things we will talk about that need to be
19 clarified -- what we were planning on doing is to
20 add a provision giving the Board discretionary
21 authority to issue a stay order stopping the
22 Subpart C proceeding pending the outcome of the
23 Subpart B proceeding.

24 MS. ERVIN: Is there a follow-up

1 question?

2 Thank you. If you would like to

3 continue.

4 MR. WIGHT: Next question upon which we

5 owed a response, and, in general, the Board

6 expressed concern that under certain scenarios in

7 both Sections 741.320(b)(3) and 741.325(b), the

8 concern was that the total of the agreed

9 allocations among the hearing participants is

10 unclear, so we have a reply to that.

11 MR. KING: Yeah. This is somewhat

12 similar to the response on the previous question,

13 and that is the nature of why we think an errata

14 sheet would be appropriate to just add some

15 additional language to that section to clarify

16 that provision.

17 MS. ERVIN: Are you going to be

18 introducing this errata sheet at our next

19 hearing?

20 MR. KING: That's correct.

21 MR. WIGHT: The next question concerns

22 Section 741.320(C)(2), actually, there were a

23 couple of questions involved there. The first

24 was, does the Board have to allocate the full

1 100 percent; and the second question was, how can
2 the Board allocate the full 100 percent when the
3 parties with agreed allocations have been
4 dismissed?

5 MR. KING: This issue appears similar
6 to the issue that we just talked about in the
7 previous question; however, in this case, we
8 thought we had correctly stated the principle,
9 and we didn't think another errata was necessary
10 there. We thought we had a cross-reference to
11 741-315(a)(1), which we think is the correct
12 cross-reference, so we thought that was correctly
13 set up already.

14 MS. ERVIN: Thank you. I am sorry.

15 Mr. Flemal?

16 MR. FLEMAL: Can I do some follow-up on
17 this?

18 MS. ERVIN: Sure.

19 MR. FLEMAL: 320, particularly in C1,
20 it sets out a process where the hearing officer
21 makes a recommendation to the Board. What is
22 perceived by the Agency's merits of this
23 procedure?

24 MR. KING: I guess I am a little

1 confused by the term "merits."

2 MR. FLEMAL: You're proposing it, I
3 presume, because you believe this is an
4 appropriate course of action and why you see it
5 as a meritorious course of action?

6 MR. KING: Yeah. We thought that -- I
7 guess this is a little bit different from the way
8 the Board process works in an enforcement
9 hearing, but we thought that having a
10 recommendation by the hearing officer relative to
11 the allocations was an appropriate thing,
12 particularly in light of -- you know, we were
13 talking earlier about some of the issues relative
14 to credibility of the evidence. We thought that
15 having a hearing officer recommendation rather
16 than just the record going to the Board would be
17 an advisable way to do things.

18 MR. FLEMAL: What do we gain by having
19 the hearing officer make that recommendation
20 rather than the Board make it?

21 MR. KING: I think, to some extent, the
22 gain that's made is the hearing officer having a
23 little more control on things, I guess.

24 MR. FLEMAL: More control than the

1 Board has?

2 MR. KING: No more control than I would
3 see a hearing officer has had in other types of
4 proceedings.

5 MR. FLEMAL: I understand that this is
6 different, but you are suggesting that in other
7 proceedings it has not been the optimum way to
8 proceed?

9 MR. KING: Well, one of the things -- I
10 guess this comes back to -- maybe we should talk
11 a little bit about the history of how we develop
12 this kind of an approach.

13 Yeah. As we discuss this with the Site
14 Remediation Advisory Committee and talk to
15 outside persons who were -- had been involved in
16 allocation procedures on a federal level, the
17 conclusions that we were reaching relative to
18 that were that it seemed to have -- it made more
19 sense to do that, to have a hearing officer who
20 could -- would be in a position to push the
21 parties to reach allocations relative to those
22 to -- rather than just -- rather than just to sit
23 back and hold the hearings and be done with it,
24 that really he would have a more active role in

1 trying to get the parties to reach --

2 MR. FLEMAL: Would writing a
3 recommendation push the hearing officer to do a
4 better job or to get the parties to agree?

5 MR. KING: I think it does in terms of
6 it -- if he doesn't have a responsibility to take
7 that role, then I don't think there is as much
8 incentive for him to try to get the parties to
9 work things out.

10 MR. FLEMAL: The Board has a 27-year
11 history where this has not been the case. I
12 guess I fail to see where it would get us to
13 change this.

14 Let me ask, are there any technical
15 decisions that you expect that the hearing
16 officer would be making in reviewing and making
17 this recommendation?

18 MR. KING: You mean in terms of like
19 remedial decisions and that kind of thing?

20 MR. FLEMAL: If you are going to make a
21 recommendation, presumably you would do it
22 because you are able to make a judgment position
23 call. I think you use, yourself, a statement
24 that the Board is going to have some judgment

1 here. Is this the judgment of the hearing
2 officer that we see in this recommendation?

3 MR. KING: Well, I mean, the hearing
4 officer would be using his judgment. Ultimately
5 the decision would rest with the Board --

6 MR. FLEMAL: That judgment, is that a
7 technical judgment or is that a judgment of law
8 that you see the hearing officer making?

9 MR. KING: I guess I was trying to
10 focus on -- when I heard the word "technical," I
11 was thinking in terms of remediation decisions,
12 and that would not be part of what a hearing
13 officer would be --

14 MR. FLEMAL: -- doing in this
15 recommendation?

16 MR. KING: Correct.

17 MR. FLEMAL: The statement above in
18 320(a) also has -- it says, the hearing officer
19 shall preside over hearings conducted pursuant to
20 Section 341 through 15(a)(3) above, and shall
21 rule on any issues of fact and law presented in
22 the hearing.

23 Can you give me some examples of what
24 kinds of issues of fact and law that you would

1 have the hearing officer rule on?

2 MR. KING: I think we probably should
3 follow this line of questioning up at the next
4 hearing. We really -- I mean, a number of these
5 sections within Subpart C really -- we -- they
6 were put together very early on as part of our
7 discussions with the site remediation advisory
8 committee, and a number of these things, I think,
9 actually came out of the drafts. So, once we
10 kind of laid those to rest in terms of our
11 discussions and went on to what we considered to
12 be some bigger issues, we really -- we haven't
13 returned much to that as far as the discussion.
14 So, I think we should go back and think this
15 through a little bit more before we say too much
16 as far as a response.

17 MS. MANNING: My understanding of what
18 this provision would do, Mr. King, is set forward
19 the hearing officer's authority to issue
20 recommendations of fact and conclusions of law
21 regarding the allocation determination, which
22 would then be appealable to the Board by either
23 party that didn't like that recommendation, and
24 the final determination would only be made by the

1 Board; is that kind of -- sort of a more typical,
2 two-part administrative determination just
3 typical in other administrative contexts? Is
4 that what you are proposing?

5 MR. KING: Right. That's correct.

6 MS. ERVIN: Are there other questions?

7 MR. GIRARD: In other words, you came
8 up with this because you're basing this on a
9 federal model that you think is being useful; is
10 that correct?

11 MR. KING: No. I don't suppose as
12 much, not in this section here because I don't
13 think they have really done that much.

14 What we are trying to do is not reflect
15 so much on a federal model but the experiences of
16 allocators who have worked under the federal
17 system.

18 MS. McFAWN: When you are deliberating
19 that over the next couple of weeks or talking
20 about it, could you look -- maybe try to
21 characterize it whether you want the hearing
22 officer to act as a mediator or an arbitrator,
23 because based on your answers, I am kind of
24 confused as to which it would be? When you were

1 first discussing it, I thought you would wanted
2 them to be more of a mediator.

3 MR. KING: Fair question.

4 MS. McFAWN: That's what -- I am
5 saying, if you can think of it in that context --

6 MS. MANNING: Or perhaps a mixed role,
7 which is appropriate in certain contexts as well,
8 but certain safeguards have to be presented if
9 the hearing officer is to perform a -- sort of a
10 mixed mediation and then arbitrate, you know,
11 sort of an adjudicatory or even recommendation on
12 an adjudicatory mechanism.

13 MR. KING: Right.

14 MS. ERVIN: Are there any other
15 questions you would like the Agency to think
16 about on the same line?

17 MR. GIRARD: Yeah. I have one along
18 the same lines.

19 Several of the public comments seem to
20 hit on the theme that, you know, private industry
21 would like a process which is simple and takes
22 place in a very timely fashion, doesn't use up
23 too many economic resources on, well, the legal
24 parts of this activity, and yet it sees like this

1 is a little bit more cumbersome, because you have
2 got a hearing officer who makes recommendation
3 and puts it out for the parties to comment on,
4 and then the Board, when it makes its final
5 deliberation, it has to deal with the hearing
6 officer's recommendation, and the parties'
7 response to that recommendation, and that takes
8 more time. Doesn't that go against some of the
9 comments that say we want to have a simpler
10 process?

