

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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4 PEOPLE OF THE STATE OF ILLINOIS,

5 Complainant,

6 vs. No. PCB 96-111

7 JOHN CHALMERS, INDIVIDUALLY AND

8 D/B/A JOHN CHALMERS HOG FARM,

9 Respondent.

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13 Proceedings held on July 16, 1998 at 10:35 a.m.,

14 at the Illinois Pollution Control Board, 600 South

15 Second Street, Suite 402, Springfield, Illinois,

16 before the Honorable Jack Burds, Hearing Officer.

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

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3 STATE OF ILLINOIS, OFFICE OF THE ATTORNEY
4 GENERAL

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6 Springfield, Illinois 62706
6 On behalf of the People of the State of
7 Illinois.

7 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

8 BY: Bobella Glatz
9 Assistant Counsel
9 2200 Churchill Road
10 Springfield, Illinois 62794-9276
10 On behalf of the Illinois EPA.

11 GROSBOLL, BECKER, TICE & SMITH

11 BY: Jerry Tice, Esq.
12 101 East Douglas
12 Petersburg, Illinois 62675
13 On behalf of Respondent.

14 Also present:
15 Catherine Glenn

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1 PROCEEDINGS

2 (July 16, 1998; 10:35 a.m.)

3 HEARING OFFICER BURDS: Let the record reflect
4 that this is Docket Number PCB 96-111. I am Hearing
5 Officer Jack Burds with the Illinois Pollution Control
6 Board. Today's date is July 16th, 1998. We are here
7 at the Pollution Control Board offices in Springfield
8 in the conference room on a motion of the respondent,
9 John Chalmers, and doing business as John Chalmers Hog
10 Farm.

11 I would ask at this time that all parties present,
12 although I will state for the record that Cathy Glenn,
13 the Board Assistant for Ron Flemal, is present. We
14 are here, as I think I have already stated, on the
15 respondent's motion to compel or in the alternative, a
16 motion for a protective order.

17 What I would like at this time is for Counsel for
18 each party to identify themselves and a party that
19 they have brought along with them. Why don't we start
20 with you, Ms. Peri. You are the complainant.

21 MS. PERI: Desiree Peri, Assistant Attorney
22 General from the Attorney General's Office.

23 HEARING OFFICER BURDS: And, Ms. Glatz, could you
24 identify yourself?

25 MS. GLATZ: I am Bobella Glatz, B-O-B-E-L-L-A,

1 G-L-A-T-Z. I am an attorney with the Illinois

2 Environmental Protection Agency.

3 HEARING OFFICER BURDS: And Mr. Tice.

4 MR. TICE: Jerry Tice, Attorney at Law,

5 Petersburg, Illinois, appearing on behalf of the

6 respondent.

7 HEARING OFFICER BURDS: All right. For the

8 record, I think the record should reflect that prior

9 to the proceeding we had an informal conversation

10 related to the process which we would employ in this

11 hearing. What I indicated to Counsel then was that I

12 would take the documents that are in question at this

13 motion to compel that have been identified by Ms.

14 Peri, consisting of 12 documents, in my possession for

15 an in camera review, which I have conducted. We will

16 proceed in the manner that I laid out in that previous

17 discussion which is effectively as follows.

18 I have then completed an in camera review of the

19 documents. There are 12 documents. I do have one

20 concern. The documents that are identified in the

21 correspondence attached to respondent's motion to

22 compel consist of 12 documents. Number six has a date

23 on the written correspondence attachment of May 17th.

24 However, after reviewing all of the documents that I

25 have been provided in camera there is no such document

1 dated May 17th. However, there is a written
2 memorandum, as described here under number six to a
3 Dan Peacock (spelled phonetically) to the records
4 unit, dated May 19th. I just want to be sure that
5 that -- is that a --

6 MS. PERI: I can represent to, Mr. Burds, that
7 that is a typographic error, indeed. The correct
8 document is 05-19-97.

9 HEARING OFFICER BURDS: Okay. So is there a
10 document, a written memorandum of that on May 17th?

11 MS. PERI: There is not.

12 HEARING OFFICER BURDS: Okay. With that
13 representation, that should resolve that question.

14 Now, the other question that I have is this. As
15 far as all other interrogatories and all other
16 documentation, it was represented to me, prior to
17 going on the record, by Ms. Peri that all other
18 documents requested had been provided, responsive to
19 the interrogatories propounded by Mr. Tice and his
20 client to the complainant had been responded to as far
21 as documentation but for these 12 documents and the
22 documents that we will I guess refer to as the Amy
23 Simons Jackson notes.

24 Now, the record should also reflect that, Mr.
25 Tice, I believe now you are withdrawing any request

1 for the documents identified that we will identify as
2 the Amy Simons Jackson notes.

3 And those notes consist of what, Ms. Peri?

4 MS. PERI: Those notes consist of personal
5 handwritten notes of Amy Simons Jackson, the then
6 Assistant Attorney General prosecuting that case, and
7 made during or subsequent to a meeting involving the
8 parties in this matter.

9 HEARING OFFICER BURDS: Mr. Tice.

10 MR. TICE: Based on that representation, the
11 respondent withdraws that request.

12 HEARING OFFICER BURDS: All right. That should
13 leave us with the remaining 12 documents. Now, as --
14 and with the correction to number six, and I will
15 state for the record that I have reviewed all of the
16 documents in camera. And I will state that my in
17 camera review has been a very preliminary review so I
18 don't want to give the impression that I have in any
19 way given any depth of review of these documents.
20 However, I am going to glean from argument, I hope,
21 whether I need to do a more extensive in camera
22 review. What I am hoping to do, based upon the
23 arguments of Counsel, is make a decision today.
24 However, I am not going to guarantee that, based on my
25 review of the documents.

1 All right. Again, based on our previous
2 discussion prior to going on the record what I
3 indicated was that I would ask Mr. Tice to lay the
4 foundation regarding the motion to compel and the
5 basis of his motion to compel and the relief he has
6 requested. And then upon that foundation, I would
7 then ask Ms. Peri, who has asserted privileges to
8 certain documents and certain requests, to then
9 address those issues, as I believe that the burden of
10 proof then shifts upon the -- the assertion of
11 privilege to the party making that assertion.

12 Now, Mr. Tice, I would then turn it over to you.

13 MR. TICE: Thank you, Mr. Hearing Officer. It is
14 the position of the respondent that there is two
15 substantive matters with regard to this motion to
16 compel. The first is our request for information
17 regarding past penalties which the IEPA has asked
18 against operators who have been found in violation of
19 the IEPA who were livestock operators. We believe
20 that information is relevant in this case since the
21 penalty is a relevant issue in this proceeding. While
22 the Civil Practice Act itself does not directly apply
23 to the proceeding before the Board, the Board's rules
24 do make it clear that the Civil Practice Act is to be
25 considered and reviewed when there is a question

1 regarding discovery.
2 The Civil Practice Act for the State of Illinois
3 requires that all information be provided in discovery
4 to the other side as long as that information is
5 either relevant or may provide information that may be
6 relevant. It does not necessarily have to be
7 admissible evidence. It just has to be information
8 that may lead to some discovery of relevant
9 information. We believe that the penalties portion of
10 this proceeding is very relevant here.

11 As I have stated in the motion, the Attorney
12 General's office has started out requesting a
13 \$100,000.00 penalty in this case. I believe, quite
14 frankly, that such a penalty has never been sought or
15 if it has, it has never been assessed against a
16 livestock operator in the past. In fact, our
17 information that we have been able to glean from prior
18 cases indicates that the highest penalty ever made
19 against any livestock operator in this state is
20 \$5,000.00, and I think there was some rather
21 aggravated circumstances in that case. Therefore, I
22 think the information that we have sought with regard
23 to the penalty phase of this case is relevant.

24 Further, penalties that are assessed, should there
25 be found to be a violation here, and can be assessed

1 on a fair and equal basis, it doesn't have meaning
2 whatsoever. You just cannot single out one person as
3 against all others and assess an astronomical
4 penalty. So the Board, I believe, has an obligation
5 to take into consideration what the past penalties
6 have been in view of the nature of the facts and
7 circumstances of the case.

8 For that reason, I think the past history of those
9 penalties as well as what has been sought by the IEPA
10 in similar cases is relevant and that information
11 should be provided. Or may well lead to relevant
12 information.

13 The other aspect of our motion to --

14 HEARING OFFICER BURDS: Why don't we stay here. I
15 guess what I would ask for here is you did receive a
16 response. What was the response that you received
17 related to this request?

18 MR. TICE: There was a response to this request.

19 No. You mean in the discovery?

20 HEARING OFFICER BURDS: Yes.

21 MR. TICE: No, there was no response. It was
22 objected to.

23 HEARING OFFICER BURDS: I am sorry. But the
24 answer that you received was --

25 MR. TICE: Was --

1 HEARING OFFICER BURDS: They did not assert a
2 privilege in response?

3 MR. TICE: No, they didn't assert any. They just
4 said it was not relevant, as I recall.

5 HEARING OFFICER BURDS: Based on the motion --

6 MR. TICE: I think that's the only thing that they
7 asserted. They didn't assert any privilege or
8 anything of that nature on the request for the
9 penalties.

10 HEARING OFFICER BURDS: Excuse me for
11 interrupting, but I do want to deal with this, as it
12 is a non privilege issue where they have not asserted
13 privilege, so I do not believe the burden would be
14 shifted as to the privilege issue anyway as to this
15 request. As far as the response that you have
16 indicated in your motion, what I have is as answer the
17 complainant objected that such information was
18 irrelevant and that the production of such information
19 would be unreasonably burdensome. The complainant's
20 full answer is shown on Exhibit 4, Attachment 2,
21 summary of complainant's answer.

