

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
 PROPOSED AMENDMENTS TO CLEAN) R12-09
 CONSTRUCTION OR DEMOLITION) (Rulemaking-
 DEBRIS FILL OPERATIONS (CCDD)) Land
 AND UNCONTAMINATED SOIL)
 FILL OPERATIONS: PROPOSED)
 AMENDMENTS TO 35 Ill. Adm. Code) NOV 07 2011
 1100)

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STATE OF ILLINOIS
Pollution Control Board

REPORT OF THE PROCEEDINGS held in the
 above entitled cause before Hearing Officer Marie
 Tipsord, called by the Illinois Pollution Control
 Board, taken by Steven Brickey, CSR, for the State
 of Illinois, 100 West Randolph Street, Chicago,
 Illinois, on the 26th day of October, 2011,
 commencing at the hour of 10:00 a.m.

A P P E A R A N C E S

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MS. ALISA LIU
MR. ANAND RAO
MR. THOMAS JOHNSON

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MR. CHRISTIAN LIEBMAN
MS. KIMBERLY GEVING
MR. H. MARK WIGHT
MR. DOUGLAS CLAY
MR. THOMAS HORNSHAW
MS. HEATHER NIFONG
MR. STEPHEN NIGHTINGALE

ALSO PRESENT:

MR. SCOTT BELL
MR. JOHN HENRIKSEN
MR. RANDI WILLIE
MR. DENNIS WILT
MR. RYAN LADIEU
MR. MARK KRUMENACHER
MR. STEPHEN SYLVESTER
MR. DAVID PYLES
MR. JOHN HOCK
MR. JAMES HUFF
MR. KENNETH LISS
MR. STEVEN GOBELMAN
MR. GREGORY WILCOX

REPORTED BY:

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E X H I B I T S

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Exhibit No. 21.....	20
Exhibit No. 22.....	20
Exhibit No. 23.....	63
Exhibit No. 24.....	67
Exhibit No. 25.....	76

1 MS. TIPSORD: Good morning,
2 everyone. Welcome back. My name is Marie Tipsord
3 and I've been appointed by the Board to serve as
4 Hearing Officer in this proceeding entitled
5 Proposed Amendments To Clean Construction or
6 Demolition Debris Fill Operations (CCDD).
7 Proposed Amendments to 35 Ill. Adm. Code 1100.
8 This is Docket R12-9. To my immediate left today
9 is Board Member Thomas Johnson. To my far right
10 is Alisa Liu and to my immediate right is Anand
11 Rao.

12 Also today, as I told all of you
13 yesterday, we have Conner in the back. Conner is
14 from DePaul and is one of -- Conner Kane. He is
15 one of our interns this semester.

16 Today, we will continue hearing
17 the testimony of the Agency and take questions of
18 the Agency. In addition today, we will continue
19 to take any comment at the close of the hearing on
20 the Section 27(b) DCEO's decision not to conduct
21 an EcIS. The EcIS letter is up here and since
22 this is a continuation from yesterday, I'm not
23 going to go into all of that.

24 Anyone may ask a question of the

1 Agency today. I do ask that you raise your hand,
2 wait for me to acknowledge you. After I have
3 acknowledged you, please state your name and whom
4 you represent before you begin your question.
5 Please speak one at a time. We had a lot of
6 problems with that yesterday. If you're speaking
7 over each other, the court reporter will not be
8 able to get everything on the record.

9 Please note, any questions asked
10 by the board member or staff are intended to help
11 build a complete record for the Board's decision
12 and not to express any preconceived notions or
13 bias. I do want to give everybody a heads up. At
14 the close of hearing today, we will set a public
15 comment date so you may want to start thinking
16 about that what day works best for all of you.
17 And, with that, I think we're going to begin.
18 Suburban Public Works Directors Association did
19 pre file questions. They are not here to ask the
20 questions. However, the technical unit thought
21 some of the questions were relevant so the
22 technical unit will be asking some of those
23 questions of the Agency. So, with that, I'll let
24 them begin.

1 MS. LIU: Good morning. I'll simply
2 read the question as it's written. Number one,
3 does a prior use that minutely or slightly
4 increases the potential presence of contamination
5 make the source site fall into the definition of a
6 potentially impacted property? Please provide
7 some meaningful guidance as to how much of an
8 increase the IEPA is concerned with as it relates
9 to increases, the presence or potential presence
10 of contamination at the source site?

11 MS. TIPSORD: Before you answer, I
12 would just like to remind everyone the Agency's
13 witnesses were sworn in yesterday and they are
14 still sworn in today.

15 MR. CLAY: Doug Clay. One of the
16 intentions of the 2010 CCDD law is to identify
17 soil as most likely to be contaminated and in need
18 of professional evaluation and certification
19 before placement within a fill site.

20 Illinois EPA created the term
21 potentially impacted property to give maximum
22 flexibility to source site owners and operators,
23 receiving facilities, contractors, environmental
24 professionals, while still aligning with the

1 purposes of the certification requirements. My
2 response is a four part answer.

3 First, the decision as to which
4 soil certification form to use, the source site
5 certification or the PE/PG certification should be
6 made by the source site owner/operator and the
7 receiving facility in advance of any excavation or
8 dropped hauling. Second, no matter how
9 descriptive Part 1100 regulations may be in regard
10 to load certifications, the receiving facility may
11 choose to be more stringent and require a PE/PG
12 certification and analytical testing. The
13 interpretation of potentially impacted property is
14 ultimately made by the receiving facility since
15 the responsibility falls to them to make sure that
16 only CCDD and uncontaminated soil are accepted for
17 fill.

18 Third, for meaningful guidance
19 as to whether a property, including right of ways
20 or easements, may be potentially contaminated, we
21 recommend you consult ASTM Standard Practices for
22 Environmental Site Assessment Phase 1
23 Environmental Site Assessment Process E1527-05.
24 This document is recognized national -- is a

1 recognized national standard for evaluating a
2 properties' potential for environmental
3 contamination and, fourth, no type of property or
4 land used in category three may be excluded. The
5 owner should use his or her knowledge of the site
6 and history of the site, vicinity and the history
7 in the vicinity of the site. If the history is
8 unknown, consult a professional engineer or
9 geologist.

10 MR. RAO: Question two. What does
11 potential mean?

12 MR. CLAY: Again, we recommend you
13 consult ASTM Standard Practices for Environmental
14 Site Assessment Phase 1 Environmental Site
15 Assessment Process E1527-05. No type of property
16 or land can categorically be excluded.

17 MR. RAO: How do you measure
18 potential?

19 MR. CLAY: I think it's the same
20 answer there. If you look at the document we're
21 referring to, it talks about how you -- the types
22 of things you would look at to make that decision.

23 MS. TIPSORD: Excuse me. You've
24 given us some guidance through the ASTM standard

1 and things like that on what they should look at.
2 Do you think there's any benefit that it might be
3 to add some of that information to the definition
4 of potentially impacted?

5 MR. CLAY: Well, we didn't want to
6 mandate the use of that. We just wanted to
7 provide that as one document that someone could
8 rely on. That's not to be mandated. They use
9 that.

10 MR. RAO: Are there any other
11 standards they can rely on other than the ASTM
12 standards or they can propose something on their
13 own?

14 MR. CLAY: They can propose or use
15 whatever criteria they choose as a professional or
16 as the site owner and operator. We were just
17 providing this one document that is nationally
18 recognized as a good source to use if they didn't
19 have -- if they wanted some type of guidance.

20 MR. RAO: The next part of the
21 question states what specific factors do you use
22 to measure if there has been an increase in the
23 potential for presence of contamination?

24 MR. CLAY: Again, we would refer to

1 the ASTM standards because, again, it goes through
2 the types of things you'd be looking at to make
3 that determination.

4 MR. RAO: Looking at the rest of the
5 question it seems like your answers may be the
6 same.

7 MR. CLAY: Yes.

8 MR. RAO: We'll go onto number
9 three.

10 MS. LIU: Question number three.
11 What specific factors are to be considered by the
12 owner and/or operator of a source site in making a
13 determination as to whether a past or current use
14 of a property increases the potential presence of
15 contamination? Are any of these factors weighed
16 more heavily than others in making that
17 determination? Which specific factor or factors
18 are most likely to increase the potential for
19 contamination?

20 MR. CLAY: Once again, we would
21 refer you to the ASTM standards. The things such
22 as what the property adjacent to where the soil is
23 being generated would be a factor, but, again, the
24 ASTM standards goes into a lot of the things you

1 should look at.

2 MS. TIPSORD: I understand
3 Mr. Shepard from the Suburban --

4 MR. SMITH: I'm an attorney for the
5 association. I apologize.

6 MS. TIPSORD: That's all right. If
7 you would like to come up and continue asking the
8 questions, we've just been going through the list.

9 MR. SMITH: Sure. I apologize for
10 the tardiness.

11 MS. TIPSORD: That's quite all
12 right. We've asked the first three questions so
13 if you would like to continue with question four.
14 Go ahead and have a seat and introduce yourself
15 for the record.

16 MR. SMITH: My name is Greg Smith
17 and I'm an attorney with the law firm of Klein,
18 Thorpe & Jenkins and I'm here today on behalf of
19 the Suburban Public Works Association. I
20 appreciate your attention to this matter. Thank
21 you.

22 Question number four. What is
23 the meaning of, quote, contamination under the
24 definition of, quote, potentially impacted

1 property? Is it above clean up objectives?

2 MR. CLAY: For purposes of the
3 uncontaminated soil certification, contamination
4 means above the MAC values established using the
5 methodology proposed at 1100.605 for other
6 non-CCDD.

7 MR. SMITH: Question number five.
8 What specific due diligence steps should and/or
9 must a source site owner and/or operator take to
10 establish that the source site is or is not a,
11 quote, potentially impacted property? If he or
12 she takes those steps, are they still subject to
13 the penalty of a felony if the IEPA is not in
14 agreement with the analysis or conclusion that the
15 site is not a, quote, potentially impacted
16 property? What due diligence steps can be taken
17 to ensure a site source operator will not be
18 subject to a felony?

19 MR. CLAY: Please consult the ASTM
20 E1528-06 standard practice for limited
21 environmental due diligence transaction screening
22 process. The felony provisions on the
23 uncontaminated soil certification form is specific
24 to the person who, quote, knowingly makes false,

1 fictitious or fraudulent material statements, end
2 quote. Basically, don't lie on the certification.

3 MR. SMITH: Question number six.
4 How is the term, quote, potentially impacted
5 property applied directly to a transportation
6 right of way or easement?

7 MR. CLAY: The source site owner or
8 operator or the PE or PG should use the same three
9 criteria to evaluate a right of way or easement as
10 they would for a source site; the current use of
11 the property, prior use of the property and uses
12 of adjoining properties.

13 MR. SMITH: Question number seven.
14 Is a transportation right of way and/or easement
15 in a residential area a, quote, potentially
16 impacted property? Is a transportation right of
17 way outside a residential area and in a commercial
18 or industrial area always considered a, quote,
19 potentially impacted property that requires the
20 certification of a professional engineer or
21 geologist?

22 MR. CLAY: Again, no type of
23 property or land use can be categorically
24 excluded. The owners should use his or her

1 knowledge of the right of way or easement in the
2 vicinity or if the history is unknown consult a
3 professional engineer or geologist.

4 MR. SMITH: Question number eight.
5 If a transportation right of way or other public
6 works source site is outside of and not adjacent
7 to or in close proximity to the boundaries of a
8 site under the Comprehensive Environmental
9 Response Compensation and Liability Act of 1980,
10 The Resource Conservation and Recovery Act or a
11 cite under an IEPA remediation program such as the
12 Leaking Underground Storage Tank program or
13 Illinois Site Remediation Program is that enough
14 to certify that it is not a, quote, potentially
15 impacted area? If not, what other steps must be
16 taken to make that certification?

17 MR. CLAY: Again, no type of
18 property or land use can be categorically
19 excluded. The owner should use his or her
20 knowledge of the right of way or easement in the
21 vicinity. If the history is unknown, consult a
22 professional engineer or geologist.

23 MR. SMITH: Question number nine.
24 How do you determine if a site is a, quote,

1 proximate site under the definition? What factors
2 do you use to determine if a site is a, quote,
3 proximate site?

4 MR. CLAY: We recommend you consult
5 ASTM Standard for Environmental Site Assessment
6 Phase 1 Environmental Site Assessment Process
7 E1527-05.

8 MR. RAO: Mr. Clay, can I ask a
9 follow up?

10 MR. SMITH: Sure.

11 MR. RAO: You refer to the ASTM
12 document quite a few times in response to these
13 questions. I think it was asked earlier that be
14 made part of the rules. Is that incorporated by
15 reference?

16 MR. CLAY: It's not now and, again,
17 we want to provide this as one tool, one guided
18 document we can use, but I guess we would
19 incorporate it by reference.

20 MR. RAO: Especially, since you
21 consider that document as a national standard.
22 I'm assuming that the Agency relies on it a lot in
23 evaluating issues?

24 MR. CLAY: Yes.

1 MR. RAO: There are other standards
2 at least. You didn't mention any on the record.
3 So it would be helpful if you could.

4 MR. CLAY: We have no objection if
5 you want to incorporate it.

6 MR. RAO: Thanks.

7 MR. JOHNSON: But you want it
8 obviously referred to as one document rather than
9 the document?

10 MR. CLAY: Correct.

11 MR. JOHNSON: As squishy as
12 possible.

13 MS. TIPSORD: Is that a legal term?

14 MR. JOHNSON: Yes.

15 MR. WIGHT: I think the
16 incorporation would be fine, but we wouldn't want
17 to include it in a substantive provision
18 indicating the use is required. So if we can make
19 that distinction, we're fine with the
20 incorporation.

21 MR. SMITH: Question number ten.
22 What factors do you use to determine who is,
23 quote, responsible for the operation of the site
24 of origin of these CCDD or uncontaminated soil

1 under the definition of source site operator?

2 MR. CLAY: The source site operator
3 is the person with managing authority for the
4 property and the ability to make decisions about
5 activities at the property. The source site
6 operator should be someone knowledgeable about the
7 property and its history and historical use.

8 MR. SMITH: Do you have anything
9 else that you can share with us to explain the
10 part of the question which deals with who is
11 responsible for the operation of the site?

12 MR. CLAY: Once again, it's the
13 person that is managing the site. Other than that
14 and the definition, I'm not sure what else we can
15 add.

16 MR. SMITH: Thank you. Question
17 number 11. Are contractors who are engaged in
18 public works jobs throughout the bidding process,
19 quote, responsible for the operation of the source
20 site? Can these contractors be considered source
21 site operators?

22 MR. CLAY: The answer to both of
23 those questions is no for the reasons stated in
24 ten above.

1 MR. SMITH: Thank you. The final
2 question. Number 12. How many certification
3 forms are needed for a public works project or
4 source site? Does each load have to have a
5 separate certification form? What testing
6 requirements and address should be used on the
7 certification for soils consolidated for
8 stockpiling soils from different areas within the
9 village such as in the case of water main breaks?
10 Is the source site the area where the water main
11 break occurred or where the soils are stockpiled
12 and transported from? What would be considered a
13 proximate site?

14 MR. CLAY: The number of
15 certification forms needed must be coordinated
16 between the source site and the receiving
17 facility. You're asked -- you are asking a job
18 specific question and the answer may vary
19 depending on the fill site. In regards to
20 stockpiling of soils, if using a source site
21 certification form, the addresses where the soil
22 originated should be listed. If using a PE
23 certification or PG certification form, the
24 address of the location of the stockpile soil

1 should be listed. EG, the municipal public works
2 yard. In both cases, the source site owner or
3 operator or PE or PG should coordinate with the
4 receiving facility.

5 MR. SMITH: Thank you.

6 MS. TIPSORD: Thank you. All right.
7 With that, I think we're ready to move onto
8 pre-filed testimony.

9 MR. HUFF: Do you have me on those
10 questions?

11 MS. TIPSORD: Since you specifically
12 asked questions about the pre-filed testimony, we
13 were going to have pre-filed testimony and then
14 have you ask those questions.

15 MR. HUFF: Fair enough.

16 MR. WIGHT: We've already had both
17 the rider sheets admitted as exhibits. So what I
18 have in addition to that would be the pre-filed
19 testimony, additional testimony of Stephen F.
20 Nightingale, which was, as we said, pre-filed.

21 MS. TIPSORD: Just one is all I
22 need.

23 MR. JOHNSON: It's already been
24 identified.

1 MS. TIPSORD: Yes, just one.

2 MR. WIGHT: And we have the same,
3 testimony for Thomas C. Hornshaw on the Agency's
4 errata sheet number one.

5 MS. TIPSORD: If there's no
6 objection, we will admit the additional testimony
7 of Stephen F. Nightingale as Exhibit 21. Seeing
8 none, it's Exhibit 21.

9 (Document marked as IL PCB
10 Exhibit No. 21 for
11 identification.)

12 MS. TIPSORD: And the testimony of
13 Thomas C. Hornshaw will be admitted as Exhibit 22
14 if there's no objection. Seeing none, it's
15 Exhibit 22.

16 (Document marked as IL PCB
17 Exhibit No. 22 for
18 identification.)

19 MS. TIPSORD: And with that,
20 Mr. Huff?

21 MR. HUFF: Good morning. I'd just
22 like to start with kind of a follow up to the same
23 line of questioning that we had. Could the Agency
24 compare and contrast a recognized environmental

1 condition under the ASTM standards and your
2 definition of potentially impacted property? Are
3 they the same? Is there a difference between
4 those two terms?

5 MR. CLAY: We're saying the ASTM
6 standard is something that could be used when the
7 professional engineer or professional geologist
8 makes that determination. So it's really up to
9 the professional on how they use that.

10 MR. HUFF: Same question. In your
11 mind, is there any difference between the
12 recognized environmental condition and a
13 potentially impacted property?

14 MR. CLAY: I think that's up to the
15 professional or to the source site owner or
16 operator.

17 MR. NIGHTINGALE: What do you mean
18 by a recognized --

19 MR. HUFF: Under ASTM, that's the
20 term that is used and that's where the confusion
21 comes in and all the questions under the what
22 we've operated under for the past year on
23 industrial/commercial. If you look at the law, it
24 looked to me like it was modeled after ASTM where

1 you went out and identified recognized
2 environmental conditions. That's the term that is
3 used under ASTM and the confusion was the first
4 interpretation on industrial/commercial and then
5 that confusion still resides today. Although, I
6 think -- although, the last set of comments was
7 very helpful in clarifying because what I heard is
8 that possibly impacted property is exactly the
9 same as a recognized environmental condition under
10 ASTM. So I'm just trying to figure out is what I
11 heard today consistent with what the Agency's
12 intent is under potentially impacted property?

13 MR. CLAY: I think if the
14 professional followed ASTM standards and based
15 that -- that was the basis of their decision, that
16 would be a very good standard to follow. It's not
17 the only standard, but it's certainly a recognized
18 environmental condition under the ASTM and would
19 be a reasonable parallel to the potential impact
20 of property.

21 MR. HUFF: So they could be the same
22 then?

23 MR. CLAY: Yes.

24 MR. HUFF: Thank you. That's what

1 I'm trying to get. My pre-filed questions are
2 directed back to Tom Hornshaw. On page three of
3 your pre-filed testimony, you note that the
4 Agency, quote, has no ingestion or inhalation
5 concern for painted concrete, brick or asphalt,
6 end quote. Question A, what ingestion and
7 inhalation concerns does the Agency have with all
8 material placed in CCDD facilities below three and
9 five feet respectfully?

10 MR. HORNSHAW: The Agency has the
11 same concerns for soil ingestion and dust and
12 vapor inhalation that are recognized in TACO.
13 Soil ingestion and soil dust and vapor inhalation
14 are potential contact pathways in TACO for human
15 exposure to soil contaminants. Paint when adhered
16 to a substrate is less likely than soil to be
17 inadvertently eaten or become airborne or inhaled.

18 MS. TIPSORD: Just for the record,
19 Mr. Huff. Your question -- your pre-filed
20 question had three and ten feet. I just want to
21 be sure that ten feet and five feet make no
22 difference in your answer?

23 MR. HORNSHAW: It's a difference if
24 you consider what is in TACO because TACO uses

1 three feet as the limit for clean soil by
2 ingestion and ten feet for clean soil by
3 inhalation.

4 MR. HUFF: That was my intent.
5 Three feet and ten feet.

6 MS. TIPSORD: I just wanted to
7 double check.

8 MR. HUFF: So if there's ten feet of
9 clean material over the top, then under TACO that
10 would be acceptable for excluding that pathway?

11 MR. HORNSHAW: For excluding the
12 inhalation pathway.

13 MR. HUFF: And three feet for
14 excluding the ingestion pathway?

15 MR. HORNSHAW: Yes.

16 MR. HUFF: Thank you. Is scraping
17 paint off a surface a representative sample under
18 35 IAC Part 72110?

19 MR. HORNSHAW: The Agency uses the
20 term representative in its common dictionary sense
21 of being typical or shared characteristics with
22 others. It's legal definition in the hazardous
23 waste rule is not relevant in this context. In
24 its usage to describe paint samples, a

1 representative sample might be of the same color
2 and texture and have the same number of layers as
3 the painted debris being sampled.

4 MR. HUFF: On page five of your
5 pre-filed testimony, you indicate that the Agency
6 has added Section 1100.610D to prohibit soil
7 sampling compositing. Does not compositing
8 provide a more representative sample?

9 MR. HORNSHAW: The Agency does not
10 require representative soil samples when
11 demonstrating compliance using Section 1100.610B.
12 The purpose of soil sampling is to identify for
13 exclusion any soil that is noncompliant. Deceit
14 samples in associated areas that fail the Section
15 1100.610C comparisons are excluded from CCDD and
16 soil only disposal sites.

17 Furthermore, TACO does not allow
18 averaging or compositing for the construction
19 worker scenario and only allows compositing for
20 the soil to groundwater pathway within a bore
21 hole. We believe these concepts should be
22 continued in the CCDD rule.

23 MR. HUFF: What about for ingestion
24 and inhalation with respect to compositing and

1 averaging?

2 MR. HORNSHAW: That's allowed in
3 TACO.

4 MR. HUFF: Thank you. When soil is
5 excavated, loaded in the trucks and then emptied
6 at CCDD facilities, wouldn't this result in some
7 soil mixing reducing the peak concentrations?

8 MR. HORNSHAW: Reducing peak
9 concentrations through soil mixing is another way
10 to express contaminant dissolution. Section
11 3.610C of the act defines uncontaminated soil to
12 be, quote, soil that does not contain contaminants
13 in concentrations that pose a threat, end quote.
14 The Agency interprets this to be uncontaminated
15 soil used as fill at regulated fill operations
16 should pose no threat to human health and safety
17 at any location and at any volume. And you have a
18 second question?

