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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LAWRENCE C. SWEDA,)
)
Complainant,)
)
vs.) No. PCB 99-38
) (Enforcement-Noise,
OUTBOARD MARINE CORPORATION) Citizens)
and the CITY OF WAUKEGAN,)
)
Respondents.)

The following is the transcript of a hearing
held in the above-entitled matter, taken
stenographically by MICHELE J. LOSURDO, CSR, a notary
public within and for the County of DuPage and State
of Illinois, before JOHN KNITTLE, Hearing Officer, at
18 North County Street, Room 301, Waukegan, Illinois,
on the 19th day of April, 1999, A.D., scheduled to
commence at 9:30 a.m., commencing at 9:30 a.m.

1 APPEARANCES:

2

3 HEARING TAKEN BEFORE:

4 ILLINOIS POLLUTION CONTROL BOARD,
100 West Randolph Street
5 Suite 11-500
Chicago, Illinois 60601
6 (312) 814-6923
BY: MR. JOHN KNITTLE

7

LAWRENCE C. SWEDA
8 923 N. County Street
Waukegan, Illinois 60085

9

Appeared on behalf of the Complainant;

10

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
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BY: MR. THOMAS LUPO and
13 MS. SUSANNAH A. SMETANA

14 Appeared on behalf of the Respondent,
Outboard Marine Corporation;

15

DIVER, GRACH, QUADE & MASSINI
16 111 N. County Street
Waukegan, Illinois 60085
17 BY: MS. HEIDI J. AAVANG

18 Appeared on behalf of the Respondent,
City of Waukegan.

19

20 ALSO PRESENT:
Mr. Joseph S. Moran, Outboard Marine Corporation

21

22

23

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1 HEARING OFFICER KNITTLE: My name is John
2 Knittle. I'm a hearing officer with the Illinois
3 Pollution Control Board. Today's date is April 19th,
4 1999. It is 9:30 and we are having a hearing in
5 PCB 99-38, Lawrence C. Sweda versus Outboard Marine
6 Corporation and the City of Waukegan.

7 We're are having this hearing in accordance
8 with the Illinois Environmental Protection Act and
9 Pollution Control Board Rules. Specifically, the
10 hearing will be conducted in accordance with
11 Section 103.202 and 103.203. At this point, I'd like
12 to have the parties identify themselves for the
13 record starting with the Complainant, Mr. Sweda.

14 MR. SWEDA: My name is Lawrence C. Sweda.

15 HEARING OFFICER KNITTLE: The Respondents?

16 MR. LUPO: Thomas D. Lupo for Outboard
17 Marine Corporation.

18 MS. SMETANA: Susannah A. Smetana,
19 S-m-e-t-a-n-a, for Outboard Marine Corporation.

20 MS. AAVANG: Heidi J. Aavang, A-a-v-a-n-g,
21 for the City of Waukegan.

22 HEARING OFFICER KNITTLE: Anybody else from
23 the Respondents?

24 MR. MORAN: My name is Joseph S. Moran and

1 I'm senior counsel for Outboard Marine Corporation.

2 HEARING OFFICER KNITTLE: And to the best
3 of my recollection, you have filed an appearance in
4 this case, correct?

5 MR. MORAN: I have.

6 HEARING OFFICER KNITTLE: Thank you very
7 much. We're going to start out addressing motions
8 preliminary to the hearing. I have in front of me
9 first and second motions in limine of Outboard Marine
10 Corporation. Mr. Sweda, you haven't responded to
11 these motions to the best of my knowledge. You
12 haven't filed anything with the Board, have you?

13 MR. SWEDA: No, I haven't responded because
14 there wasn't an awful lot of time to do that.

15 HEARING OFFICER KNITTLE: All right. I'm
16 going to allow you to respond orally now. You're
17 with in your seven-day response time if you so
18 desire. Do you have any response to these motions?

19 MR. SWEDA: Yes, I just want to indicate
20 that information was provided in the form of my
21 answers or responses to interrogatories for the City
22 and also that there was contact from the Respondents
23 to -- I estimate about a two hour, hour and a half to
24 two hour deposition that was taken, at which I was

1 present on the telephone, a conference deposition of
2 Mr. Zack that occurred about a week and a half ago.