22 Apparently this is a short summary. So apparently
23 it was limited to relevance and unreasonably
24 burdensome. However, I will let Ms. Peri address that
25 issue, and maybe the better thing to do would be deal

1 with this interrogatory individually.

2 MR. TICE: Yes.

3 HEARING OFFICER BURDS: As far as this request, I
4 guess my concern is this, Mr. Tice. You are
5 seeking -- I want to be clear on what you are seeking
6 here. And I am not sure, based on what I read here,
7 why you couldn't obtain this through your own legal
8 research.

9 MR. TICE: I have obtained some of it. But the
10 reason I have asked for it is if they have other
11 information regarding the nature of the penalties that
12 have been requested or granted. I mean, I have
13 research available, yes, and I have found some
14 information that leads me to believe that, as I have
15 said in my motion here, that it does not exceed -- the
16 highest penalty that has ever been assessed does not
17 exceed \$5,000.00. Now, I think I have the right to
18 ask for other information that may be relevant on that
19 same issue just to make sure that there is not
20 something else out there that I have not been made
21 aware of or have missed.

22 If they have knowledge of what the penalties are
23 that they have received on livestock operators where
24 they have taken it to the Board it wouldn't be that
25 difficult for them to turn that information over to

1 us. I don't think it is burdensome. There can't be
2 that many cases involved with livestock operators that
3 have gone to the Pollution Control Board by the
4 Attorney General's office. And there may be some out
5 there that never have gone that far but they have
6 settled them seeking certain penalties for which there
7 wouldn't even be a record probably.

8 And I think I am entitled to that information
9 because if they have settled cases with livestock
10 operators with a certain level of penalty in it, that
11 should be considered by the Board in assessing or
12 determining any potential penalty in this case, so
13 that you keep these penalties somewhat fair in
14 relationship to the nature of the offenses that have
15 been charged. You don't have any respect for the
16 law. You are not going to get any respect for the
17 action of the Agency unless those do -- unless those
18 penalties, as assessed, are fair and in accordance
19 with what the nature of the facts of the case were.

20 So there may be some sources of information regarding
21 penalty out there that I don't have access to but
22 through the Attorney General's office as they deal
23 with livestock regulations.

24 HEARING OFFICER BURDS: We will deal with this
25 because I don't believe the burden does shift to you

1 on this issue.

2 MR. TICE: I understand that.

3 HEARING OFFICER BURDS: Ms. Peri, response.

4 MS. PERI: Thank you for the opportunity to

5 respond. We have asserted that discovery as to past

6 penalty decisions of the Board are irrelevant to this

7 litigation for primarily two reasons. First, this

8 case has a very unique set of facts and circumstances,

9 like all cases. The application of the Section 42(h)

10 factors listed under the Illinois Environmental

11 Protection Agency as applied to one case are very

12 likely to lead to a different result in another case.

13 We would maintain that is no different here. The

14 Chalmers case presents a unique set of facts and

15 decisions made as to penalty, and other cases have no

16 bearing on a decision as to penalty in this case.

17 Secondly, Mr. Tice has recognized and the State

18 would agree that the Board can take into consideration

19 other cases and penalties ordered in those cases.

20 However, I think the underlying problem here is the

21 timing in which we are looking at this issue. The

22 examination of prior Board decisions and penalties

23 assessed in those decisions comes later in the

24 process. We are in a prehearing discovery phase in

25 this litigation. We are talking about settlement in

1 this litigation. It is certainly the State's
2 prerogative to make a reasonable and appropriate
3 penalty demand in the course of those negotiations.
4 The respondent has stated in its motion that it is
5 incumbent on the complainant to provide evidence to
6 support any penalty demand assessed against a
7 respondent. The People maintain that there is no such
8 duty in negotiations or in a prehearing phase. That
9 is not to say that the State is unwilling or has not
10 provided explanation as to its penalty demand during
11 negotiations.

12 Further, to say that cases could not be considered
13 by the Board, we have already acknowledged that. But
14 that consideration comes at or after a hearing on the
15 merits when liability has been determined or on the
16 Board's review of the stipulation and proposal for
17 settlement. The State is not stepping into the shoes
18 of the Board when it enters into negotiations with the
19 respondent. There are reasons when the parties enter
20 into negotiations for settlement solutions. There is
21 no requirement that the parties settle. And so,
22 again, if this were to go to hearing then perhaps
23 other penalty cases would have some bearing if the
24 Board were defining liability. But then I would
25 expect that the Board would request that information

1 from the State in some sort of briefing or perhaps the
2 Board would already be aware of penalty decisions and
3 that alone would be sufficient in its consideration of
4 their impact on this case.

5 In short, with respect to the motion to compel on
6 the prior penalty case issue, the State maintains that
7 other penalty cases are not relevant to the substance
8 of this complaint nor to current settlement
9 discussions, particularly in view of their
10 inconsequential bearing on this settlement process in
11 this litigation. The State also maintains that that
12 request is overly burdensome on the State. We have a
13 large office. We see a lot of cases that are opened
14 and closed in the last eight years. I have
15 representations of my office to rely on that this is,
16 in fact, an overwhelming task. Thank you.

17 HEARING OFFICER BURDS: Okay. Ms. Peri, I guess I
18 have a few questions. As far as the relevance issue,
19 wouldn't you agree with me that the Board rules
20 specifically lay out that relevance shall not be a
21 basis for objecting to a discovery request?

22 MS. PERI: I would agree with that.

23 HEARING OFFICER BURDS: Then how would I prevent
24 such a request from being granted on the basis that
25 you have indicated at least as part of the basis as to

1 this objection on relevance, how would I be able to,
2 in any way, prevent, on that basis, Mr. Tice from
3 obtaining that information?

4 My second question is this. As far as that
5 information is concerned, if what Mr. Tice has
6 indicated is true, how else would a party in his
7 position, his client's position, obtain such
8 information, as you have apparently conceded at some
9 point may become relevant, whether this is a
10 bifurcated proceeding or not, how else would they
11 become aware of this process other than through their
12 own legal research? But the specific example Mr. Tice
13 identified which, i.e., would be the settlement
14 process where a case was done without a consent order
15 or without Board approval, or without the Board's
16 confirmation, how else would a party in his position
17 obtain that information?

18 So I guess I would ask that you respond to those
19 two questions.

20 MS. PERI: Certainly. As to your first question,
21 frankly, I didn't understand the rules to prevent the
22 Board from relying on relevancy as a basis for its
23 decision.

24 HEARING OFFICER BURDS: Well, let me read it to
25 you.

1 MS. PERI: Sure.

2 HEARING OFFICER BURDS: It specifically states
3 that relevance shall not be a basis for not responding
4 to a discovery request. It is that specific.

5 MS. PERI: Okay. Well, I would defer to the rules
6 and your representation of the rules. That does not
7 prevent the Board from looking at the timing of this
8 request and finding that it certainly is inappropriate
9 for us to be discussing penalty and other penalties in
10 other cases at this point in the litigation. We would
11 still fall on our maintaining that the request is
12 overly burdensome to my office.

13 And I think that broaches your second question.
14 There are opportunities for the respondent to obtain
15 other Board decisions. Those requests may be made
16 through a FOIA process through the Illinois Pollution
17 Control Board.

18 HEARING OFFICER BURDS: Well, I think Mr. Tice has
19 represented that he is able to do that. In fact, I
20 think he was very candid in the response that he is
21 able to do his own legal research as far as what is
22 available as far as Board precedent. What he
23 indicated that is not available to him are cases that
24 have been brought by the Attorney General's office,
25 and that seems to be the only thing that he is seeking

1 here related to that that I can see, unless you can
2 show that it is broader than that, i.e. some local
3 prosecutor or federal prosecutor's office,
4 specifically before the Board that specifically
5 identify those cases that were brought before the
6 Board in which a Board order was not entered but was
7 settled short of a Board order or without the need for
8 a Board order. How would Mr. Tice obtain that
9 information?

10 MS. PERI: I would assume, Mr. Burds, that any
11 case that was settled prior to hearing would still be
12 on file with the Pollution Control Board and entered
13 as an order pursuant to a stipulation in the proposal
14 for settlement.

15 HEARING OFFICER BURDS: I don't think that is
16 necessarily the case is it, Ms. Peri, as far as --
17 what if the case -- I can certainly envision a case
18 where the case is voluntarily dismissed by the People
19 of the State of Illinois without a consent decree or
20 consent order. Certainly that is not unacceptable.

21 MS. PERI: I suppose that could happen, but in
22 those cases there would be no penalty. And I
23 understand the point of Mr. Tice's inquiry to be to
24 look at other penalties in similarly situated cases.

25 HEARING OFFICER BURDS: Then why not make that

1 representation responsive to this interrogatory?

2 MS. PERI: I am sorry?

3 HEARING OFFICER BURDS: I guess I am unclear why

4 that representation was not made in that -- as you

5 have indicated, and as I asked Mr. Tice specifically,

6 certainly any Board precedent would be available from

7 1990, which I believe is what you have requested,

8 through any general Lexus search related to other

9 types of facilities. The one he has specifically

10 requested are the ones that do not have Board orders

11 or do not have a final order laying out a stipulated

12 penalty or whether a penalty was sought. I think all

13 that Mr. Tice -- if I understand Mr. Tice's request,

14 it is not specifically as to what is on Board's

15 precedent. He knows that. What he wants to know is

16 are there other cases out that there are not subject

17 to FOIA or not on Lexus or otherwise that are in the

18 possession of the Attorney General's office, that were

19 brought before the Board that may have resulted

20 without a consent decree. What you have indicated to

21 me is that there would be no penalty. So based on

22 that representation isn't that a representation that

23 you could make responsive to that request?