11 MR. KING: Well, you know, ultimately,
12 we have a very simple process, and that's the
13 process that we put together in Part 740 of the
14 Board's rule, which is the Site Remediation
15 Program, which is -- that's a simpler process
16 that -- where people have just agreed to do a
17 cleanup, and they -- outside of the context of
18 any kind of adjudicatory body, they reach some
19 agreement as to how they are going to allocate
20 the cleanup costs, and then they come before the
21 Agency, and we work on the remedial action plans,
22 and we get the site cleaned up. That's really
23 the simplest way of things.

24 This process is there to deal with

1 those situations where responsible parties would
2 choose to make a decision or have a decision made
3 in a public forum as opposed to making it in a
4 private forum. Most all of the time, the
5 decisions are -- they are made in a private forum
6 when it comes to allocation decisions.

7 There are, of course, you know,
8 numerous private cost recovery actions that occur
9 under federal Superfund, but where it's a
10 situation where the government is involved,
11 usually it ends up being some kind of private
12 decision made.

13 So, we do that most simple procedure
14 under Part 740. This is a more complicated
15 procedure. I would agree we weren't quite sure
16 how to make it more simple given the other
17 contexts we had. Part of that, I think, is due
18 to the fact that once we -- you know, everybody
19 kind of came to grips from SRAC's standpoint and
20 our standpoint that we weren't really talking
21 about very many sites. Even under Subpart B we
22 aren't talking about a great number of sites.
23 Subpart C is fewer still. We really ended up at
24 that point not spending a lot of time discussing

1 a lot of the details in Subpart C.

2 MS. HENNESSEY: While you are thinking
3 about this, maybe you can tell me today, is there
4 a particular reason why you have the hearing
5 officer claim this role in Subpart C proceedings
6 but not in Subpart B proceedings?

7 MR. KING: We saw Subpart B as being
8 more akin to a traditional enforcement proceeding
9 in which there will be -- ultimately there would
10 be -- for instance, an example is there would be
11 a remediation decision that ultimately would come
12 out of that enforcement case potentially, that
13 the administrative body would have to make, and
14 we didn't think that that was something that a
15 hearing officer should be making recommendations
16 on, that that should be strictly a Board
17 decision. We had that more paralleled in the
18 enforcement process.

19 With Subpart C, it's a different type
20 of proceeding. It's a new type of process before
21 the Board, who believed at the time we proposed
22 it, and still believe, that it would be
23 meritorious to look at it in a different approach
24 in some of these different kinds of cases.

1 MS. ERVIN: Are there any other
2 questions?

3 MR. NEWCOMB: Have you identified any
4 downsides to the use of Subpart C?

5 MR. KING: Well, you mean from the
6 Agency's perspective?

7 MR. NEWCOMB: From either the Agency's
8 perspective or from the participating party's
9 perspective.

10 MR. KING: From our perspective, we
11 tried to conduct it so there was no downside to
12 us. Maybe that's kind of obvious. We are
13 writing the rules.

14 MS. ROSEN: Self-servant.

15 MR. KING: There may be downsides for
16 people going through the process in terms of it
17 may take additional time, and it does expose
18 certain evidence in a public forum that people
19 might not otherwise want put into a public forum.

20 MR. NEWCOMB: Did you consider whether
21 this may cut off anyone's right of contribution
22 if 100 percent of the shares had been allocated
23 and accounted for and, I guess, authorized in a
24 public forum, whether or not this may create a

1 res judicata for any of the parties?

2 MR. KING: I don't know that we really
3 thought about that. That might be the case.

4 MS. ERVIN: Would you like to think
5 about that and get back?

6 MR. NEWCOMB: Again, I really asked the
7 question because it was -- I guess, earlier
8 questions were formulated. This would be
9 something to consider for the next segment,
10 perhaps.

11 MS. MANNING: I am not sure I
12 understand the question.

13 MR. NEWCOMB: If 100 percent of the
14 shares must be allocated in order to use
15 Subpart C, then aren't the private parties who
16 are participating somehow having you say 100
17 percent of the liability has been taken care of,
18 you, private parties, participated in Subpart C
19 are, therefore, precluded from bringing a
20 contribution action before the Board if you find
21 or want -- or find somebody else who is
22 responsible for the harm or if you want to or if
23 you couldn't get them to participate earlier? I
24 mean, that's one of the problems I see.

1 MS. MANNING: You mean, new evidence
2 would come after the Subpart C determination?

3 MR. NEWCOMB: Possibly. That's not
4 unheard of.

5 MS. MANNING: Certainly, if you had
6 information prior to the Subpart C proceeding,
7 you would bring that forward in the Subpart C
8 proceeding.

9 MR. NEWCOMB: Or if you had somebody
10 who refused, and I realize you may want to force
11 a Subpart C type of proceeding, but if you didn't
12 want to go that route, what are some of the
13 downsides? What are some of the risks you are
14 taking?

15 MS. ERVIN: Ms. Rosen?

16 MS. ROSEN: Wasn't Subpart C intended
17 to be solely voluntary on behalf of the parties
18 that were willing to assume 100 percent of the
19 shares of the cost at the site?

20 MR. KING: Yes.

21 MS. ROSEN: And it wasn't intended for
22 use by parties who were -- later would be seeking
23 recourse against recalcitrant or whatnot that
24 might have had some responsibility in the past

1 but chose not to enter voluntarily into the
2 Subpart C allocation provisions?

3 MR. KING: I think that's a fair
4 characterization.

5 MS. ERVIN: Mr. King?

6 MR. CHUCK KING: When you talk about a
7 complaint back in Section 105, are you
8 considering that to be typical or are you reading
9 Section 58.9 as creating a new proceeding that is
10 filed in front of the Board?

11 MR. KING: We have not seen 58.9 as
12 creating a new cause of action. That would --
13 so, it would have to be from another part of the
14 act.

15 MR. CHUCK KING: Well -- and underneath
16 Part B nor part C -- Subpart B or Subpart C is
17 there a provision for applying this process where
18 you have a suit or a complaint that's filed by
19 less than a full Subpart C group and not by the
20 state. Was that your intention?

21 MR. KING: Yes.

22 MR. CHUCK KING: Why is that?

23 MR. KING: Because if you allow that
24 middle route to occur, then you are going to be

1 in a position of forcing the state to join every
2 one of those proceedings, and that would force us
3 into a position either of being part of that
4 litigation where we haven't chosen to initiate
5 that and end up perhaps committing an orphan
6 share amount to a site where we really haven't
7 concluded that that's the best use of state
8 resources as far as protecting the public health
9 and environment.

10 MR. CHUCK KING: How do you harmonize
11 that exclusion with the statement in Section
12 58.9, that -- I don't have the exact language in
13 front of me, but I understand that that applies
14 to any person seeking that -- who files something
15 before the Board seeking a determination that
16 somebody is liable to remediate or for cost,
17 because that certainly could and has come up?

18 MR. KING: I think the provision you
19 are talking about is 58.9(d), and it's part of
20 the Board's responsibilities as far as adopting
21 this rule, and it includes provision procedures
22 to establish how and when such persons may file a
23 petition for determination of such apportionment.

24 MR. CHUCK KING: I was actually looking

1 at Section 58.9(a)(1), which just has the basic
2 statements in it notwithstanding any other
3 provision of this Act to the contrary, in no
4 event may an agency of the state of Illinois or
5 any other person bringing an action pursuant to
6 this Act seek to recover costs for remedial
7 activity conducted by the state of Illinois or
8 any person beyond the remediation -- so that
9 sounds like that would include a citizen
10 enforcement action where Party A is seeking an
11 order from the Board requiring Party B to
12 remediate a release?

13 MR. KING: Well, that could be. This
14 is our proposal, so, I mean, we were trying to
15 propose something that we thought was consistent
16 with what the -- what is going to be the Board's
17 responsibilities under the statute, and we didn't
18 see that the Board was required to address, you
19 know, that situation, that there was a
20 requirement that they address that.

21 We felt that, again, we would -- for
22 the reason I was saying before, we don't think
23 that that's a good idea, certainly from our
24 perspective, because it could have the potential

1 for the state having to commit monies to a
2 project when we have not concluded that that's an
3 appropriate use of state funding.

4 MR. CHUCK KING: How would that follow?

5 How would -- the scenario I am envisioning is
6 Party A comes in with a citizens' enforcement
7 action and says Party B is responsible for this
8 waste that's been released at this site. We want
9 them -- we order them to clean it up. Party B
10 comes back and says, well, if we are, we are
11 certainly not responsible for all of it, and
12 under Section 58.9, we can only be charged with
13 cleaning up our proportionate share of it. So,
14 what is the Board to do in that situation because
15 it seems like that's not addressed by your rule?

16 MR. KING: You're right. It is not
17 addressed by the rules.

18 MR. CHUCK KING: How does that force
19 the state to commit money?

20 MR. KING: Because it forces us to get
21 involved in that proceeding in the sense that if
22 Party B says, I am less than 100 percent
23 responsible, okay, I think Party C is 75 percent
24 responsible, and he's bankrupt, and he is an

1 orphan, he is not proceeding. But now B proceeds
2 on the notion that he is 25 percent liable; C is
3 75 percent liable. And now they -- they bring in
4 that third guy who is a bankrupt guy in -- as
5 another defendant, and now the result is that we
6 end up with a Board order says that B is
7 25 percent liable; C, an orphan, is 75 percent
8 liable. Now, how does the cleanup occur? How
9 does the cleanup get accomplished?