3 And at that time, with that plus the answer
4 to the interrogatories and discussions that occurred
5 over the last year and a half were substantial
6 enough, I think, to not limit his testimony. I don't
7 have copies of those depositions because I didn't
8 make them, but I was there on the phone, so I object
9 to their motions do deny him.

10 HEARING OFFICER KNITTLE: Anything else,
11 Mr. Sweda?

12 MR. SWEDA: No.

13 HEARING OFFICER KNITTLE: Is there a
14 response?

15 MR. LUPO: We would like to add,
16 Mr. Knittle, that the answers to interrogatories
17 simply continuously identified Mr. Zack and said
18 things like concerns and nature -- actually, I'd like
19 to read into the record, it says very little. And
20 then during his deposition he said I'm not prepared.
21 I've done nothing but go back and look at a file from
22 20 years ago and then said, well, this could be the
23 case. That could be the case and so forth and
24 concluded with there are no affirming answers,

1 responses or opinions that he could share and as
2 stated in our motion, we --

3 HEARING OFFICER KNITTLE: Which motion,
4 sir?

5 MR. LUPPO: In our first motion, we stated
6 that we even asked for an extension of time in order
7 to give some deference to the citizen complainant and
8 raised the issue a number of times over including
9 during status conferences that we are seeking these
10 opinions in order to prepare. And we received a
11 response from Mr. Zack again just -- I'm sorry --
12 Mr. Sweda again just identifying Mr. Zack as his
13 witness and stating he may share whatever opinions he
14 gives or he formulates on the day of the hearing.
15 And so we renew our -- we stand behind our motion in
16 limine that we have no notice and no information of
17 Mr. Zack's opinions other than perhaps his
18 inclinations.

19 HEARING OFFICER KNITTLE: Ms. Aavang?

20 MS. AAVANG: Basically, just reiterating as
21 recent as March 25th, Mr. Zack had indicated in his
22 deposition that he had not formulated a complete
23 opinion because he wanted to come to this hearing to
24 hear testimony and perhaps have an opportunity to

1 take some tests himself and that is all we were
2 given, nothing even to indicate what type of testing
3 procedure he was going to utilize but presumably it
4 would be similar to what is standard in the industry,
5 but again the lack of any concrete information as to
6 his opinion.

7 HEARING OFFICER KNITTLE: Thank you.
8 Mr. Sweda, do you have anything else to add?

9 MR. SWEDA: Yeah, I have the point being
10 that during the deposition and I can't go through the
11 whole thing, it's on the record, some record, that --
12 I mean there was even a question -- the attorney that
13 questioned Mr. Zack regarding the testing that was
14 performed by Outboard Marine and the City that they
15 will be using in this hearing. And there was a
16 rather extensive questioning period of Mr. Zack
17 regarding that testing which occurred during that
18 deposition.

19 It was not a quick and easy deposition. It
20 was almost characterized as -- it was nothing there
21 and that it didn't last for two hours and again
22 Mr. Zack is also a public servant. He's not a paid
23 consultant or anything like that. All I'm saying is
24 that there was substantial information provided

1 through that and he was doing nothing other than
2 being honest about it and I was trying to do my best
3 in terms of presenting what he would do in his
4 testimony.

5 HEARING OFFICER KNITTLE: Mr. Lupo, you
6 look like you have something else to say.

7 MR. LUPO: Well, I just wanted to read into
8 the record the responses that Mr. Sweda has referred
9 to.

10 HEARING OFFICER KNITTLE: Mr. Sweda, do you
11 have any objection to that?

12 MR. SWEDA: I would wish that Mr. Zack
13 would be here and I did not provide myself a copy of
14 that.

15 HEARING OFFICER KNITTLE: I'm going to
16 allow you to read it in.

17 MR. LUPO: The response that was filed on
18 April 6th, 1999 by Mr. Sweda, it's entitled
19 Complainant Witness List and Expert Opinions. I'll
20 refer solely to the paragraph addressing Mr. Zack.