19 MR. HUFF: I did. Wouldn't this
20 type of activity result in composited samples
21 being more representative?

22 MR. HORNSHAW: TACO rules for
23 averaging overexposure units and through specific
24 depths are meaningless in the fill site situation.

1 In the absence of a logical and meaningful
2 averaging and compositing strategy for fill
3 operations, the Agency has determined that
4 averaging and compositing are inappropriate.

5 MR. HUFF: When characterizing if a
6 solid waste is a hazardous waste, does not 35 IAC
7 Part 721 Part 120C require a representative sample
8 as defined in 35 IAC Part 720?

9 MR. HORNSHAW: Uncontaminated soil
10 is not a waste and Part 720 and 721 are not
11 directly applicable. In Part 1100.610, the Agency
12 outlines procedures whereby soil may be judged to
13 be uncontaminated. We seek to include only,
14 quote, soil that does not contain contaminants in
15 concentrations that pose a threat, end quote. For
16 purposes of soil used as fill material at
17 regulated fill operations, it is our intent that
18 soil below the MAC criteria is uncontaminated and
19 that soil over the criteria is contaminated. It
20 is our position that mixing of the two through
21 sample compositing or averaging results is
22 contrary to the statutory intent and the TACO
23 requirements.

24 MR. HUFF: In the proposed

1 regulations, you have referenced an SW-846 as a
2 method of sampling, is that not correct?

3 MR. HORNSHAW: I believe so.

4 MR. HUFF: Let's skip to 2H. For
5 linear projects such as a highway project that
6 extends for over one mile and extending to a depth
7 of ten feet for sewer installation, how many
8 samples for analysis would be appropriate in your
9 professional opinion assuming --

10 MR. HORNSHAW: You lost me.

11 MR. HUFF: Pardon me?

12 MR. HORNSHAW: You lost me. Where
13 are you?

14 MR. HUFF: H. The last question.

15 MS. TIPSORD: We don't have an H.

16 MR. HUFF: We'll make this
17 contemporaneous. You have a linear project such
18 as a highway that extends for a mile to a depth of
19 ten feet for sewer installation. How many samples
20 for analysis would be appropriate in your
21 professional opinion assuming no recognized
22 environmental conditions have been identified?

23 MR. CLAY: I think that is up to the
24 environmental professional.

1 MR. HUFF: Mr. Clay, you're a
2 professional engineer. You're an environmental
3 professional. I'm asking your professional
4 opinion.

5 MR. CLAY: I guess I need to have
6 more information.

7 MR. HUFF: What do you need?

8 MR. CLAY: I need to know what the
9 surrounding property was.

10 MR. HUFF: Residential. No RECs.
11 We've already established there's no REC's.

12 MR. CLAY: I don't think my
13 professional opinion is applicable. I think it's
14 a professional that is certifying to it that has
15 to make that determination.

16 MR. HUFF: So if you collect 20
17 samples and you analyze for arsenic for some
18 reason, you would expect statistically that one
19 out of those 20 are going to exceed 13 due to
20 natural background? Dr. Hornshaw, would you agree
21 with that?

22 MR. HORNSHAW: I would agree with
23 that.

24 MR. HUFF: So you would conclude

1 that naturally occurring arsenic above 13 then has
2 to be excluded from a CCDD facility?

3 MR. HORNSHAW: I believe so, yes.

4 MR. HUFF: Focus on taking these
5 over a mile area. I have one depth with one
6 sample at 13. The next step the environmental
7 professional would do is then conduct step out
8 borings. They do another 20 and low and behold
9 one out of 20 of those fail. It's a never ending
10 process where you give me an absolute limit of 13,
11 which is really at variance of what the background
12 intent was under TACO where one would be allowed
13 to compute the upper confidence level as a mean
14 and as long as that was below 13 it was acceptable
15 and I further point out that the 13 is an
16 ingestion exposure pathway, not a soil migration.

17 MS. FLOWERS: Is he testifying?

18 MS. TIPSORD: He's been sworn in so
19 if he is --

20 MS. FLOWERS: Just making sure.

21 MR. HUFF: How do we overcome that
22 kind of issue with arsenic?

23 MR. CLAY: In your example,
24 Mr. Huff, if there is one sample out of the 20

1 that exceeds the MAC table for arsenic, then you
2 can either do further evaluation or it should be
3 treated as waste and taken for disposal. The idea
4 is we're trying to prevent dissolution of the
5 contaminants and identify hot spots. If you have
6 one hot spot, then that should be taken off the
7 disposal.

8 MR. HUFF: It's kind of naive to
9 think there aren't going to be other, quote,
10 unquote, hot spots. You've already acknowledged
11 that 13 mg/L and above of arsenic can occur here
12 naturally and, in fact, about five percent of the
13 Illinois soils already do that. It's a never
14 ending process because what you -- you don't have
15 money budgeted for this so you would go out and do
16 additional samplings trying to cut down on the
17 arsenic and every time you do that you find
18 another arsenic value over 13. So you're then
19 obligated how much do you dig before you take more
20 confirmation samples and at the end of the day
21 you're going to have exactly what you heard
22 yesterday. 82 percent of the soils here are going
23 to go out of state or into a landfill at a very
24 significant economic impact.

1 My recommendation is the Agency
2 needs to go back and look at your Maximum
3 Allowable Concentrations that were based on the
4 soil migration pathway which arsenic was not and
5 most of the carcinogenic PNA's are not and
6 reconsider whether you should be allowed to do
7 compositing or averaging for those that are in
8 ingestion or inhalation controlling contaminant
9 levels because you've created, in my opinion, a
10 situation here where nothing is going to be
11 allowed to go in these CCDD facilities. There is
12 a major problem.

13 My final question I think is
14 another hypothetical. If a CCDD facility is found
15 to have a concentration of, let's say, chlorides
16 above background exiting the site property, as I
17 read that correctly, they then would be required
18 to get into some kind of remediation to reduce
19 that chloride. Would the Agency support in that
20 example a groundwater management zone and if
21 there's not enough information, under what
22 scenario would the Agency support a request for a
23 groundwater management zone?

24 MR. NIGHTINGALE: Steve Nightingale.

1 That's something we have considered and there
2 wouldn't be any reason why they couldn't apply for
3 a groundwater management zone.

4 MR. HUFF: My question is whether
5 the Agency would support it?

6 MR. NIGHTINGALE: I think we would
7 support it like we would anybody else who would
8 apply for a GMZ.

9 MR. HUFF: How many GMZ's has the
10 Agency supported over the last ten years?

11 MR. NIGHTINGALE: I don't know that.
12 I do know that we have GMZ's that have been
13 approved for landfills and I think GMZ's have been
14 approved by our public water supply, but I don't
15 have that number and RCRA facilities as well.

16 MR. HUFF: In your mind, the Agency
17 would be open to supporting a GMZ where chloride
18 was going offsite above background?

19 MR. NIGHTINGALE: I think if they've
20 gone through the process that we laid out here
21 where they could show that -- first off, they need
22 to potentially show that it's from somebody else
23 and if it is, then they don't have to, but it's
24 from them --

1 MR. HUFF: From them.

2 MR. NIGHTINGALE: -- that would be
3 the mechanism that you would normally go through
4 to allow you a period of time to come into
5 compliance. So, yeah, I think that would be an
6 option.

7 MR. HUFF: So a period of time and
8 how would they come into compliance? They have
9 chlorides coming out of the CCDD from highway
10 deicing salt that was brought in as just on the
11 roadway itself, you had elevated chlorides, and
12 you're not above Class 1, you're just above the
13 background chloride levels in that area, but it's
14 going off site?

15 MR. NIGHTINGALE: If you weren't
16 above Class 1, I don't think you would generally
17 be getting into a situation that you need to get a
18 GMZ.

19 MR. HUFF: Do not your regulations
20 say you have to meet background concentrations at
21 the property line?

22 MR. NIGHTINGALE: These regulations
23 require that you either meet the 620 numeric
24 standards or background. Whichever is higher.

1 MR. HUFF: I believe that's on the
2 property. What about exiting the property?

3 MR. NIGHTINGALE: They do have --
4 leaving the property or off the property, they are
5 required to meet the non-degradation requirements
6 that are in 620.

7 MR. HUFF: What does that mean,
8 non-degradation requirements? That's my question.

9 MR. WIGHT: I think we have our
10 interpretation of that, but I don't think that's
11 been a clearly settled issue and I think the
12 original Board opinion on that reflects it wasn't
13 even settled in the Board's mind at that time. So
14 I don't think we can give you a clear answer as to
15 what constitutes non-degradation.

16 MR. HUFF: Let me get this straight.
17 The Agency is proposing rules here that says you
18 can't have degradation which in the Agency's mind
19 says above whatever the background concentration
20 is and they're now asking the Board to adopt that
21 when we don't have a clear understanding of what
22 background means?

23 MR. WIGHT: That's a result of the
24 620 rules and not a result of this rule. And I

1 don't know that we even mentioned GMZ in this
2 rule. You raised the issue in your question, but
3 as I think as you very well know that is a
4 difficult issue when what we have are
5 interpretations and the Agency would touch that on
6 a site specific basis. So we can't give you
7 blanket answers.

8 MR. NIGHTINGALE: Mr. Huff, I want
9 to add something on that. If they're not
10 exceeding the 620 numeric standards on site, they
11 are not required to deal with the issue off site.

12 MR. HUFF: So don't ask, don't tell?

13 MR. NIGHTINGALE: No.

14 MR. HUFF: You have a lot of
15 facilities that the quarry basically goes almost
16 to the property line. So they're going to end up
17 putting these monitoring wells at the property
18 line?

19 MS. TIPSORD: We can't get a nod on
20 the record.

21 MR. NIGHTINGALE: That could be
22 true, yes.

23 MR. HUFF: And if that property line
24 shows that the chlorides are above whatever the

1 established background was at that site, as I read
2 the regulations they then would be required to
3 start corrective actions, whatever those may be.

4 MR. NIGHTINGALE: They would be --
5 it wouldn't necessarily be background. First,
6 what they would have to do is show that they were
7 exceeding the 620 numeric standards. That would
8 kick them into showing that it's either at the 620
9 numeric standard or the background. Whichever is
10 higher.

11 MR. HUFF: Just so I understand. If
12 I have a property lined well that meets the 620
13 numeric standards, I'm done? I don't have to say
14 that that -- at the property line because
15 everybody knows then that going off site is going
16 to be above background?

17 MR. NIGHTINGALE: That's correct.
18 That's the way these regulations are written and
19 they're done in conjunction with all the front end
20 precautionary measures that are being applied.
21 Our intent was to have the groundwater monitoring
22 as a final check to verify that there was not a
23 problem and we felt the 620 Class 1 numeric
24 standard was the appropriate number to use as that

1 check.

2 MR. HUFF: So if you had a quarry
3 that basically went to the property line, then
4 they're going to have to put the monitoring wells
5 off site?

6 MR. NIGHTINGALE: No.

7 MR. HUFF: They're going to put it
8 inside the fill?

9 MR. NIGHTINGALE: Well, that may be
10 something that would potentially subject them to
11 obtaining an adjusted standard because they do
12 have to put it -- it does need to be at the
13 property line or at the distance that's described
14 in the regulations, whichever is smaller. So if
15 they go right up to the property, the regulations
16 don't address that. So -- I mean to me, that may
17 be something that they would have to seek relief
18 from the Board.

19 MR. HUFF: Thank you.

20 MR. RAO: Mr. Nightingale, in your
21 response to Mr. Huff regarding meeting the 620
22 standards, is that clearly spelled out in the
23 rules?

24 MR. NIGHTINGALE: Yes, it is.

1 MR. RAO: What section of the rules?

2 I was looking at Section 1100.410C under

3 termination of permits.

4 MS. TIPSORD: 412C. That's why I

5 was looking over. I couldn't find a 410C.

6 MR. NIGHTINGALE: Section 1100.720

7 compliance with groundwater quality standards.

8 MR. RAO: Does it say where

9 Subsection B talks about a compliance point that

10 defines --

11 MS. TIPSORD: In other words, we're

12 not seeing at the property line anywhere.

13 MR. NIGHTINGALE: It is in the --

14 let's see. The definition of compliance boundary.

15 It's in -- the definition of compliance boundary

16 means a line at the land surface that surrounds a

17 CCDD fill operation or uncontaminated soil fill

18 operation and that extends vertically from the

19 ground surface to the bottom of the upper most --

20 THE COURT REPORTER: Can you speak

21 up and slower.

22 MR. NIGHTINGALE: The distance

23 between the compliance boundary and the edge of

24 the fill operation can be no more than one hundred

1 feet or the distance between the property boundary
2 and the edge of the fill operation, whichever is
3 less. That, in conjunction with the compliance
4 point, means a point on or within the compliance
5 boundary at which the concentration of
6 constituents from the fill operation may not cause
7 the groundwater to exceed the Class 1 groundwater
8 quality standard at 35 Ill. Adm. Code 620.410.

9 And then that in conjunction
10 with Section 1100.720 where it actually indicates
11 that the owner/operator must ensure that the fill
12 operation does not cause or exceed Class 1
13 groundwater quality standard at 35 Ill. Adm. Code
14 620.410 ties it together.

15 MR. RAO: Okay. What do you have
16 under determination of permit requirements under
17 412? Is that consistent with compliance with
18 groundwater quality standards?

19 MR. NIGHTINGALE: Under 412?

20 MR. RAO: 412C. C1D.

21 MR. NIGHTINGALE: Yes. C1D.

22 1100.412C1D, it's consistent with that
23 requirement, yes.

24 MR. RAO: All right. Thank you very

1 much for the clarification.

2 MS. TIPSORD: Are there any more
3 questions at this time for the Agency? Start
4 right here. Identify yourself for the record,
5 please.

6 MR. QUINN: I'm Josh Quinn, Vulcan
7 Materials Company. Q-U-I-N-N. Going back to
8 Mr. Huff's example about the 20 samples along the
9 roadway. If you had a PH for each of those bore
10 holes and you compared the arsenic result within
11 that PH range, would that be acceptable even if it
12 was above the background standard? Can you please
13 clarify that?

14 MR. CLAY: In Public Act 097-10137,
15 which is effective July 14th of 2011, it talks
16 about the use of -- this is a carcinogen. Arsenic
17 is a carcinogen and you can -- so one in a million
18 risk would apply. However, you can use background
19 and in this case you would -- the background
20 number is the one that would apply and you would
21 not be able to use site specific PH that would
22 give you a number above background. So you would
23 still -- the background numbers would still apply
24 from the MAC table.

1 MS. TIPSORD: For the record, that
2 is in Section 3.160C1 of the act.

3 MR. CLAY: Correct.

4 MS. TIPSORD: Are there any other
5 questions for follow up?

6 MR. GOBELMAN: Steve Gobelman.
7 Illinois Department of Transportation. Under
8 Mr. Huff's example regarding arsenic, if I have an
9 arsenic value total of 20, but I have run a TCLP
10 or SPLP test and that arsenic concentration was at
11 or below the Class 1 groundwater standard, would
12 that stuff be considered uncontaminated soil?

13 MR. HORNSHAW: Samples that are
14 analyzed by a TCLP or SPLP only pertain to
15 migration to groundwater pathway. The answer that
16 Doug just gave to the previous question I think
17 applies here as well. You would be potentially
18 exceeding or probably exceeding the background
19 based values that are in the MAC table. So I
20 think you would not be able to pass.

21 MR. GOBELMAN: Okay.

22 MS. TIPSORD: Are there any other
23 questions right now? The Agency has some more
24 testimony to present so they'll be here for a

1 couple more minutes if you think of anything.

2 Mr. Wight?

3 MS. FLOWERS: I guess at this time
4 we would want to direct your attention to errata
5 sheet two and provide a little bit of background
6 as to why we submitted errata sheet two and Doug
7 Clay will give that testimony.

8 MR. CLAY: Errata sheet two makes
9 modifications to Section 1100.205. The first part
10 is in 205A1A. We're adding a sentence. If soil
11 is consolidated from more than one source site, a
12 certification must be obtained for each source
13 site owner or operator. This is to clarify the
14 question was who would -- you consolidate soils
15 for a public -- at a public works yard and have
16 those -- you can have those soils certified by a
17 professional and then meet the MAC table, take
18 those to a CCDD facility. Is there an option to
19 get an owners -- a site owners certification for
20 each project, consolidate the load and have all of
21 those 662 forms that the owner's certification as
22 another option and we said yes. You just need to
23 get the source site owner's certification for each
24 of the projects that was part of the consolidated

1 load. So that was just a clarification as to how
2 the Agency interpreted that.

3 The second portion -- the second
4 part of the changes to 205 had to do with issues
5 that were brought up at the last hearing. The
6 last hearing Steve Gobelman from the Illinois
7 Department of Transportation had several questions
8 regarding rejected loads and being able to provide
9 additional information or analysis that would
10 allow the loading to then be accepted at a CCDD
11 site or soil fill operation. At the hearing, we
12 said that we would consider revising the load
13 rejection wording at Section 1100.205. Subsequent
14 to the last hearing, we met with IDOT shortly
15 after the hearing so that we would better
16 understand their issues.

17 After that, we conducted a
18 couple of conference calls that included IDOT, the
19 IAAP, which is the Illinois Association of
20 Aggregate Producers, LRRRA, Land Reclamation and
21 Recycling Association, and representatives from
22 the road builders.

23 What we submitted in errata
24 number two we believe all of those groups have

1 agreed to the wording that is part of errata
2 number two. The errata before you represents
3 wording changes to Sections 1100.205A4 and
4 1100.205B4A. Do you have any questions regarding
5 that?

6 MS. TIPSORD: Actually, I do,
7 Mr. Clay. Funny you should ask. In B4A, you have
8 B4 -- wait. Let's see. Yes. A4 sorry. A4A, B,
9 C, D and then something JCAR doesn't like and
10 neither does the Secretary of State, a paragraph
11 that is unnumbered that doesn't appear to go with
12 Sub D. Could you take a look at that. It is an
13 unnumbered paragraph and that's not something the
14 SOS or JCAR likes to see. So maybe recommend to
15 us in final comments how best to address that.

16 MS. FLOWERS: We can do that.

17 MR. CLAY: We will do that. Thank
18 you. Are there any other questions for the Agency
19 on these errata sheets or on any -- does the
20 Agency have anything else?

21 MS. MANNING: I have a question.

22 MS. TIPSORD: I can't see you today.

23 MS. MANNING: Claire Manning with
24 the Chicago Public Building Commission. On these

1 questions that we had this morning about site
2 specific -- the ability of the Agency to look at
3 things beyond just a uniform MAC and the
4 legislative history of this particular regulation,
5 would you agree with me that the legislation was
6 created not solely for the purpose of providing
7 further regulation of CCDD, hauling, tracking,
8 deposition in CCDD facilities, but also to provide
9 a reasonable and workable definition for
10 uncontaminated soil such that soils in the state
11 wouldn't all have to be landfill, but they could
12 be safely deposited in a CCDD facility?

13 MR. CLAY: I believe the statute in
14 the legislature passed and the governor signed was
15 intended to define uncontaminated soil with
16 numeric standards as to what was uncontaminated
17 for purposes of mines, quarries and other
18 excavations.

19 MS. MANNING: CCDD facilities?

20 MR. CLAY: CCDD facilities as well
21 as soil fill operations.

22 MS. MANNING: And I read nothing in
23 this legislation nor in -- as I testified was very
24 involved in the legislative development of the

1 proposal on behalf of the Public Building
2 Commission of the City of Chicago. I see nothing
3 in this proposal that forecloses the Agency or the
4 Board -- not in the proposal, but in the
5 legislation or the legislative history that
6 forecloses the Agency and the Board from
7 developing a more flexible, if you will, approach
8 to what the MAC is as it relates to specific soil
9 conditions, soil conditions at the quarries,
10 background at the quarries, PH levels at the
11 quarries.

12 Does the Agency -- can you point
13 me to something more specific about why you
14 believe that a one size fits all approach is the
15 only approach envisioned by the legislature in
16 passing this legislation?

17 MR. CLAY: Section 3.160C, and I'll
18 read this, of the Environmental Protection Act.
19 For purposes of this section, the term
20 uncontaminated soil means soil that does not
21 contain contaminants in concentrations that pose a
22 threat to human health and safety and the
23 environment. Under C1, it directs -- it directs
24 the Board to adopt rules specifying the, quote,

1 maximum concentrations of contaminants that may be
2 present in uncontaminated soils for purposes of
3 this section, end quote.

4 So we believe that the
5 legislature is directing the Agency and the Board
6 to adopt rules that -- for uncontaminated soil.
7 Not uncontaminated soil based on location or
8 engineered barriers or what the characteristics,
9 physical or chemical characteristics of the soil
10 is, but rather it directs the Board to adopt
11 regulations for uncontaminated soil that are
12 protected of human health in the environment and
13 we believe that is one standard and not 20, 30, 50
14 standards depending on where you're at and what
15 the conditions are of that site.

16 MS. MANNING: And just for purposes
17 of the record, I would agree with Doug's statement
18 at the very end of that statement that the Board
19 is directed to make MAC's that are protective of
20 human health and safety, but I disagree that a one
21 size fits all approach is appropriate I think that
22 they wrote in TACO. I think that the legislation
23 talks about a one in one hundred million
24 declaration to the Board.

1 I do not think it says anything
2 about a one size fits all and I think you can tell
3 from a lot of the testimony today when we talk
4 about background we're talking about PH issues at
5 the site. Those are all TACO related issues that
6 I believe this legislation calls for a more
7 flexible approach.

8 MS. TIPSORD: I would note
9 Ms. Manning was also sworn in yesterday.

10 MS. MANNING: Thank you. That's it.
11 Thank you.

12 MR WILT: Just a follow-up question
13 along these lines. The act that Mr. Clay referred
14 to talks about rules to be protective of health
15 and environment. I just want to clarify. The act
16 does not require that the rules be adopted so that
17 the amount of soil being landfilled is landfill
18 limited, I think, is that correct? That's not the
19 intention or that's not the role of the rulemaking
20 to necessarily limit the amount of soil that has
21 to be landfilled. That is dependant entirely on
22 the application of the rules, but that's not the
23 mission of the Board or the Agency with respect to
24 the rules and I guess I pose that as a question to

1 confirm that is not -- the Agency hasn't submitted
2 these proposed rules based on an understanding
3 that these rules are intended to limit the amount
4 of soil to be landfilled?

5 MR. CLAY: I would say the Agency
6 did not submit these rules and we don't believe it
7 is the legislature's intent to reduce the amount
8 of material going to landfills or increase the
9 amount of material going to CCDD facilities or
10 other fill operations. The intent is to define
11 uncontaminated that it is protected of human
12 health in the environment.