24 MS. PERI: I am reluctant to make that as a

25 general response. Frankly, you know, I have been with

1 the Attorney General's office for seven months. So I
2 rely on my own more brief experience in explaining to
3 the Board that I believe all cases that don't proceed
4 toward settlement not to be filed with the Board. So
5 there isn't something that is there obtainable through
6 a FOIA like process. It seems to me that it does not
7 hit upon Mr. Tice's request. And maybe I am missing
8 your point, but if I didn't make the representation
9 prior to now in my response to respondent's motion, I
10 have certainly, in prior correspondence, mentioned to
11 Mr. Tice that this information that relates to
12 decisions of the Board or settlements approved by the
13 Board would certainly be available to anyone that
14 requested them because they are, indeed, on file.

15 HEARING OFFICER BURDS: I don't disagree with
16 you. I guess my concern is -- and I think Mr. Tice
17 agrees with you as well. The ones that Mr. Tice seems
18 to be concerned about and seems to be seeking here are
19 above and beyond that, those that would not be
20 accessible through a Lexus search or through a FOIA
21 request, as you have indicated, certainly whether
22 those types of cases exist, but I thought what you
23 represented earlier was that that type of case would
24 not exist because there was no penalty sought in those
25 type -- there would be no penalty sought in those

1 types of cases. Now you are not as sure as you once

2 were or --

3 MS. PERI: Just a moment, please.

4 (Ms. Peri and Ms. Glatz confer briefly.)

5 MS. PERI: Mr. Burds, the State would not be aware

6 of any other -- without combing through all of its

7 files from the last eight years, and even without

8 combing through all of its files through the last

9 eight years, it would not be aware of cases where a

10 penalty was imposed and that case was not on file with

11 the Board if it were indeed a Board case and certainly

12 a consent order with the court, if it were filed in

13 Circuit Court, because it is the Board and the Courts

14 that have the authority to impose penalties and not

15 the Agency.

16 HEARING OFFICER BURDS: So have you just answered

17 our question as far as this is concerned? There are

18 no cases? Is that what you are saying to me, that

19 there is no other cases than those that are before the

20 Board and have a Board order that can be obtainable

21 through a Lexus search from 1990?

22 MS. PERI: There are no other water pollution

23 cases that the State is aware of that would be on file

24 obtainable through that process.

25 MR. TICE: Involving livestock operators?

1 MS. GLATZ: Yes.

2 MS. PERI: Yes.

3 MR. TICE: So there is no other water pollution
4 cases or allegation of water pollution offenses with
5 the IEPA against livestock operators other than what
6 would have been filed with the Pollution Control Board
7 and a consent decree or final judgment being entered?

8 MS. PERI: Either through the Board or through the
9 Courts.

10 MR. TICE: That would be the Circuit Courts of
11 Illinois?

12 MS. PERI: Yes.

13 HEARING OFFICER BURDS: Okay. Let's be clear.
14 Your interrogatory does not request such information
15 from the Circuit Courts, is that --

16 MR. TICE: It does not. It does not. Only the
17 Pollution Control Board.

18 HEARING OFFICER BURDS: I understand. Okay. With
19 that representation, do we need to -- well, would you
20 like an opportunity to respond, Mr. Tice?

21 MR. TICE: I want to make sure that what I am
22 hearing in the form of this representation, that is
23 that there are no existing resolution of alleged
24 violations under the water -- for water pollution
25 between the IEPA and a livestock operator in the

1 relevant time periods other than what cases have been
2 filed and then subsequently resolved either by consent
3 decree or final judgment before the Pollution Control
4 Board? That's what -- if that's the representation,
5 so there is no -- I want to make it clear, that there
6 are no cases that have been brought or that the
7 Attorney General or the EPA have been involved in and
8 then subsequently settled without reaching the
9 Pollution Control Board.

10 MS. PERI: I will accept that with this
11 qualification, and I consider it a major
12 qualification. I would limit that statement to the
13 resolution of cases that lead to a penalty. Any
14 penalty cases settled or otherwise entered with the
15 Attorney General's office would be filed with the
16 Board or the Circuit Clerk.

17 HEARING OFFICER BURDS: Well, I guess I am
18 concerned. You said that -- would that include
19 existing cases in which -- that are still pending
20 before the Board and which penalty has not been
21 determined?

22 MR. TICE: No, no.

23 HEARING OFFICER BURDS: You are just seeking the
24 historical --

25 MR. TICE: I just want to know the past history,

1 what the past road track has been.

2 HEARING OFFICER BURDS: With Ms. Peri's

3 qualification. You had a response?

4 MR. TICE: My only question was then that is which

5 led to a penalty. So there have been some out there

6 that have not led to penalty, have been resolved

7 without penalty. That is my concern. That means that

8 there are cases that -- that implies, and maybe I may

9 be reaching the wrong implication, that there have

10 been some cases brought which were ultimately resolved

11 involving livestock operators for water pollution for

12 which did not involve any penalty. And that's the

13 very essence of what I am asking.

14 HEARING OFFICER BURDS: Ms. Peri.

15 MS. PERI: I cannot fully respond to that without

16 looking through all of our cases. I simply don't have

17 the longevity and experience to answer that. I have

18 represented to the Board that all resolutions that

19 lead to penalty are on file with the Board or the

20 Courts. It is my understanding of the interrogatory

21 that it is penalty decisions that the respondent is

22 seeking information regarding. If it is something

23 else that he is seeking, I need to know exactly what

24 it is he is seeking, because that is a very open-ended

25 question.

1 HEARING OFFICER BURDS: And just -- it does seem
2 to be -- the 31(d) process itself, Mr. Tice, doesn't
3 it envision the potential of bringing cases without
4 the need for a penalty enforcement action?

5 MR. TICE: Well, sure it does. But if there is no
6 penalty, there is some other form of action that has
7 taken place during that process, and if the result is
8 that there is no financial penalty --

9 HEARING OFFICER BURDS: Informal action.

10 MR. TICE: If there is no financial penalty
11 involved, whether it be formal action or informal
12 action, but if there is no financial penalty, that is
13 a decision, that is a resolution of a case. And I
14 can't believe --

15 HEARING OFFICER BURDS: Well, not necessarily
16 before the Board.

17 MR. TICE: No, not before the Board, that is
18 right.

19 HEARING OFFICER BURDS: Isn't that effectively
20 what you are seeing for, seeking in this
21 interrogatory, what was bought before the Board? I
22 mean, am I reading this incorrectly?

23 MR. TICE: Well, you are not reading it
24 incorrectly. But what this has now gotten to, it has
25 gotten beyond --

1 HEARING OFFICER BURDS: That is what I am asking.

2 I want to be clear.

3 MR. TICE: It has gotten beyond -- the explanation

4 I am getting back has gone beyond what really goes

5 before the Pollution Control Board. What I am

6 understanding now is that there were cases or I am

7 getting the implication that there were cases filed,

8 maybe not filed with the Board, but brought seeking

9 some resolution, whether it be through a formal

10 enforcement or otherwise, because of a livestock

11 operator's violation of water pollution control rules

12 and regulations for which the resolution did not

13 envision a financial penalty. It may have envisioned

14 some other way of resolving it. To me that is an

15 enforcement action against the livestock operator that

16 did not result in a financial penalty.

17 That is -- I would like to know that information,

18 and I can't imagine that there are that many

19 enforcement actions, formal or informal, against

20 livestock operators in this state. When you look back

21 at the history of it in the records there are not that

22 many, what was decided by the Pollution Control

23 Board. I can't imagine that there are that many more

24 that are either formal or informal. This is not a

25 large industry in this state. There is --

1 HEARING OFFICER BURDS: Well, but you would agree

2 that -- I am sorry.

3 MR. TICE: There is not a lot of activity in this

4 regard.

5 HEARING OFFICER BURDS: But do you agree that that

6 is a different question than what has been proposed in

7 this interrogatory?

8 MR. TICE: I agree with you that that is a

9 different question than what I have proposed here and

10 the reason it has now evolved to that is because of

11 this discussion.

12 HEARING OFFICER BURDS: I understand. I am not

13 assigning any culpability.

14 MR. TICE: It is a different question.

15 HEARING OFFICER BURDS: I am simply asking what

16 you seem to be seeking now is different than what you

17 asked for here. And I think Ms. Peri is being candid

18 in what she can obtain and what she cannot obtain. So

19 I think perhaps, and I don't know yet, but I think

20 perhaps the appropriate response may be to define the

21 question a little better or the questions a little

22 better to get the information you seem to be looking

23 for. I am not going to make that ruling now, but

24 that's my initial response.

25 MR. TICE: I understand your initial response.

1 HEARING OFFICER BURDS: Ms. Peri, you had --

2 MS. PERI: Certainly, if I may add a comment. If

3 all you are looking for are cases that were resolved

4 on purely technical grounds, it would be my

5 expectation that those cases would also be on file

6 with the Board or the Circuit Court but not

7 necessarily all of them.

8 HEARING OFFICER BURDS: Well, isn't it possible

9 under the 31(d) process not to bring a case before the

10 Board and have it resolved, Ms. Peri?

11 MS. PERI: Certainly.

12 HEARING OFFICER BURDS: I think, if I understand

13 Mr. Tice, that is the type of case that he is looking

14 for potentially. However, as he has acknowledged as

15 well, that is a different question than what he has

16 asked here. I think I have -- unless there is more

17 comments related to this interrogatory, I have all of

18 the argument that I need.