21 HEARING OFFICER KNITTLE: Can you read me
22 the paragraph?

23 MR. LUPO: Yes, I will. It's not numbered,
24 but it's the fourth full paragraph on this page.

1 Greg Zack, Noise Advisor, Illinois Environmental
2 Protection Agency, P.O. Box 19276, Springfield,
3 Illinois, 62794-9276, phone (217) 785-7726. A copy
4 of Greg Zack's subpoena provided earlier to all
5 parties will testify on his knowledge of 99-38 as
6 noise advisor with IEPA including testing presented
7 during the April 19th and 20th, 1999 hearings.
8 Propane cannon noise evaluations parentheses if
9 completed close parentheses will be presented.

10 And then proceeding to the next one. It's
11 dated March 4th, 1999. Received by the Board.
12 Stamped and received March 5th, 1999. It appears to
13 be a supplemental response to a letter from
14 Ms. Heidi J. Aavang delivered on February 26th, 1999,
15 page 1. Again, the paragraphs are not numbered.
16 It's at the bottom of the second page under a cover
17 letter. Re: Zack, I phoned Mr. Zack on Monday
18 March 1, 1999 with the request of Ms. Aavang and sent
19 a copy of Ms. Aavang's letter. I requested a
20 response to me as soon as possible.

21 We would state that we still have not
22 received anything. We're not aware of any testing
23 that's been done and we think in fairness and in
24 light of the most applicable procedure rules, that

1 we're really entitled to that in order to prepare and
2 present our case in our defense.

3 HEARING OFFICER KNITTLE: Thank you,
4 Mr. Lupo. Ms. Aavang, do you have anything else?

5 MS. AAVANG: No.

6 HEARING OFFICER KNITTLE: I'm going to deny
7 both motions in limine. I'm going to -- of course,
8 you'll be able to make any objections to the
9 testimony that he does provide at hearing and I'll be
10 willing to entertain any objections at that point in
11 time; however, I'm going to deny both motions. This
12 is a citizen complainant and the evidentiary
13 standards before the Pollution Control Board are a
14 little bit less strenuous than before a certain
15 court.

16 So let's move on from there. Mr. Sweda,
17 you just made an oral motion, I take it, before the
18 hearing started. Do you want to make that now? This
19 is about -- what is it Barbara Lopez?

20 MR. SWEDA: Barbara Lopez.

21 HEARING OFFICER KNITTLE: If you could
22 state that for the record.

23 MR. SWEDA: I have a request that Barbara
24 Lopez at 927 North County Street had planned on and

1 does plan on attending the hearings; however, she had
2 to go for a cardiac stress test up in Milwaukee. She
3 had two open heart surgeries in the last five years
4 and her husband is sick and this kind of was
5 something that was coming up, but just came up at the
6 wrong time. She can make it tomorrow. She can't
7 make it today.

8 I met with her last night outside in the
9 backyard and just said be ready for the hearing. And
10 she indicated that she had to go for the cardiac
11 stress test in Milwaukee. I said how long does it
12 take and she says it takes all day basically. I said
13 good luck and take it easy and I'll ask or request
14 that you can get to go on until Tuesday.

15 I said I don't know that my witnesses and
16 testimony will take all day which would be a little
17 bit confusing and I'll try to at least make that
18 request. It was important to my case and still is.
19 I will simply forward that request on to you.

20 HEARING OFFICER KNITTLE: Any response?

21 MR. LUPO: We would object. We feel we
22 have a right to see the case that's going to be
23 presented against our clients. We've incurred
24 significant expense preparing for the various

1 witnesses in our defense here. We have -- the
2 presentation of the Complainant's evidence should be
3 presented first. It's consistent with the Board's
4 rules and we don't think it makes sense to adjourn
5 the hearing. We've brought people and experts in
6 including a couple from out of town.

7 HEARING OFFICER KNITTLE: Let's let
8 Ms. Aavang respond if she has any response.

9 MS. AAVANG: My only concern at this point
10 would be, again, the break that it's going to pose.
11 I also have people whose schedules have been
12 rearranged to allow them to come in either this
13 afternoon or tomorrow morning and I'm not certain at
14 this point what effect this may have in terms of
15 rearranging them.