13 MR. WILT: Thank you.

14 MS. MANNING: Just for purposes of
15 the record. Claire Manning again. I just never
16 intimated that the legislature's intent had
17 anything to do with that other than defining
18 contaminated and uncontaminated for purposes of
19 making a workable rule and the Board knows well
20 its role under Section 27(a) of the act. What
21 factors it needs to continue, technically
22 justified, economically reasonable and those
23 factors in terms of whatever it makes a decision
24 in the rulemaking and those are the factors that

1 are applicable to the Board. Thank you.

2 MS. TIPSORD: Mr. Gobelman?

3 MR. GOBELMAN: Just another
4 follow-up question. Did the Agency go through the
5 process of a professional engineer, professional
6 geologist who has a sample boring of 20 for
7 arsenic and non-detect TCLP of their evaluation of
8 compliance and determining uncontaminated levels
9 going through the regulation of how you evaluate
10 that sample?

11 MR. CLAY: I think the same answer
12 as Mr. Hornshaw gave is we went out and took a
13 sample as part of an inspection and the sample
14 came up with a total arsenic of 20 and the
15 background number on the MAC table is 13 and then
16 we ran a TCLP and it was under the 620 groundwater
17 standards, that would be a violation and we would
18 potentially send a violation notice and pursue
19 enforcement.

20 MR. GOBELMAN: Can you go through
21 the points of the regulations that allows that
22 process under 1100.605, the Maximum Allowable
23 Concentration of chemical constituents and
24 uncontaminated soils?

1 MR. WIGHT: I think we just provided
2 the statutory background of carcinogens that the
3 highest we can go is the background. That's a
4 particular subset of contaminants. I believe that
5 question has already been answered. It's a
6 statutory interpretation that plays itself out
7 through the methodology proposed in 1100.605.

8 MR. GOBELMAN: Why under Section
9 1100.610 on compliance of evaluation performance
10 and documentation of soil sampling and chemical
11 analysis that for inorganic constituents you allow
12 the alternatives of evaluating a sample for TCLP
13 or SPLP? My reading of this is that it's one or
14 the other.

15 MR. HORNSHAW: Under the scenario
16 you just described, Section 1100.610 when you get
17 to B1 first of the determinants for the chemicals
18 that are in tables G or H, the background tables,
19 you don't get past that. You don't get to the
20 option of doing that value base on a TCLP. That
21 only is relevant when the migration to groundwater
22 pathway is controlling what value goes into the
23 MAC table. The first option is background. You
24 never get to doing a comparison between either

1 TCLP or soil total for showing compliance.

2 MR. GOBELMAN: Where is that stated
3 that it says you stop there?

4 MR. HORNSHAW: I'll just read
5 1100.610A1. If the background value -- I'm sorry.
6 B1. Section 1100.610B1. The background value
7 from 35 Ill. Adm. Code 742 Appendix A, tables G or
8 H, was determined to be the Maximum Allowable
9 Concentration for ionizing organic constituent or
10 an inorganic constituent, a direct comparison of
11 that value with a total soil concentration from
12 the laboratory report must be used to evaluate
13 compliance.

14 MR. GOBELMAN: What chemical
15 constituent then would TCLP fall under?

16 MR. HORNSHAW: Migration of
17 groundwater pathway is the most restrictive of the
18 pathways evaluated.

19 MS. TIPSORD: Mr. Hornshaw, you need
20 to speak to the court reporter.

21 MR. HORNSHAW: Then you have an
22 option of doing the TCLP or SPLP instead of totals
23 to show compliance.

24 MS. TIPSORD: Mr. Huff?

1 MR. HUFF: Now, I'm confused.
2 Arsenic and lead, which one is controlling for
3 that? What is it we're supposed to be running?

4 MR. HORNSHAW: The background value
5 is controlling for arsenic.

6 MR. HUFF: So I don't ever run to
7 see if I leach out above the drinking water
8 standard despite that all this is going in below
9 the water table?

10 MR. HORNSHAW: We have chosen the
11 most restrictive value.

12 MR. HUFF: Which is 13?

13 MR. HORNSHAW: Correct.

14 MR. HUFF: So the SPLP value that I
15 thought was listed in there also is not
16 applicable?

17 MR. HORNSHAW: Not for arsenic.

18 MR. HUFF: I'm going to tell you the
19 whole regulating community doesn't understand
20 that. How about lead?

21 MR. HORNSHAW: I couldn't tell you.
22 I'd have to look up what the basis was. I think
23 it was background, but only for counties outside
24 of metropolitan statistical areas. I'd have to

1 look.

2 MS. TIPSORD: Mr. Hornshaw,
3 remember, the court reporter can't see you or hear
4 you.

5 MR. HORNSHAW: Sorry.

6 MR. GOBELMAN: I believe the lead
7 was PH driven. We were using the most stringent
8 PH value for lead as the number.

9 MR. HORNSHAW: For counties outside
10 of the metropolitan statistical area, the value is
11 23 milligrams per kilogram, which is based on the
12 lowest of the PH values available for migration to
13 groundwater. That's the controlling value. For
14 counties within metropolitan statistical areas,
15 the value is 36 milligrams per kilogram, which is
16 background based.

17 MS. GIVENS: Dr. Hornshaw, are you
18 referring just to lead in that example?

19 MR. HORNSHAW: Yes, I am. I'm
20 sorry. In response to Steve's question.

21 MR. GOBELMAN: So in the way you're
22 looking at this evaluation, you have -- before you
23 even get to a leachate test, you have to eliminate
24 the parameters that are being controlled by

1 background, eliminate the parameters that are
2 being controlled by PH before you ever get to the
3 point that you'd need to run a TCLP test?

4 MR. HORNSHAW: The first thing you
5 do is select a parameter that is the most
6 restrictive out of all five of the potential
7 pathways. Residential ingestion, residential
8 inhalation -- I'm sorry. Construction ingestion,
9 construction inhalation and migration to Class 1
10 groundwater. Whichever of those values is the
11 lowest, is most restrictive, is where you start
12 and then if that value is above -- I'm sorry --
13 below background, then background comes in as the
14 first determinant.

15 MR. GOBELMAN: In your example that
16 you gave for lead, since it is being controlled by
17 the PH, then you --

18 MR. HORNSHAW: For counties outside
19 metropolitan statistical areas.

20 MR. GOBELMAN: Aren't they both
21 being controlled by a PH value?

22 MR. HORNSHAW: No. For counties
23 within the metropolitan statistical areas, the
24 background value is the controlling factor.

1 MR. GOBELMAN: But in either case,
2 you can't run TCLP on it because they're being
3 controlled by either a background or a PH specific
4 value?

5 MR. HORNSHAW: Since lead is not
6 being treated as a carcinogen for counties outside
7 of metropolitan statistical areas where value is
8 controlled by a PH table you could substitute TCLP
9 or SPLP values to show compliance.

10 MR. HUFF: What about inside a major
11 metropolitan area, could you not do the same thing
12 there?

13 MR. HORNSHAW: For that case, the
14 MAC value is controlled by background. It's not
15 based on the migration to groundwater pathway.

16 MR. HUFF: So background is one of
17 the factors since putting that table together even
18 if you meet all the Tier 1 remedial objectives,
19 the soil migration to groundwater, ingestion,
20 inhalation and construction worker?

21 MR. HORNSHAW: If the controlling
22 value for those values is less than background
23 values for tables G and H, then the background
24 value which is higher is the MAC available.

1 MR. HUFF: But not necessarily
2 higher because if you're on the leaching test, you
3 meet the soil groundwater standard?

4 MR. HORNSHAW: For purposes of
5 showing compliance, if the value originally is
6 based on migration to groundwater, then you can
7 use the TCLP or SPLP procedures to show compliance
8 rather than the total concentration.

9 MR. HUFF: What about lead in a
10 major metropolitan area?

11 MR. HORNSHAW: The controlling value
12 is based on background.

13 MR. HUFF: So background is one of
14 the five factors? You can never be above
15 background?

16 MR. HORNSHAW: It's one of the
17 factors. The first five are the five pathways
18 that are employed in this rule. Again, like I
19 said, residential ingestion and inhalation,
20 construction worker ingestion and inhalation and
21 migration to Class 1 groundwaters. Whichever is
22 the lowest out of those controls, unless you look
23 at the background values and if the background
24 values are higher, it replaces the lowest value

1 from the previous five.

2 MR. HUFF: But the background values
3 for lead, 36 I believe you said, that is higher
4 than which pathway?

5 MR. HORNSHAW: The PH specific, I
6 believe.

7 MR. HUFF: But that's the soil
8 migration to groundwater?

9 MR. HORNSHAW: Correct.

10 MR. HUFF: So why couldn't I run an
11 SPLP in that example? Because the reg says or in
12 that 410 section --

13 MR. HORNSHAW: I think you can use
14 the TCLP in that case because the lower value is
15 still based on the PH table, which is migration to
16 groundwater driven.

17 MR. HUFF: So I could run SPLP in
18 lieu of total lead in that scenario?

19 MR. HORNSHAW: Yes.

20 MR. HUFF: Thank you.

21 MS. TIPSORD: Are there any other
22 questions for the Agency? Thank you very much.
23 Before we close, I would like to ask if anyone
24 wishes to comment -- go ahead.

1 MR. WIGHT: I was going to say we do
2 have some additional responses on questions that
3 we brought back from the first hearing so we have
4 additional --

5 MS. TIPSORD: Let's go right ahead
6 to that.

7 MR. WIGHT: Those include specific
8 responses to questions plus Mr. Hornshaw -- Dr.
9 Hornshaw's supplemental testimony on the PH issue
10 so we'll start with the responses to the specific
11 questions. Give us a moment to reorganize here.

12 MS. TIPSORD: Sure. Why don't we
13 take about a ten minute break.

14 (Whereupon, a break was taken
15 after which the following
16 proceedings were had.)

17 MR. NIGHTINGALE: At page 30 and 35
18 of the transcript, John Henriksen asks whether
19 Illinois EPA knows the estimated cost of analyzing
20 for all the proposed groundwater monitoring
21 parameters. The Agency has done some additional
22 research on the cost and our findings are very
23 similar to the cost estimates provided by John
24 Hock's testimony dated October 6th, 2011, and also

1 at page 61 of the transcript Mr. Rao recommends
2 revising the uncontaminated soil fill operation
3 registration form to include a description of the
4 fill operation.

5 Illinois EPA has revised that
6 the LPCPA 665 form for registering an
7 uncontaminated fill operation, specifically under
8 Section 1, the form now requires an estimate of
9 the total area of fill, the average depth of fill
10 and the total volume of fill when the proposed
11 fill project has been completed. Additionally,
12 the form requires the operator to submit maps
13 depicting the fill boundaries and elevations and
14 we have the revised 665 form available for
15 exhibit.

16 MS. TIPSORD: A couple of notes for
17 the record. The transcript you're referring to is
18 from the September 26th, 2011, hearing that took
19 place in Springfield.

20 MR. NIGHTINGALE: That's correct.

21 MS. TIPSORD: For the record,
22 Mr. Hock's testimony is Exhibit 12.

23 MR. WIGHT: I have copies of the
24 revised form 665. These were not pre-filed so you

1 do not already have copies of these.

2 MS. TIPSORD: If there's no
3 objection, we will enter this -- did we previously
4 admit the LPC665 as an exhibit at the last
5 hearing? I lost my hearing sheet. I just want to
6 be able to distinguish between the two.

7 MR. WIGHT: That's a good point and
8 I'm not certain if that was previously an exhibit
9 or not. I know we did the 662 and the 663.

10 MS. TIPSORD: I don't think we did
11 665.

12 MR. WIGHT: I don't believe we did
13 the 665.

14 MS. TIPSORD: I apologize. I
15 misplaced my --

16 MR. WIGHT: For people who may be
17 interested, we do have additional copies of this
18 form over here as well and, unfortunately, we
19 didn't have a table to layout all of the
20 documents, but there are additional documents in
21 this white box and, unfortunately, those are not
22 on the top, but we can certainly get you fixed up
23 with those before you leave if you're interested
24 in copies of these additional exhibits.

1 MS. TIPSORD: If there's no
2 objection, we will admit the Illinois
3 Environmental Protection Agency's form titled
4 Uncontaminated Soil Fill Operations Registration
5 Form by Owner and/or Operator LPC665 as Exhibit
6 23. Seeing none, it's Exhibit 23. Go ahead.

7 (Document marked as IL PCB
8 Exhibit No. 23 for
9 identification.)

10 MR. HORNSHAW: At page 102 of the
11 transcript, Dr. Rao asks for clarification of the
12 definition of, quote, acceptable detection limit,
13 unquote, or ADL and Section 1100.103. In
14 particular, he asks what the phrase, quote, lowest
15 appropriate practical quantitation limit, end
16 quote, means focusing on the word appropriate.
17 The phrase acceptable detection limit is used only
18 at proposed Section 1100.605A4 and the phrase
19 practical quantitation limit is not used at all in
20 Part 1100 except in the definition of ADL. The
21 Agency's proposed definitions of ADL and practical
22 quantitation limit are taken directly from Section
23 742.200 of the current TACO rule and they are
24 identical. The Agency used TACO definitions to

1 maintain consistency between the TACO remediation
2 objectives and the MAC methodology. In both TACO
3 and the MAC methodology, the concept is important
4 because the ADL serves as the remediation
5 objective or the Maximum Allowable Concentration,
6 whenever the lowest Tier 1 soil value for a
7 chemical is less than the ADL.

8 In the phrase lowest appropriate
9 practical quantitation limit, the word appropriate
10 refers to the lowest immediate specific PQL, EG,
11 low soil or sediment and the high soil or sediment
12 of the specific laboratory analytical methods
13 applicable to the chemical that is subject to the
14 analysis.

15 MR. RAO: Thank you.

16 MR. HORNSHAW: Next, at pages 105
17 and 106 of the transcript, Dr. Rao asks for
18 clarification of Section 1100.212C2.
19 Specifically, Dr. Rao asks whether painted CCDD
20 from outside Illinois should be tested by a
21 laboratory and credited by IEPA in accordance with
22 Part 186 or whether other quantitation is
23 acceptable. Yes, the paint from painted CCDD to
24 be used as fill at a regulated fill operation no

1 matter where the CCDD facility originates must be
2 analyzed by a laboratory accredited in accordance
3 with 35 Ill. Adm. Code 186 within the scope of the
4 accreditation.

5 Part 186 draws its authority
6 from Subsections N and O of Section 4 of the
7 Environmental Protection Act. Section 186.110
8 authorizes the Agency to accredit laboratories
9 under the standards adopted at the National
10 Environmental Laboratory Accrediting Conference or
11 NELAC. The NELAC standards are incorporated by
12 reference at Section 186.115.

13 There are no formal state to
14 state reciprocity agreements. Under the governing
15 NELAC standards, the Illinois EPA is one of 15
16 state recognized accreditation bodies that grants
17 primary accreditations and that recognizes primary
18 accreditations granted by other state
19 accreditation bodies under the National
20 Environmental Laboratory Accreditation Program or
21 NELAP. Illinois does not grant primary NELAP
22 accreditation to out of state laboratories.
23 However, out of state laboratories with primary
24 accreditation from other state accreditation

1 bodies may apply for secondary NELAP accreditation
2 from the Illinois EPA.

3 These are routinely granted
4 within 30 days. The scope of the secondary
5 accreditation is the same as the scope of the
6 primary accreditation unless the Illinois EPA does
7 not or cannot offer accreditation for a particular
8 test method granted by the primary accrediting
9 besides. The secondary accreditation enables the
10 out of state laboratories to participate in
11 Illinois programs requiring Illinois
12 accreditation.

13 Other state accreditation bodies
14 would similarly grant secondary accreditation
15 standards -- or statute to Illinois laboratories,
16 statute to Illinois laboratories that have
17 received primary accreditation from Illinois EPA.
18 There are currently over 50 out of state
19 laboratories with secondary accreditation from
20 Illinois and I believe Mark has an exhibit.

21 MR. RAO: I appreciate that detailed
22 response on that.

23 MR. WIGHT: You know more than you
24 wanted now. This exhibit is a list of the out of

1 state laboratories with NELAP secondary
2 accreditation from Illinois.

3 MS. TIPSORD: If there's no
4 objection, we will enter the list of out of state
5 laboratories with NELAP secondary accreditation
6 from Illinois 2011 as Exhibit 24. Seeing none, it
7 is Exhibit 24.

8 (Document marked as IL PCB
9 Exhibit No. 24 for
10 identification.)

11 MR. RAO: Thank you.

12 MR. HORNSHAW: At pages 113 to 114
13 of the transcript, Dr. Rao requests Agency comment
14 on whether Subsection C of Section 1100.605 should
15 specify a timeframe within which the Agency must
16 respond to a request to develop a Maximum
17 Allowable Concentration for a chemical not listed
18 in the TACO tables in which the MAC's are derived.
19 The Agency does not think a timeframe is necessary
20 or desirable. The provision is very similar to 35
21 Ill. Adm. Code 742.510C, which authorizes the
22 Agency to develop site specific remediation
23 objectives for contaminants of concern that are
24 not listed in the TACO Tier 1 tables. The Agency

1 has been providing these objectives for several
2 years under the TACO provision with little or no
3 problem. It has compiled a list of 140 additional
4 sets of remediation objectives for the Tier 1
5 exposure routes. These requests normally are
6 addressed within two days or less. Occasionally,
7 additional toxicity data is needed and the
8 response may take up to 30 days. For purposes of
9 Section 1100.605C, once the Agency has determined
10 the remediation objectives for the TACO Tier 1
11 tables, it takes only minutes to determine the
12 Maximum Allowable Concentration using the
13 methodology in Section 1100.605A.

14 This can be done by either the
15 Agency or the requestor. If the timeframe were
16 added to the provision, it would have to
17 accommodate the worst case scenario for gathering
18 toxicity data and would not come into play in the
19 vast majority of requests. Moreover, the Agency
20 does not expect a significant number of requests
21 because the Tier 1 tables and the additional 140
22 sets of objectives already developed in TACO
23 should cover most, I might add nearly all, of the
24 chemical constituents likely to be found at

1 construction or demolition sites. In calendar
2 year 2011, the Agency so far has received and
3 responded to six requests for the development of
4 remediation objectives under the TACO provision.

5 MR. RAO: Thank you.

6 MS. BLAKE MYERS: At pages 107
7 through 117 of the transcript, Mr. Rao requests
8 Agency comment and clarification on Section
9 1100.750 in regards to the use and establishment
10 of background groundwater quality. The
11 groundwater monitoring system is installed to
12 monitor groundwater conditions from all wells at
13 the facility. Throughout the compliance period as
14 part of routine detection monitoring, samples
15 would be obtained on an annual basis from up
16 gradient and down gradient well locations.
17 Analysis will be performed and the results will be
18 compared to the appropriate 35 Ill. Adm. Code 620
19 Class 1 groundwater quality standards. Monitoring
20 the up gradient wells will provide the data needed
21 to calculate background water quality. However,
22 the establishment of background values for the
23 purposes of statistical analysis is not necessary
24 until such time that an exceedance of a 35 Ill.

1 Adm. Code 620 Class 1 groundwater quality standard
2 occurs. The guidance document Statistical
3 Analysis of Groundwater Monitoring at RCRA
4 Facilities Unified Guidance 2009 has been added to
5 Ill. Adm. Code 1100.104 incorporation by reference
6 rather than requiring the guidance in the rule in
7 order to allow the decision on the appropriate
8 statistical methods and strategies to be left to
9 the experience and judgment of the professional
10 engineer.

11 MR. RAO: Just to get a
12 clarification. If there is an exceedance of 620
13 standard, then it's up to the owner or operator to
14 see whether the 620 standard is -- if it's below
15 the background data that they have, then they can
16 use a statistical method to establish background
17 and make comparisons?

18 MS. BLAKE MYERS: Right. The data
19 would be available. It would just be a matter of
20 performing the appropriate statistical method to
21 see if there was a statistically significant
22 increase.

23 MR. RAO: I think my question is, is
24 there enough guidance to make sure whatever data

1 they collect would be adequate for establishing --

2 MS. BLAKE MYERS: Yes, the guidance
3 is hundreds of pages long with a lot of different
4 methods, a lot of different approaches and there
5 is an entire section on how to collect data for
6 background purposes.

7 MR. RAO: Okay.

8 MR. WIGHT: Okay. We have one more
9 part to our presentation. By way of introduction,
10 I'd like to say that soil PH has been one of the
11 more significant issues raised in this proceeding.
12 The Agency's proposed use of the 35 Ill. Adm.
13 Code, appendix B, table C, PH sensitive values as
14 MAC has been somewhat contested because of our
15 conservative approach to the use of that table.
16 We did do some analysis of our own as far as PH
17 goes.

18 We had not presented that to
19 this point because we assumed that at some point
20 we would be asked about it, but we had not yet
21 been asked about it or at least we didn't
22 understand the question to be asking this about
23 it. So now we've reached the end of the second
24 hearing and still have not entered our data to the

1 record. So we think it's important to get that
2 data as part of the record before we conclude. So
3 Mr. Hornshaw has a brief introduction about how we
4 approached the issue of statewide soil PH and he
5 would like to explain that and then we have an
6 additional exhibit which would be our worksheet on
7 how we attempted to make some determination of
8 what statewide PH values would be.

9 MR. HORNSHAW: Let me preface my
10 remarks by Mr. Marrow, who was not able to be
11 here, did all of this investigation and took quite
12 a bit of time and it's pretty in depth and I
13 apologize in advance if somebody asks a really
14 detailed question. I may have to bring him in
15 when he gets back into the office. So, with that
16 said, I'll go into this.

17 For ionized inorganic and most
18 inorganic constituents, TACO provides multiple
19 allowable concentration candidates based on the
20 soil PH. At Section's 1100.6605A2 and 1100.605A3A
21 of our proposed rule, the Agency proposes that the
22 lowest of the available PH dependant
23 concentrations in Part 742 appendix B table C
24 should become the Maximum Allowable Concentration

1 in uncontaminated soil. The Agency recognizes
2 that any default soil PH must be relevant at
3 various levels from the ground surface level to
4 great depths, perhaps to bedrock.