19 Mr. Tice, is there anything else that you wanted

20 to --

21 MR. TICE: I have nothing further.

22 HEARING OFFICER BURDS: Ms. Peri?

23 MS. PERI: No.

24 HEARING OFFICER BURDS: All right, then. Why

25 don't we do this, why don't we go on to the second and

1 third issues. And I believe both of these issues are
2 related to the assertion of privilege. So I will try
3 to stick with the original game plan here, Mr. Tice.
4 I apologize for swaying a bit there, but I think it
5 was appropriate. So why don't we go into the second
6 and third request.

7 MR. TICE: The position of the respondent with
8 respect to the motion to compel is that the request
9 that we have made for the various documents that have
10 been identified by the Attorney General's office, the
11 12 documents, as being privileged is not -- that they
12 should be discoverable. If a party raises the
13 question of privilege, whether it be attorney-client,
14 work product, or now this new privilege called
15 deliberative process privilege, that I don't think
16 really exists in Illinois, it becomes their burden to
17 prove, once they raise it and identify these
18 documents, that, in fact, these documents meet the
19 requirements for any one of those three privileges.
20 They have raised the attorney-client privilege
21 with respect to the documents they have identified,
22 all of which are documents generated by or created by
23 employees of the IEPA. Those employees have been
24 identified as has their positions with the IEPA. They
25 obviously are not attorneys and, therefore, the

1 attorney work product privilege would not apply.

2 HEARING OFFICER BURDS: Well, if I understand Ms.

3 Peri's response, and I apologize for interrupting, she

4 has withdrawn the attorney-client privilege portion of

5 the privilege --

6 MR. TICE: All right.

7 HEARING OFFICER BURDS: -- within the motion. Is

8 that correct, Ms. Peri?

9 MS. PERI: That is correct.

10 HEARING OFFICER BURDS: All right. Then the work

11 product is the only --

12 MR. TICE: Just the work product privilege.

13 MS. PERI: Just the attorney-client privilege.

14 HEARING OFFICER BURDS: That was withdrawn. Work

15 product is still existing. Let's be clear. You have

16 withdrawn -- my recollection of the motion

17 specifically is that your response to the motion to

18 compel was that you were withdrawing -- complainant

19 withdraws its claim of the attorney-client privilege

20 with respect to those documents.

21 MS. PERI: Correct.

22 HEARING OFFICER BURDS: You are still maintaining

23 the work product privilege with respect to all of

24 these documents, or at least specific documents?

25 MS. PERI: Yes, sir.

1 MR. TICE: I think also the deliberative process

2 privilege. Is that still --

3 HEARING OFFICER BURDS: Yes. I apologize. I

4 didn't mean to be all inclusive.

5 MR. TICE: All right.

6 HEARING OFFICER BURDS: I believe that privilege

7 is still being --

8 MR. TICE: Well, with that in mind, the work

9 product privilege only applies, from my reading of the

10 law, to the work of the attorney, not the work of the

11 particular individual who is a non attorney. So,

12 therefore, that work product privilege would not

13 apply. I believe it is incumbent upon the State in

14 this case to show that it otherwise would apply.

15 HEARING OFFICER BURDS: Ms. Peri, I believe that

16 is an adequate foundation to shift the burden to you.

17 I believe the law is clear once you have asserted the

18 privilege that the burden is incumbent upon you to

19 establish the privilege. Also, I will note that the

20 relevance -- I want to be clear. I don't want to

21 sound reprimanding as far as the relevance. However,

22 I think it is incumbent to be clear here under

23 103.161(a) relevance does not -- or the

24 inadmissibility of a document is not an appropriate

25 basis for, you know, not responding. Just because you

1 give it to them in discovery doesn't mean it is going
2 to be admissible at hearing. But the rule is very
3 specific.

4 Referring again to 103.161(a) regarding any matter
5 not privileged, the hearing officer shall order
6 discovery upon written request of any party when the
7 parties cannot agree on the legitimate scope of
8 discovery. It is not a ground for objection that the
9 testimony will be inadmissible at hearing if the
10 information sought is reasonable, calculated to lead
11 to discovery of admissible evidence, or is relevant to
12 the subject matter involved in the pending action.

13 Now, it is not as specific as I had earlier
14 related. However, inadmissibility is not a basis for
15 denying discovery. I just want to be clear. So with
16 that, I will then allow you to address the 12
17 documents. Now, as far as how we want to address the
18 12 documents, obviously, we want to be somewhat
19 sensitive to not going into the substantive nature of
20 the documents themselves. But as adeptly as you can,
21 Ms. Peri, please make your argument.

22 MS. PERI: Certainly. Thank you for pointing out
23 the application of Section 103.161(a). Based on your
24 reading of that provision, the State will necessarily
25 withdraw the relevancy argument set forth in its

1 response to respondent's motion and therefore will
2 limit its argument to the application of the attorney
3 work product privilege and the deliberative process
4 privilege as guards against the disclosure of the 12
5 documents.

6 HEARING OFFICER BURDS: Well, so it is clear and
7 so I am fair here, I am not sure that it is as broad
8 as I initially remembered, as well. I think what it
9 says is that if a document is inadmissible that is not
10 a basis for withdrawing. However, it does say -- it
11 goes on to say or is relevant to the subject matter
12 involved in the pending action. I don't know that it
13 completely limits you from claiming relevancy as a
14 basis for objection. I want to be fair here and
15 recognize my own error, which I am doing now.

16 MS. PERI: Then, Mr. Hearing Officer, for purposes
17 of making a record, I might proceed and simply make
18 that argument.

19 HEARING OFFICER BURDS: That is fine.

20 MS. PERI: Thank you.

21 HEARING OFFICER BURDS: Yes.

22 MS. PERI: Beginning then with the relevancy
23 argument, Mr. Hearing Officer, the State maintains
24 that the withheld documents are not relevant and in
25 camera review should show that they are not relevant

1 to this litigation. The discussions in the withheld
2 documents do not concern specific allegations in the
3 complaint and, in fact, those discussions occurred
4 more than one year following the filing of that
5 complaint.

6 Instead, these documents were prepared by
7 technical personnel of the Illinois Environmental
8 Protection Agency for the purposes of discussing the
9 adequacy of respondent's livestock waste management
10 plan. It is critical to point out the plan was
11 requested by the Attorney General's office and the
12 Illinois EPA as a condition of settlement. Therefore,
13 communications between Mr. Peacock, Mr. Wells, Mr.
14 Yurdin, Mr. Bridgewater, and Mr. Brockamp regarding
15 the plan were made in the course of an internal review
16 by the Agency of the plan submittals and for the
17 broader purpose of engaging in good faith
18 negotiations.

19 The technology surrounding the bulk of those
20 documents, which happen to be E-mail correspondence,
21 has no bearing on their admissibility or relevancy.
22 Whether they are E-mail correspondence, written
23 memorandum, or memorialization of telephone calls,
24 those discussions or communications were made in the
25 course of settlement discussions or for the purposes

1 of settlement and are, therefore, irrelevant and non
2 discoverable.

3 As a matter of policy, the State would simply ask
4 the Board to consider the impact of requiring the
5 Illinois EPA to reveal all settlement discussions that
6 occur, in particular those that have no bearing or
7 relevancy to the merits of the People's allegations.

8 Again, these discussions related to the adequacy of a
9 livestock waste management plan. The People suspect
10 that the impact on future cases and the State's
11 inclination to enter into settlement talks when
12 discovery of all of those talks may be discoverable
13 could be chilling.

14 With that, I will then move on to discuss the
15 attorney work product privilege and its application in
16 the present case.

17 HEARING OFFICER BURDS: Before you move on, are
18 you indicating that there is a settlement privilege?

19 MS. PERI: I don't know of a settlement
20 privilege. I do know that there is a question of
21 relevancy in cases brought before the Circuit Court as
22 to discovery. Discovery under Circuit Court cases, in
23 particular, goes to information that is relevant to
24 the litigation. We are asserting that the documents
25 concerning settlement negotiations and the substance

1 of those negotiations are not relevant to this
2 litigation and in particular are not relevant to the
3 State's prove up on the allegations set forth in the
4 complaint.

5 HEARING OFFICER BURDS: As far as that
6 application, what would prevent the State agency from
7 applying that application to all or any notes, whether
8 they were settlement or not, of potential witnesses?
9 As I understand it, all these individuals that you
10 have identified have been identified as writers of
11 these documents are potential witnesses that may be
12 called to testify at a hearing in this proceeding. Is
13 that correct?

14 MS. PERI: The State maintains that regardless of
15 who is the author, if the discussions relate to
16 settlement negotiations that do not specifically
17 relate to the allegations in the complaint, then they
18 are not relevant to the litigation.

19 HEARING OFFICER BURDS: My question was these
20 parties are all potential witnesses in this
21 litigation, correct?

22 MS. PERI: Correct.

23 HEARING OFFICER BURDS: As far as the application
24 of this policy or this relevancy argument to what the
25 State has as settlement documents, what would prevent

1 that from being applied to the notes of witnesses or
2 statements of witnesses that were not related to
3 settlement documents even after the complaint had been
4 initially filed?

5 MS. PERI: I believe the two areas that you speak
6 of are severable areas. The area of witness testimony
7 that would relate to the allegations in the complaint
8 and certainly the authors of these documents may
9 potentially testify on those issues, but there is also
10 an area regarding the livestock waste management plan
11 that is not at issue that will be addressed at hearing
12 at least from the State's vantage point. So we look
13 at them independently. Although the authors may be
14 witnesses on testimony relevant to litigation, we
15 maintain that the substance of the 12 withheld
16 documents concerning the livestock waste management
17 plan is not relevant to the litigation.