16 I can appreciate Ms. Lopez's situation, but
17 I would note that this date has been known for some
18 time and I don't know -- stress tests are generally
19 scheduled ahead of time. They're usually not
20 scheduled just a day in advance. That's my only
21 position.

22 HEARING OFFICER KNITTLE: Mr. Sweda, what
23 are you -- what is Ms. Lopez going to testify for
24 you?

1 MR. SWEDA: The same basic kind of
2 testimony that Mr. Neff and myself would be doing,
3 but mine's just a little bit more extensive. So as I
4 explained to her, I said if it's not ruled that we
5 can do it, then that's fine. I didn't know what the
6 procedures were whether she could -- I assumed, but
7 I'm not a lawyer and that's very evident that she
8 could just go in tomorrow and they can start their
9 presentation, just do her presentation separate which
10 would take maybe a half hour. I don't know if that's
11 possible, so I just said if that's possible, I'll do
12 that, but if that's not the proper procedure legally,
13 then I accept that.

14 HEARING OFFICER KNITTLE: Is there anything
15 else from the --

16 MR. SWEDA: I didn't want to hold up their
17 case.

18 HEARING OFFICER KNITTLE: Understood. Is
19 there anything else from the Respondents?

20 MR. LUPO: No, Mr. Knittle -- well, I guess
21 we add one thing that is we've had a couple instances
22 here -- we understand fully there is a citizen
23 complainant and we tried to accommodate a number of
24 things including our request for an extension of time

1 based primarily to get information in another
2 instance on the motions upon which you've just ruled,
3 so we feel there comes a point where fairness
4 intercedes on the other side.

5 HEARING OFFICER KNITTLE: Section 103.202
6 does allow me to modify the order of the hearing for
7 a good cause, but I'm not going to do that. I don't
8 think there's good cause here. This has been
9 scheduled for a long time and it does seem that this
10 was something that could have been scheduled at a
11 different time by Ms. Lopez, so I'm going to deny
12 your oral motion, Mr. Sweda. If, in fact, your case
13 takes longer than today, you can do her tomorrow, but
14 at this point in time, I'm going to deny that. Any
15 other motions? Are there any other motions
16 preliminary to the hearing?

17 MR. LUPO: Just two points.

18 HEARING OFFICER KNITTLE: Motions or
19 points?

20 MR. LUPO: Points actually, Mr. Knittle,
21 and I don't have a further motion.

22 HEARING OFFICER KNITTLE: Mr. Sweda, do you
23 have any further motions.

24 MR. SWEDA: No.

1 HEARING OFFICER KNITTLE: What do you have
2 to say, Mr. Lupo?

3 MR. LUPU: Number 1, that we do plan to
4 renew our objections concerning Mr. Zack as we
5 proceed.

6 HEARING OFFICER KNITTLE: Understood.

7 MR. LUPU: Secondly, that we'd like to -- I
8 don't know if there's a certification to go before
9 the Board, I'm not required -- I'm not aware of one,
10 but to state our taking exception to the ruling and
11 renew it at a later time.

12 HEARING OFFICER KNITTLE: Definitely, I
13 think you can make that objection to the Board. I
14 think you can actually have a motion to overrule the
15 hearing officer's decision and I think you can do
16 that at a later time to the Board. Okay. If that's
17 it, then let's proceed with the hearing. Mr. Sweda,
18 it is -- do you have any opening statement at this
19 point in time.