10 Well, it's only going to get
11 accomplished if the state is going to be involved
12 with the thing. And we did not want to get drug
13 into a proceeding like that because we don't
14 think that's an appropriate function for us.

15 MR. CHUCK KING: Can the Board not --

16 MS. ERVIN: If I can just interject.

17 We have answered some of these questions. I know
18 we have more questions on this particular topic,
19 and maybe we will be addressing them to some
20 other parties, but I would like to finish with
21 the pre-file questions that we have got so that
22 we can get to Mr. Dunn's testimony today. If --
23 we will return to this issue, but if we can go
24 ahead and get back to the responses to the

1 pre-file questions.

2 MR. WIGHT: The next question, does the
3 Board approve an agreed allocation for less than
4 all of the participating potentially responsible
5 parties under Section 741.325?

6 MR. KING: The answer is yes.

7 MR. WIGHT: Next question, does
8 proceeding then become bifurcated between the PRP
9 that has an agreed allocation and those that seek
10 a hearing?

11 MR. KING: That would -- the answer
12 there would be yes as well.

13 If the initial -- if the initial
14 participants are in agreement as to the share of
15 some of the parties and the Board would be
16 approving the agreement, then we thought that
17 those parties should be allowed out of the
18 proceeding.

19 MR. WIGHT: Next question, does the
20 Board have the authority to reject the agreed
21 allocation?

22 MR. KING: Yes, they would. And we
23 just presumed that the Board would be reviewing
24 those as they would other types of agreed

1 proposals.

2 MR. WIGHT: Does the Board have to
3 approve the agreed allocation before proceeding
4 to hear to determine the remaining allocations?

5 MR. KING: The answer there is no. We
6 didn't see that that necessarily had happened
7 that way. The Board would have 90 days to
8 approve an agreed allocation, and then there
9 could be a separate hearing scheduled for the
10 remainder of the case.

11 MR. WIGHT: If the answer to the
12 previous question was no, which it was, can the
13 deadlines in Section 741.325 be met?

14 MR. KING: We think they can. We saw
15 that there was only one deadline, and that's in
16 Section 741.325, the time in which the issue of
17 final order when presented with a joint proposal
18 for an agreed allocation or a hearing officer
19 recommendation, and the Board would have 90 days
20 to issue a final order in either case. Where the
21 original proceeding has become bifurcated, the
22 Board most likely would issue the final order on
23 the agreed allocation before the hearing is
24 complete.

1 MR. WIGHT: There was another question,
2 I believe, asked by Mr. King under Section
3 741.315(a)(2). This is a provision that provided
4 for a motion to dismiss a party as a result of an
5 agreed allocation. Mr. King's question was, was
6 this really a dismissal or was that the proper
7 terminology for that situation?

8 MR. KING: As we looked at it, we
9 thought this is probably something that is now
10 unnecessary. It could be deleted. It's a
11 leftover from some of the earlier and more
12 complex drafts we had, and it seems like it's
13 kind of an unnecessary item at this point.

14 MR. WIGHT: That's all of the Subpart C
15 questions as we have them.

16 MR. GIRARD: I have one quick question
17 before we move on.

18 At 741.325(b), the end of that, it
19 talks about the Board shall reallocate the
20 unallocated shares as provided in Section
21 741.320(d)(2). I notice there is no D2. I
22 assume you meant C2; is that correct?

23 MR. WIGHT: I believe that's correct.
24 I think there are at least two incorrect

1 cross-references that we have located, that one
2 and an earlier one in the proposal, and we would
3 be proposing changes to correct those in the
4 errata sheets that we are contemplating for the
5 next hearing.

6 MS. ERVIN: Are there any additional
7 questions for the Agency at this time?

8 MS. McFAWN: Are the errata sheets
9 going to be coming at the next hearing or --

10 MR. WIGHT: We will not submit those
11 until the testimony of all of the other
12 participants is finished, so they will not be out
13 prior to completion of the testimony. However,
14 we will present those at the hearing, assuming
15 that everything goes as anticipated, and we will
16 be providing comments to support those so that
17 you will understand the rationale.

18 MS. ERVIN: Mr. Howe?

19 MR. HOWE: I just have a few errata
20 questions. I will try to keep them brief, if I
21 can.

22 First of all, in terms of time frames
23 for completion of the process, it appears that
24 there aren't really any limits on the amount of

1 time that the process can take in Subpart B or
2 realistically in Subpart C, especially with
3 regard to Section 310; is that correct?

4 MR. KING: As you may recall, when we
5 had earlier drafts, we did have a lot of time
6 frames in there. As we went along in the
7 process, we concluded that because of the
8 variable from case to case to try to set one set
9 of rigid time frames, it just wasn't going to
10 work. So, you're correct in your statement.

11 MR. HOWE: Okay. Thank you. Next
12 question I have got -- and this may have been
13 asked at the previous hearing -- in Section
14 741.120(a), it appears that the limitation on
15 this is to response actions. This doesn't deal
16 at all with any kind of a cost recovery
17 situation.

18 MR. KING: I was just checking the
19 statute to see what the statutory term was in
20 there. The statutory term was remedial
21 activities, and we changed that to response
22 action because response action was a little
23 broader than remedial activities. But you're
24 correct; it's not a cost recovery thing.

1 MR. HOWE: Could you -- I want to keep
2 this brief. I am wondering why, but maybe we can
3 ask that the next time or that that can be
4 included?

5 MR. KING: Well, just as we understood
6 the language in 58.9(b), it was really directed
7 at future cleanup activities as opposed -- and
8 giving people the opportunity to perform those
9 cleanup activities as opposed to asserting some
10 kind of issue of cost recovery.

11 MR. HOWE: Thank you for that.

12 Two other quick questions then. First,
13 in Section 741.220, the appeals appear to be
14 rather limited, or rather the adjustments appear
15 to be rather limited in situations. For example,
16 it says, where an allocation determination has
17 been issued, in 220(a), the last sentence says,
18 to the extent that the underlined complaint was
19 for cost recovery, the adjustment recovery is not
20 applicable.

21 It doesn't appear, for example, that if
22 there are new facts that surface under Subpart B
23 that in a cost recovery type of situation, that
24 there would be any possibility for appeal; is

1 that the way you read that too?

2 MR. KING: Possibility for adjustment;

3 is that what you mean? Possibility for

4 adjustment?

5 MR. HOWE: Yeah.

6 MR. KING: That's correct.

7 MR. HOWE: And a final one that I think

8 that the Banker's Association would like me to

9 ask.

10 MR. KING: I'm not sure you are here on

11 their behalf, but --

12 MR. HOWE: One concern would be that if

13 a party gets involved in a proceeding and

14 basically wants to settle out and buy their

15 peace, I'm not sure that I see any means by which

16 they could do that without there being a

17 100 percent allocation already being made; in

18 other words, there doesn't appear to be a way for

19 anybody to settle early through these proceedings

20 under B or C, I think?

21 MR. KING: You're correct. We didn't

22 specify a specific provision in Subpart B. We

23 wanted to take advantage, as much as we could,

24 relative to the Board's existing procedures under

1 103 for enforcement-type cases, and we just saw
2 that as being an issue of one where a plaintiff
3 and a defendant reach an agreement on a specific
4 issue or, you know, a specific conclusion, that
5 they can go ahead and settle that independently.

6 MR. HOWE: I think that right now
7 that's limited only to small parties; is that
8 still accurate?

9 MS. ERVIN: Can you speak up?

10 MR. HOWE: I am sorry. I think right
11 now that's only limited to small parties in these
12 proceedings; is that still accurate under the
13 current rules? By the way, this is the last of
14 my questions, so after this, you don't have to
15 deal with me.

16 MR. KING: I think we were just kind of
17 talking through. There is a provision in the Act
18 that talks about settlements where you have
19 smaller share individuals -- and I am not finding
20 it right away -- but in that provision, it
21 does -- if you use that provision, you get
22 certain benefits, but maybe we can take a look at
23 that and respond to that at the next hearing.

24 MR. HOWE: Okay. Thank you very much.

1 MS. ERVIN: Mr. King?

2 MR. CHUCK KING: What's the rational
3 behind Section 741.335(a)(2)?

4 MR. KING: Well, when we were going
5 through a process of discussing the Subpart with
6 SRAC, that was one of their recommendations.
7 That was what they recommended as Subpart C, the
8 adjustment process should work under Subpart C.

9 MR. CHUCK KING: With -- would that be
10 reopening just the agreed determinations or
11 including any determinations that the Board had
12 made after a hearing?

13 MR. KING: It could be after a hearing.

14 MR. CHUCK KING: Is there any causal
15 relationship between how much the cleanup costs
16 are and how much -- how responsible any given
17 party is?

18 MR. KING: I am not sure I understand
19 the question.

20 MR. CHUCK KING: Why would how much the
21 cleanup costs are have anything to do with the
22 percentage of responsibility any given party had
23 for a relief? They don't seem logically
24 connected to me, and I was wondering if there was

1 some reason that I have not seen?