18 HEARING OFFICER BURDS: Okay. Go ahead. I
19 apologize for interrupting.

20 MS. PERI: No problem. The People maintain that
21 the attorney work product privilege also protects
22 these 12 document from disclosure. Mr. Brockamp, Mr.
23 Peacock, Mr. Wells, Mr. Yurdin, Y-U-R-D-I-N, and Mr.
24 Bridgewater have each been active and necessary
25 participants in the People's litigation team. They

1 are engineers. Their input, advice, and analysis on
2 technical issues relating to the livestock waste
3 management plan have been critical to the People's
4 development of an acceptable settlement strategy.

5 If I may, I would like to briefly read from a U.S.
6 Supreme Court decision, U.S. versus Nobles, a 1975
7 decision. The citation is 95 Supreme Court, 2160. I
8 am reading from page 2170. The Court stated: At its
9 core, the work product doctrine shelters the mental
10 processes of the attorney providing a privileged area
11 within which he can analyze and prepare his client's
12 case. But the doctrine is an intensely practical one
13 grounded in the realities of litigation in our
14 adversary system. One of these realities is that
15 attorney often must rely on the assistance of
16 investigators and other agents in the compilation of
17 materials in preparation for trial. It is therefore
18 necessary that the doctrine protect materials prepared
19 by agents for the attorney as well as those prepared
20 by the attorney himself.

21 Mr. Burds, I am not an engineer and I am not
22 qualified to evaluate the strengths or weaknesses of
23 the respondent's livestock waste management plan
24 submittals, and so I am forced to invite Illinois EPA
25 engineers to assist in the technical aspects of

1 settlement discussions if such discussions are to take
2 place. By evaluating the livestock waste management
3 plan submitted by the respondent, the authors of those
4 documents, the IEPA engineers, were acting as agents
5 of the People's counsel in the negotiations phase.

6 Therefore, their communications made in that role are
7 protected from disclosure under the attorney work
8 product privilege.

9 For purposes of that privilege the theories and
10 mental impressions of those authors are theories and
11 mental impressions of complainant's counsel.

12 Therefore, like the Nobles' Court, the People would
13 ask the Board to find that it is necessary that the
14 attorney work product privilege protect material
15 prepared by agents for the attorney, in this case Mr.
16 Brockamp, Peacock, Wells, Yurdin and Bridgewater.

17 HEARING OFFICER BURDS: Okay. Which begs another
18 question. The documents, as you have described them,
19 are memos between employees of the Agency, correct?

20 MS. PERI: Yes.

21 HEARING OFFICER BURDS: And based on the
22 description that you have given, they are not to you?

23 MS. PERI: That's correct.

24 HEARING OFFICER BURDS: Yet you maintain that they
25 are impressions that are made for you?

1 MS. PERI: That's correct. Those discussions were
2 made on behalf of me.

3 HEARING OFFICER BURDS: At your request?

4 MS. PERI: Each communication was not specifically
5 made at my request. However, each communication was
6 made pursuant to my request that these Illinois EPA
7 engineers developed a framework from which we could
8 base a technical resolution of this case for purposes
9 of entering into settlement discussions.

10 HEARING OFFICER BURDS: Okay.

11 MS. PERI: Mr. Burds, I will go ahead and move on
12 to the deliberative process privilege, also referred
13 to as the predecisional deliberative process
14 privilege. The complaint maintains that the internal
15 discussions of Illinois EPA employees regarding the
16 acceptability of respondent's livestock waste
17 management plan fall under this privilege. There are
18 essentially two major policy concerns and I will just
19 briefly refer to them.

20 First, state and federal courts that have looked
21 at this issue have found that the privilege takes the
22 focus away from the considerations made before a final
23 decision made by an agency so that what is relevant
24 receives that focus, and that is the final decision.

25 I believe that this Board acknowledged that in West

1 Suburban Recycling and Energy Center versus Illinois
2 EPA. That is Pollution Control Board Number 95-119
3 and 95-125, an October of 1996 decision.

4 Secondly, those courts have found that the
5 privilege protects predecisional communications of
6 governmental personnel in order to foster a free
7 exchange of ideas among those persons before a final
8 decision is made, and in doing so improves the
9 decision making process so that employees don't feel
10 guarded about the ideas they explore even though those
11 decisions may not fall into the final decision. The
12 People certainly acknowledge that there may be
13 instances where the predecisional deliberative process
14 privilege may not apply. I believe the Moorehead
15 versus Lane case, which recognized -- this is a
16 Federal District Court case -- recognizing that state
17 agencies should also be eligible for this privilege in
18 certain instances, recognized that the privilege may
19 not apply where there is malfeasance in the
20 predecisional process.

21 I believe the Burkett Court of the Second District
22 perhaps appropriately chose to not apply the
23 predecisional deliberative process privilege in that
24 instance, but in that case the party seeking
25 predecisional material demonstrated to the Court that

1 there was indeed a concern about malfeasance or
2 impropriety in the predecisional phase and the court
3 in that instance allowed the discovery of
4 predecisional communications.

5 But the People maintain that this case is more
6 like West Suburban Recycling where the Board on in
7 camera review found no evidence of malfeasance and
8 instead denied the discoverability of a memo -- pardon
9 me -- the admissibility of a memorandum of a Bureau of
10 Air manager. And the People maintain that in this
11 instance on in camera review the Board should find
12 that likewise. This case will not reveal malfeasance
13 of any kind by the Agency in the predecisional, that
14 is the predecision period, prior to deciding on the
15 livestock waste management plan.

16 I don't believe that respondent's counsel has
17 suggested any malfeasance that would lead even to that
18 question. So I believe that this case survives the
19 Burkett's holding, which I believe should be limited
20 to the question of whether there is the potential or
21 belief that there is malfeasance at the predecisional
22 phase and if not, then the predecisional deliberative
23 process privilege applies. If we look at the lack of
24 relevance of these documents as they pertain to the
25 litigation, the application of the attorney work

1 product privilege, the application of the
2 predecisional process privilege, the People urge this
3 Board to find that the government's interest in the
4 nondisclosure of these types of documents far out
5 balance the respondent's interest in their
6 disclosure.

7 HEARING OFFICER BURDS: Let me ask a question. As
8 far as the client is concerned, in subsequent
9 litigation or the potential for subsequent litigation
10 are you espousing that if petitioner or the respondent
11 in this case somehow appealed the decision related to
12 the work client they would not be entitled to any
13 memorandum or notes related to the decision of the
14 Agency?

15 MS. PERI: I would suggest, Mr. Burds, that that
16 question is now moot because the plan has been
17 accepted by the Agency.

18 HEARING OFFICER BURDS: But that was not the
19 question.

20 MS. PERI: Could you repeat it for me?

21 HEARING OFFICER BURDS: The question was as far as
22 the plan is concerned, the potential litigation
23 related to the plan, if it was not accepted would a
24 potential petitioner be entitled to information in
25 this process, i.e., the E-mail related to the decision

1 making process regarding the plan?
2 MS. PERI: If we apply the predecisional
3 deliberative process privilege like the Moorehead
4 Court and even like the Burkett Court, you wouldn't
5 probe those predecisional communications unless there
6 is some showing of probable malfeasance or a potential
7 malfeasance by the Illinois EPA engineers, which is
8 wholly lacking in this case.

9 HEARING OFFICER BURDS: Mr. Tice.

10 MR. TICE: How are you going to know it is fully
11 lacking in this case if you don't have the documents
12 to inspect to make sure. That begs the question to
13 say the malfeasance is wholly lacking in this case
14 and, therefore, there is no basis for denying the
15 deliberative process privilege. But that also
16 presumes that there is such a privilege that exists,
17 and it doesn't even exist in this State.

18 It has not been recognized by any court in this
19 State that has been faced with the question or had the
20 question of deliberative process raised to it. The
21 Attorney General's office simply does not cite any
22 authority for that process and, in fact, I cited it to
23 the examiner, to the hearing officer, Justice
24 Stegeman, and, of course, he is quite outspoken at
25 times, we all know that. But I think his statement is

1 quite appropriate in this case.

2 I don't think this deliberative process privilege
3 is any place outside of the offices of the IEPA. And
4 it is raised whenever there is some documents that
5 they simply don't want to disclose to the respondent
6 in these cases that they cannot otherwise adequately
7 cover or protect by some other privilege. Now, they
8 have already waived the attorney-client privilege.
9 They first raised that. We had to go through a motion
10 to compel and file it to get that way. If they were
11 going to waive it, it should have been waived a long
12 time ago. That's the purpose of discovery. That's
13 the purpose of attorneys discussing discovery problems
14 in the first instance. And we should not even have
15 had to raise the motion to compel as to that issue but
16 we had to. But that attorney-client privilege is
17 gone. So any communications between these particular
18 witnesses, and these are all witnesses that have been
19 disclosed to me as the attorney for the respondent
20 that have knowledge and information about the
21 allegations in the complaint.