5 This includes soils that may
6 extend into the saturated zone. One of the
7 Agency's goals is that our proposal should be
8 generally applicable across the entire state and
9 to facilities established in the future. Thus,
10 another requirement was that any default soil PH
11 value should be appropriate to use at any location
12 in Illinois. With these requirements, the Agency
13 sought to identify a default soil PH value for use
14 in this proposed rule. Through Internet searches
15 and other inquiries, the Agency selected the state
16 soil geographic database known as STATSGO,
17 S-T-A-T-S-G-O, as our source for soil PH values.
18 The STATSGO database is maintained by the Natural
19 Resources Conservation Service, which is a
20 division of the US Department of Agriculture and
21 it is regarded as scientifically reliable. The
22 STATSGO database provides statewide coverage by
23 county for soil depths of up to 80 inches. County
24 results are organized by soil type and soil PH

1 provided at several depth ranges. A review of
2 Agency records show that CCDD and soil only sites
3 were located in 23 counties, 14 northern, seven
4 central and two southern. These counties were
5 targeted to determining a default soil PH value
6 for each of the 23 counties, the STATSGO database
7 was queried for soil unit type. This search
8 yielded dozens of soil types, many of which
9 represented minimal coverage of the county. For
10 practical reasons, the major soil types were
11 selected to represent the county. A target of 30
12 percent coverage was selected.

13 Using the major soil types for
14 each county, the database was again searched for
15 soil, quote, chemical properties, end quote, which
16 includes soil PH. For each soil type, the high
17 and low across all depths recorded was record. A
18 table of PH ranges for each selected soil type in
19 each county was prepared for the workgroup. The
20 summary of soil PH values showed varied PH for
21 each soil type and between the various counties.
22 For most soil types, PH trended higher with depth.
23 This is expected due to the high organic content
24 and the impact of precipitation on the upper

1 levels. The most striking result was the trend to
2 lower PH at all soil depths seen in the southern
3 counties and from this our conclusions are based
4 on this investigation. The workgroup determined
5 that no single default soil PH value could be
6 identified that would provide a level of safety
7 for all soil depths at all locations in the state.

8 Use of the most protective PH
9 dependant TACO objective is the Agency's
10 recommendation in light of the widely varying soil
11 PH's determined in our investigation and expected
12 to be introduced into the fill site pits and I
13 believe Mark has another exhibit.

14 MR. WIGHT: Yes. We have an exhibit
15 that is essentially our worksheet where we
16 assembled the data just described by Mr. Hornshaw.
17 So, again, these have not been seen before so I
18 have copies for each of you.

19 MS. TIPSORD: If there's no
20 objection, we will mark what is a two-sided
21 document Summary of Illinois Soil PH Values and
22 mark that as Exhibit 25. Seeing no objection,
23 it's Exhibit 25.

24

1 (Document marked as IL PCB
2 Exhibit No. 25 for
3 identification.)

4 MR. WIGHT: Again, I'm sure these
5 will be of interest to everybody. We have a
6 number of copies here that you can pick up and
7 examine at your convenience whenever the hearing
8 concludes or I guess I can even hand some of these
9 out now. I think this is a document that people
10 will be curious in seeing. So maybe I'll just go
11 ahead and circulate some of these and you pass
12 them up and down the rows if you would please.
13 Did everybody get a copy who is interested?

14 MS. TIPSORD: Are there any
15 questions of Dr. Hornshaw based on this? Okay.
16 Anything else from the Agency today?

17 MR. WIGHT: No, that concludes our
18 presentation.

19 MS. TIPSORD: Thank you very much.
20 Before we do anything further, I want to ask if
21 anyone wishes to comment on DCEO's decision not to
22 do an economic impact study? I've had no one come
23 up and approach me to ask about that and I see --
24 Mr. Huff?

1 MR. HUFF: I would.

2 MS. TIPSORD: I remind you that you
3 are sworn in. You were sworn in yesterday.

4 MR. HUFF: We heard yesterday from
5 Mr. Hock that 82 percent of the soil samples that
6 he took inside CCDD facilities failed for metals.
7 He also indicated he felt that was representative
8 of what was currently being generated in the
9 industry today. 82 percent. Where is this
10 material going to go if these regulations are
11 promulgated where they're at today? And we heard,
12 well, it's going to go to Indiana. It's going to
13 go to Wisconsin. It's going to go to landfills
14 here. And it's going to go to unregulated sites.

15 And the implication of this,
16 one, it's not very sustainable. We're trucking
17 this stuff further. It costs more to the
18 transportation department here in Illinois. It's
19 not sustainable from the greenhouse gas emission
20 from the additional CO2 that's going to be
21 generated from that and certainly material --
22 increasing what we put in the landfills, in my
23 mind, is not a sustainable alternative here and I
24 can't imagine anybody believes increasing the

1 amount of this material we take on on unregulated
2 sites is in the best interest of the State of
3 Illinois. And the only groundwater data we have
4 was what I submitted. We have seen nothing in the
5 way of groundwater data that even suggests that
6 there's a problem with these CCDD facilities.

7 So from an economic perspective,
8 I am confident you're going to see a very high
9 percentage of these CCDD facilities begin to go
10 out of business and that's going to force
11 additional work to go out of state and, of course,
12 the jobs that go with that as well, the toll ways
13 and their \$13 billion budget. Where are we going
14 to take this excess material because we're trying
15 to improve the roads and create jobs up in
16 Illinois?

17 So I'm very fearful that we have
18 a regulation that is going to be an incredible
19 economic burden and I see no demonstration that
20 there's been any benefits that are going to come
21 from this. So I'm disappointed that we don't have
22 an economic impact analysis. So I think this is a
23 perfect case where we need to understand what are
24 the implications of these CCDD facilities as well

1 as the regulated communities that is generated.

2 Thank you.

3 MS. TIPSORD: Thank you.

4 Ms. Manning?

5 MS. MANNING: I also was going to
6 say, economically, somebody needs to look at the
7 economics of all this in terms of -- he spoke in
8 terms of the CCDD facilities. My concern and my
9 client's concern is that the Board is able to make
10 a wise decision in terms of having soil safely
11 from the urban areas which, of course, has
12 background kind of constituents that aren't
13 necessarily -- aren't from an underground storage
14 tank, but historically have urban kinds of
15 contaminants and the Board needs to make a good
16 decision and the EPA needs to have, in my opinion,
17 a more flexible approach in terms of issues as to
18 where and what types of soils can go into the CCDD
19 facility which aren't necessarily just a one size
20 fits all approach because the soils in upper
21 Illinois are much different than they are in
22 southern Illinois and the type of facilities that
23 can accommodate those soils in northern Illinois
24 are also much more flexible in terms of being able

1 to be protective where those soils can be put.

2 So, in that vein as well, it's a
3 real economic -- the way this rule is proposed,
4 it's a real economic issue proposed and if DCEO
5 would do a particular analysis this would be a
6 good one to do an analysis on in terms of just the
7 impact of the rule and how the rule needs to be
8 setup. Thank you.

9 MS. TIPSORD: Mr. Henriksen?

10 MR. HENRIKSEN: Please.

11 MS. TIPSORD: Mr. Henriksen has said
12 off the record he does not wish to be sworn in so
13 this will be a comment.

14 MR. HENRIKSEN: Well, I'll be glad
15 to be sworn.

16 WHEREUPON:

17 JOHN HENRIKSEN

18 called as a witness herein, having been first duly
19 sworn, deposeth and saith as follows:

20 MR. HENRIKSEN: And, again, my name
21 is John Henriksen. I'm with the Illinois
22 Association of Aggregate Producers. My industry
23 represents companies that mine and produce crushed
24 stone, sand and gravel and as such we have a

1 number of our members that accept clean soil and
2 CCDD and have for many years. I echo
3 Ms. Manning's and Mr. Huff's concerns about the
4 lack of economic analysis for DCEO. It's very
5 disappointing and to explain why I think we can go
6 back a time a little bit to look at this
7 rulemaking in context. Somebody coming in from
8 the street might think that for the first time the
9 State of Illinois is thinking about setting up a
10 regulatory scheme to regulate the disposal of
11 clean soil or CCDD. As I hope everyone does know,
12 we've been doing this in our state successfully
13 for many years. My industry has been partnering
14 with the IEPA for decades, specifically starting
15 in the '90s to make sure that our pits and
16 quarries were good homes for excess soil and CCDD.
17 We did this and we're encouraged by the IEPA to do
18 this so soil that shouldn't go in landfills, So
19 CCDD that shouldn't go in landfills, that's why we
20 did this, that's why we started accepting this.
21 It was an aggressive course, but we were also
22 encouraged by the Agency to have our pits and
23 quarries be places where clean soil and CCDD could
24 be placed to help complete reclamation or to be

1 filled up to create home sites or whatever.

2 We further as we became
3 concerned with the risk out there -- we, led by
4 Vulcan Materials, worked on best management
5 practices to give our agencies -- excuse me -- our
6 industry guidance about what we should do to make
7 sure we wouldn't be taking bad materials. We
8 worked with them to create BMP's for due
9 diligence, for load checking, for manifesting, for
10 everything that is necessary to prevent problems
11 and, in fact, in 2005 the BMP's that are attached
12 to Mr. Willie's testimony were approved by the
13 IEPA.

14 In fact, Bureau Chief Childs
15 sent out a letter saying these BMP's went beyond
16 what was required by law. So we worked as an
17 industry with the IEPA to make sure that the soil
18 and the CCDD that are generated and we took
19 wouldn't hurt the environment and we're encouraged
20 by the IEPA to do that. As all of us in the room
21 know because of a family dispute with the
22 Blagojevich family, the law changed, and then
23 Section 22.51 became law and that setup a
24 statutory program to require the EPA to regulate

1 CCDD for the first time even though there wasn't a
2 track record, from my understanding, of having
3 environmental problems associated with accepting
4 this material.

5 We again stepped up and
6 partnered with the IEPA. The original Part 1100
7 of the rules came from our BMP's. We made sure
8 the regulatory scheme that these folks put
9 together and we adhered to protected the
10 environment. We're successful. We did run
11 into -- one of our members did run into some
12 problems with the IEPA regarding whether or not
13 some material they were accepting was clean.
14 There was a dispute which is still in the
15 Pollution Control Board and that led to the
16 subsequent legislation that Ms. Manning was
17 referring to that tried to create a bright line to
18 determine what is clean, what isn't clean, what we
19 can take and what we can't. And that's where we
20 are today.

21 Our industry wants very much to
22 be able to take this material, but do so in a way
23 that protects the environment, protects human
24 health and safety. That being said, we think it's

1 highly inappropriate that the regulatory program
2 as currently we're facing -- it's highly
3 inappropriate for us to try to adhere to that.

4 You heard Randy Willie testify that he has put up
5 chains on his sites, Meyer Material. Meyer
6 Material was a leader in the industry to take clay
7 and other soil and use that to reclamation.

8 They're not doing that anymore because the cost of
9 this program makes it prohibitive. Plus they're
10 concerned how the IEPA will enforce these rules
11 against them. All the other legitimate companies
12 that are doing or likewise who are just taking
13 soil, they're going to be going out of business.
14 They're going to be closing up.

15 You'll hear hopefully, if my
16 members who have CCDD operations do their job,
17 they'll be writing letters to you all explaining
18 what their increased costs are and absent changes,
19 they will have to go out of business as well and
20 what you're going to see is what you're already
21 seeing and Mr. Purseglove talked about, you're
22 already seeing more and more trucks that -- loads
23 that we reject some go out of state, but a lot go
24 down the road. A lot go to farm fields all over

1 northeast Illinois and downstate because a farm
2 field, even though they can't take waste, they're
3 not under the regulatory purview of the IEPA
4 because a low lying spot in the ground, whether
5 it's a farm, forest preserve district or anywhere
6 else, you can put CCDD in there and clean soil and
7 not have to register, not have to get a permit.
8 That's where it going right now. And if you
9 follow those trucks you will see.

10 We're not asking -- we're not
11 suggesting that we should be unregulated. Far be
12 it because unlike a road contractor or a bidding
13 contractor, once they get their last check, once
14 their job is spotted off, they're done. We get a
15 hot load, we're on the hook forever. We're on the
16 hook for generations. So we have a strong
17 business ethical interest in making sure we don't
18 take hot loads, don't take bad loads and that's
19 why we are so intimately involved in this
20 rulemaking process.

21 We have -- in my opinion, we
22 have clearly shown a path to the EPA and more
23 importantly to the Board about a regulatory scheme
24 that will work. John Hock's testimony outlined in

1 detail the kinds of tweaks that can be made to the
2 rulemaking that would allow us to stay in
3 business. Absent those kinds of changes and
4 absent responses from the Board to some of the
5 things that the IDOT representative and Mr. Huff
6 talked about, absent the Board taking those
7 suggestions into consideration and fashioning a
8 good regulatory program, a livable regulatory
9 program, we won't be in business and we can't be
10 in business. And then we will be -- they will be
11 the only state that has a cradle to grave CCDD
12 program like Illinois with very few people
13 participating.

14 We shouldn't be. This program
15 has to be reasoned and I'm very disappointed with
16 DCEO's decision not to do an economic analysis and
17 my industry we're counting on you all to do what
18 you can do which is take into account the economic
19 impact of what these folks are proposing in good
20 faith. They're trying to get their arms around a
21 real tough problem and not take anything away from
22 them, we've worked with them for years. They
23 listened to a lot of things we've had to say, but
24 where they're at right now, still it's

1 unacceptable. We will not be in business. We're
2 asking you to take this program and make the
3 changes to make it work. Thank you.

4 MS. TIPSORD: Thank you. Are there
5 any questions for Mr. Henriksen? Thank you very
6 much.

7 MR. HENRIKSEN: You're quite
8 welcome.

9 MS. TIPSORD: Let's go off the
10 record for just one moment.

11 (Whereupon, a break was taken
12 after which the following
13 proceedings were had.)

14 MR. WILT: I would like to make a
15 comment, and it can be a public comment, I don't
16 need to be sworn, on the economic impact
17 statement. When we started yesterday, you
18 commented that was something that would be
19 discussed. In my mind, I don't know what an
20 economic impact study would study because there's
21 nothing in the record that I'm aware of other than
22 perhaps speculation based upon borings at four
23 sites as to how much soil would have to be
24 regulated through this, how much would be -- would

1 have to go into a landfill. It's pure
2 speculation.

3 So I'm not sure what an economic
4 study would do. So I'm not surprised that the
5 decision was made not to have one. There's
6 nothing in this record indicating that these rules
7 as recommended by the Agency, if they were
8 adopted, would result in more soil going to
9 landfills at that cost or less soils going to
10 landfill. It may well be, particularly since
11 background is being considered that there may be
12 far less soil going into landfills in the future
13 when these rules were adopted then is going in
14 today, but we just don't know that. So I don't
15 know what an impact study would evaluate and
16 that's the comment I would like to make. Thank
17 you.

18 MS. TIPSORD: Anything else on the
19 record change?

20 MS. MANNING: I just had a follow up
21 to that comment. I think there is information in
22 the record and certainly there will be information
23 put in the public comment as well for the Board to
24 ascertain this. Obviously, we had to go through

1 the whole issues of asking the Agency questions in
2 order to understand how the rule would be
3 implemented in order to make those kinds of
4 determinations, but there will be that information
5 for the Board to assess.

6 In addition to that, I had one
7 final question for the Agency because last night I
8 was thinking about something that is unclear on
9 the record. The attorney general's office -- if I
10 might, Madame Hearing Officer.

11 MS. TIPSORD: Mm-hmm.

12 MS. MANNING: The Attorney General's
13 Office asked a lot of questions about inert
14 landfills and my question to the Agency is my
15 understanding is there are no inert landfills in
16 Illinois and very few, if any, landfills have ever
17 been permitted through the Board's inert landfill
18 regulations and I just thought we should close
19 that question and just answer that question before
20 we ended the record. Am I right, Steve?

21 MR. NIGHTINGALE: Yes, that's
22 correct.

23 MS. MANNING: Okay. Just so the
24 Board understands, you have the inert landfill

1 regulations, but they've never really been
2 utilized and practiced by anybody, is that
3 correct?

4 MR. NIGHTINGALE: That's correct.

5 MS. MANNING: That's correct.

6 MR. RAO: As a follow up. When the
7 Agency is developing these rules, did you look at
8 the inert waste landfill regulations to see how
9 those requirements would be applied?

10 MR. NIGHTINGALE: We did look at
11 them. One of the things that caused us I guess to
12 shy away from them was this leachate monitoring
13 program and with these sites and the variability
14 of the waste or the variability of the fill
15 material, you would have to put in a substantial
16 amount of leachate monitoring in the program and
17 the cost would be a lot -- trying to put them in
18 there and not damaging them, would be very
19 difficult and I guess we kind of looked at the
20 inert waste type of situation being more of a
21 uniform type of waste. So we kind of stepped away
22 from trying to use those and those regulations
23 do -- if you have a problem with that, it kicks
24 you into another set of regulations and we felt

1 the way we had this setup would be more
2 appropriate.

3 MR. RAO: Thank you.

4 MR. LIEBMAN: One of our other
5 concerns that Steve didn't get into with trying to
6 apply some of the requirements for inert waste
7 landfills to the site regulations was the
8 dewatering that we understand often occurs at CCDD
9 fill operations and we thought that that
10 dewatering would make monitoring the leachate
11 difficult.

12 MR. RAO: Thanks.

13 MR. SYLVESTER: Could I ask just a
14 follow-up question regarding the inert waste? One
15 of the things that I think is brought to light is
16 the detention between inert waste and CCDD and
17 based on the definitions inert waste includes
18 nonbiodegradable, nonputrescible solid waste,
19 including, but not limited to bricks, masonry and
20 concrete and then the definition for CCDD is
21 uncontaminated broken concrete without protruding
22 metals bars, bricks, rocks, stones and painted or
23 other asphalt pavement. And the question I have
24 is if you have a pile of bricks or if you have

1 some concrete, how can you tell whether it's CCDD
2 or inert waste or a recyclable material?

3 MR. NIGHTINGALE: Well, as far as
4 for the regulation for the inert waste, there is a
5 description of what would be considered inert
6 waste I think based on the leachability test or at
7 least the leachate that would be coming from it.
8 So I guess there wouldn't be anything in these
9 regulations that would prevent somebody from going
10 and applying for an inert waste landfill if they
11 could meet those regulations. I think what we
12 found historically is that they really cannot meet
13 this leachability test. So people don't apply for
14 those types of permits.

15 MR. SYLVESTER: I guess as a
16 follow-up question more from a regulatory oversight
17 perspective. I mean, the definition it says
18 bricks, multiple. One is a waste. If you put it
19 in an unlined hole, it's CCDD. I just don't
20 understand the rationale behind that and why there
21 hasn't been any kind of preceding to clarify the
22 CCDD regulations to have a unified system under
23 the regulations. I would agree that there hasn't
24 been much done with the inert waste regulations

1 and landfills or whatnot, but they are still on
2 the board and they're still good law as far as I
3 know.

4 MR. WIGHT: If I might add, I think
5 to some extent the question was addressed by
6 Mr. Clay yesterday in response to Mr. Sylvester's
7 question number 11 and Mr. Clay did make -- part
8 of Mr. Clay's statement -- the question was about
9 whether or not this is consistent with federal law
10 and Mr. Clay pointed out that part of the answer
11 to Mr. Sylvester's questions was simply the
12 legislature had a different idea about how this
13 material would be handled and if it were used as
14 fill material, that it could be managed
15 differently and that's why we have different
16 sections in the act. So I think that's at least
17 part of the answer is we've been directed to take
18 a different approach.

19 MR. SYLVESTER: I don't disagree
20 with that. I just thought throughout the
21 regulations if you look at 810.103, there's a
22 waste pile that would include those same bricks.
23 It's just -- in enforcing the Environmental
24 Protection Act, it's become clear that there's

1 some inconsistencies on how you define what waste
2 is or CCDD is in terms of that and I was just
3 wondering if it could be something considered
4 going forward because there are these
5 inconsistencies.

6 MS. TIPSORD: Anything further?
7 Let's go off the record for just one moment.

8 (Whereupon, a break was taken
9 after which the following
10 proceedings were had.)

11 MS. TIPSORD: After a discussion off
12 the record, we've decided that the post hearing
13 comment deadline will be December 2nd. That's in
14 the clerk's office on December 2nd. Also, if you
15 file electronically with the clerk's office there
16 is no need to serve me as the Hearing Officer a
17 hardcopy. I will have it in my hands about ten
18 minutes after it comes into the clerk's office.
19 So it's much quicker for me to do that. So if you
20 do file electronically, please do not feel the
21 need to serve me a hardcopy. Although I'm on the
22 service list, you don't have to do that if you
23 file electronically. Is there anything else?
24 Thank you all very, very much. It's been a

1 pleasure.

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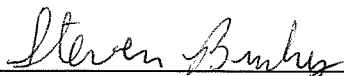
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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF COOK)
4

5 I, Steven Brickey, Certified Shorthand
6 Reporter, do hereby certify that I reported in
7 shorthand the proceedings had at the trial
8 aforesaid, and that the foregoing is a true,
9 complete and correct transcript of the proceedings
10 of said trial as appears from my stenographic
11 notes so taken and transcribed under my personal
12 direction.