2 MS. ERVIN: Is it something you would

3 like to respond to?

4 MR. KING: Yeah. I think we are

5 struggling -- at least I am struggling with it

6 right now with responding.

7 MR. WIGHT: Was that last question

8 still with regard to 741.335(a)(2)?

9 MR. CHUCK KING: A2, yes.

10 MR. WIGHT: And the question, again,

11 was?

12 MR. CHUCK: How is the cost of a

13 cleanup or remediation or whatever is done

14 related to the percentage of responsibility that

15 any given party has for it? Why would the fact

16 that it cost more than expected provide a basis

17 for changing a determination of you're 10

18 percent, you're 30 percent, you're 40 percent?

19 MR. KING: I think I understand a

20 little better.

21 See, what is kind of assumed here is

22 that if for some reason the costs end up being

23 much higher than what everybody expected, it may

24 very well be because somebody's -- one of the

1 parties' contaminants that it contributed to the
2 site has driven a remedy in a specific direction,
3 and that may call for an adjustment of the -- of
4 the share because that one party was driving --
5 their contamination drove the cleanup levels
6 higher.

7 MR. CHUCK KING: Would that be -- would
8 that be information that would come to light
9 afterwards, or are you talking about like
10 discovery of a new contaminant that wasn't known
11 of when the allocation was made?

12 MR. KING: This is envisioning that you
13 have selected a remedy, okay, but now the parties
14 want an allocation so that the remedy can be
15 performed. Now, you go ahead and perform the
16 remedy, but it turns out in performing the remedy
17 that it isn't quite what everybody expected going
18 into it. And so now, since we have a different
19 result from what people expected and it's a
20 substantial difference, then there should be an
21 opportunity to seek an adjustment.

22 MS. McFAWN: So, it's not just because
23 of the cost of the remedy has gone up, you are
24 saying there is also some factor there that would

1 cause for reallocation of liability?

2 MR. KING: I am is saying if the total
3 cost has gone up by more than 25 percent or by
4 more than 100,000, that could trigger the inquiry
5 into whether there should be an adjustment.

6 MR. CHUCK KING: Would that then be
7 additional information that might bring it in
8 under No. 3? And in the context of Paragraph 3,
9 would it be appropriate to condition that on
10 discovery of new information?

11 MR. KING: Well, I guess we weren't
12 looking at it so much as -- as a new information
13 in terms of you found something that you didn't
14 have before. This is more context that something
15 has happened which you know wasn't even a thing
16 that had happened at the time you did the
17 allocation.

18 MS. McFAWN: But does that just have to
19 be a cost factor or does it have to be based on
20 some new facts? Because if you just read 2
21 alone, it looks like, well, if it gets a little
22 too costly, we will go back and reallocate.

23 MR. SHERRILL: There is kind of an
24 implied, if the cost goes up, there is a reason

1 that the cost went up.

2 MS. McFAWN: But it doesn't say that,
3 does it? It doesn't say, find the reason and
4 then reallocate. It says, if the costs go up,
5 you can go back into allocation.

6 MR. GIRARD: It sounds like what you
7 are saying is that when we go back to the
8 allocation factors, which is 741.215, that one of
9 the assumed allocation factors to be considered
10 is the cost of remediation, and as you enter into
11 the project, the cost of the remediation is
12 assumed to be a certain amount based on how you
13 estimate cleanup is going to go. And if the
14 cleanup gets to be beyond \$100,000 more, then you
15 begin to question your assumptions about what the
16 remediation costs were going to be, which implies
17 that was one of the allocation factors that went
18 into the decision in the first place; is that
19 correct?

20 MR. KING: I think that's pretty fair.
21 That's a fair characterization.

22 MS. ERVIN: Mr. Rieser?

23 MR. RIESER: Isn't it accurate that
24 this section provides thresholds under which the

1 Board has the jurisdiction to consider
2 reallocation, that the idea was that you don't
3 want to consider reallocation in every instance
4 because you want these things closed, but if
5 there are things that are significantly different
6 in terms of costs than there were before, it's
7 only in those circumstances that you are going to
8 allow reconsideration of the allocation, and the
9 factors by which you would reconsider those would
10 be things that would have to be supplied in terms
11 of the traditional in terms of the stated
12 allocation factors?

13 MR. KING: I would agree with that.

14 MS. ERVIN: Mr. King.

15 MR. CHUCK KING: Why don't you take
16 Ms. Crowley.

17 MS. ERVIN: Ms. Crowley?

18 MS. CROWLEY: If I understand Mr. King
19 correctly, this was a suggestion by SRAC, this
20 section?

21 MR. KING: Yes. Those -- yes, that's
22 true.

23 MS. CROWLEY: If need be, it would be
24 useful for SRAC to address some of these issues?

1 I think part of the difficulty here, it seems as
2 if there may be some circumstances that were
3 considered when this was drafted that aren't
4 fully included within the draft we see here.

5 For instance, there really is nothing
6 that says what factors the Board is to consider
7 when it reallocates. It says, when parties can
8 seek reallocation, but it doesn't suggest what
9 the Board should consider when they reallocate.
10 Maybe that is something to discuss and address at
11 some point.

12 MS. ERVIN: The Board fully intends to
13 ask SRAC whenever we can get to their testimony.

14 MR. WIGHT: Just as an additional
15 point, I think you might want to compare and
16 contrast that section with Section 741.220, which
17 would be the adjustment section for Subpart B.
18 And I think our statement of reasons explains
19 that we really agreed with SRAC that some sort of
20 an adjustment provision was necessary but that it
21 was difficult to come to a conclusion as to just
22 what should trigger the adjustment, and it was
23 hard to set arbitrary levels that should be a
24 threshold.

1 So, what we have really done is offered
2 two different approaches to an adjustment
3 procedure, both in 741.220, which is more general
4 language that would require some showing to the
5 Board, and then the one which we have just been
6 discussing.

7 So, we offered those up as options of
8 approaches to the same thing, and I think that
9 those who go back and look at what we have just
10 been discussing should also take a look at 220
11 and see that also as another approach to the same
12 issue, and perhaps that will answer some of the
13 difficulties. I just offer that so people won't
14 lose site of 741.220.

15 MS. ERVIN: Thank you. Thank you.

16 Mr. King?

17 MR. CHUCK KING: Going back to 741.215,
18 do you gentlemen consider or do you have any
19 opinions on exactly how those considerations
20 ought to be weighed?

21 MR. KING: Well, we thought about that
22 a lot. And, you know, we started down the road
23 to -- we went as far as trying to come up with a
24 matrix process and, you know, you throw in

1 numbers and calculate things. And John did a
2 wonderful job putting something together, and we
3 concluded that really you couldn't do that. It
4 really didn't make a lot of -- ultimately, a lot
5 of sense in a litigated case in trying to do
6 that.

7 MR. CHUCK KING: Well, if you couldn't
8 do it, then how is the Board supposed to do it?

9 MR. KING: Well, I think there is a
10 difference in doing it in a case where the facts
11 have been developed so that you have a model of
12 site operations and now can look at all of the
13 facts and how they work together relative to
14 specific site and developing a model -- a matrix
15 that you are going to look to, to apply to all
16 sites. I think there is a big difference.

17 MR. SHERRILL: One of them is more
18 qualitative and one is more quantitative.

19 MR. CHUCK KING: It seems like a
20 framework like that could be really, really
21 helpful as a starting point, at least just so
22 that, A, the people who are going to be on the
23 other side are going to at least have some
24 expectation of where that calculation is going to

1 start from, and also then on the other side, so
2 that the Board has something to work with even if
3 there's just -- you know, some numbers are very
4 simple situations.

5 I, for one, at least, would be very
6 interested to just hear what your proposals would
7 be. Off the top of your head, how you think that
8 a situation of A produced it, B transported it,
9 and C disposed of it? Who gets what percentage
10 of that?

11 MR. KING: Yeah. I think, you know,
12 the policy issues that are raised by that, they
13 certainly cut both ways, and it certainly is good
14 to have as much information to people and the
15 methodology for people to use. We were concerned
16 that, you know, you put a chart -- you put a
17 chart on the back of the rules and it has a
18 matrix in it, and that's all -- the only thing
19 that ever gets used is the matrix, and you lose
20 sight of the fact that there is a need to develop
21 what we have called a model of site operations
22 which are going to be very specific facts related
23 to sites.

24 MR. CHUCK KING: One other question --

1 MR GIRARD: Could I follow up to your
2 question there really quick, and I don't want an
3 answer here today, but I was wondering if you
4 could bring something to the next hearing on
5 this, and that is, all of these allocation
6 factors, certainly the Agency has much more
7 experience in working with cleanups than we do,
8 so you have ideas of the kind of concrete
9 evidence that parties would bring forward to you
10 to make the demonstrations for these three
11 general classes of allocation factors, and I just
12 wondered if you could bring some of these
13 concrete examples before us at the next hearing
14 for these three general classes of allocation
15 factors so we could see what kind of hard
16 evidence the parties would be bringing forward in
17 helping us determine these allocation factors and
18 what weight to give to the different factors.