22 Now, nobody has told me exactly what knowledge
23 each one of these people have about the allegations in
24 the complaint. They have just told me and the
25 discovery has disclosed to me that they all have this

1 information. Since they have waived that
2 attorney-client privilege and withdrawn that as a
3 privilege and a basis for denying the disclosure of
4 these documents they cannot now come back and say,
5 well, it is this communication that comes back from
6 these particular witnesses to the attorney who is
7 going to be prosecuting this case that makes it an
8 attorney work product and, therefore, subject to or
9 protected by the attorney work product privilege.
10 The attorney work product privilege is only for
11 the attorney's work. That is why it is called the
12 attorney work product privilege. I would cite to the
13 Hearing Officer, as I did in my motion to compel, the
14 Consolidated Coal Company which is the decision of the
15 Illinois Supreme Court and that has been followed
16 routinely throughout by Circuit Courts in this State
17 in dealing with the discovery questions that arise in
18 disclosing information from engineers and people that
19 are in companies and so forth to the attorneys for
20 those companies who may be representing them in
21 litigation.
22 And, quite frankly, that court did not allow the
23 attorneys, the respondent's in that case, to refuse to
24 disclose the communication that came back from the
25 engineers to the attorney. They were very precise.

1 They were very precise in their definition, and this
2 is the Supreme Court of this State in what the
3 attorney work product privilege was. That was that
4 the notes made by that attorney as a result of talking
5 with witnesses and sometimes even those are
6 discoverable if there is no other way to get that
7 information, but that's not an issue in this case at
8 this point.

9 And then those notes made by that attorney that
10 are or display the mental impressions and theories of
11 the attorney for the prosecution of that or the
12 handling of that case that they are involved in, and
13 in this instance here all of these documents are
14 documents generated by the person who is a witness in
15 this case or has knowledge of this case and is
16 directed not to the attorney, if I understand what Ms.
17 Peri is now explaining to the Hearing Officer, but
18 rather to other people in the Agency who are also
19 witnesses and have knowledge of this particular case.

20 That document, if not relevant or if not
21 containing relevant information that could be
22 introduced at the hearing may potentially contain
23 information that may lead to relevant information that
24 may be helpful to the respondent in his preparation of
25 his defense or his presentation of his case. That is

1 what is at the heart of discovery. That is the
2 purpose for discovery. Basically in discovery you
3 have to disclose most everything you have got unless
4 you have a privilege that will protect it, and the
5 attorney's work product privilege, this simply does
6 not apply. They cannot fit into the four corners of
7 the privilege here. It was not made by the attorney.
8 It was made by the witness. It is not directed to the
9 attorney. It is directed to other people who are
10 witnesses in the case. And what it contains is really
11 not the issue here. It is about the allegations in
12 the complaint.

13 They say -- they make the argument that you
14 shouldn't grant us the right to these documents
15 because they are not relevant to the allegations in
16 the complaint and we are not going to use them. This
17 is the words of the Attorney General here. We are not
18 going to use these documents or the information in
19 these documents to prove our complaint. Well, that
20 makes it rather suspicious. Is there something in
21 there that might be beneficial to the respondent in
22 the proving of his case? That is a discoverable item
23 unless it is otherwise covered by one of these
24 privileges. There is no basis for withholding that
25 information simply because we are not going to use the

1 information in it to prove our case. In fact, that
2 implies, very unequivocally, that it does contain
3 information that may be, in fact, helpful to the
4 respondent and that is what is discoverable. That is
5 what has to be turned over, and that is what we are
6 requesting. Whether it does or not --

7 HEARING OFFICER BURDS: If I could interrupt, Mr.
8 Tice, I just want to make sure that we address the
9 representation that Ms. Peri has made here. If I
10 understand her correctly, she represented that these
11 documents were solely prepared at her request. She
12 didn't say that they were not to her. But she said
13 they were prepared at her request by these parties,
14 and that they are limited to settlement related to a
15 solid -- the plan associated with this site.

16 I guess I would like you to address that component
17 in that representation.

18 And you correct me if I wrong, Ms. Peri.

19 MS. PERI: May I just slightly clarify so that the
20 representation is not overly broad. My requests of
21 the Illinois EPA engineers is not as to each specific
22 communication but as to communications on the
23 negotiations issues. For example, I did not request
24 on 09-18-96 that Mr. Peacock draft a memo to Mr.
25 Brockamp. It was my request that each of these

1 authors participate in discussions on behalf of the
2 Agency and the Attorney General's office to produce a
3 framework for a technical resolution for settlement.
4 HEARING OFFICER BURDS: Aren't you representing
5 that these are consequences of that or are you
6 representing that --
7 MS. PERI: Certainly.
8 MR. TICE: A section of all involves all of the
9 allegations of the case. It is not just necessarily
10 the livestock waste management plan. Even if it were
11 limited just to the livestock waste management plan,
12 that is an issue in this case. It was an issue in
13 this case. It is still an issue in this case. It has
14 not been withdrawn by the Attorney General's office
15 from the complaint. There may be information in those
16 documents that lead to some information helpful to the
17 respondent in the presentation of his case. Whether
18 it is dealing just with his livestock waste management
19 plan or whether it is dealing with other
20 technicalities or technical aspects of the allegations
21 in this complaint. There are number of technical
22 aspects to this case. And we have no way of knowing
23 whether those documents may be helpful or not helpful
24 unless we are allowed to review them. That is the
25 purpose -- to me, that's the purpose of discovery.

1 You don't allow one side to simply say, and I have
2 never had this experience in a Circuit Court where a
3 party gets in there and says, well, judge, these
4 documents are not relevant because we are not going to
5 use them in the proceeding because we are now
6 satisfied that this is not part of the complaint.
7 These documents are conversations between parties that
8 are witnesses in the case, but they are not talking
9 about anything that is now going to be used in the
10 ultimate litigation in this trial. The circuit judge
11 would simply say no. If it is produced by the
12 witnesses who are people who are potential witnesses
13 in this case, if it contains information about the
14 case, you are going to have to disclose them to the
15 other side.
16 Now, they may not be admissible. The information
17 in them may not be admissible at the time of trial but
18 that's not the test for discovery. Discovery is very
19 broad and intended to be very broad so that one side
20 is not left without the necessary information with
21 which to respond to their allegations made against
22 them. That is not a basis in this case, in my
23 opinion. To simply say we don't have to give them to
24 you because we are not going to use the information,
25 that's the theory with which they are now approaching

1 this argument about providing these documents to us.
2 The attorney work product privilege, and I am not
3 sure whether they are or the Attorney General is still
4 really relying on the work product privilege or not,
5 because they didn't prepare -- the attorney didn't
6 prepare it. I think it is clear now that the people
7 who prepared these documents are the witnesses
8 themselves, the people with the information. And that
9 is not an attorney work product privilege. The
10 attorney may have asked them to prepare that. The
11 document didn't get back to the attorney. It is of
12 discussions among the witnesses about the nature of
13 the case, some aspect of this case. That's what we
14 are after. If the representation is made here that
15 the only aspect of this case that these documents
16 pertain to is a livestock management plan and we are
17 not going to make that an issue in the case I don't
18 think that prevents the disclosure of these documents
19 or allows them to deny us the disclosure of these
20 documents, because it has not been withdrawn from the
21 complaint and, number two, it may contain information
22 in those discussions that are helpful to the
23 respondent. Number three, discovery is not determined
24 on the basis of what the party with the information
25 determines they are going to use or not use in the

1 case. It is made on a much broader principle and that
2 is relevant and not relevant and may lead to relevant
3 information.

4 Now, the deliberative process, I mean, I don't
5 want to beat a dead horse here on this deliberative
6 process privilege, but it does not exist. There is no
7 statutory authority for it. There is no case law
8 authority for it. The Burkett case clearly says that
9 it does not apply. The Attorney General's office's
10 first response to me on that was, well, that is not a
11 Fourth District Appellate Court case on the
12 deliberative process. There is no Fourth District
13 Appellate Court case directly deciding the
14 deliberative process privilege, however, Justice
15 Stegeman did, in his concurring opinion, determine in
16 the Griggalet (spelled phonetically) case, which
17 involves the Pollution Control Board, very clearly --
18 it made it very clear that the deliberative process
19 privilege just does not exist and the courts are not
20 going to allow that to be the basis for refusing to
21 disclose information no matter what. The EPA, the
22 Agency people can talk among themselves about these
23 cases but if they have memorandums of them they are
24 going to have to disclose them as long as they are
25 otherwise discoverable. The deliberative process

1 privilege is not going to protect them. And for that
2 reason we think we are entitled to these documents.
3 Neither are the two privileges that they have
4 asserted, attorney work product does not protect them
5 and keep them from being discoverable and the
6 deliberative process does not protect them and keep
7 them from being discoverable, because it does not
8 exist.

9 HEARING OFFICER BURDS: The representation that
10 these are solely related to settlement, and while I
11 don't disagree with you that, you know, it is not up
12 to the party with the information to indicate if they
13 don't plan to pursue it at hearing it does not make it
14 irrelevant. My question is related to Ms. Peri's
15 representation that these documents are solely related
16 to settlement not just the livestock waste management
17 plan, but that they are related to the settlement of
18 this case.

19 MR. TICE: And that does not make it
20 nondiscoverable. There is nothing in the rules of the
21 Civil Practice Act and nothing in the rules of the
22 Pollution Control Board and nothing in the court
23 decision that allow for a -- that allows to refuse to
24 have discovery on the basis that the document
25 discusses settlement of the case. When you talk about

1 settlement of a case you are talking about the
2 weaknesses and strengths of a case. You have a
3 witness -- this is not the attorney's mental
4 impressions of it. We are not asking for that. This
5 is not being asserted here.