13 Witness my official signature in and for
14 Cook County, Illinois, on this 7th day of
15 November, A.D., 2011.
16
17
18
19

20 
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ability 17:4 46:2	83:13 accommod... 68:17 79:23	19:19 20:6 31:16 44:9 60:2,4,21	96:8 after 5:2 21:24 44:15	63:3,21 71:12 73:7 75:9	77:23 alternatives 52:12
able 5:8 41:21 42:20 44:8 62:6 72:10 79:9 79:24 83:22	accordance 64:21 65:2 account 86:18 accredit 65:8 accreditation 65:4,16,19 65:20,22,24 65:24 66:1 66:5,6,7,9 66:12,13,14 66:17,19 67:2,5	62:17,20,24 68:3,7,21 72:6 77:20 78:11 Additionally 61:11 address 18:6 18:24 38:16 45:15 addressed 68:6 93:5 addresses 18:21 adequate 71:1 adhere 84:3 adhered 23:15 83:9 adjacent 10:22 14:6 adjoining 13:12 adjusted 38:11 ADL 63:13 63:20,21 64:4,7 Adm 1:5 4:7 40:8,13 53:7 65:3 67:21 69:18 70:1,5 71:12 admit 20:6 62:4 63:2 admitted 19:17 20:13 adopt 35:20 47:24 48:6 48:10 adopted 49:16 65:9 88:8,13 advance 7:7 72:13 aforsaid	44:17 60:15 87:12 94:9 94:11,18 again 8:12 9:24 10:1 10:20,23 13:22 14:17 15:16 17:12 50:15 58:18 74:14 75:17 76:4 80:20 83:5 against 84:11 agencies 82:5 Agency 2:5 4:17,18 5:1 5:23 15:22 20:23 23:4 23:7,10 24:19 25:5 25:9 26:14 27:3,11 32:1,19,22 33:5,10,16 35:17 36:5 41:3 42:23 44:2 45:18 45:20 46:2 47:3,6,12 48:5 49:23 50:1,5 51:4 59:22 60:21 63:24 65:8 67:13,15,19 67:22,24 68:9,15,19 69:2,8 72:21 73:1 73:12,15 74:2 76:16 81:22 88:7 89:1,7,14 90:7 Agency's 6:12 20:3 22:11 35:18	Aggregate 44:20 80:22 aggressive 81:21 agree 29:20 29:22 46:5 48:17 92:23 agreed 45:1 agreement 12:14 agreements 65:14 Agriculture 73:20 ahead 11:14 59:24 60:5 63:6 76:11 airborne 23:17 aligning 6:24 Alisa 2:3 4:10 allow 25:17 34:4 44:10 52:11 70:7 86:2 allowable 32:3 51:22 53:8 64:5 67:17 68:12 72:19,24 allowed 26:2 30:12 32:6 32:11 allows 25:19 51:21 almost 36:15 along 41:8 49:13 already 19:16,23 29:11 31:10 31:13 52:5 62:1 68:22 84:20,22 alternative	although 22:5,6 94:21 always 13:18 Amendme... 1:2,5 4:5,7 amount 49:17,20 50:3,7,9 78:1 90:16 analysis 12:14 28:8 28:20 44:9 52:11 64:14 69:17,23 70:3 71:16 78:22 80:5 80:6 81:4 86:16 analytical 7:12 64:12 analyze 29:17 analyzed 42:14 65:2 analyzing 60:19 Anand 2:4 4:10 and/or 10:12 12:8,9 13:14 63:5 annual 69:15 another 26:9 30:8 31:18 32:14 43:22 51:3 73:10 75:13 90:24 answer 6:11 7:2 8:20 17:22 18:18 23:22 35:14 42:15 51:11 89:19 93:10 93:17 answered
about 5:16 8:21 17:4,6 19:12 25:23 31:12 35:2 39:9 41:8 41:16 46:1 47:13 48:23 49:2,4,4,14 54:20 57:10 58:9 60:13 71:20,21,22 72:3 76:23 81:3,9 82:6 84:21 85:23 86:6 89:8 89:13 93:8 93:12 94:17	acknowled... 65:17,18 accredited 65:2 accrediting 65:10 66:8 acknowledge 5:2 acknowled... 5:3 31:10 across 73:8 74:17 act 14:9,10 26:11 41:14 42:2 47:18 49:13,15 50:20 65:7 93:16,24 actions 37:3 activities 17:5 activity 26:20 actually 40:10 45:6 add 9:3 17:15 36:9 68:23 93:4 added 25:6 68:16 70:4 adding 43:10 addition 4:18 19:18 89:6 additional	above 1:8 12:1,4 17:24 30:1 31:11 32:16 33:18 34:12 34:12,16 35:19 36:24 37:16 41:12 41:22 54:7 56:12 58:14 absence 27:1 absent 84:18 86:3,4,6 absolute 30:10 accept 81:1 acceptable 24:10 30:14 41:11 63:12 63:17 64:23 accepted 7:16 44:10 accepting 81:20 83:3	Agency's 6:12 20:3 22:11 35:18	airborne 23:17 aligning 6:24 Alisa 2:3 4:10 allow 25:17 34:4 44:10 52:11 70:7 86:2 allowable 32:3 51:22 53:8 64:5 67:17 68:12 72:19,24 allowed 26:2 30:12 32:6 32:11 allows 25:19 51:21 almost 36:15 along 41:8 49:13 already 19:16,23 29:11 31:10 31:13 52:5 62:1 68:22 84:20,22 alternative	answered

52:5	48:21 49:7	29:3 35:20	available	88:11	believe 25:21
answers 10:5	71:15 76:23	71:22 85:10	55:12 57:24	bad 82:7	28:3 30:3
36:7	79:17,20	87:2 89:1	61:14 70:19	85:18	35:1 44:24
anybody	93:18	asks 60:18	72:22	barriers 48:8	46:13 47:14
33:7 77:24	approached	63:11,14	Avenue 2:6	bars 91:22	48:4,13
90:2	72:4	64:17,19	average 61:9	base 52:20	49:6 50:6
anymore	approaches	72:13	averaging	based 22:14	52:4 55:6
84:8	71:4	asphalt 23:5	25:18 26:1	32:3 42:19	59:3,6
anyone 4:24	appropriate	91:23	26:23 27:2	48:7 50:2	62:12 66:20
59:23 76:21	28:8,20	assembled	27:4,21	55:11,16	75:13
anything	37:24 48:21	75:16	32:7	57:15 58:6	believes
17:8 43:1	63:15,16	assess 89:5	aware 87:21	58:12 59:15	77:24
45:20 49:1	64:8,9	Assessment	away 86:21	72:19 75:3	BELL 2:14
50:17 76:16	69:18 70:7	7:22,23	90:12,21	76:15 87:22	below 23:8
76:20 86:21	70:20 73:11	8:14,15	A.D 96:15	91:17 92:6	27:18 30:14
88:18 92:8	91:2	15:5,6	a.m 1:13	basically	42:11 54:8
94:6,23	approved	associated	A4 45:8	13:2 36:15	56:13 70:14
anywhere	33:13,14	25:14 83:3	A4A 45:8	38:3	benefit 9:2
39:12 85:5	82:12	association		basis 22:15	benefits
apologize	area 13:15,17	5:18 11:5	B	36:6 54:22	78:20
11:5,9	13:18 14:15	11:19 44:19	B 3:1 39:9	69:15	besides 66:9
62:14 72:13	18:10 30:5	44:21 80:22	45:8 71:13	became 82:2	best 5:16
appear 45:11	34:13 55:10	assumed	72:23	82:23	45:15 78:2
appears	57:11 58:10	71:19	back 4:2,13	become	82:4
96:10	61:9	assuming	23:2 32:2	23:17 72:24	better 44:15
appendix	areas 18:8	15:22 28:9	41:7 60:3	93:24	between
53:7 71:13	25:14 54:24	28:21	72:15 81:6	bedrock 73:4	18:16 21:3
72:23	55:14 56:19	ASTM 7:21	background	before 1:8	21:11 39:23
applicable	56:23 57:7	8:13,24	29:20 30:11	5:4 6:11,19	40:1 52:24
27:11 29:13	79:11	9:11 10:1	32:16 33:18	31:19 45:2	62:6 64:1
51:1 54:16	arms 86:20	10:21,24	34:13,20,24	55:22 56:2	74:21 91:16
64:13 73:8	around 86:20	12:19 15:5	35:19,22	59:23 62:23	beyond 46:3
application	arsenic 29:17	15:11 21:1	37:1,5,9,16	72:2 75:17	82:15
49:22	30:1,22	21:5,19,24	41:12,18,19	76:20 89:19	bias 5:13
applied 13:5	31:1,11,17	22:3,10,14	41:22,23	begin 5:4,17	bidding
37:20 90:9	31:18 32:4	22:18	42:18 43:5	5:24 78:9	17:18 85:12
applies 42:17	41:10,16	attached	47:10 49:4	behalf 11:18	billion 78:13
apply 33:2,8	42:8,9,10	82:11	51:15 52:2	47:1	bit 43:5
41:18,20,23	51:7,14	attempted	52:3,18,23	behind 92:20	72:12 81:6
66:1 91:6	54:2,5,17	72:7	53:5,6 54:4	behold 30:8	Blagojevich
92:13	ascertain	attention	54:23 55:16	being 10:23	82:22
applying	88:24	11:20 43:4	56:1,13,13	24:21 25:3	BLAKE 2:8
92:10	asked 5:9	attorney 11:4	56:24 57:3	26:21 37:20	69:6 70:18
appointed	11:12 15:13	11:17 89:9	57:14,16,22	44:8 49:17	71:2
4:3	18:17 19:12	89:12	57:23 58:12	55:24 56:2	blanket 36:7
appreciate	71:20,21	authority	58:13,15,23	56:16,21	BMP's 82:8
11:20 66:21	89:13	17:3 65:5	58:23 59:2	57:2,6 77:8	82:11,15
approach	asking 5:22	authorizes	69:10,21,22	79:24 83:24	83:7
47:7,14,15	11:7 18:17	65:8 67:21	70:15,16	88:11 90:20	board 1:1,10
			71:6 79:12		

35:12,20	budget 78:13	8:16 13:23	certifying	clarification	clerk's 94:14
38:18 47:4	budgeted	14:18	29:14	41:1 44:1	94:15,18
47:6,24	31:15	category 8:4	chains 84:5	63:11 64:18	client's 79:9
48:5,10,18	build 5:11	cause 1:8	change 88:19	69:8 70:12	close 4:19
48:24 49:23	builders	40:6,12	changed	clarify 41:13	5:14 14:7
50:19 51:1	44:22	caused 90:11	82:22	43:13 49:15	59:23 89:18
79:9,15	Building	CCDD 1:3	changes 44:4	92:21	closing 84:14
83:15 85:23	45:24 47:1	4:6 6:16	45:3 84:18	clarifying	Code 1:5 4:7
86:4,6	burden 78:19	7:16 16:24	86:3 87:3	22:7	40:8,13
88:23 89:5	Bureau	23:8 25:15	characteris...	Class 34:12	53:7 65:3
89:24 93:2	82:14	25:22 26:6	24:21 48:8	34:16 37:23	67:21 69:18
Board's 5:11	business	30:2 32:11	48:9	40:7,12	70:1,5
35:13 89:17	78:10 84:13	32:14 34:9	characteriz...	42:11 56:9	71:13
bodies 65:16	84:19 85:17	39:17 43:18	27:5	58:21 69:19	collect 29:16
65:19 66:1	86:3,9,10	44:10 46:7	check 24:7	70:1	71:1,5
66:13	87:1	46:8,12,19	37:22 38:1	clay 2:11	color 25:1
bore 25:20	B1 52:17	46:20 50:9	85:13	6:15,15	come 11:7
41:9	53:6	64:19,23	checking	8:12,19 9:5	34:4,8
boring 51:6	B4 45:8	65:1 74:2	82:9	9:14,24	68:18 76:22
borings 30:8	B4A 45:7	77:6 78:6,9	chemical	10:7,20	78:20
87:22		78:24 79:8	48:9 51:23	12:2,19	comes 21:21
both 17:22	C	79:18 81:2	52:10 53:14	13:7,22	56:13 94:18
19:2,16	C 2:1 20:3,13	81:11,16,19	64:7,13	14:17 15:4	coming 34:9
56:20 64:2	45:9 67:14	81:23 82:18	67:17 68:24	15:8,16,24	81:7 92:7
bottom 39:19	71:13 72:23	83:1 84:16	74:15	16:4,10	commencing
boundaries	calculate	85:6 86:11	chemicals	17:2,12,22	1:13
14:7 61:13	69:21	91:8,16,20	52:17	18:14 21:5	comment
boundary	calendar	92:1,19,22	Chicago 1:11	21:14 22:13	4:19 5:15
39:14,15,23	69:1	94:2	45:24 47:2	22:23 28:23	59:24 67:13
40:1,5	called 1:9	central 74:4	96:22	29:1,5,8,12	69:8 76:21
box 2:6 62:21	80:18	certain 62:8	Chief 82:14	30:23 41:14	80:13 87:15
break 18:11	calls 44:18	certainly	Childs 82:14	42:3 43:7,8	87:15 88:16
60:13,14	49:6	22:17 62:22	chloride	45:7,17	88:21,23
87:11 94:8	came 51:14	77:21 88:22	32:19 33:17	46:13,20	94:13
breaks 18:9	83:7	certification	34:13	47:17 49:13	commented
brick 23:5	candidates	6:18 7:1,4,5	chlorides	50:5 51:11	87:18
Brickey 1:10	72:19	7:5,12 12:3	32:15 34:9	84:6 93:6,7	comments
2:22 96:5	carcinogen	12:23 13:2	34:11 36:24	93:10	22:6 45:15
96:20	41:16,17	13:20 14:16	choose 7:11	Clay's 93:8	commercial
bricks 91:19	57:6	18:2,5,7,15	9:15	clean 1:2 4:5	13:17
91:22,24	carcinogenic	18:21,23,23	chosen 54:10	12:1 24:1,2	Commission
92:18 93:22	32:5	43:12,19,21	CHRISTI...	24:9 81:1	45:24 47:2
brief 72:3	carcinogens	43:23	2:9	81:11,23	common
bright 83:17	52:2	certifications	circulate	83:13,18,18	24:20
bring 72:14	case 18:9	7:10	76:11	85:6	communities
broken 91:21	41:19 57:1	certified	cite 14:11	clear 35:14	79:1
brought	57:13 59:14	43:16 96:5	City 47:2	35:21 93:24	community
34:10 44:5	68:17 78:23	certify 14:14	Claire 45:23	clearly 35:11	54:19
60:3 91:15	cases 19:2	96:6	50:15	38:22 85:22	companies
	categorically				

80:23 84:11	26:7,9,13	confusion	14:21 15:4	55:24 56:2	couple 43:1
Company	27:15 32:3	21:20 22:3	contact 23:14	56:16,21	44:18 61:16
41:7	34:20 47:21	22:5	contain	57:3,8,14	course 78:11
compare	48:1 72:23	conjunction	26:12 27:14	controlling	79:11 81:21
20:24	concept 64:3	37:19 40:3	47:21	32:8 52:22	court 1:24
compared	concepts	40:9	contaminant	54:2,5	2:24 3:24
41:10 69:18	25:21	Conner 4:13	26:10 32:8	55:13 56:24	5:7 39:20
comparison	concern 23:5	4:13,14	contamina...	57:21 58:11	53:20 55:3
52:24 53:10	67:23 79:8	Conservati...	23:15 31:5	controls	cover 68:23
comparisons	79:9	14:10 73:19	47:21 48:1	58:22	coverage
25:15 70:17	concerned	conservative	52:4 67:23	convenience	73:22 74:9
Compensat...	6:8 82:3	71:15	79:15	76:7	74:12
14:9	84:10	consider	contaminat...	Cook 96:3,14	CO2 77:20
compiled	concerns	15:21 23:24	6:17 7:20	coordinate	cradle 86:11
68:3	23:7,11	44:12	27:19 50:18	19:3	create 78:15
complete	81:3 91:5	considerati...	contaminat...	coordinated	82:1,8
5:11 81:24	conclude	86:7	26:12 27:14	18:15	83:17
96:9	29:24 72:2	considered	contaminat...	copies 61:23	created 6:20
completed	concludes	10:11 13:18	6:4,10 8:3	62:1,17,24	32:9 46:6
61:11	76:8,17	17:20 18:12	9:23 10:15	75:18 76:6	credited
compliance	conclusion	33:1 42:12	10:19 11:23	copy 76:13	64:21
25:11 34:5	12:14	88:11 92:5	12:3	correct 16:10	criteria 9:15
34:8 39:7,9	conclusions	94:3	contempor...	28:2 37:17	13:9 27:18
39:14,15,23	75:3	consistency	28:17	42:3 49:18	27:19
40:3,4,17	concrete 23:5	64:1	content 74:23	54:13 59:9	crushed
51:8 52:9	91:20,21	consistent	contested	61:20 89:22	80:23
53:1,13,23	92:1	22:11 40:17	71:14	90:3,4,5	CSR 1:10
57:9 58:5,7	condition	40:22 93:9	context 24:23	96:9	2:22,23
69:13	21:1,12	consolidate	81:7	corrective	96:20,23
composited	22:9,18	43:14,20	continuation	37:3	curious
26:20	conditions	consolidated	4:22	correctly	76:10
compositing	22:2 28:22	18:7 43:11	continue	32:17	current
25:7,7,18	47:9,9	43:24	4:16,18	cost 60:19,22	10:13 13:10
25:19,24	48:15 69:12	constituent	11:7,13	60:23 84:8	63:23
27:2,4,21	conduct 4:20	53:9,10,15	50:21	88:9 90:17	currently
32:7	30:7	constituents	continued	costs 77:17	66:18 77:8
Comprehe...	conducted	40:6 51:23	25:22	84:18	84:2
14:8	44:17	52:11 68:24	contractor	counties	cut 31:16
compute	conference	72:18 79:12	85:12,13	54:23 55:9	C1 47:23
30:13	44:18 65:10	constitutes	contractors	55:14 56:18	C1D 40:20
concentrati...	confidence	35:15	6:23 17:17	56:22 57:6	40:21
32:15 35:19	30:13	construction	17:20	74:3,4,6,21	
40:5 42:10	confident	1:3 4:5	contrary	75:3	D
51:23 53:9	78:8	25:18 56:8	27:22	counting	D 45:9,12
53:11 58:8	confirm 50:1	56:9 57:20	contrast	86:17	damaging
64:5 67:17	confirmation	58:20 69:1	20:24	county 73:23	90:18
68:12 72:19	31:20	consult 7:21	Control 1:1,9	73:23 74:9	data 68:7,18
72:24	confused	8:8,13	83:15	74:11,14,19	69:20 70:15
concentrati...	54:1	12:19 14:2	controlled	96:3,14	70:18,24
					71:5,24

78:3,5	50:17	67:18	dewatering	26:10 31:4	76:15
database	definition 6:5	describe	91:8,10	distance	draws 65:5
73:16,18,22	9:3 11:24	24:24	dictionary	38:13 39:22	drinking
74:6,14	15:1 17:1	described	24:20	40:1	54:7
date 5:15	17:14 21:2	38:13 52:16	difference	distinction	driven 55:7
dated 60:24	24:22 39:14	75:16	21:3,11	16:19	59:16
DAVID 2:18	39:15 46:9	description	23:22,23	distinguish	dropped 7:8
day 1:12 5:16	63:12,20	61:3 92:5	different	62:6	due 12:8,16
31:20 96:14	91:20 92:17	descriptive	18:8 71:3,4	district 85:5	12:21 29:19
days 66:4	definitions	7:9	79:21 93:12	division	74:23 82:8
68:6,8	63:21,24	desirable	93:15,18	73:20	duly 80:18
DCEO 80:4	91:17	67:20	differently	Docket 4:8	dust 23:11,13
81:4	degradation	despite 54:8	93:15	document	
DCEO's 4:20	35:18	detail 86:1	difficult 36:4	7:24 8:20	E
76:21 86:16	deicing 34:10	detailed	90:19 91:11	9:7,17	E 2:1,1 3:1
deadline	demolition	66:21 72:14	dig 31:19	15:12,18,21	each 5:7 18:4
94:13	1:3 4:6 69:1	detection	diligence	16:8,9 20:9	41:9 43:12
deal 36:11	demonstrat...	63:12,17	12:8,16,21	20:16 63:7	43:20,23
deals 17:10	25:11	69:14	82:9	67:8 70:2	74:6,14,16
debris 1:3	demonstrat...	detention	direct 43:4	75:21 76:1	74:18,19,21
4:6 25:3	78:19	91:16	53:10	76:9	75:18
decades	DENNIS	determinant	directed 23:2	documenta...	earlier 15:13
81:14	2:16	56:14	48:19 93:17	52:10	easement
December	department	determina...	directing	documents	13:6,9,14
94:13,14	42:7 44:7	52:17	48:5	62:20,20	14:1,20
decided	73:20 77:18	determinat...	direction	doing 52:20	easements
94:12	DePaul 4:14	10:3,13,17	96:12	52:24 53:22	7:20
decision 4:20	dependant	21:8 29:15	directly 13:5	81:12 84:8	East 2:6
5:11 7:3	49:21 72:22	40:16 72:7	27:11 63:22	84:12	eaten 23:17
8:22 22:15	75:9	determinat...	Directors	done 37:13	echo 81:2
50:23 70:7	depending	89:4	5:18	37:19 60:21	EcIS 4:21,21
76:21 79:10	18:19 48:14	determine	directs 47:23	68:14 85:14	economic
79:16 86:16	depicting	14:24 15:2	47:23 48:10	92:24	31:24 76:22
88:5	61:13	16:22 68:11	disagree	double 24:7	78:7,19,22
decisions	deposeth	83:18	48:20 93:19	Doug 6:15	80:3,4 81:4
17:4	80:19	determined	disappointed	42:16 43:6	86:16,18
declaration	deposited	27:3 53:8	78:21 86:15	DOUGLAS	87:16,20
48:24	46:12	68:9 75:4	disappointi...	2:11	88:3
Decreet	deposition	75:11	81:5	Doug's 48:17	economically
25:13	46:8	determining	discussed	down 31:16	50:22 79:6
default 73:2	depth 28:6	51:8 74:5	87:19	69:16 76:12	economics
73:10,13	28:18 30:5	develop	discussion	84:24	79:7
74:5 75:5	61:9 72:12	67:16,22	94:11	downstate	edge 39:23
define 46:15	74:1,22	developed	disposal	85:1	40:2
50:10 94:1	depths 26:24	68:22	25:16 31:3	dozens 74:8	effective
defined 27:8	73:4,23	developing	31:7 81:10	Dr 29:20	41:15
defines 26:11	74:17 75:2	47:7 90:7	dispute 82:21	55:17 60:8	eight 14:4
39:10	75:7	development	83:14	63:11 64:17	either 31:2
defining	derived	46:24 69:3	dissolution	64:19 67:13	34:23 37:8
					52:24 57:1