19 MR. KING: I think that's something we
20 can do.

21 MR. GIRARD: Thank you.

22 MS. ERVIN: Any other questions?

23 MR. CHUCK KING: Just one more.

24 In section 714.210(C), you talk about

1 the defenses under 58.9(a)(2). Assuming one of
2 those defenses is established, would that mean
3 that the parties opposing the defense either
4 would not be included in the percentage liability
5 calculation, or would their portion of the
6 liability just automatically become an orphan
7 share?

8 MR. KING: They would not become an
9 orphan share, because that would be a conclusion
10 that they were not a responsible party, so you
11 couldn't divvy a share to somebody who is not a
12 liable party, and if you're -- if you proved up
13 one of the definite defenses there, you would be
14 proving that you didn't have liability.

15 MR. CHUCK KING: Well, but suppose you
16 have a scenario where 20 percent is -- of the
17 liability is a portion of owners, and you have
18 had three owners over a period of time, and one
19 of them is, say, a financial institution that
20 falls under 59(a)(2)(e), so they can't be held
21 liable. Does that mean that the other two owners
22 have to -- that entire 20 percent is divvied up
23 between them or do they each get 10 percent? Do
24 they each get a third of it?

1 MR. KING: Well, if somebody is not a
2 liable party, then they are just not -- the
3 people who are liable parties would be
4 responsible for paying the amount.

5 MS. ERVIN: Could you state your name?

6 MS. BROWN: Carol Brown with the City
7 of Chicago.

8 I have a question on 741.325(c), that
9 provision states that the PRP has been allocated
10 responsibility subsequently to default on payment
11 of performance on its share, the remaining
12 parties have to pick up the portion that's been
13 defaulted. I am wondering whether the Agency
14 believes that that might discourage parties from
15 participating in a Subpart C proceeding,
16 especially if one party has been allocated a
17 larger share than another party -- a
18 significantly larger share than another party?

19 MR. KING: It could. We thought that
20 that was a significant issue from our standpoint.
21 We didn't want to see any, you know, some
22 strawman put up by responsible parties, and then
23 turns out that that -- and they assign that guy a
24 60 percent share, and he goes bankrupt, and now

1 they have got a Board order that says they only
2 have to bear, you know, the smaller amount.

3 MS. BROWN: That's fine.

4 MS. ERVIN: I think that concludes the
5 questions for the Agency at this point.

6 We are going to take a five-minute
7 break, and following that, we will go to the rest
8 of the pre-file testimony starting with Mr. Dunn.

9 (Whereupon, a recess was taken.)

10 MS. ERVIN: We will go back on the
11 record.

12 Next order of business that we have is
13 the testimony of Mr. Dunn.

14 Would the court reporter like to swear
15 in the witness.

16 (Witness sworn.)

17 MS. ERVIN: Mr. Dunn, you may proceed
18 when you are ready.

19 MR. DUNN: Madame Hearing Officer,
20 Madame Chairman, Honorable Boardmembers, it is my
21 pleasure to testify on behalf of the Attorney
22 General's Office this afternoon. The Attorney
23 General's office did participate in the SRAC
24 meeting along with IEPA. We found them very

1 cordial and very productive, arising to the
2 filings that the Board is considering in this
3 proceeding. But I ask that my pre-file testimony
4 be admitted in the record. Hearing officer has
5 marked it as Exhibit 9 for identification.

6 (WHEREUPON, the document
7 above-referred to was
8 marked Exhibit No. 9 for
9 identification.)

10 MS. ERVIN: Are there any objections to
11 the admittance of this testimony?

12 Seeing none, the testimony of
13 Matthew J. Dunn will be admitted into the record
14 as Exhibit No. 9.

15 MR. DUNN: I would like to acknowledge
16 with me today as Assistant Attorney General, Beth
17 Wallace, who serves as the Attorney General's
18 point person in this proceeding who has been
19 instrumental in our participation in this matter.

20 We do, at the Attorney General's
21 office, support the Agency's proposal. We have
22 been involved, as I said, throughout the
23 proceedings of the meetings that gave rise to the
24 proposal before the Board as have SRAC. And I

1 think that many of the good points and
2 uncontested points are as a result of those many
3 meetings and long hours of diligent work by all
4 participants.

5 I was suggested by Morgan not to get
6 into reading pre-file testimony and leaving it
7 for the record, but sometimes you get into
8 testimony that's just so well drafted and so
9 exact that it does need to be read into the
10 testimony, and while I would like to think that
11 the testimony at the Attorney General's Office
12 that is provided would fall into that same
13 column, I am referring to Mr. Rieser's testimony
14 rather than our own.

15 And on Page 2 of that testimony,
16 Mr. Rieser sets forth their views with respect to
17 the applicability provisions. And the -- and the
18 applicability provisions are the key provisions
19 that are of concern to the Attorney General's
20 Office, and in the second full paragraph under
21 applicability from Mr. Rieser's testimony,
22 quoting, there can be no question that owners or
23 operators of RECRA or UST sites of federal and
24 state statutory and regulatory responsibility

1 regarding those sites, and that the adoption of
2 Section 58.9 of the Act and these regulations
3 cannot diminish the State's authority to enforce
4 those responsibilities. It was not the intent of
5 the legislature to impair the ability of the
6 state to enforce those programs.

7 The Attorney General's office concurs
8 with that statement of Mr. Rieser and his clients
9 regarding the applicability. It could be a
10 little broader in that Section 58.1 of the Act
11 does talk about a couple of other classes of
12 sites, including NPL sites and solid waste sites,
13 closure or permit requirements under the Act, in
14 addition to RECRA and UST sites, and a final
15 category of sites, and those being sites that are
16 subject to Federal orders.

17 We believe it is very important that
18 the Board state in its deliberations that 58.9 is
19 subject to 58.1 limitations, the applicability of
20 limitations. The title was passed as a new title
21 to the Act; 58.9 is a section of that title.
22 Appropriately, it should be limited by the
23 applicability provision of 58.1.

24 We have supplied in our written

1 testimony, legislative debate where questions to
2 the sponsors of this important legislation
3 affirmatively stated that there are classes of
4 sites that are excluded from 58.9. Those are
5 listed in 58.1, so, we would request the Board
6 affirmatively addressing this issue.

7 As was alluded to the last day of the
8 hearing, there have been situations where
9 counsel -- not as keen as Mr. Rieser -- have not
10 taken a position he took here, and have said that
11 this does -- 58.9 does add defenses and hoops and
12 burdens to the state in RECRA enforcement.

13 And as Mr. King stated in his initial
14 testimony, the Act is not all that clear with
15 respect to certain of these provisions and what
16 the legislative's intent is in that regard.
17 Clarification of that point by the Board would be
18 very useful to the implementation of these
19 regulations, I believe crucial to the
20 implementation, and we request that the Board
21 specifically address that issue.

22 I will stand then on the other pre-file
23 testimony positions taken therein and open up to
24 whatever questions that anyone has. Thank you.

1 MS. ERVIN: Thank you. Are there any
2 questions for Mr. Dunn?

3 Mr. Rieser?

4 MR. RIESER: Mr. Dunn, needless to say,
5 I appreciate the mention of my testimony and
6 support of it, but let me ask a further question
7 on that, which is the SRAC-proposed language with
8 respect to the applicability of it is different
9 than that in the Agency proposal, and what's the
10 position of the Attorney General's Office on the
11 SRAC language proposed on this issue?

12 MR. DUNN: I would echo the Agency. I
13 think that when you do look at the 58.1, it does
14 start out talking about any person, and then it
15 talks about sites, the site is on the NPL, the
16 site is, and the site, the site.

17 So, there is a legitimate difference of
18 approach there as to whether you look at the
19 person, owner/operator or if you look at the
20 site, RECRA, solid waste, permitted, unpermitted,
21 NPL, whatever. I would echo the Agency's view
22 that there probably is some room to find middle
23 ground in there to where we're not true and fast
24 to what's in the initial submission from IEPA;

1 the Attorney General's Office is not. And I
2 would echo Mr. King's statements to similar
3 questions that we think there is room to try to
4 get off the dime here.

5 MR. RIESER: Thank you.

6 May I ask another question about your
7 testimony, and this is sort of a comparison also
8 between testimony that Mr. King gave.

9 Mr. King was asked questions about
10 Section 741.210(b)(3) with respect to the
11 liability of an owner or operator, and the fact
12 that this section appears to state that for an
13 owner operator to be liable, to have the owner
14 operator at the site at the time of disposal,
15 transport, storage or treatment of hazardous
16 substances or pesticides, but specifically
17 excluded from the litany was the term "release."

18 You have stated in your testimony --
19 stressed in your testimony the idea of liability
20 for failure to mitigate, and I am -- I want to
21 confirm that you agree with how Mr. King
22 testified with respect to this -- the liability
23 of owner/operator, that it's not liable as the
24 owner/operator solely because it was the

1 owner/operator at the time that there was a
2 release on the property as opposed to disposal,
3 transport, storage or treatment?