20 MR. SWEDA: Yes, I do have an opening
21 statement that I worked on.

22 HEARING OFFICER KNITTLE: Now is the time
23 for it, so it is your turn to make your opening
24 statement.

1 MR. SWEDA: I prefer to sit. I have
2 difficulty --

3 HEARING OFFICER KNITTLE: You can
4 definitely sit. Are you okay to do this now,
5 Mr. Sweda? Do you need a second?

6 MR. SWEDA: I'm just getting down here.

7 MR. LUPO: If we may in the meantime raise
8 another point of order?

9 HEARING OFFICER KNITTLE: Sure.

10 MR. LUPO: We believe that the Complainant
11 should present his case in whole and bear us the
12 burden of proof in this matter and we are hopeful the
13 same issue doesn't come up again where we have to
14 object to Mr. Zack's testifying at a later time
15 especially given the types of notice we received that
16 he's going to form opinions while here and so forth,
17 so I guess --

18 HEARING OFFICER KNITTLE: Your point is
19 made on the record. I'm not going to make a decision
20 until something actually comes out, but if Mr. Zack
21 is able to present testimony today, I'm going to
22 allow his testimony. If in fact he doesn't show up
23 and Mr. Sweda makes a motion to continue the hearing,
24 that will be a separate issue and I'll rule on that

1 then.

2 MR. LUPO: Thank you.

3 HEARING OFFICER KNITTLE: Mr. Sweda?

4 MR. SWEDA: Title 35 Environmental

5 Protection Act, Subtitle H, Noise, under that section

6 900.101, there's definitions. Noise pollution: The

7 emission of sounds that unreasonably interferes with

8 the enjoyment of life or any lawful business

9 activity. Further, impulsive sound: Either a single

10 pressure peak or a single burst of multiple pressure

11 peaks for a duration usually less than one second.

12 Examples of impulsive sound sources are a drop-forge

13 hammer and explosive blasting.

14 I am not a biologist or an ornithologist.

15 I am not an attorney, sound engineer or pyrotechnic

16 specialist. I am a rather normal peaceable and

17 friendly resident of the near north side of Waukegan

18 and have been for 25 years. I was born and raised in

19 Waukegan. Other than going to school and living in

20 Ohio for three years, I came back because Waukegan

21 was a nice place to live.

22 The only reason I am here today before the

23 Illinois Pollution Control Board is to formally

24 present my noise pollution complaint along with

1 supporting testimony. Specific sections of the
2 Environmental Protection Act and Board regulations on
3 noise which I believe have and continue to be
4 violated by Outboard Marine Corporation and the City
5 of Waukegan are 415 Illinois Combined Statutes 5-24;
6 35-Illinois Administrative Code, Subtitle H,
7 Chapter 1, Section 900.102 and 901.104. These
8 sections cover acts prohibited, prohibition of noise
9 pollution and impulsive sound all dealing with noise.

10 I am on the record in the Waukegan News Sun
11 article that I have -- quote that I have no ill-will
12 or quarrel -- that's in brackets -- with OMC or the
13 City of Waukegan unquote. I'm respectful of health,
14 economic, safety issues that may be affected by the
15 gull's presence at the Waukegan lake front. I am
16 also aware that there are other systems besides
17 propane cannons that can be successfully used to
18 discourage gulls and other various birds that fall.
19 My only -- my one and only issue is noise. That's
20 it. Thank you.

21 HEARING OFFICER KNITTLE: Thank you,
22 Mr. Sweda. Do you have an opening statement from the
23 Respondents?

24 MR. LUPO: Yes, Mr. Knittle. Members of

1 the Board, Mr. Hearing Officer and Mr. Sweda, the
2 evidence will show that OMC's gull control program
3 does not exceed the Board's noise standards nor does
4 it constitute an unreasonable unfairness with the
5 enjoyment of life and lawful business activity.

6 The evidence before the Board will clearly
7 defeat these allegations, rather, the true context of
8 this matter relates to OMC's efforts to address the
9 true nuisance and public problem, that thousands of
10 migratory sea gulls had moved onto OMC's property in
11 the mid-1990's. Within a few short years, the gulls
12 became an escalating safety, health and property
13 damage problem to OMC, its employees and their
14 property.

15 The short story is as follows: The
16 evidence will show that literally thousands of sea
17 gulls concentrated on OMC's property. Within a few
18 short years, the gulls established a colony, nesting
19 and growing in number to over 5,000 gulls on a
20 contaminated section of OMC's property which bordered
21 OMC plants and office buildings and is across from
22 the public beach.