6 We are talking about the impressions and the
7 statements of the people who investigated and who
8 brought these charges in the first instances, made the
9 assessment in the first instance about this case,
10 about the weaknesses and strengths of their case. We
11 are talking about the issue of settlement here. Those
12 documents will contain -- that is the content of those
13 documents. They will contain information that may be
14 helpful to the respondent in presentation of his
15 case. And they are otherwise then discoverable,
16 because there is no way to keep them from being
17 discoverable.

18 Now, they may not be -- the documents may not be
19 and the information directly talked about in there may
20 not be introducible in evidence because it has to do
21 with settlement, but it may contain admissions by
22 these party witnesses and that would be admissable.
23 It may contain other relevant types of statements or
24 information or even technical information that would
25 be relevant to the respondent's preparation of his

1 case and/or if otherwise introducible under the rules
2 of evidence, introducible in the proceeding. They may
3 be helpful in cross-examination of these particular
4 witnesses when they are called to the stand. That is
5 the heart of the documents, I believe, that have been
6 withheld by the Attorney General's office. Those
7 clearly, under those kind of circumstances, are
8 discoverable.

9 HEARING OFFICER BURDS: Ms. Peri.

10 MS. PERI: Thank you. Mr. Burds, the People stand
11 on their arguments made in response to respondent's
12 motion and to prior argument made today, and would
13 simply try to recapture for the Board the substance of
14 the information being sought under this request. The
15 livestock waste management plan has been approved. It
16 was a condition of settlement. So, frankly, I am
17 befuddled as to why predecisional communications made
18 on that now approved plan are considered relevant to
19 the litigation.

20 HEARING OFFICER BURDS: Well, let me espouse an
21 example. What if in those statements a witness had a
22 contrary statement from what he stated under oath or
23 otherwise. Wouldn't that be something that you would
24 want to be entitled to, Ms. Peri?

25 MS. PERI: Certainly. But I think that we can't

1 overlap the potential testimony of witnesses who in
2 this case happen to also be authors of these
3 documents.

4 The fact that there is a potential witness who
5 authored these communications -- let me rephrase
6 that. The fact that the authors listed as potential
7 witnesses, whether it be Mr. Brockamp or Mr. Yurdin or
8 Mr. Bridgewater, would have no bearing on the
9 privileged nature of their discussions in the withheld
10 documents. It is a separate issue as to whether the
11 communications in those documents are relevant, if
12 they are protected by the attorney work product
13 privilege, and whether they are protected by the
14 predecisional deliberative process privilege. I think
15 we need to isolate the two. The fact that a witness
16 is potentially going to testify on issues that are
17 separate and apart from the withheld communications
18 cannot undercut their protective nature.

19 HEARING OFFICER BURDS: I don't disagree that
20 privilege can potentially privilege relevant
21 documents. In fact, I think that's the nature of the
22 privilege. It can encompass relevant documents. I
23 guess the question is, and I don't want to let any cat
24 out of any bag related to the documents, because I
25 don't pretend to know whether these documents include

1 any statement that would be relevant. All I am
2 indicating, I think, and we can all come up with
3 examples of potential work statements of potential
4 witnesses whether they are related to settlement or
5 otherwise, but are somehow related to the proceeding,
6 aren't those potentially something that all of us
7 would want to obtain if there was a written statement
8 of a potential witness.

9 MS. PERI: It really depends on the substance of
10 the communications. And, again, without revealing in
11 its entirety what is in those communications, I have
12 already stated that they contain discussions of the
13 livestock waste management plan submittals. We have
14 to examine what is their bearing on this case. These
15 discussions were had after the filing of the complaint
16 because the State said we will require a livestock
17 waste management plan to be submitted and approved by
18 the Agency or we will settle this case. We did not
19 allege that there was a problem with the livestock
20 waste management plan in the complaint.

21 The complaint deals with the lack of an NPDES
22 permit in Section 12(f) of the Act. While a permit
23 may require a livestock waste management plan, that is
24 not our allegation. Our allegation is discharge or
25 threat of discharge. So the livestock waste

1 management plan and its bearing on the litigation that
2 may occur, we would argue, is nil.

3 HEARING OFFICER BURDS: Okay. Any response?

4 MR. TICE: The only thing I can say is that I am
5 hearing different representations by the Attorney
6 General's office in this argument. First these
7 documents deal with the livestock waste management
8 plan, which is a requirement of the NPDES permit and
9 that is an issue in the case, the NPDES permit and the
10 fact that Mr. Chalmers had one and then didn't have
11 one and whether or not he meets the requirements or
12 has met the requirements of the NPDES permit. So
13 those are live allegations in this complaint yet. And
14 then secondly that they involve settlement of this
15 case.

16 And my point is simply this, these people are
17 witnesses in the case. These are the principals who
18 the State is going to use to prove the allegations or
19 attempt to prove the allegations against Mr. Chalmers
20 here. These people have engaged, apparently, in some
21 settlement discussions regarding this case or
22 discussions concerning this case, whether it is
23 settlement or otherwise. I am entitled to those
24 documents. I am entitled to see what their statements
25 say. It is just like an insurance adjuster's

1 statement in an automobile accident. It is just like
2 a police report in an automobile accident. It is just
3 like a police report in a criminal case. Those are
4 all discoverable documents without question. They may
5 contain statements about what should be done,
6 recommendations, et cetera. If they were put in there
7 by the author that does not prevent the document from
8 being discoverable by the other side. It may have
9 some bearing on whether those documents per se or
10 items, statements from the documents are used in
11 evidence. That is to be determined later. These are
12 relevant to us. We would ask that they be disclosed
13 to us in total.

14 HEARING OFFICER BURDS: Ms. Peri, any further
15 comment?

16 MS. PERI: I would just refer Mr. Hearing Officer
17 in his in camera review to these documents to pay
18 particular attention to one document that will be
19 obvious to Mr. Burds that specifically deals with the
20 author's review of the draft consent order in this
21 case. I think that that is an extreme example of what
22 we are seeking to protect from disclosure, but is not
23 fully separate from the balance of the documents which
24 we continue to maintain that deal with a set of issues
25 on this plan that are separate from the narrower issue

1 that will be litigated at hearing and that is whether
2 there was a permit. That's all I have.

3 HEARING OFFICER BURDS: What I would like to do at
4 this point is just take a five or ten minute break and
5 come back and we will go back on the record. So let's
6 go off the record for about five minutes. I would
7 like a chance to review the documents.

8 (Whereupon a short recess was taken.)

9 HEARING OFFICER BURDS: Let the record reflect
10 that we are back on the record in 96-111. We are here
11 on respondent's motion to compel or in the alternative
12 a motion for a protective order.

13 Here is my initial -- what I had initially
14 planned, as I indicated at the beginning of all of
15 this, was to try to do this as quickly and as feasibly
16 as possible to allow the litigation to proceed as
17 quickly as possible. I think that we have resolved
18 some of the issues that are before us today already.
19 I am referring specifically to the Amy Simons
20 Jackson's notes. I am going to deem that as a mute
21 issue at this point based upon Mr. Tice's withdraw and
22 based upon the representation of Ms. Peri.

23 Also I would indicate and I am prepared to state
24 that as far as the first issue that we addressed in
25 this case and that is relating to the penalty phase,

1 the relevancy and bifurcated nature of the penalty
2 phase that Ms. Peri referred to and what seems to be,
3 based upon he analysis, maybe a qualification of what
4 Mr. Tice is seeking related to that question, this is
5 what I am going to do. And I want to do it in
6 compliance with what we laid out here. I know there
7 is a discovery schedule in this case but I know also
8 there is a continuance. We continued the discovery
9 cutoff date.

10 What I am going to indicate is I am going to allow
11 Mr. Tice to modify, as he did here today, what it is
12 that he is seeking in that initial interrogatory
13 number one related to the penalty to represent what he
14 has represented here in this proceeding and,
15 obviously, provide Ms. Peri the opportunity to respond
16 to the interrogatory as propounded. What I want to do
17 is try to stay within the four corners of the
18 discovery schedule that we set out, but I know that we
19 continued that and I am not sure to which date that we
20 did that.

21 MS. PERI: August 14th.

22 MR. TICE: Yes, August the 14th, as I recall.

23 HEARING OFFICER BURDS: The 14th of August. Here
24 is my concern related to the next two issues. Again,
25 what I had hoped to do is resolve those issues today.

1 I am not prepared to make a decision, and I don't want
2 to make a decision based upon the arguments made by
3 Counsel. I want the opportunity to review the
4 arguments and do my own independent inquiry. Today is
5 the first date I have seen these documents. I will
6 relate that, obviously, I will take the fiduciary
7 responsibility for maintaining these documents and the
8 confidentiality that you have requested regarding
9 these documents, Ms. Peri.

10 I am going to take them in camera to make my
11 decision related to the privileges that you have
12 asserted and the arguments that you have made.
13 However, upon my decision, if I decide that they
14 should be provided to the other side, I will make sure
15 that the documents are put back in your possession by
16 courier or otherwise or we may even have to come back
17 here. I don't know. If I do, I will require you to
18 provide those documents, if necessary, based upon my
19 decision. Then, obviously, my decision is appealable
20 by either side.

21 However, as far as the first nature, I want to
22 keep things going as much as we can. I will tell you
23 that I will make a decision no later than Friday of
24 next week. What I will do -- hopefully I have not
25 been too eager to indicate that, but what I would hope

1 to do is have a written decision to you by the end of
2 next week with the documents in tow, wherever they may
3 be. However, as I have indicated, if I decide that
4 the documents should go to Mr. Tice and his client, I
5 will require you, Ms. Peri, as a party, to do that.