4 MR. DUNN: Assuming you get by the
5 applicability provisions?

6 MR. RIESER: Yes.

7 MR. DUNN: I agree with Mr. King's
8 testimony.

9 MS. ERVIN: Do have another question,
10 Mr. Rieser?

11 MR. RIESER: Excuse me. You say in
12 your testimony on Page 9, in cases where the
13 state brings an action unlike contribution
14 actions, the state is not a culpable party;
15 therefore, the state should not have to produce
16 evidence to demonstrate any party's share of
17 liability.

18 It's not your position that the state
19 doesn't have to prove liability; is that correct?

20 MR. DUNN: That is correct.

21 MR. RIESER: So, what exactly are you
22 intending to state with this?

23 MR. DUNN: I think on the share of
24 the -- on the apportioning issue of this burden

1 shifting that's been discussed by the Agency
2 representatives.

3 MR. RIESER: I have no further
4 questions. Thank you.

5 MS. ERVIN: Are there any other
6 questions for Mr. Dunn?

7 Mr. Newcomb?

8 MR. NEWCOMB: If I may set forth a
9 hypothetical and ask you how the Attorney
10 General's Office might proceed if the IEPA was
11 referring an enforcement action to the Attorney
12 General's Office, and the information collected
13 by the IEPA was not sufficient enough to identify
14 all of the responsible parties in site and
15 volumes of waste, et cetera, but you had one
16 party that was willing to undertake an immediate,
17 necessary response action, but you thought that
18 under Section 58.9, he was not actually a
19 responsible party because he did not proximately
20 cause the release of any hazardous substance,
21 could you take his facts as an affirmative
22 defense only or would you consider not filing
23 suit against him or maybe filing suit against him
24 and perhaps releasing him after he had conducted

1 certain remedial activities?

2 MR. DUNN: I got the IEPA referral
3 part, can all PRPs -- we have -- we have one
4 person we believe is a PRP who says they want to
5 do a removal, but that PRP has indicated they're
6 excluded under 58.9?

7 MR. NEWCOMB: Right.

8 MR. DUNN: And then?

9 MR. NEWCOMB: Because their basis for
10 that is that they did not proximally cause the
11 release, therefore, they did not proximally cause
12 the harm, et cetera. How do you treat that type
13 of situation?

14 MR. DUNN: I would start with 58.1, and
15 I would say, does this person fall in any of the
16 exclusions there to where I don't get to the
17 58.9, are they an owner/operator, is this an UST
18 site, is this a RECRA disposal site, is it a site
19 under federal order, does it fall under any of
20 those, should they have had a license, do they
21 have closure requirements? If I get any hits
22 there, I am saying 58.9 is inapplicable, and
23 there they are.

24 MR. NEWCOMB: So, your step one is to

1 go straight to 58.1 and determine whether or not
2 applicability exists there alone, without taking
3 an affirmative look at whether the individual has
4 proximally caused the release?

5 MR. DUNN: Proximate causation is 58.9
6 only, and if I don't get to 58.9, there is no
7 status liability under these other acts, so I am
8 not -- I am under strict liability under the
9 other acts not under proximate causation, and all
10 of that.

11 MR. NEWCOMB: Now besides the fact that
12 Section 58.9(a) says, notwithstanding any other
13 provisions of that Act, you believe that -- you
14 stopped your analysis after looking at 58.9?

15 MR. DUNN: It's our position that 58.9
16 is limited by the applicability provision of the
17 title in which it is found, and that
18 applicability provision is found in 58.1, and
19 that rejection of 58.9 proximate causation
20 proportionate shares in situations listed in 58.1
21 is contrary to legislative intent and is
22 inappropriate.

23 If you look at, for instance, the
24 definition of remedial action, which is found at

1 58.9, remedial action is a defined term. It is
2 where people come in and voluntarily seek to join
3 the SRP and clean up their site. If I am filing
4 apportion action, the definition of remedial
5 action is not even met as it is defined in this
6 title. Remedial action is voluntary. It's not
7 forced action, which only gets to what Mr. King
8 referred to and what I referred to, is some of
9 the difficulties in finding legislative intent
10 here when you have terms that have meanings that
11 you really can't follow in that situation.

12 So -- but to answer your question, I am
13 going to start with 58.1, and when I get that
14 referral, I am -- I will see if that person was
15 an owner/operator of a LUST, were they an
16 owner/operator of a RECRA facility, do they have
17 closure requirements under the act that are
18 unaffected by 58.9.

19 MS. ERVIN: Mr. Dunn, do you believe
20 that the notwithstanding language of 58.9 has no
21 meaning?

22 MR. DUNN: No. I think that what
23 people were trying to get to was the -- I think
24 what the Attorney General's understanding was

1 trying to get to the specific Superfund provision
2 22.2. They deal with specifically trying to get
3 a generator, generator-type liability, and that
4 they did not want one generator or one drum
5 scenario or was it the one-thousand or a
6 ten-thousand-drum site being jointly and
7 severally liable.

8 When you are dealing with owners and
9 operators, I think they did not mean or attempt
10 to address that.

11 MS. ERVIN: Do you think they knew
12 that -- the way they wrote it then would only
13 apply to basically less than three sites per
14 year?

15 MR. DUNN: I wasn't there.

16 MS. ERVIN: Mr. Marder?

17 MR. MARDER: I think we both agree that
18 when all is said and done, there will be some
19 sites that will be subject to proportionate
20 shares, some to joint and severally? We would
21 agree on that?

22 MR. DUNN: Yes. Just -- and just to
23 make it clear, I think that where you're in a
24 joint-and-several-type situation, generator isn't

1 all that -- generator situation, you are probably
2 looking at more being subject to the
3 proportionate share than joint and several.

4 But I think joint and several is
5 largely affected and largely impacted here,
6 because these others are -- if you are owner, you
7 are it, but --

8 MR. MARDER: But if an issue arises
9 between your office, if you bring a suit, and the
10 respondent as to whether the site should be
11 judged under proportionate share or joint and
12 several, what do you think the recourse would be?
13 How would that issue get resolved? Would that be
14 a board decision?

15 MR. DUNN: The first instance in the
16 historical practice of the Attorney General's
17 Office, we would write to and offer a meeting
18 with pre-filing of any legal action with someone
19 who's implicated in a site. So, we would write
20 to the PRPs, offer them the opportunity to come
21 in, obviously, with representation, and tell us
22 why they think we are crazy or why they think we
23 are on board, who else they think should be at
24 the table or -- across the board, whatever their

1 issues are.

2 And at that meeting, similarly, one, we
3 want to hear their side of it to help flesh it
4 out, and, two, we, likely, would say this is what
5 we think the dollar amounts are and this is what
6 we think we are looking to you all to divvy up
7 among your group of 5 or 7 or 1300 or whatever it
8 is, and we would like to hear your proposal back
9 in a month or whatever time period.

10 So, there -- initially, there would be
11 an opportunity to meet -- a request from us for
12 such a meeting, and then we would have to look at
13 what -- what counsel said is their position. I
14 am not on 58.1 because, and if you read the regs
15 done, you are going to reach the same conclusion,
16 so go read them.

17 MR. MARDER: Maybe -- let me rephrase
18 the question.

19 If there was a legitimate difference of
20 opinion as to whether the standard of liability
21 should be joint and several or proportionate
22 share, if your office is saying you are jointly
23 and severally liable, and the respondent is
24 saying, I am only liable for my proportionate

1 share, and you and the parties can't reach
2 agreement and the case was brought forth before
3 the Board, would that be an issue before the
4 Board? Would the Board decide the standard of
5 liability?

6 MR. DUNN: Yes, they would. Good
7 chance you are talking about cross-motions for
8 summary judgment, and it doesn't sound like in
9 your scenario, sir, that there are a lot of
10 issues -- a lot of facts at issue, and this is
11 how we read the law, and Mr. Attorney General,
12 IEPA, this is how you read the law, and the
13 hearing officer or the decision maker, the hearer
14 of the case, is going to make that decision.

15 MR. MARDER: But that decision would be
16 made by --

17 MR. DUNN: Absolutely. Sure. It would
18 be a litigated matter.

19 MS. ERVIN: Mr. Newcomb, did you have
20 your hand up?

21 MR. NEWCOMB: No.

22 MR. RIESER: In the situation
23 Mr. Marder was describing, could another avenue
24 that the Attorney General take be to file the

1 action in federal court under CERCLA?

2 MR. DUNN: Yes.

3 MR. RIESER: And you reserve the
4 authority to do that in any given case?

5 MR. DUNN: Yes.

6 MR. RIESER: In which case, that
7 argument would disappear about proportionate
8 share liability because you would be under the
9 federal statute?

10 MR. DUNN: Yes.

11 MS. MANNING: Would you take that
12 position that you could take that argument in
13 the Circuit Court as well and make a Circuit
14 Court determination as to these particular
15 issues?

16 MR. DUNN: State law-wise, yes.

17 MR. RIESER: I am sorry. I didn't
18 understand the question.

19 MR. DUNN: If I understood the
20 chairman's question, not that we would bring a
21 federal CERCLA action, but we would --

22 MS. MANNING: State action.

23 MR. DUNN: State action in state court.

24 Yes, I think we are to file in the Circuit Court,

1 and it has now been touched here and we still
2 have the ability.