57:3 68:14	71:24	69:9,22	40:7,12	express 5:12	false 12:24
electronica...	entire 71:5	estimate 61:8	exceedance	26:10	family 82:21
94:15,20,23	73:8	estimated	69:24 70:12	extend 73:6	82:22
elevated	entirely	60:19	exceeding	extending	far 4:9 69:2
34:11	49:21	estimates	36:10 37:7	28:6	71:16 85:11
elevations	entitled 1:8	60:23	42:18,18	extends 28:6	88:12 92:3
61:13	4:4	ethical 85:17	exceeds 31:1	28:18 39:18	93:2
eliminate	environment	evaluate 13:9	except 63:20	extent 93:5	farm 84:24
55:23 56:1	47:23 48:12	51:9 53:12	excess 78:14	E1527-05	85:1,5
emission	49:15 50:12	88:15	81:16	7:23 8:15	fashioning
77:19	82:19 83:10	evaluated	excluded 8:4	15:7	86:7
employed	83:23	53:18	8:16 13:24	E1528-06	fearful 78:17
58:18	environme...	evaluating	14:19 25:15	12:20	federal 93:9
emptied 26:5	2:5 6:23	8:1 15:23	30:2		feel 94:20
enables 66:9	7:22,23 8:2	52:12	excluding	F	feet 23:9,20
encouraged	8:13,14	evaluation	24:10,11,14	F 19:19 20:7	23:21,21
81:17,22	12:21 14:8	6:18 31:2	exclusion	facilities 6:23	24:1,2,5,5,8
82:19	15:5,6	51:7 52:9	25:13	23:8 26:6	24:13 28:7
end 13:1 23:6	20:24 21:12	55:22	excuse 8:23	32:11 33:15	28:19 40:1
26:13 27:15	22:2,9,18	even 35:13	82:5	36:15 46:8	felony 12:13
31:20 36:16	28:22,24	36:1 41:11	exhibit 3:3,4	46:19,20	12:18,22
37:19 48:3	29:2 30:6	55:23 57:17	3:5,6,7 20:7	50:9 70:4	felt 37:23
48:18 63:15	47:18 63:3	76:8 78:5	20:8,10,13	73:9 77:6	77:7 90:24
71:23 74:15	65:7,10,20	83:1 85:2	20:15,17	78:6,9,24	few 15:12
ended 89:20	83:3 93:23	ever 54:6	61:15,22	79:8,22	86:12 89:16
ending 30:9	envisioned	56:2 89:16	62:4,8 63:5	facility 7:7	fictitious
31:14	47:15	every 31:17	63:6,8	7:10,14	13:1
enforce 84:10	EPA 6:20	everybody	66:20,24	18:17 19:4	field 85:2
enforcement	60:19 61:5	5:13 37:15	67:6,7,9	30:2 32:14	fields 84:24
51:19	65:15 66:2	76:5,13	72:6 75:13	43:18 46:12	figure 22:10
enforcing	66:6,17	everyone 4:2	75:14,22,23	65:1 69:13	file 5:19
93:23	79:16 82:24	6:12 81:11	76:2	79:19	94:15,20,23
engaged	85:22	everything	exhibits	facing 84:2	fill 1:3,4 4:6
17:17	errata 20:4	5:8 82:10	19:17 62:24	fact 31:12	6:19 7:17
engineer 8:8	43:4,6,8	exactly 22:8	exiting 32:16	82:11,14	18:19 26:15
13:20 14:3	44:23 45:1	31:21	35:2	factor 10:17	26:15,24
14:22 21:7	45:2,19	examine 76:7	expect 29:18	10:23 56:24	27:2,16,17
29:2 51:5	Especially	example	68:20	factors 9:21	38:8 39:17
70:10	15:20	30:23 32:20	expected	10:11,15,17	39:17,24
engineered	essentially	41:8 42:8	74:23 75:11	15:1 16:22	40:2,6,11
48:8	75:15	55:18 56:15	experience	50:21,23,24	44:11 46:21
enough 14:13	establish	59:11	70:9	57:17 58:14	50:10 61:2
19:15 32:21	12:10 70:16	excavated	explain 17:9	58:17	61:4,7,9,9
70:24	established	26:5	72:5 81:5	fail 25:14	61:10,11,13
ensure 12:17	12:4 29:11	excavation	explaining	30:9	63:4 64:24
40:11	37:1 73:9	7:7	84:17	failed 77:6	64:24 75:12
enter 62:3	establishing	excavations	exposure	Fair 19:15	90:14 91:9
67:4	71:1	46:18	23:15 30:16	faith 86:20	93:14
entered	establishm...	exceed 29:19	68:5	fall 6:5 53:15	filled 82:1

final 18:1 32:13 37:22 45:15 89:7	follows 80:19 follow-up 49:12 51:4 91:14 92:16	76:16 77:4 77:19,20,21 78:7,21 79:11,13 81:7 83:2,7 86:21 90:12 90:22 92:7 92:9,16 96:10	6:21 30:10 35:14 36:6 41:22 43:7 60:11 82:5 given 8:24 GIVENS 55:17 glad 80:14 GMZ 33:8,17 34:18 36:1 GMZ's 33:9 33:12,13 go 4:23 10:8 11:14 31:15 31:23 32:2 32:11 34:3 38:15 45:11 51:4,20 52:3 59:24 60:5 63:6 72:16 76:10 77:10,12,13 77:13,14 78:9,11,12 79:18 81:5 81:18,19 84:19,23,23 84:24 87:9 88:1,24 94:7	38:4,7 41:7 50:8,9 51:9 54:8,18 60:1 77:10 77:12,12,13 77:14,20 78:8,10,13 78:18,20 79:5 84:13 84:13,14,20 85:8 88:8,9 88:12,13 92:9 94:4 gone 33:20 good 4:1 6:1 9:18 20:21 22:16 62:7 79:15 80:6 81:16 86:8 86:19 93:2 governing 65:14 governor 46:14 gradient 69:16,16,20 Grand 2:6 grant 65:21 66:14 granted 65:18 66:3 66:8 grants 65:16 grave 86:11 gravel 80:24 great 73:4 greenhouse 77:19 Greg 11:16 GREGORY 2:20 ground 39:19 73:3 85:4 groundwater 25:20 32:20 32:23 33:3 37:21 39:7 40:7,7,13 40:18 42:11	42:15 51:16 52:21 53:17 55:13 56:10 57:15,19 58:3,6 59:8 59:16 60:20 69:10,11,12 69:19 70:1 70:3 78:3,5 groundwat... 58:21 groups 44:24 guess 15:18 29:5 43:3 49:24 76:8 90:11,19 92:8,15 guidance 6:7 7:18 8:24 9:19 70:2,4 70:6,24 71:2 82:6 guided 15:17
find 31:17 39:5 findings 60:22 fine 16:16,19 firm 11:17 first 7:3 11:12 22:3 33:21 37:5 43:9 52:17 52:23 56:4 56:14 58:17 60:3 80:18 81:8 83:1	forecloses 47:3,6 foregoing 96:8 forest 85:5 forever 85:15 form 7:4 12:23 18:5 18:21,23 61:3,6,8,12 61:14,24 62:18 63:3 63:5 86:4 formal 65:13 forms 18:3 18:15 43:21 forward 94:4 found 32:14 68:24 92:12 four 7:2 11:13,22 87:22 fourth 8:3 fraudulent 13:1 from 4:14,22 11:3 18:8 18:12 25:15 30:2 33:22 33:24 34:1 34:9 38:18 39:18 40:6 41:24 43:11 44:6,21 47:6 49:3 53:7,11 59:1 60:3 61:18 63:22 64:20,23 65:6,24 66:2,17,19 67:2,6 69:12,15 73:3 75:3	front 37:19 Funny 45:7 Fur 58:4 further 30:15 31:2 46:7 76:20 77:17 82:2 94:6 Furthermore 25:17 future 73:9 88:12	<hr/> G <hr/> G 52:18 53:7 57:23 gas 77:19 gathering 68:17 gave 42:16 51:12 56:16 generally 34:16 73:8 general's 89:9,12 generated 10:23 77:8 77:21 79:1 82:18 generations 85:16 geographic 73:16 geologist 8:9 13:21 14:3 14:22 21:7 51:6 gets 72:15 getting 34:17 GEVING 2:10 give 5:13	GMZ 33:8,17 34:18 36:1 GMZ's 33:9 33:12,13 go 4:23 10:8 11:14 31:15 31:23 32:2 32:11 34:3 38:15 45:11 51:4,20 52:3 59:24 60:5 63:6 72:16 76:10 77:10,12,13 77:13,14 78:9,11,12 79:18 81:5 81:18,19 84:19,23,23 84:24 87:9 88:1,24 94:7 goals 73:7 Gobelman 2:20 42:6,6 42:21 44:6 51:2,3,20 52:8 53:2 53:14 55:6 55:21 56:15 56:20 57:1 goes 10:1,24 36:15 52:22 71:17 going 4:23 5:17 11:8 19:13 29:19 31:9,21,22 32:10 33:18 34:14 36:16 37:15,15	fits 47:14 48:21 49:2 79:20 five 12:7 23:9 23:21 25:4 31:12 56:6 58:14,17,17 59:1 fixed 62:22 flexibility 6:22 flexible 47:7 49:7 79:17 79:24 FLOWERS 2:8 30:17 30:20 43:3 45:16 Focus 30:4 focusing 63:16 folks 83:8 86:19 follow 15:9 20:22 22:16 42:5 85:9 88:20 90:6 followed 22:14 following 60:15 87:12 94:9
					<hr/> H <hr/> H 2:10 3:1 28:14,15 52:18 53:8 57:23 hand 5:1 76:8 handled 93:13 hands 94:17 hardcopy 94:17,21 hauling 7:8 46:7 having 79:10 80:18 83:2 hazardous 24:22 27:6 heads 5:13 health 26:16 47:22 48:12 48:20 49:14 50:12 83:24 hear 55:3 84:15 heard 22:7

22:11 31:21 77:4,11 84:4 hearing 1:8 2:3 4:4,16 4:19 5:14 44:5,6,11 44:14,15 60:3 61:18 62:5,5 71:24 76:7 89:10 94:12 94:16 HEATHER 2:12 heavily 10:16 held 1:7 help 5:10 81:24 helpful 16:3 22:7 Henriksen 2:15 60:18 80:9,10,11 80:14,17,20 80:21 87:5 87:7 her 8:5 13:24 14:19 high 64:11 74:16,23 78:8 higher 34:24 37:10 57:24 58:2,24 59:3 74:22 highest 52:3 highly 84:1,2 highway 28:5 28:18 34:9 him 72:14 historical 17:7 historically 79:14 92:12 history 8:6,6 8:7 14:2,21 17:7 46:4 47:5	Hock 2:18 77:5 Hock's 60:24 61:22 85:24 hole 25:21 92:19 holes 41:10 home 82:1 homes 81:16 hook 85:15 85:16 hope 81:11 hopefully 84:15 Hornshaw 2:11 20:3 20:13 23:2 23:10,23 24:11,15,19 25:9 26:2,8 26:22 27:9 28:3,10,12 29:20,22 30:3 42:13 51:12 52:15 53:4,16,19 53:21 54:4 54:10,13,17 54:21 55:2 55:5,9,17 55:19 56:4 56:18,22 57:5,13,21 58:4,11,16 59:5,9,13 59:19 60:8 63:10 64:16 67:12 72:3 72:9 75:16 76:15 Hornshaw's 60:9 hot 31:5,6,10 85:15,18 hour 1:13 Huff 2:19 19:9,15 20:20,21 21:10,19	22:21,24 23:19 24:4 24:8,13,16 25:4,23 26:4,19 27:5,24 28:4,11,14 28:16 29:1 29:7,10,16 29:24 30:4 30:21,24 31:8 33:4,9 33:16 34:1 34:7,19 35:1,7,16 36:8,12,14 36:23 37:11 38:2,7,19 38:21 53:24 54:1,6,12 54:14,18 57:10,16 58:1,9,13 59:2,7,10 59:17,20 76:24 77:1 77:4 86:5 Huff's 41:8 42:8 81:3 human 23:14 26:16 47:22 48:12,20 50:11 83:23 hundred 39:24 48:23 hundreds 71:3 hurt 82:19 hypothetical 32:14 <hr/> I IAAP 44:19 IAC 24:18 27:6,8 idea 31:3 93:12 identical 63:24 identificati...	3:2 20:11 20:18 63:9 67:10 76:3 identified 19:24 22:1 28:22 75:6 identify 6:16 25:12 31:5 41:4 73:13 IDOT 44:14 44:18 86:5 IEPA 6:8 12:13 14:11 64:21 81:14 81:17 82:13 82:17,20 83:6,12 84:10 85:3 IL 20:9,16 63:7 67:8 76:1 Ill 1:5 4:7 40:8,13 53:7 65:3 67:21 69:18 69:24 70:5 71:12 Illinois 1:1,9 1:11,12 2:5 2:7 6:20 14:13 31:13 42:7 44:6 44:19 60:19 61:5 63:2 64:20 65:15 65:21 66:2 66:6,11,11 66:15,16,17 66:20 67:2 67:6 73:12 75:21 77:18 78:3,16 79:21,22,23 80:21 81:9 85:1 86:12 89:16 96:1 96:14,22 imagine 77:24	immediate 4:8,10 64:10 impact 22:19 31:24 74:24 76:22 78:22 80:7 86:19 87:16,20 88:15 impacted 6:6 6:21 7:13 9:4 11:24 12:11,15 13:4,16,19 14:15 21:2 21:13 22:8 22:12 implemented 89:3 implication 77:15 implications 78:24 important 64:3 72:1 importantly 85:23 improve 78:15 inadverten... 23:17 inappropri... 27:4 84:1,3 inches 73:23 include 16:17 27:13 60:7 61:3 93:22 included 44:18 includes 73:5 74:16 91:17 including 7:19 91:19 inconsisten... 94:1,5 incorporate 15:19 16:5 incorporated 15:14 65:11	incorporati... 16:16,20 70:5 increase 6:8 9:22 10:18 50:8 70:22 increased 84:18 increases 6:4 6:9 10:14 increasing 77:22,24 incredible 78:18 Indiana 77:12 indicate 25:5 indicated 77:7 indicates 40:10 indicating 16:18 88:6 industrial 13:18 industrial/... 21:23 22:4 industry 77:9 80:22 81:13 82:6,17 83:21 84:6 86:17 inert 89:13 89:15,17,24 90:8,20 91:6,14,16 91:17 92:2 92:4,5,10 92:24 information 9:3 29:6 32:21 44:9 88:21,22 89:4 ingestion 23:4,6,11 23:13 24:2 24:14 25:23 30:16 32:8
--	--	--	--	--	--

56:7,8	interpretat...	4:9 16:7,11	86:1,3 89:3	81:18,19	legislature
57:19 58:19	36:5	16:14 19:23	Klein 11:17	88:9,12	46:14 47:15
58:20	interpreted	Josh 41:6	know 29:8	89:14,15,16	48:5 93:12
inhalation	44:2	judged 27:12	33:11,12	91:7 93:1	legislature's
23:4,7,12	interprets	judgment	36:1,3 62:9	last 22:6	50:7,16
23:13 24:3	26:14	70:9	66:23 81:11	28:14 33:10	legitimate
24:12 25:24	intimated	July 41:15	82:21 87:19	44:5,6,14	84:11
32:8 56:8,9	50:16	just 6:12 9:6	88:14,15	62:4 85:13	less 23:16
57:20 58:19	intimately	9:16 11:8	93:3	89:7	40:3 57:22
58:20	85:19	19:21 20:1	knowingly	law 6:16	64:7 68:6
inhaled	introduce	20:21 22:10	12:24	11:17 21:23	88:9,12
23:17	11:14	23:18,20	knowledge	82:16,22,23	let 5:23 35:16
inorganic	introduced	24:6 30:20	8:5 14:1,20	93:2,9	72:9
52:11 53:10	75:12	34:10,12	knowledge...	layers 25:2	letter 4:21
72:17,18	introduction	37:11 42:16	17:6	layout 62:19	82:15
inquiries	71:9 72:3	43:22 44:1	known 73:16	leach 54:7	letters 84:17
73:15	investigation	46:3 48:16	knows 37:15	leachability	let's 28:4
inside 38:8	72:11 75:4	49:12,15	50:19 60:19	92:6,13	32:15 39:14
57:10 77:6	75:11	50:14,15	KRUMEN...	leachate	45:8 60:5
inspection	involved	51:3 52:1	2:17	55:23 90:12	87:9 94:7
51:13	46:24 85:19	52:16 53:4	<hr/>	90:16 91:10	level 30:13
installation	ionized 72:17	55:18 62:5	L	92:7	73:3 75:6
28:7,19	ionizing 53:9	70:11,19	laboratories	leaching 58:2	levels 32:9
installed	issue 30:22	75:16 76:10	65:8,22,23	lead 54:2,20	34:13 47:10
69:11	35:11 36:2	79:19 80:6	66:10,15,16	55:6,8,18	51:8 73:3
instead 53:22	36:4,11	84:12 87:10	66:19 67:1	56:16 57:5	75:1
intended	60:9 72:4	88:14,20	67:5	58:9 59:3	Liability
5:10 46:15	80:4	89:18,19,23	laboratory	59:18	14:9
50:3	issues 15:23	91:13 92:19	53:12 64:12	leader 84:6	License 2:23
intent 22:12	44:4,16	93:20,23	64:21 65:2	Leaking	lie 13:2
24:4 27:17	49:4,5	94:2,7	65:10,20	14:12	LIEBMAN
27:22 30:12	71:11 79:17	justified	lack 81:4	least 16:2	2:9 91:4
37:21 50:7	89:1	50:22	LADIEU	71:21 92:7	lieu 59:18
50:10,16	<hr/>	<hr/>	2:16	93:16	light 75:10
intention	J	K	laid 33:20	leave 62:23	91:15
49:19	J 2:22	Kane 4:14	land 1:3 8:4	leaving 35:4	like 6:12 9:1
intentions	JAMES 2:19	KENNETH	8:16 13:23	led 82:3	10:5 11:7
6:16	JCAR 45:9	2:19	14:18 39:16	83:15	11:13 20:22
interest 76:5	45:14	kick 37:8	44:20	left 4:8 70:8	21:24 33:7
78:2 85:17	Jenkins	kicks 90:23	landfill 31:23	legal 16:13	45:9 58:18
interested	11:18	kilogram	46:11 49:17	24:22	59:23 71:10
62:17,23	job 18:17	55:11,15	88:1,10	legislation	72:5 86:12
76:13	84:16 85:14	KIMBERLY	89:17,24	46:5,23	87:14 88:16
Internet	jobs 17:18	2:10	90:8 92:10	47:5,16	likely 6:17
73:14	78:12,15	kind 20:22	landfilled	48:22 49:6	10:18 23:16
interns 4:15	John 2:15,18	30:22 31:8	49:17,21	83:16	68:24
interpretat...	60:18,23	32:18 79:12	50:4	legislative	likes 45:14
7:13 22:4	80:17,21	90:19,21	landfills	46:4,24	likewise
35:10 52:6	85:24	92:21	33:13 50:8	47:5	84:12
	Johnson 2:4	kinds 79:14	77:13,22		

limit 24:1 30:10 49:20 50:3 63:12 63:15,17,19 63:22 64:9	logical 27:1 long 30:14 71:3 look 8:20,22 9:1 11:1 21:23 32:2 45:12 46:2 54:22 55:1 58:22 79:6 81:6 90:7 90:10 93:21	64:3 71:14 MAC's 48:19 67:18 Madame 89:10 made 7:6,14 15:14 83:7 86:1 88:5 main 18:9,10 maintain 64:1 maintained 73:18 major 32:12 57:10 58:10 74:10,13 majority 68:19 make 6:5 7:15 8:22 10:2 14:16 16:18 17:4 23:21 28:16 29:15 48:19 70:17,24 72:7 79:9 79:15 81:15 82:6,17 87:2,3,14 88:16 89:3 91:10 93:7	82:9 Manning 45:21,23,23 46:19,22 48:16 49:9 49:10 50:14 50:15 79:4 79:5 83:16 88:20 89:12 89:23 90:5 Manning's 81:3 many 18:2 28:7,19 33:9 74:8 81:2,13 maps 61:12 Marie 1:8 2:3 4:2 mark 2:10,17 66:20 75:13 75:20,22 marked 3:2 20:9,16 63:7 67:8 76:1 Marrow 72:10 masonry 91:19 material 13:1 23:8 24:9 27:16 50:8 50:9 77:10 77:21 78:1 78:14 83:4 83:13,22 84:5,6 90:15 92:2 93:13,14	67:16 68:12 72:24 may 4:24 5:15 7:9,10 7:20 8:4 10:5 18:18 27:12 37:3 38:9,16 40:6 48:1 62:16 66:1 68:8 72:14 73:5 88:10 88:11 maybe 45:14 76:10 mean 8:11 21:17 30:13 35:7 38:16 92:17 meaning 11:23 meaningful 6:7 7:18 27:1 meaningless 26:24 means 12:4 35:22 39:16 40:4 47:20 63:16 measure 8:17 9:22 measures 37:20 mechanism 34:3 meet 34:20 34:23 35:5 43:17 57:18 58:3 92:11 92:12 meeting 38:21 meets 37:12 member 4:9 5:10 members 81:1 83:11 84:16	mention 16:2 mentioned 36:1 met 44:14 metals 77:6 91:22 method 28:2 66:8 70:16 70:20 methodology 12:5 52:7 64:2,3 68:13 methods 64:12 70:8 71:4 metropolitan 54:24 55:10 55:14 56:19 56:23 57:7 57:11 58:10 Meyer 84:5,5 mg/L 31:11 might 9:2 25:1 68:23 81:8 89:10 93:4 migration 30:16 32:4 42:15 52:21 53:16 55:12 56:9 57:15 57:19 58:6 58:21 59:8 59:15 mile 28:6,18 30:5 milligrams 55:11,15 million 41:17 48:23 mind 21:11 33:16 35:13 35:18 77:23 87:19 mine 80:23 mines 46:17 minimal 74:9 minute 60:13		
limited 12:20 49:18 91:19	looked 21:24 90:19 looking 10:2 10:4 39:2,5 55:22 lost 28:10,12 62:5 lot 5:5 10:24 15:22 36:14 49:3 71:3,4 84:23,24 86:23 89:13 90:17 low 30:8 64:11 74:17 85:4 lower 59:14 75:2 lowest 55:12 56:11 58:22 58:24 63:14 64:6,8,10 72:22	makes 12:24 21:8 43:8 50:23 84:9 making 10:12,16 30:20 50:19 85:17 managed 93:14 management 32:20,23 33:3 82:4 managing 17:3,13 mandate 9:6 mandated 9:8 manifesting	marked 3:2 20:9,16 63:7 67:8 76:1 Marrow 72:10 masonry 91:19 material 13:1 23:8 24:9 27:16 50:8 50:9 77:10 77:21 78:1 78:14 83:4 83:13,22 84:5,6 90:15 92:2 93:13,14 materials 41:7 82:4,7 matter 1:2 7:8 11:20 65:1 70:19 maximum 6:21 32:2 48:1 51:22 53:8 64:5	mean 8:11 21:17 30:13 35:7 38:16 92:17 meaning 11:23 meaningful 6:7 7:18 27:1 meaningless 26:24 means 12:4 35:22 39:16 40:4 47:20 63:16 measure 8:17 9:22 measures 37:20 mechanism 34:3 meet 34:20 34:23 35:5 43:17 57:18 58:3 92:11 92:12 meeting 38:21 meets 37:12 member 4:9 5:10 members 81:1 83:11 84:16	load 7:10 18:4 43:20 44:1,12 82:9 85:15 loaded 26:5 loading 44:10 loads 44:8 84:22 85:18 85:18 located 74:3 location 18:24 26:17 48:7 73:11 locations 69:16 75:7	LPCPA 61:6 LPC665 62:4 63:5 LRRRA 44:20 lying 85:4 L.A 1:24 2:24 3:24 <hr/> M <hr/> MAC 12:4 27:18 31:1 41:24 42:19 43:17 46:3 47:8 51:15 52:23 57:14 57:24 64:2	LISS 2:19 list 11:8 66:24 67:4 68:3 94:22 listed 18:22 19:1 54:15 67:17,24 listened 86:23 little 43:5 68:2 81:6 Liu 2:3 4:10 6:1 10:10 livable 86:8 LLC 1:24 2:24 3:24 load 7:10 18:4 43:20 44:1,12 82:9 85:15 loaded 26:5 loading 44:10 loads 44:8 84:22 85:18 85:18 located 74:3 location 18:24 26:17 48:7 73:11 locations 69:16 75:7