6 In the alternative, then there won't be an issue. I
7 will simply return the documents back to you.

8 Now, as far as the decision, my understanding is
9 that these are the only documents that exist outside
10 the interrogatory propounded by Mr. Tice. I will
11 indicate to you that I will make my decision no later
12 than Friday afternoon, which is July the 24th. I will
13 make a decision on or before July 24th and hopefully
14 well before then. But I am going to take advantage of
15 the opportunity to take the time to make what I hope
16 to be the correct decision, and that is my goal here
17 to make the correct decision to allow the parties a
18 fair opportunity to go on.

19 Now, the 14th, is that still realistic in light of
20 the fact that -- like I said, I can't -- I hope to
21 have it done before the 24th. I am giving myself
22 until the 24th to allow for my own schedule.

23 MS. PERI: May I address that?

24 HEARING OFFICER BURDS: Sure.

25 MS. PERI: I think that will largely depend on the

1 scope of Mr. Tice's revised interrogatory number one,
2 and assuming that that would be acceptable to my
3 office and --

4 HEARING OFFICER BURDS: Well, I understand, and
5 you certainly have the ability to appeal my ruling. I
6 can't prejudge how you are going to respond. I am
7 telling you based upon -- I want to make it clear that
8 based upon the modification that Mr. Tice represented
9 today as to what he was seeking I do not deem that to
10 be an unreasonable request. However, I am not going
11 to prejudge. If you have an objection to that request
12 you can certainly state an objection.

13 MR. TICE: I am not sure the 14th is very
14 realistic.

15 HEARING OFFICER BURDS: Well, that's what I am
16 wondering. Should we adjust that accordingly? I want
17 to keep the litigation moving, but I can only go as
18 fast as --

19 MR. TICE: As we go.

20 HEARING OFFICER BURDS: Exactly. I want to make
21 sure everybody has what they need.

22 MR. TICE: I would say realistically speaking that
23 I think you are looking at probably in September.

24 MS. PERI: Again, it depends on --

25 MR. TICE: The middle of September. It depends on

1 your decision.

2 MS. PERI: It depends on the scope of the

3 interrogatory.

4 (Ms. Peri and Ms. Glatz confer briefly.)

5 MS. PERI: The State has a concern about whether

6 Mr. Tice's revised interrogatory may be expanded to

7 include cases that were resolved prior to referral to

8 the Attorney General's office during the Section 31

9 process, because that would open up a can of worms

10 that would involve a significant amount of time.

11 HEARING OFFICER BURDS: Well, as I have indicated,

12 I think the question is a different question than what

13 he has posed in the interrogatory. I can only go by

14 what he is seeking to determine. I really can't

15 prejudge what affect that might have or how broad the

16 request is until I see it. The one that I have before

17 me is until 1990 related to a proceedings brought

18 before the Board. I think we all agree here that that

19 is ascertainable independently by all of us. However,

20 it seems to be something else that Mr. Tice is after,

21 based on his representations, and that is to determine

22 those types of cases that were not necessarily brought

23 before the Board, and I don't want to prejudge what

24 that is. Maybe Mr. Tice has not fully articulated

25 what it is he is looking for. But based on his

1 representations it does not seem like an unreasonable
2 request at this time.

3 However, I cannot prejudge that it is unreasonable
4 or predetermine that any objections you may have may
5 be unreasonable either. I would encourage you to do
6 what you have done in this case. I want to make clear
7 that I appreciate both Counsel first trying to resolve
8 the difference before coming to me. I know that that
9 is not a specific Board requirement, but as you both
10 have pointed out, we do allow the Civil Procedure
11 Rules to apply and to come under a 201(k) auspices,
12 and that's what I prefer. I would like that
13 documented, that same approach taken in the future and
14 always, because that is where discovery should be
15 resolved, in my opinion.

16 However, I know that that is part of my role here,
17 and I don't want to try to duck any responsibility of
18 my own. That's what I hope to do here and hope to
19 have to you next week. Now as far as -- I am going to
20 allow him to revise that request. I am going to deem
21 his motion to compel related to interrogatory number
22 one as moot based on the revisions that he has
23 indicated.

24 Now, Mr. Tice, I don't know. That may be
25 something that you want to address. I don't know.

1 But as far as number one is concerned, it seems to me
2 that it is fairly clear that what you are after is
3 different than what you propound in your
4 interrogatory.

5 MR. TICE: I accept the examiner's statements in
6 that regard. But as to addressing the discovery
7 cutoff date, I think August 14th is unrealistic. I
8 don't think from the practical standpoint we are going
9 to get it accomplished by then. My personal judgment
10 is that setting it at end of September is more
11 realistic. I think that that allows us to get this
12 part taken care of and, again, to a certain extent it
13 depends upon what your ruling is.

14 There are -- for instance, I just found out there
15 had been a couple inspections of the premises by IEPA
16 representatives. I have a letter coming to Ms. Peri
17 to obtain those reports from those inspections. I
18 assume that there won't be any problem with that, but
19 there might be. But I think that will be handled very
20 swiftly, is what I would expect in that regard. But I
21 would -- my suggestion, and it is only a suggestion,
22 that the discovery cutoff date be at the end of
23 September.

24 HEARING OFFICER BURDS: With your qualification,
25 Ms. Peri, and I understand your concern as to the

1 breadth of the interrogatory request. All I can do
2 is -- I can't prejudge myself. All I can do is -- I
3 can only move as fast -- in some ways as fast as you
4 let me. I promise you a decision quickly in these
5 matters. I have made as many decisions as quickly as
6 I want to make them related to the motion today. I
7 think we have resolved at least two outstanding
8 questions with two remaining.

9 Now, as far as discovery I don't know how long it
10 will take Mr. Tice. I would hope that he will be able
11 to get the revised interrogatory very quickly to you
12 and then any response that you would have, I
13 understand that you are concerned as to breadth,
14 however, I can't prejudge that. But as to September
15 30th, do you have an objection to going to the end of
16 September as the discovery date?

17 MS. PERI: No.

18 HEARING OFFICER BURDS: Why don't we adjust the
19 discovery cutoff to the last day in September for the
20 discovery to be complete. There are a lot of things
21 that can happen between now and then. There is no
22 reason to speculate or try to determine what might
23 happen, because I don't think any of us know at this
24 point what might -- well, you certainly don't know
25 what my decision is to the two outstanding issues, and

1 we certainly don't know whether one party or the other
2 may want to appeal that decision in itself, which in
3 itself may be a time consuming process before the
4 Board, i.e., it would require argument before the
5 Board and briefing before the Board and appeal of my
6 ruling.

7 So where we will go is this. I have indicated to
8 you I will have a decision on the remaining two issues
9 to you by no later than next Friday and hopefully
10 before. Mr. Tice, as far as the revised
11 interrogatory, I am not going to put any deadline on
12 you as to when that would be. The only thing I would
13 ask is that you move as quickly possible. And,
14 obviously, if you have any response that the
15 complainant moves as quickly as possible. Then we can
16 deal with those issues as quickly as need be.

17 So I am going to adjust the discovery cutoff date
18 to September 30th. Do we have a telephone status
19 conference scheduled in this case?

20 MS. PERI: We revised it to make it today, didn't
21 we?

22 HEARING OFFICER BURDS: That may be. We certainly
23 know what the status of the case is based upon the
24 representation of both Counsel and where we are. My
25 understanding is -- now, I don't want to get the wrong

1 impression here and I don't want you to assume too
2 much here but as far as settlement, several
3 discussions have been related to the livestock waste
4 management plan and that has been ultimately accepted,
5 however, it is obvious that this case is not settled.
6 So I am proceeding on a litigation tract. So I think
7 what he ought to try to do is set a telephone status
8 conference and maybe the thing to do is this. Why
9 don't we set a telephone status conference on next
10 Friday.

11 MS. PERI: I am going to be unavailable next
12 Friday. I have mandatory training in Shelbyville.

13 HEARING OFFICER BURDS: Okay. Let's not do that.
14 Let's go to -- I am trying to anticipate how this will
15 come up. How about the week after which would be
16 August 3rd. That would give a week for the parties to
17 have the decision, at least one week, because I will
18 fax the copy of my decision no latter than Friday and
19 hopefully I will try to express it to you as quickly
20 as I can.

21 MR. TICE: Monday the 3rd?

22 HEARING OFFICER BURDS: Friday the 3rd. I
23 apologize. July 31st for the status conference.

24 MR. TICE: What time?

25 HEARING OFFICER BURDS: I guess I would leave that

1 to the parties. It is a Friday.

2 MR. TICE: The earlier the better, I would say.

3 9:00?

4 HEARING OFFICER BURDS: 9:00 is fine.

5 MS. PERI: Sure.

6 HEARING OFFICER BURDS: I will tell you this, I

7 may have another case scheduled at 9:00. Is 8:45

8 possible?

9 MS. PERI: That's fine.

10 MR. TICE: Okay.

11 HEARING OFFICER BURDS: That would be better for

12 me. Because then I can guarantee that time in that

13 time slot.

14 MR. TICE: Do you set it up?

15 MS. PERI: I will initiate it.

16 HEARING OFFICER BURDS: All right. I will issue

17 an order that the call will be initiated by the

18 complainant.

19 MS. PERI: Okay.

20 HEARING OFFICER BURDS: We will adjust the

21 discovery schedule according to September the 30th.

22 And then we will deal with things as they come.

23 All right. I would like to thank you all for your

24 patience during this process. Thank you. Is there

25 anything else that we need to talk about, Mr. Tice?

1 MR. TICE: No.

2 HEARING OFFICER BURDS: Ms. Peri?

3 MS. PERI: No. Thank you.

4 HEARING OFFICER BURDS: Thank you.

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