3 MR. RIESER: But wouldn't the Circuit
4 Court be bound by the proportionate share
5 language of this statute?

6 MR. DUNN: Absolutely. It would be
7 under the same laws.

8 MR. RIESER: Mr. Sherrill testified
9 about the number of cases typically brought by
10 the Attorney General's Office to recover costs or
11 to seek remediation. I think he put that number
12 at about five to ten cases a year. Is that
13 accurate?

14 MR. DUNN: Yes, it is.

15 MR. RIESER: And that's cases filed in
16 front of the Pollution Control Board, or what mix
17 does that --

18 MR. DUNN: Either -- I would say they
19 probably lay more toward the Circuit Court,
20 probably 60/40. And you are talking five to ten.
21 You are not talking about a lot of individual
22 sites, but I would say probably a little more to
23 Circuit Courts.

24 MR. RIESER: So, half of those five to

1 ten cases that you file in Circuit Court are
2 filed with consent orders to resolve the case at
3 the same time?

4 MR. DUNN: That's correct.

5 MR. RIESER: And how many cases do you
6 typically file a year in federal courts under
7 Superfund?

8 MR. DUNN: We have never filed.

9 MR. RIESER: Is it the case involving
10 the Steagall landfill filed in the Central
11 District Court of Illinois under Superfund?

12 MR. DUNN: I am getting hand signals
13 from the audience.

14 MS. MANNING: Your people.

15 MR. DUNN: From my people, so, yes, I
16 defer to the hearing officers as to how --

17 MS. ERVIN: Just answer the question.

18 MR. DUNN: I am being refreshed that
19 that is in federal court, and the case was
20 referred to in the prior testimony of proceeding
21 as, say, filed in the 80s. I believe it is a
22 longstanding matter that is in federal court.

23 MS. ERVIN: If Mr. Morgan has
24 additional testimony, we can swear him in.

1 MR. RIESER: Any light you can shed on
2 this would be appreciated.

3 (Mr. Morgan was sworn in.)

4 MR. MORGAN: The Steagall landfill
5 litigation was filed in federal court, two
6 separate filings, one with 13 defendants and one
7 with 1 defendant under the Ryan administration,
8 and we are still pursuing other defendants.

9 MR. RIESER: Of those cases that were
10 filed, how many have been resolved by consent
11 decrees?

12 MR. MORGAN: Both of those cases were
13 resolved by consent decrees.

14 MR. RIESER: So, there isn't currently
15 a case pending in federal court?

16 MR. MORGAN: Correct. There is no case
17 pending.

18 MS. ROSEN: Is it correct to say that
19 their obligations are ongoing on consent orders
20 that resolve those matters?

21 MR. MORGAN: There is another complaint
22 being prepared for filing to pursue the
23 recalcitrant PRPs. The cleanup work is still
24 proceeding at the landfill.

1 MR. RIESER: And that's under the
2 consent order?

3 MR. MORGAN: Right.

4 MR. RIESER: And the suit that's going
5 to be filed against the recalcitrant, is that
6 going to be in federal court?

7 MR. MORGAN: I anticipate that that's
8 going to be before the Board.

9 MS. ERVIN: Are there any additional
10 questions for Mr. Dunn?

11 MR. DUNN: The state of Illinois has
12 served as lead enforcement and other times lead
13 technical, and both lead enforcement and lead
14 technical on NPL sites, which those are brought
15 in federal court.

16 I wasn't focusing on your question, and
17 I don't know if you are either, Mr. Rieser, but,
18 again, we have undertaken and just made it an NPL
19 litigation which would be in federal court
20 which -- that seems to be more at issue here.

21 MR. RIESER: And the NPL sites would be
22 required to be filed in federal court, would they
23 not?

24 MR. DUNN: That is at least our form of

1 choice.

2 MR. RIESER: Thank you.

3 MS. ERVIN: Mr. Newcomb?

4 MR. NEWCOMB: Going back to my
5 questions before Mr. Marder's questions, I was
6 setting forth the scenario where perhaps the IEPA
7 had provided you with a certain package of
8 information regarding one of many potentially
9 responsible parties for a site and went to the
10 first step of what your analysis would have been
11 regarding your culpability, and I want to take
12 you down that road to a couple more steps.

13 When your office has sufficient
14 information to identify that person has not
15 proximally caused the release of a hazardous
16 substance, although the hazardous substance has
17 been the subject of a removal action, and other
18 parties have been adequately identified, and this
19 one person has taken responsible action which you
20 can reasonably tell that at the end of the day if
21 everyone had been involved, he had done more than
22 his share, would you refuse or I should -- maybe
23 I should restate that. Strike that -- would the
24 Attorney General's Office be open to releasing

1 them from the enforcement action if under
2 proportionate share they had already done more
3 than their fair share?

4 MR. DUNN: We would evaluate it. Yes.
5 I mean, we evaluate everything as to what are the
6 facts, what's the law, and if we try this to the
7 Board or the court, what's the likely ruling
8 going to be, what would the correct outcome of
9 the matter be.

10 If you are telling me in your scenario
11 the correct ruling will be that that person
12 doesn't have to do anything further and has no
13 further payments or contributions that he has to
14 make, and if that was the evaluation that my
15 staff and the Agency staff came up with, we
16 likely would not pursue it.

17 MR. NEWCOMB: Would one of the factors
18 you would consider be that the other parties that
19 you had identified, that they were not coming
20 forward or they were having difficulty obtaining
21 their participation?

22 MR. DUNN: Perhaps -- you know, I -- I
23 would want to look at everything we could think
24 of and then think about it some more and come up

1 with other things. I mean, would that be one of
2 the factors? Yeah. It would be a factor to plug
3 in. I don't know where I would range it in
4 hierarchy of factors or whatever, but I would
5 want to look at everything and discuss
6 everything.

7 MS. ERVIN: Chairman Manning?

8 MS. MANNING: Mr. Dunn, under current
9 authority, often comes the Board or the Circuit
10 Court against multiple parties even in the joint
11 and several liability scheme, could you walk
12 through, for purposes of the record, what kinds
13 of investigatory techniques and discovery
14 mechanisms you utilize now to get to all
15 questions of liability and evidentiary questions
16 to get to all of the parties that are potentially
17 responsible in that proceeding?

18 MR. DUNN: I guess it starts out with
19 investigation that the IEPA can undertake, what's
20 a site history, what did the Agency learn about
21 it, was it permitted already here or was it under
22 manifest, are there other documents that lead us
23 to know who generators are, who operators would
24 have been, that kind of thing. Primarily, we get

1 into depositions of past or current owners, past
2 or current employees to try to, again, get more
3 information that way. If you have identified
4 some PRPs that you can call in and talk to, maybe
5 they would be forthcoming as to -- I wouldn't
6 call it fingerpointing, but at least leads to
7 other avenues and other likely PRPs, and from
8 that perhaps also records of the facility are
9 there that remain what, did they invoice people,
10 however often, for the services provided to dump
11 at their facility to bring drums to their
12 facility, whatever.

13 And, so, first you just generally go
14 out and talk to people, and after that, see if
15 something is filed through interrogatories,
16 depositions, and things like that.

17 MS. MANNING: How about concerning the
18 financial acumen, if you will, or the financial
19 abilities of a potentially responsible party? I
20 asked the question at the hearing I know you were
21 at in Springfield with the Agency about a
22 potentially bankrupt party and what mechanisms
23 the state might utilize to protect whatever
24 interest it may have in a bankruptcy proceeding.

1 Could you shed a little light on that too from
2 the Attorney General's perspective?

3 MR. DUNN: Yes. From my view,
4 bankruptcy proceedings are the most annoying and
5 frustrating proceedings that you are involved in,
6 because you are generally dealing with somebody
7 who not only couldn't run a clean environmental
8 shop, but also couldn't run their business
9 profitably and who knows how many other things.

10 You are standing there in line a lot of
11 times with the pension funds, with the federal
12 tax man, probably the state tax man. You have
13 people that have just basically oftentimes
14 ignored all of their legal responsibilities and
15 one of which is in the environmental area.

16 One, we work closely with IEPA to find
17 out what is the immediate human health
18 environment impact at the facility. Is there
19 something that, knowing that the possibility and
20 likelihood of having trust -- bankruptcy estate
21 funds to do protective actions at the facility
22 are not going to be there. Do we need to make
23 those reviews internally for immediate removal
24 and protective actions? The folks at IEPA need

1 to call up the USEPA officials and discuss that
2 we have got a site that needs work right now and
3 we get something done out there.

4 In a bankruptcy proceeding itself, we
5 will oftentimes enter appearance in the
6 proceedings oftentimes in the county where it is
7 located, the facility and all. Bankruptcy, as
8 most people in the room know, can be filed
9 anywhere in the country. Delaware and the East
10 Coast seem to be the favorite places with these.

11 So, not only is there -- you add to
12 that problem the fact that you have to prepare,
13 and in order to proceed in those types of
14 hearings, you have to fly people at your expense
15 to wherever that proceeding is being handled,
16 which adds to the impact to the tax payers of the
17 state.