minutely 6:3	10:18 32:5	82:10	nonbiodeg...	37:7,9,13	official 96:13
minutes 43:1	39:19 53:17	need 6:17	91:18	37:23 46:16	offsite 33:18
68:11 94:18	54:11 55:7	19:22 29:5	noncompli...		often 91:8
misplaced	56:5,11	29:7,8	25:13	O	Okay 40:15
62:15	68:23 72:17	33:21 34:17	none 20:8,14	O 65:6	42:21 71:7
mission	74:22 75:1	38:12 43:22	63:6 67:6	objection	71:8 76:15
49:23	75:8	53:19 56:3	nonputresc...	16:4 20:6	89:23
mixing 26:7	move 19:7	78:23 87:16	91:18	20:14 62:3	once 10:20
26:9 27:20	much 6:7	94:16,21	non-CCDD	63:2 67:4	17:12 68:9
Mm-hmm	31:19 41:1	needed 18:3	12:6	75:20,22	85:13,13
89:11	59:22 76:19	18:15 68:7	non-degra...	objective	one 4:14,15
modeled	79:21,24	69:20	35:5,8,15	64:5 75:9	5:5 6:2,15
21:24	83:21 87:6	needs 32:2	non-detect	objectives	9:7,17
modificatio...	87:23,24	50:21 79:6	51:7	12:1 57:18	15:17,17
43:9	92:24 94:19	79:15,16	normally	64:2 67:23	16:8 19:21
moment	94:24	80:7	34:3 68:5	68:1,4,10	20:1,4 28:6
60:11 87:10	multiple	neither 45:10	North 2:6	68:22 69:4	29:18 30:5
94:7	72:18 92:18	NELAC	northeast	obligated	30:5,9,12
money 31:15	municipal	65:11,11,15	85:1	31:19	30:24 31:6
monitor	19:1	NELAP	northern	obtained	39:24 41:17
69:12	must 12:9	65:21,21	74:3 79:23	43:12 69:15	41:20 43:11
monitoring	14:15 18:15	66:1 67:1,5	note 5:9 23:3	obtaining	47:14 48:13
36:17 37:21	40:11 43:12	never 30:9	49:8	38:11	48:20,23,23
38:4 60:20	53:12 65:1	31:13 50:15	notes 61:16	obviously	49:2 52:13
69:11,14,19	67:15 73:2	52:24 58:14	96:11	16:8 88:24	54:2 57:16
70:3 90:12	MYERS 2:8	90:1	nothing	Occasionally	58:13,16
90:16 91:10	69:6 70:18	next 9:20	32:10 46:22	68:6	65:15 71:8
Monroe	71:2	30:6 64:16	47:2 78:4	occur 31:11	71:10 73:6
96:21	N	NIFONG	87:21 88:6	occurred	76:22 77:16
more 7:11	N 2:1 65:6	2:12	notice 51:18	18:11	79:19 80:6
10:16 25:8	naive 31:8	night 89:7	notions 5:12	occurring	83:11 87:10
26:21 29:6	name 4:2 5:3	Nightingale	number 6:2	30:1	88:5 89:6
31:19 39:24	11:16 80:20	2:12 19:20	10:8,10	occurs 70:2	90:11 91:4
41:2 42:23	national 7:24	20:7 21:17	11:22 12:7	91:8	91:14 92:18
43:1,11	8:1 15:21	32:24,24	13:3,13	October 1:12	94:7
47:7,13	65:9,19	33:6,11,19	14:4,23	60:24	only 7:16
49:6 66:23	nationally	34:2,15,22	16:21 17:17	off 24:17	22:17 25:16
71:8,11	9:17	35:3 36:8	18:2,14	31:6 33:21	25:19 27:13
77:17 79:17	natural	36:13,21	20:4 25:2	34:14 35:4	42:14 47:15
79:24 84:22	29:20 73:18	37:4,17	33:15 37:24	36:11 37:15	52:21 54:23
84:22 85:22	naturally	38:6,9,20	41:20,22	38:5 80:12	63:17 68:11
88:8 90:20	30:1 31:12	38:24 39:6	44:24 45:2	85:14 87:9	74:2 78:3
91:1 92:16	nearly 68:23	39:13,22	51:15 55:8	94:7,11	86:11
Moreover	necessarily	40:19,21	68:20 76:6	offer 66:7	onto 10:8
68:19	37:5 49:20	60:17 61:20	81:1 93:7	office 72:15	19:7
morning 4:1	58:1 79:13	89:21 90:4	numbers	89:9,13	open 33:17
6:1 20:21	79:19	90:10 92:3	41:23	94:14,15,18	operated
46:1	necessary	nine 14:23	numeric	Officer 1:8	21:22
most 6:17	67:19 69:23	nod 36:19	34:23 36:10	2:3 4:4	operation
				89:10 94:16	

16:23 17:11	12:5 14:5	92:16	71:9 72:2	percent	Phase 7:22
17:19 39:17	14:15 16:1	own 9:13	72:23 83:6	31:12,22	8:14 15:6
39:18,24	17:13 31:9	71:16	93:7,10,17	74:12 77:5	Phone 96:22
40:2,6,12	39:11 42:4	owner 8:5	participate	77:9	phrase 63:14
44:11 61:2	42:22 45:18	9:16 10:12	66:10	percentage	63:17,18
61:4,7	46:17 50:10	12:9 13:7	participating	78:9	64:8
64:24	50:17 52:14	14:19 19:2	86:13	perfect 78:23	physical 48:9
operations	59:21 64:22	21:15 43:13	particular	performance	PH's 75:11
1:3,4 4:6	65:18,24	63:5 70:13	46:4 52:4	52:9	pick 76:6
26:15 27:3	66:13 73:15	owners 6:22	63:14 66:7	performed	pile 91:24
27:17 46:21	84:7,11	13:24 43:19	80:5	69:17	93:22
50:10 63:4	87:21 91:4	43:19	particularly	performing	pits 75:12
84:16 91:9	91:23	owner's	88:10	70:20	81:15,22
operator	others 10:16	43:21,23	partnered	perhaps 73:4	place 61:19
9:16 10:12	24:22	owner/ope...	83:6	87:22	placed 23:8
12:9,17	out 22:1,10	7:6 40:11	partnering	period 34:4,7	81:24
13:8 17:1,2	29:19 30:7		81:13	69:13	placement
17:6 19:3	30:9,15,24	P	pass 42:20	permit 40:16	6:19
21:16 43:13	31:15,23	P 2:1,1	76:11	85:7	places 81:23
61:12 63:5	33:20 34:9	page 23:2	passed 46:14	permits 39:3	play 68:18
70:13	38:22 51:12	25:4 60:17	passing	92:14	plays 52:6
operators	52:6 54:7	61:1 63:10	47:16	permitted	please 5:3,5,9
6:22 17:21	56:6 58:22	pages 64:16	past 10:13	89:17	6:6 12:19
opinion 28:9	65:22,23	67:12 69:6	21:22 52:19	person 12:24	41:5,12
28:21 29:4	66:10,18,24	71:3	path 85:22	17:3,13	76:12 80:10
29:13 32:9	67:4 76:9	paint 23:15	pathway	personal	94:20
35:12 79:16	78:10,11	24:17,24	24:10,12,14	96:11	pleasure 95:1
85:21	82:3,15	64:23	25:20 30:16	perspective	plus 60:8
option 34:6	84:13,19,23	painted 23:5	32:4 42:15	78:7 92:17	84:9
43:18,22	93:10	25:3 64:19	52:22 53:17	pertain 42:14	PNA's 32:5
52:20,23	outlined	64:23 91:22	57:15 59:4	PE/PG 7:5	point 30:15
53:22	85:24	paragraph	pathways	7:11	39:9 40:4,4
order 70:7	outlines	45:10,13	23:14 53:18	PG 13:8	47:12 56:3
89:2,3	27:12	parallel	56:7 58:17	18:23 19:3	62:7 71:19
organic 53:9	outside 13:17	22:19	PAUL 2:9	PH 41:9,11	71:19
74:23	14:6 54:23	parameter	pavement	41:21 47:10	pointed
organized	55:9 56:18	56:5	91:23	49:4 55:7,8	93:10
73:24	57:6 64:20	parameters	PCB 20:9,16	55:12 56:2	points 51:21
origin 16:24	over 5:7 24:9	55:24 56:1	63:7 67:8	56:17,21	Pollution 1:1
original	27:19 28:6	60:21	76:1	57:3,8 59:5	1:9 83:15
35:12 83:6	30:5 31:18	Pardon 28:11	PE 13:8	59:15 60:9	portion 44:3
originally	33:10 39:5	part 7:2,9	18:22 19:3	71:10,13,16	pose 26:13,16
58:5	62:18 66:18	9:20 15:14	peak 26:7,8	72:4,8,20	27:15 47:21
originated	84:24	17:10 24:18	penalty	72:22 73:2	49:24
18:22	overcome	27:7,7,8,10	12:13	73:10,13,17	position
originates	30:21	27:11 43:9	people 62:16	73:24 74:5	27:20
65:1	overexposu...	43:24 44:4	76:9 86:12	74:16,18,20	possible
other 5:7	26:23	45:1 51:13	92:13	74:20,22	16:12
9:10,11	oversite	63:20 64:22	per 55:11,15	75:2,5,8,21	possibly 22:8
		65:5 69:14			

potential 6:4 6:9 8:2,11 8:18 9:23 10:14,18 22:19 23:14 56:6	pretty 72:12 prevent 31:4 82:10 92:9 previous 42:16 59:1 previously 62:3,8 pre-filed 19:8,12,13 19:18,20 23:1,3,19 25:5 61:24 primary 65:17,17,21 65:23 66:6 66:8,17 prior 6:3 13:11 probably 42:18 problem 32:12 37:23 68:3 78:6 86:21 90:23 problems 5:6 82:10 83:3 83:12 procedures 27:12 58:7 proceeding 4:4 71:11 proceedings 1:7 60:16 87:13 94:10 96:7,9 process 7:23 8:15 12:22 15:6 17:18 30:10 31:14 33:20 51:5 51:22 85:20 produce 80:23 Producers 44:20 80:22 professional 6:18 8:8 9:15 13:20 14:3,22	21:7,7,9,15 22:14 28:9 28:21,24 29:2,3,3,13 29:14 30:7 43:17 51:5 51:5 70:9 professionals 6:24 program 14:11,12,13 65:20 82:24 84:1,9 86:8 86:9,12,14 87:2 90:13 90:16 programs 66:11 prohibit 25:6 prohibitive 84:9 project 18:3 28:5,17 43:20 61:11 projects 28:5 43:24 promulgated 77:11 properties 8:2 13:12 74:15 property 6:6 6:21 7:13 7:19 8:3,15 10:14,22 12:1,11,16 13:5,11,11 13:16,19,23 14:18 17:4 17:5,7 21:2 21:13 22:8 22:12,20 29:9 32:16 34:21 35:2 35:2,4,4 36:16,17,23 37:12,14 38:3,13,15 39:12 40:1	proposal 47:1,3,4 73:7 propose 9:12 9:14 proposed 1:2 1:4 4:5,7 12:5 27:24 50:2 52:7 60:20 61:10 63:18,21 71:12 72:21 73:14 80:3 80:4 proposes 72:21 proposing 35:17 86:19 protected 48:12 50:11 83:9 Protection 2:5 47:18 63:3 65:7 93:24 protective 48:19 49:14 75:8 80:1 protects 83:23,23 protruding 91:21 provide 6:6 9:7 15:17 25:8 43:5 44:8 46:8 69:20 75:6 provided 52:1 60:23 74:1 provides 72:18 73:22 providing 9:17 46:6 68:1 provision 16:17 67:20 68:2,16 69:4	provisions 12:22 proximate 15:1,3 18:13 proximity 14:7 public 5:14 5:18 11:19 14:5 17:18 18:3 19:1 33:14 41:14 43:15,15 45:24 47:1 87:15 88:23 pure 88:1 purpose 25:12 46:6 purposes 7:1 12:2 27:16 46:17 47:19 48:2,16 50:14,18 58:4 68:8 69:23 71:6 Purseglove 2:9 84:21 pursue 51:18 purview 85:3 put 38:4,7,12 77:22 80:1 83:8 84:4 85:6 88:23 90:15,17 92:18 putting 36:17 57:17 PYLES 2:18 P.O 2:6 <hr/> Q <hr/> quality 39:7 40:8,13,18 69:10,19,21 70:1 quantitation 63:15,19,22 64:9,22 quarries 46:17 47:9	47:10,11 81:16,23 quarry 36:15 38:2 queried 74:7 question 4:24 5:4 6:2 8:10 9:21 10:5 10:10 11:13 11:22 12:7 13:3,13 14:4,23 16:21 17:10 17:16 18:2 18:18 21:10 23:6,19,20 26:18 28:14 32:13 33:4 35:8 36:2 42:16 43:14 45:21 49:12 49:24 51:4 52:5 55:20 70:23 71:22 72:14 89:7 89:14,19,19 91:14,23 92:16 93:5 93:7,8 questioning 20:23 questions 4:17 5:9,19 5:20,21,23 11:8,12 15:13 17:23 19:10,12,14 21:21 23:1 41:3 42:5 42:23 44:7 45:4,18 46:1 59:22 60:2,8,11 76:15 87:5 89:1,13 93:11 quicker 94:19 Quinn 41:6,6
--	---	---	--	---	--

quite 11:11 15:12 72:11 87:7	rather 16:8 48:10 58:8 70:6	65:17 73:1	referring 8:21 55:18 61:17 83:17	rejected 44:8 rejection 44:13	representat... 44:21
quote 11:23 11:24 12:11 12:15,24 13:2,4,15 13:18 14:14 14:24 15:2 16:23 17:19 23:4,6 26:12,13 27:14,15 31:9 47:24 48:3 63:12 63:14,16 74:15,15	rationale 92:20 RCRA 33:15 70:3 reached 71:23 read 6:2 32:17 37:1 46:22 47:18 53:4 reading 52:13 ready 19:7 real 80:3,4 86:21 really 21:8 30:11 72:13 90:1 92:12	recommend 7:21 8:12 15:4 45:14 recommen... 32:1 75:10 recommen... 88:7 recommends 61:1 reconsider 32:6 record 5:8,11 11:15 16:2 23:18 36:20 41:4 42:1 48:17 50:15 61:17,21 72:1,2 74:17 80:12 83:2 87:10 87:21 88:6 88:19,22 89:9,20 94:7,12	refers 64:10 reflects 35:12 reg 59:11 regard 7:9 regarded 73:21 regarding 38:21 42:8 44:8 45:4 83:12 91:14 regards 18:19 69:9 register 85:7 registering 61:6 registration 61:3 63:4 regulate 81:10 82:24 regulated 26:15 27:17 64:24 79:1 87:24 regulating 54:19 regulation 46:4,7 51:9 78:18 92:4 regulations 7:9 28:1 34:19,22 37:2,18 38:14,15 48:11 51:21 77:10 89:18 90:1,8,22 90:24 91:7 92:9,11,22 92:23,24 93:21 regulatory 81:10 83:8 84:1 85:3 85:23 86:8 86:8 92:16 reject 84:23	related 49:5 relates 6:8 47:8 relevant 5:21 24:23 52:21 73:2 reliable 73:21 relief 38:17 relies 15:22 rely 9:8,11 remarks 72:10 remedial 57:18 remediation 14:11,13 32:18 64:1 64:4 67:22 68:4,10 69:4 remember 55:3 remind 6:12 77:2 reorganize 60:11 replaces 58:24 report 1:7 53:12 reported 2:21 96:6 reporter 5:7 39:20 53:20 55:3 96:6 REPORTE... 1:24 2:24 3:24 represent 5:4 74:11 representat... 24:17,20 25:1,8,10 26:21 27:7 77:7 86:5	represented 74:9 represents 45:2 80:23 request 32:22 67:16 requestor 68:15 requests 67:13 68:5 68:19,20 69:3,7 require 7:11 25:10 27:7 34:23 49:16 82:24 required 16:18 32:17 35:5 36:11 37:2 82:16 requirement 40:23 73:10 requireme... 7:1 18:6 27:23 35:5 35:8 40:16 73:12 90:9 91:6 requires 13:19 61:8 61:12 requiring 66:11 70:6 research 60:22 residential 13:15,17 29:10 56:7 56:7 58:19 resides 22:5 Resource 14:10 Resources 73:19 respect 25:24 49:23 respectfully
Q-U-I-N-N 41:7	reason 29:18 33:2 reasonable 22:19 46:9 50:22 reasoned 86:15 reasons 17:23 74:10 received 66:17 69:2 receiving 6:23 7:7,10 7:14 18:16 19:4 reciprocity 65:14 reclamation 44:20 81:24 84:7 recognized 7:24 8:1 9:18 20:24 21:12,18 22:1,9,17 23:12 28:21 65:16 recognizes	record 5:8,11 11:15 16:2 23:18 36:20 41:4 42:1 48:17 50:15 61:17,21 72:1,2 74:17 80:12 83:2 87:10 87:21 88:6 88:19,22 89:9,20 94:7,12 recorded 74:17 records 74:2 Recovery 14:10 RECs 29:10 recyclable 92:2 Recycling 44:21 REC's 29:11 reduce 32:18 50:7 reducing 26:7,8 refer 9:24 10:21 15:11 reference 15:15,19 65:12 70:5 referenced 28:1 referred 16:8 49:13	registration 61:3 63:4 regulate 81:10 82:24 regulated 26:15 27:17 64:24 79:1 87:24 regulating 54:19 regulation 46:4,7 51:9 78:18 92:4 regulations 7:9 28:1 34:19,22 37:2,18 38:14,15 48:11 51:21 77:10 89:18 90:1,8,22 90:24 91:7 92:9,11,22 92:23,24 93:21 regulatory 81:10 83:8 84:1 85:3 85:23 86:8 86:8 92:16 reject 84:23	remediation 14:11,13 32:18 64:1 64:4 67:22 68:4,10 69:4 remember 55:3 remind 6:12 77:2 reorganize 60:11 replaces 58:24 report 1:7 53:12 reported 2:21 96:6 reporter 5:7 39:20 53:20 55:3 96:6 REPORTE... 1:24 2:24 3:24 represent 5:4 74:11 representat... 24:17,20 25:1,8,10 26:21 27:7 77:7 86:5	required 16:18 32:17 35:5 36:11 37:2 82:16 requirement 40:23 73:10 requireme... 7:1 18:6 27:23 35:5 35:8 40:16 73:12 90:9 91:6 requires 13:19 61:8 61:12 requiring 66:11 70:6 research 60:22 residential 13:15,17 29:10 56:7 56:7 58:19 resides 22:5 Resource 14:10 Resources 73:19 respect 25:24 49:23 respectfully
R					
R 2:1 raise 5:1 raised 36:2 71:11 ran 51:16 RANDI 2:15 Randolph 1:11 Randy 84:4 range 41:11 ranges 74:1 74:18 Rao 2:4 4:11 8:10,17 9:10,20 10:4,8 15:8 15:11,20 16:1,6 38:20 39:1 39:8 40:15 40:20,24 61:1 63:11 64:15,17,19 66:21 67:11 67:13 69:5 69:7 70:11 70:23 71:7 90:6 91:3 91:12					

23:9	roadway	same 8:19	screening	20:14 39:12	sheets 19:17
respond	34:11 41:9	10:6 13:8	12:21	63:6 67:6	45:19
67:16	rocks 91:22	20:2,22	search 74:7	75:22 76:10	Shepard 11:3
responded	role 49:19	21:3,10	searched	84:21,22	shorthand
69:3	50:20	22:9,21	74:14	seek 27:13	96:5,7
response 7:2	room 82:20	23:11 25:1	searches	38:17	shortly 44:14
14:9 15:12	routes 68:5	25:2 51:11	73:14	seems 10:5	show 33:21
38:21 55:20	routine 69:14	57:11 66:5	seat 11:14	seen 75:2,17	33:22 37:6
66:22 68:8	routinely	93:22	second 7:8	78:4	53:23 57:9
93:6	66:3	sample 24:17	26:18 44:3	select 56:5	58:7 74:2
responses	rows 76:12	25:1,8 27:7	44:3 71:23	selected	showed
60:2,8,10	rule 24:23	27:21 30:6	secondary	73:15 74:11	74:20
86:4	25:22 35:24	30:24 51:6	66:1,4,9,14	74:12,18	showing 37:8
responsibil...	36:2 50:19	51:10,13,13	66:19 67:1	semester	53:1 58:5
7:15	58:18 63:23	52:12	67:5	4:15	shown 85:22
responsible	70:6 72:21	sampled 25:3	Secretary	send 51:18	shows 36:24
16:23 17:11	73:14 80:3	samples	45:10	sense 24:20	shy 90:12
17:19	80:7,7 89:2	24:24 25:10	section 4:20	sensitive	signature
rest 10:4	rulemaking	25:14 26:20	25:6,11,14	71:13	96:13
restrictive	1:3 49:19	28:8,19	26:10 39:1	sent 82:15	signed 46:14
53:17 54:11	50:24 81:7	29:17 31:20	39:2,6	sentence	significant
56:6,11	85:20 86:2	41:8 42:13	40:10 42:2	43:10	31:24 68:20
result 26:6	rules 15:14	69:14 77:5	43:9 44:13	separate 18:5	70:21 71:11
26:20 35:23	26:22 35:17	sampling	47:17,19	September	similar 60:23
35:24 41:10	35:24 38:23	25:7,12	48:3 50:20	61:18	67:20
75:1 88:8	39:1 47:24	28:2 52:10	52:8,16	serve 4:3	similarly
results 27:21	48:6 49:14	samplings	53:6 59:12	94:16,21	66:14
69:17 73:24	49:16,22,24	31:16	61:8 63:13	serves 64:4	simply 6:1
review 74:1	50:2,3,6	sand 80:24	63:18,22	service 73:19	93:11
revised 61:5	83:7 84:10	saturated	64:18 65:6	94:22	since 4:21
61:14,24	88:6,13	73:6	65:7,12	set 5:14 22:6	7:14 15:20
revising	90:7	saying 21:5	67:14 68:9	90:24	19:11 56:16
44:12 61:2	run 42:9 54:6	82:15	68:13 69:8	sets 68:4,22	57:5,17
rider 19:17	56:3 57:2	says 35:17,19	71:5 82:23	setting 81:9	88:10
right 4:9,10	59:10,17	49:1 53:3	sections 45:3	settled 35:11	single 75:5
7:19 11:6	83:10,11	59:11 92:17	93:16	35:13	site 6:5,10,19
11:12 13:6	running 54:3	scenario	Section's	setup 80:8	6:22 7:4,6
13:9,14,16	RYAN 2:16	25:19 32:22	72:20	82:23 91:1	7:22,23 8:5
14:1,5,20	R12-09 1:2	52:15 59:18	sediment	seven 13:13	8:6,7,14,14
19:6 38:15	R12-9 4:8	68:17	64:11,11	74:3	9:16 10:12
40:24 41:4		scheme 81:10	see 39:14	several 44:7	12:9,10,15
42:23 60:5	S	83:8 85:23	45:8,14,22	68:1 74:1	12:17 13:7
70:18 85:8	S 2:1 3:1	scientifically	47:2 54:7	sewer 28:7	13:10 14:6
86:24 89:20	safely 46:12	73:21	55:3 70:14	28:19	14:8,13,24
risk 41:18	79:10	scope 65:3	70:21 76:23	share 17:9	15:1,2,3,5,6
82:3	safety 26:16	66:4,5	78:8,19	shared 24:21	16:23 17:1
road 44:22	47:22 48:20	SCOTT 2:14	84:20 85:9	sheet 20:4	17:2,5,11
84:24 85:12	75:6 83:24	scraping	90:8	43:5,6,8	17:13,20,21
roads 78:15	saith 80:19	24:16	seeing 20:7	62:5	18:4,10,13
	salt 34:10				