18 So, we do get involved. We try to find
19 out what the assets are, what the true abilities
20 of the state might be to deal with the site, find
21 out whether the site's trustee is looking to
22 abandon the facility, and what he or she's
23 intending to do or trying to do, and then utilize
24 the provisions of the bankruptcy code that says

1 you can't use bankruptcy to avoid your legitimate
2 responsibilities under powers of the states. But
3 at the same time, if there is no money there,
4 there is no money there, and all of that comes
5 into play.

6 So, we want to try to immediately
7 identify the sites that are involved in the
8 bankruptcy and determine whether there is any
9 impact on the Public Health Environment Act, and
10 see what the trustee intends to do at the site,
11 and proceed as best we can with whatever assets
12 are available in the facility or in the estate.

13 MS. MANNING: Thank you.

14 MS. ERVIN: Are there any additional
15 questions?

16 Mr. Newcomb?

17 MR. NEWCOMB: Looking at Pages 8 and 9
18 of your pre-file testimony, you make a strong
19 argument for mere ownership to the basis of
20 liability alone. Am I correct in including that
21 this is the opinion of the Attorney General's
22 Office or I -- the position of the Attorney
23 General's Office that mere ownership may cause
24 liability -- create liability?

1 MR. DUNN: We have cited here two
2 provisions of the Act, and the underlying statute
3 says owner/operators of an UST, you have legal
4 responsibilities with respect to it on
5 owners/operators of a TSD. Yes.

6 MR. NEWCOMB: Am I correct in following
7 what you just said that that would apply to how
8 that is specifically defined in RECRA where it's
9 UST or the LUST or TSD, however, throughout these
10 regulations or proposed regulations, the word
11 sites has been banded about rather loosely. I am
12 trying to make some distinction between sites and
13 people here as proportionate share to its
14 proximate causation liability for harm, and
15 liability seems to be created under this broader
16 site or you can avoid proportionate share, and
17 it's been -- fits simply because the term "site"
18 has been --

19 MR. DUNN: You would have to look to
20 definitions within the excluded statutes, the
21 58.1, so you would have to look at the
22 definitions under the UST regs or statute. You
23 would have to look to RECRA definitions and all
24 of that to see if they are triggering and if the

1 facts and the law of the matters that are before
2 us, as prosecutors, fits, and whether we can, in
3 good faith, file an action that we are
4 considering.

5 The definitions and all that are
6 contained in this rulemaking have been designed,
7 as Mr. King testified, to make this other than an
8 illusory proceeding and one that can hopefully be
9 used to the benefit of the people in the
10 environment of the state of Illinois, and rather
11 than taking a hard line that sites here are sites
12 from the Act or the remedial action definition,
13 and title of the Act has been significantly
14 broad, so there was a joint attempt by SRAC and
15 by the IEPA with the Attorney General to try to
16 make something that, hopefully, at the end of the
17 day would all make sense and can be used to some
18 benefit.

19 MS. ERVIN: Ms. Crowley, do you have
20 your hand up?

21 MS. CROWLEY: Mr. Dunn, you answered
22 some of this in response to a question
23 Mr. Riser posed, but I was having difficulty
24 hearing all of Mr. Rieser's question. Please

1 excuse me if you repeat yourself.

2 I believe that we have determined that
3 under Illinois law, presently the Attorney
4 General can elect whether to bring a cost
5 recovery action to the Circuit Court or Pollution
6 Control Board, and I believe that you also said
7 that you believe that Title 17 of the Act would
8 apply in the Circuit Court action, correct?

9 MR. DUNN: Yes.

10 MS. CROWLEY: Do you believe these
11 rules would apply in the Circuit Court action as
12 drafted?

13 MR. DUNN: I haven't looked at that,
14 but I would say not. I don't think that -- I
15 don't believe that they were drafted with that in
16 mind.

17 MS. CROWLEY: Thank you.

18 MS. ERVIN: Do you have another
19 question? Are there any additional questions for
20 Mr. Dunn at this time?

21 MR. RIESER: I am sorry. I have to ask
22 one more.

23 Looking at this language on the bottom
24 of Page 8 of your testimony with respect to

1 owners, leaving owners out of this liability
2 situation would create a legal loophole,
3 et cetera. Doesn't Section 58.9(2)(b)
4 specifically exempt certain types of owners from
5 a liability situation?

6 MR. DUNN: Just so I have it, 58.9 --

7 MR. RIESER: 2B.

8 MR. DUNN: There is --

9 MR. RIESER: I am sorry A2B.

10 MR. DUNN: A2 definitely talks about --

11 A2 definitely does what you said. I mean, it
12 does talk about class of people who should be
13 excluded from liability.

14 MR. RIESER: Okay. And you recognize
15 that's a limit on the ability to --

16 MR. DUNN: That's part of it. If 58.9
17 is triggered, yes, sir.

18 MR. RIESER: All right. Thank you.

19 MR. NEWCOMB: Does the Attorney
20 General's Office consider that Section 58.9
21 created any new affirmative responsibilities for
22 the Attorney General prior to filing an action,
23 for either recovery response costs or remedial
24 activities?

1 MR. DUNN: I think any change in the
2 law does that. I mean, any change in the law
3 that we are proceeding under puts affirmative
4 matters that have to be considered in front of --
5 whether it is a public litigant, Attorney General
6 or privilege litigant in any matter that the
7 pleading has been filed is in good faith and
8 based on the facts and the laws that are out
9 there.

10 So, yes, it would be something that we
11 would have to look at where, number one, we
12 thought it triggered -- 58.9 was triggered, and
13 then we are in to 58.9, where are we on proximate
14 causation, where are we on proportionate degree
15 of responsibility with respect to the PRP.

16 MR. NEWCOMB: I would then ask you,
17 when you get to the point of your analysis, how
18 much can we really go after this person?

19 MR. DUNN: The question is, who is
20 going to raise their right hand at trial. That's
21 what you ask, who can raise their right hand at
22 trial and testify on those points.

23 MS. ERVIN: Mr. Sargis?

24 MR. SARGIS: On that issue of owner

1 liability we talked about -- excuse me if the
2 question has been raised before, but under the
3 burden of proof, it talks about an act or
4 omission that's a proximate cause of the release
5 or an act or omission that had aggravated or
6 failed to mitigate a release. What would be your
7 position on a passive owner, in other words that
8 an owner that had owned property after the
9 initial release or disposal of contaminants but
10 who is no longer a current owner, in other words,
11 an intermediary owner that owned property, and
12 would your position be any different under the
13 current standard, under 22.2 versus under these
14 proposed rules as to that intermediary passive
15 owner -- whatever you want to call that owner?

16 MR. DUNN: Just so I have the cite
17 right --

18 MR. SARGIS: 741.210(b)(1) and (2). I
19 believe both apply, and I am wondering if these
20 proposed rules here would change how the current
21 approach is under joint and several law?

22 MR. DUNN: Yes. I would say it adds
23 proximate causation. That's something we would
24 have to specifically focus in on and evaluate.

1 MR. SARGIS: So, an omission by a
2 passive owner to mitigate or release that was
3 initially released prior to his ownership,
4 that -- you would say that would be different or
5 it would be the same standard as what you
6 currently have?

7 MR. DUNN: I am not comfortable right
8 now saying different or the same or whatever. I
9 am just saying that we would look at the B1 and
10 B2 as drafted in 741.210 and see what elements we
11 have to meet there in order to establish or
12 trigger B1 or B2.

13 In B1, it talks about proximate cause,
14 and we would have to evaluate your scenario of
15 prior owners and current owners and all of that
16 in light of the words that are on this page.

17 MS. ERVIN: Are there any additional
18 questions for Mr. Dunn?

19 Seeing none then, on behalf of the
20 Board, I would like to thank you for preparing
21 your testimony today.

22 MS. MANNING: Thank you.

23 MS. ERVIN: We had intended to get to
24 the rest of the pre-file testimony today,

1 however, given the lateness of the day and the
2 fact that they would like to present their
3 testimony as a panel, they will be testifying at
4 the next hearing in Springfield first, so we will
5 be adjourning for the day.

6 I will remind you that the next hearing
7 is scheduled for Wednesday, May 27th at
8 10:00 o'clock in the County Building, County
9 Board Chambers, Room 201 in Springfield.

10 I would also like remind the Agency
11 that any issues which the Agency has agreed to
12 address in this hearing shall be answered after
13 we get finished with the pre-file -- the rest of
14 the pre-file testimony at the next hearing.

15 The Board has ordered an expedited
16 transcript of this hearing, and it will be
17 available on Monday. If anybody would like a
18 copy, they can talk to the court reporter or, as
19 I said, it will be available Monday in the
20 Board's office or it will also be available in
21 the Springfield office by contacting me. And it
22 will not be available on the Web site as it used
23 to. You can get one from us free of charge.

24 Are there any matters that need to be

1 addressed at this time?

2 Seeing none, I thank you again for
3 coming, and hopefully we will see you on Monday
4 or next week. Thank you.

5 (Proceedings concluded.)

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ILLINOIS POLLUTION CONTROL BOARD HEARING

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1 IN WITNESS WHEREOF, I do hereunto
2 set my hand and affix my seal of office at
3 Chicago, Illinois this _____ day of _____, A.D.,
4 19____.

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Notary Public, Cook County, Illinois

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