19:2 21:15	30:16 32:4	76:8,11	46:2 47:8	39:7 40:18	statutory
26:24 32:16	39:17 42:12	83:11,13	47:13 57:3	46:16 48:14	27:22 52:2
34:14 36:6	43:10 44:11	84:23 86:4	59:5 60:7	51:17 65:9	52:6 82:24
36:10,11	46:10,15,21	91:6 92:1	60:10 64:10	65:11,15	stay 86:2
37:1,15	47:8,9,20	93:5 94:1	64:12 67:22	66:15 69:19	stenographic
38:5 41:21	47:20 48:6	somebody	specifically	start 5:15	96:10
43:11,13,19	48:7,9,11	33:22 72:13	19:11 61:7	20:22 37:3	step 30:6,7
43:23 44:11	49:17,20	79:6 81:7	64:19 81:14	41:3 56:11	STEPHAN...
46:1 48:15	50:4 52:10	92:9	specify 67:15	60:10	2:8
49:5 67:22	53:1,11	someone 9:7	specifying	started 81:20	Stephen 2:12
75:12 91:7	57:19 58:3	17:6	47:24	87:17	2:17 19:19
sites 25:16	59:7 61:2	something	speculation	starting	20:7
69:1 74:2	63:4 64:6	9:12 21:6	87:22 88:2	81:14	stepped 83:5
77:14 78:2	64:11,11	33:1 36:9	spelled 38:22	state 1:10 5:3	90:21
82:1 84:5	71:10 72:4	38:10,17	SPLP 42:10	31:23 45:10	steps 12:8,12
87:23 90:13	72:20 73:1	45:9,13	42:14 52:13	46:10 65:13	12:16 14:15
situation	73:2,10,13	47:13 87:18	53:22 54:14	65:14,16,18	Steve 32:24
26:24 32:10	73:16,17,23	89:8 94:3	57:9 58:7	65:22,23,24	42:6 44:6
34:17 90:20	73:24,24	somewhat	59:11,17	66:10,13,18	89:20 91:5
six 13:3 69:3	74:2,5,7,8	71:14	spoke 79:7	67:1,4 73:8	Steven 1:10
size 47:14	74:10,13,15	sorry 45:8	spot 31:6	73:15 75:7	2:20,22
48:21 49:2	74:16,16,18	53:5 55:5	85:4	78:2,11	96:5,20
79:19	74:20,21,22	55:20 56:8	spots 31:5,10	81:9,12	Steve's 55:20
skip 28:4	75:2,5,7,10	56:12	spotted 85:14	84:23 86:11	still 6:14,24
slightly 6:3	75:21 77:5	SOS 45:14	Springfield	96:1	12:12 22:5
slower 39:21	79:10 81:1	sought 73:13	2:7 61:19	stated 17:23	41:23,23
smaller 38:14	81:11,16,18	source 6:5,10	squishy	53:2	59:15 71:24
Smith 11:4,9	81:23 82:17	6:22 7:4,6	16:11	statement	83:14 86:24
11:16,16	84:7,13	9:18 10:12	SS 96:2	48:17,18	93:1,2
12:7 13:3	85:6 87:23	12:9,10,17	staff 5:10	87:17 93:8	stockpile
13:13 14:4	88:8,12	13:7,10	standard	statements	18:24
14:23 15:10	soils 18:7,8	14:6 17:1,2	7:21 8:1,13	13:1	stockpiled
16:21 17:8	18:11,20	17:5,19,20	8:24 12:20	states 9:21	18:11
17:16 18:1	31:13,22	18:4,10,16	15:5,21	statewide	stockpiling
19:5	43:14,16	18:20 19:2	21:6 22:16	72:4,8	18:8,20
soil 1:4 6:17	46:10 48:2	21:15 43:11	22:17 37:9	73:22	stone 80:24
7:4,16	51:24 73:5	43:12,23	37:24 38:11	statistical	stones 91:22
10:22 12:3	79:18,20,23	73:17	40:8,13	54:24 55:10	stop 53:3
12:23 16:24	80:1 88:9	southern	41:12 42:11	55:14 56:19	storage 14:12
18:21,24	solely 46:6	74:4 75:2	48:13 54:8	56:23 57:7	79:13
23:11,13,13	solid 27:6	79:22	58:3 70:1	69:23 70:2	straight
23:15,16	91:18	speak 5:5	70:13,14	70:8,16,20	35:16
24:1,2 25:6	some 5:21,22	39:20 53:20	standards	statistically	strategies
25:10,12,13	6:7 8:24 9:3	speaking 5:6	9:11,12	29:18 70:21	70:8
25:16,20	9:19 26:6	specific 9:21	10:1,21,24	STATSGO	strategy 27:2
26:4,7,9,11	29:17 32:18	10:11,17	16:1 21:1	73:16,18,22	street 1:11
26:12,15	42:23 60:2	12:8,23	22:14 34:24	74:6	81:8 96:21
27:9,12,14	60:21 71:16	18:18 26:23	36:10 37:7	statute 46:13	striking 75:1
27:16,18,19	71:19 72:7	36:6 41:21	37:13 38:22	66:15,16	stringent

7:11 55:7	support	57:8,17	tank 14:12	4:17 19:8	32:13 33:6
strong 85:16	32:19,22	59:15 62:19	79:14	19:12,13,19	33:13,19
study 76:22	33:5,7	71:13,15	tardiness	19:19 20:3	34:5,16
87:20,20	supported	72:23 74:18	11:10	20:6,12	35:9,10,11
88:4,15	33:10	tables 52:18	target 74:11	23:3 25:5	35:14 36:3
stuff 42:12	supporting	52:18 53:7	targeted 74:5	42:24 43:7	42:16,20
77:17	33:17	57:23 67:18	TCLP 42:9	49:3 60:9	43:1 48:21
Sub 45:12	supposed	67:24 68:11	42:14 51:7	60:24 61:22	48:22 49:1
subject 12:12	54:3	68:21	51:16 52:12	82:12 85:24	49:2,18
12:18 38:10	sure 7:15	TACO 23:12	52:20 53:1	testing 7:12	51:11 52:1
64:13	11:9 15:10	23:14,24,24	53:15,22	18:5	54:22 59:13
submit 50:6	17:14 23:21	24:9 25:17	56:3 57:2,8	texture 25:2	62:10 67:19
61:12	30:20 60:12	26:3,22	58:7 59:14	Thank 11:20	70:23 72:1
submitted	70:24 76:4	27:22 30:12	technical	17:16 18:1	76:9 78:22
43:6 44:23	81:15 82:7	48:22 49:5	5:20,22	19:5,6	81:5,8
50:1 78:4	82:17 83:7	63:23,24	technically	22:24 24:16	83:24 88:21
Subsection	85:17 88:3	64:1,2	50:21	26:4 38:19	91:15 92:6
39:9 67:14	surface 24:17	67:18,24	tell 36:12	40:24 45:17	92:11 93:4
Subsections	39:16,19	68:2,10,22	49:2 54:18	49:10,11	93:16
65:6	73:3	69:4 72:18	54:21 92:1	50:13 51:1	thinking 5:15
subsequent	surprised	75:9	ten 16:21	59:20,22	81:9 89:8
44:13 83:16	88:4	take 4:17,19	17:24 23:20	64:15 67:11	Third 7:18
subset 52:4	surrounding	12:9 31:19	23:21 24:2	69:5 76:19	Thomas 2:4
substantial	29:9	43:17 45:12	24:5,8 28:7	79:2,3 80:8	2:11 4:9
90:15	surrounds	60:13 68:8	28:19 33:10	87:3,4,5	20:3,13
substantive	39:16	78:1,14	60:13 94:17	88:16 91:3	Thorpe
16:17	sustainable	83:19,22	term 6:20	94:24	11:18
substitute	77:16,19,23	84:6 85:2	13:4 16:13	Thanks 16:6	though 83:1
57:8	sworn 6:13	85:18,18	21:20 22:2	91:12	85:2
substrate	6:14 30:18	86:18,21	24:20 47:19	their 9:12	thought 5:20
23:16	49:9 77:3,3	87:2 93:17	termination	22:15 44:16	54:15 89:18
Suburban	80:12,15,19	taken 1:10	39:3	51:7 78:13	91:9 93:20
5:18 11:3	87:16	12:16 14:16	terms 21:4	84:16,18	threat 26:13
11:19	SW-846 28:1	31:3,6	50:23 79:7	85:13,14	26:16 27:15
successful	SYLVEST...	60:14 63:22	79:8,10,17	86:20	47:22
83:10	2:17 91:13	87:11 94:8	79:24 80:6	thing 56:4	three 8:4
successfully	92:15 93:19	96:11	94:2	57:11	10:9,10
81:12	Sylvester's	takes 12:12	TERRI 2:8	things 8:22	11:12 13:8
suggesting	93:6,11	68:11	test 42:10	9:1 10:2,21	23:2,8,20
85:11	system 69:11	taking 30:4	55:23 56:3	10:24 46:3	24:1,5,13
suggestions	92:22	82:7 84:12	58:2 66:8	86:5,23	through 8:24
86:7	S-T-A-T-S-...	86:6	92:6,13	90:11 91:15	10:1 11:8
suggests 78:5	73:17	talk 49:3	tested 64:20	think 5:17	26:9,23
Suite 96:21	<hr/>	talked 84:21	testified	8:19 9:2	27:20 33:20
summary	T	86:6	46:23	15:13 16:15	34:3 51:4,9
74:20 75:21	T 3:1	talking 49:4	testify 84:4	19:7 21:14	51:20 52:7
supplemen...	table 31:1	talks 8:21	testifying	22:6,13	69:7 73:14
60:9	41:24 42:19	39:9 41:15	30:17	28:23 29:12	87:24 88:24
supply 33:14	43:17 51:15	48:23 49:14	testimony	29:13 31:9	89:17
	52:23 54:9				

throughout 17:18 69:13 93:20 Tier 57:18 64:6 67:24 68:4,10,21 ties 40:14 time 5:5 31:17 34:4 34:7 35:13 41:3 43:3 69:24 72:12 81:6,8 83:1 timeframe 67:15,19 68:15 times 15:12 Tipsord 1:9 2:3 4:1,2 6:11 8:23 11:2,6,11 16:13 19:6 19:11,21 20:1,5,12 20:19 23:18 24:6 28:15 30:18 36:19 39:4,11 41:2 42:1,4 42:22 45:6 45:22 49:8 51:2 53:19 53:24 55:2 59:21 60:5 60:12 61:16 61:21 62:2 62:10,14 63:1 67:3 75:19 76:14 76:19 77:2 79:3 80:9 80:11 87:4 87:9 88:18 89:11 94:6 94:11 titled 63:3 today 4:8,12 4:16,18 5:1 5:14 6:14	11:18 22:5 22:11 45:22 49:3 76:16 77:9,11 83:20 88:14 together 40:14 57:17 83:9 told 4:12 toll 78:12 Tom 23:2 tool 15:17 top 24:9 62:22 total 42:9 51:14 53:1 53:11 58:8 59:18 61:9 61:10 totals 53:22 touch 36:5 tough 86:21 toxicity 68:7 68:18 track 83:2 tracking 46:7 transaction 12:21 transcribed 96:11 transcript 60:18 61:1 61:17 63:11 64:17 67:13 69:7 96:9 transporta... 13:5,14,16 14:5 42:7 44:7 77:18 transported 18:12 treated 31:3 57:6 trend 75:1 trended 74:22 trial 96:7,10 tried 83:17 trucking	77:16 trucks 26:5 84:22 85:9 true 36:22 96:8 try 84:3 trying 22:10 23:1 31:4 31:16 78:14 86:20 90:17 90:22 91:5 tweaks 86:1 two 8:10 21:4 27:20 43:5 43:6,8 44:24 45:2 62:6 68:6 74:4 two-sided 75:20 type 8:3,15 9:19 13:22 14:17 26:20 73:24 74:7 74:16,18,21 79:22 90:20 90:21 types 8:21 10:2 74:8 74:10,13,22 79:18 92:14 typical 24:21 <hr/> U ultimately 7:14 unacceptable 87:1 unclear 89:8 uncontami... 1:4 7:16 12:3,23 16:24 26:11 26:14 27:9 27:13,18 39:17 42:12 46:10,15,16 47:20 48:2 48:6,7,11 50:11,18	51:8,24 61:2,7 63:4 73:1 91:21 under 11:23 14:8,11 15:1 17:1 21:1,19,21 21:22 22:3 22:9,12,18 24:9,17 30:12 32:21 39:2 40:16 40:16,19 42:7 47:23 50:20 51:16 51:22 52:8 52:15 53:15 61:7 65:9 65:14,19 68:2 69:4 85:3 92:22 96:11 undergrou... 14:12 79:13 understand 11:2 37:11 44:16 54:19 71:22 78:23 89:2 91:8 92:20 understan... 35:21 50:2 83:2 89:15 understands 89:24 unfortunat... 62:18,21 unified 70:4 92:22 uniform 46:3 90:21 unit 5:20,22 74:7 units 26:23 unknown 8:8 14:2,21 unless 58:22 66:6 unlike 85:12	unlined 92:19 unnumbered 45:11,13 unquote 31:10 63:13 unregulated 77:14 78:1 85:11 until 69:24 upper 30:13 39:19 74:24 79:20 urban 79:11 79:14 usage 24:24 use 6:3 7:4 8:5 9:6,8,14 9:18,21 10:13 13:8 13:10,11,23 13:24 14:18 14:19 15:2 15:18 16:18 16:22 17:7 21:9 37:24 41:16,18,21 58:7 59:13 69:9 70:16 71:12,15 73:11,13 75:8 84:7 90:22 used 8:4 18:6 21:6,20 22:3 26:15 27:16 53:12 63:17,19,24 64:24 93:13 uses 13:11 23:24 24:19 using 12:4 18:20,22 25:11 55:7 68:12 74:13 utilized 90:2 <hr/> V value 31:18 42:9 52:20	52:22 53:5 53:6,11 54:4,11,14 55:8,10,13 55:15 56:12 56:21,24 57:4,7,14 57:22,24 58:5,11,24 59:14 64:6 73:11,13 74:5 75:5 values 12:4 42:19 55:12 56:10 57:9 57:22,23 58:23,24 59:2 69:22 71:13 72:8 73:17 74:20 75:21 vapor 23:12 23:13 variability 90:13,14 variance 30:11 varied 74:20 various 73:3 74:21 vary 18:18 varying 75:10 vast 68:19 vein 80:2 verify 37:22 vertically 39:18 very 22:7,16 31:23 36:3 40:24 46:23 48:18 59:22 60:22 67:20 76:19 77:16 78:8,17 81:4 83:21 86:12,15 87:5 89:16 90:18 94:24
--	--	--	--	--	--

94:24	welcome 4:2	29:11 71:23	45:3	Z	1100.412C...
vicinity 8:6,7	87:8	81:12 86:22	words 39:11	zone 32:20	40:22
14:2,21	well 9:5	86:23 93:17	work 78:11	32:23 33:3	1100.605
village 18:9	33:15 36:3	94:12	85:24 87:3	73:6	12:5 51:22
violation	37:12 38:9	whatnot 93:1	workable		52:7 67:14
51:17,18	42:17 46:20	whichever	46:9 50:19	\$	1100.605A
volume 26:17	50:19 62:18	34:24 37:9	worked 82:4	\$13 78:13	68:13
61:10	69:16 77:12	38:14 40:2	82:8,16		1100.605A...
Vulcan 41:6	78:12,24	56:10 58:21	86:22	0	72:20
82:4	80:2,14	while 6:24	worker 25:19	084-004675	1100.605A4
	84:19 88:10	white 62:21	57:20 58:20	2:23 96:23	63:18
	88:23 92:3	whole 54:19	workgroup	097-10137	1100.605C
W	wells 36:17	89:1	74:19 75:4	41:14	68:9
wait 5:2 45:8	38:4 69:12	widely 75:10	works 5:16		1100.610
want 5:13,15	69:20	Wight 2:10	5:18 11:19	1	27:11 52:9
9:5 15:17	went 22:1	16:15 19:16	14:6 17:18	1 7:22 8:14	52:16
16:5,7,16	38:3 51:12	20:2 35:9	18:3 19:1	15:6 34:12	1100.610A1
23:20 36:8	82:15	35:23 43:2	43:15	34:16 37:23	53:5
43:4 49:15	were 5:21	52:1 60:1,7	worksheet	40:7,12	1100.610B
62:5 76:20	6:13 9:16	61:23 62:7	72:6 75:15	42:11 56:9	25:11
wanted 9:6	19:13 32:3	62:12,16	worst 68:17	57:18 58:21	1100.610B1
9:19 24:6	37:6 44:5	66:23 71:8	wouldn't	61:8 64:6	53:6
66:24	55:7 60:16	75:14 76:4	16:16 26:6	67:24 68:4	1100.610C
wants 83:21	61:24 68:15	76:17 93:4	26:19 33:2	68:10,21	25:15
wasn't 35:12	74:3,4,10	WILCOX	37:5 46:11	69:19 70:1	1100.610D
83:1	77:3 81:16	2:20	82:7,19	10:00 1:13	25:6
waste 24:23	81:21 82:12	Willie 2:15	92:8	100 1:11	1100.6605A2
27:6,6,10	83:13 87:13	84:4	writing 84:17	102 63:10	72:20
31:3 85:2	88:7,13	Willie's	written 6:2	1021 2:6	1100.720
90:8,14,20	93:13 94:10	82:12	37:18	105 64:16	39:6 40:10
90:21 91:6	weren't	WILT 2:16	wrote 48:22	106 64:17	1100.750
91:14,16,17	34:15	49:12 50:13		107 69:6	69:9
91:18 92:2	West 1:11	87:14	X	11 17:17 93:7	113 67:12
92:4,6,10	96:21	Wisconsin	X 3:1	1100 1:5 4:7	114 67:12
92:18,24	we'll 10:8	77:13		7:9 63:20	117 69:7
93:22 94:1	28:16 60:10	wise 79:10	Y	83:6	12 18:2 61:22
water 18:9	we're 5:17	wish 80:12	yard 19:2	1100.103	120C 27:7
18:10 33:14	8:20 16:19	wishes 59:24	43:15	63:13	13 29:19 30:1
54:7,9	19:7 21:5	76:21	yeah 34:5	1100.104	30:6,10,14
69:21	31:4 39:11	witness 80:18	year 21:22	70:5	30:15 31:11
way 13:6,9	43:10 49:4	96:13	69:2	1100.205	31:18 51:15
13:14,17	54:3 77:16	witnesses	years 33:10	43:9 44:13	54:12
14:1,5,20	78:14 81:17	6:13	68:2 81:2	1100.205A4	14 74:3
26:9 37:18	82:19 83:10	wondering	81:13 86:22	45:3	14th 41:15
55:21 71:9	84:2 85:10	94:3	yesterday	1100.205B...	140 68:3,21
78:5 80:3	85:10,15,15	word 63:16	4:13,22 5:6	45:4	15 65:15
83:22 91:1	86:17 87:1	64:9	6:13 31:22	1100.212C2	186 64:22
ways 7:19	we've 11:8,12	wording	49:9 77:3,4	64:18	65:3,5
78:12	19:16 21:22	44:13 45:1	87:17 93:6	1100.410C	186.110 65:7
weighed			yielded 74:8	39:2	
10:15					

186.115	312 1:24 2:24	<u>7</u>		
65:12	3:24 96:22	720 27:8,10		
19276 2:6	35 1:5 4:7	721 27:7,10		
1980 14:9	24:18 27:6	72110 24:18		
<u>2</u>	27:8 40:8	742 53:7		
2H 28:4	40:13 53:7	72:23		
2nd 94:13,14	60:17 65:3	742.200		
20 3:3,4	67:20 69:18	63:23		
29:16,19	69:24 71:12	742.510C		
30:8,9,24	36 55:15 59:3	67:21		
41:8 42:9	<u>4</u>	76 3:7		
48:13 51:6	4 65:6	782-5544 2:7		
51:14	410 59:12	<u>8</u>		
2005 82:11	410C 39:5	8 96:21		
2007 96:21	412 40:17,19	80 73:23		
2009 70:4	412C 39:4	810.103		
2010 6:16	40:20	93:21		
2011 1:12	419-9292	82 31:22 77:5		
41:15 60:24	1:24 2:24	77:9		
61:18 67:6	3:24 96:22	<u>9</u>		
69:2 96:15	<u>5</u>	90s 81:15		
205 44:4	50 48:13			
205A1A	66:18			
43:10	<u>6</u>			
21 3:3 20:7,8	6th 60:24			
20:10	60603 96:22			
217 2:7	61 61:1			
22 3:4 20:13	620 34:23			
20:15,17	35:6,24			
22.51 82:23	36:10 37:7			
23 3:5 55:11	37:8,12,23			
63:6,6,8	38:21 51:16			
74:3,6	69:18 70:1			
24 3:6 67:6,7	70:12,14			
67:9	620.410 40:8			
25 3:7 75:22	40:14			
75:23 76:2	62794-9276			
26th 1:12	2:7			
61:18	63 3:5			
27(a) 50:20	662 43:21			
27(b) 4:20	62:9			
<u>3</u>	663 62:9			
3.160C 47:17	665 61:6,14			
3.160C1 42:2	61:24 62:11			
3.610C 26:11	62:13			
30 48:13	67 3:6			
60:17 66:4				
68:8 74:11				