23 The gulls began as a true nuisance and
24 became a concern and threat to OMC's employees'

1 health and safety, their cars and property, OMC's
2 buildings, the nearby public beach and to parking
3 lots and public road safety. OMC sought to act to
4 its employees' and the public's benefit. It sought
5 expert advice hiring Dr. William E. Southern, an
6 ornithologist with over 30 years experience in this
7 feild.

8 OMC followed Dr. Southern's advice,
9 favoring a more humane, less fatal to the gulls
10 approach for removing literally thousands of gulls
11 that Dr. Southern will state are tenaciously attached
12 to the site. You will hear more about Dr. Southern's
13 observations and recommendations in a few moments
14 including the use of the propane cannons at issue
15 here.

16 You will hear that OMC halved the number of
17 cannons recommended for use by Dr. Southern and
18 remains at this lesser number to this day. While
19 Mr. Sweda bears the burden of proof in this matter,
20 OMC will present evidence that clearly establishes
21 that his allegations are unfounded. First, Mr. Sweda
22 who lives a mile away from the noise source alleges
23 that OMC's use of the propane cannons violates the
24 Boards numerical noise standards. This is untrue.

1 You will hear the Respondent's unrefuted
2 evidence that the Board's numerical standards are not
3 violated. The Respondents in this matter commission
4 noise level readings at their own expense. These
5 readings, taken by Mr. Brian Homans, an individual
6 with two decades of experience in field noise level
7 readings and analysis, were taken on two separate
8 days from a location just short of Mr. Sweda's
9 property.

10 Each result proves the cannon noise to be
11 below the Board's standard. In fact, the results
12 from the optimal conditions set forth or required in
13 the applicable ANSI methodology adopted by the Board,
14 shows the cannon sound to be less than 50 decibels
15 far below the Board's applicable 56 decibel standard.
16 Mr. Homans will testify that the cannon noises were
17 at times difficult to hear and distinguish from local
18 background sounds and were at times less than the
19 normal -- were at all times less than a normal
20 conversational sound level.

21 Second, Mr. Sweda alleges that OMC's use of
22 propane cannons unreasonably interfered with his
23 enjoyment of life as well as affecting the lives of
24 the neighborhood animals. The evidence presented by

1 OMC and the City will strongly refute the statements
2 of Mr. Sweda and his other witness to this effect.

3 A number of local citizens, local business
4 operators and owners and OMC and city water plant
5 employees that live or work much closer to the noise
6 source than Mr. Sweda and his witness will point out
7 that not only are the cannons sounds of no
8 consequence to their personal enjoyment of life and
9 their conduct of their businesses including getting
10 outdoor and indoor work done, speaking outdoors in
11 normal tones, relaxing, reading, gardening and
12 otherwise enjoying the outdoors, but that the cannon
13 sounds is providing a service in addressing a major
14 problem to the public.

15 As stated, the Board will hear evidence of
16 the fact that the gulls had become a nuisance and
17 something more. The gulls began to gather on OMC's
18 property in the mid-1990's. By 1996 and 1997, the
19 gulls numbered in excess of 5,000. The gulls damaged
20 rooftops, omitted foul odors that penetrated area
21 buildings, swarmed around and dive-bombed employees,
22 created an atmosphere where employees frequently
23 complained and expressed health and safety concerns,
24 caused damage to the paint and coating to cars,

1 painted parking lot's cars and pedestrians with their
2 droppings.

3 It was an atmosphere where literally
4 thousands of gulls would screech in a din that
5 presented normal outdoor conversation and where the
6 gull chicks filled the roads and parking lots, both
7 dead and alive, obstructing traffic and parking.
8 These aimless chicks were faithfully defended against
9 innocent pedestrians by the screeching and
10 dive-bombing adult gulls.

11 Concerns about disease also arose.
12 Dr. Southern will explain that this concern is not an
13 empty threat. Against these almost sieged
14 conditions, OMC researched and attempted a number of
15 measures on its own. Realizing that the problem only
16 seemed to grow in magnitude, they sought professional
17 advice hiring Dr. Southern. Dr. Southern will tell
18 the Board that this gull colony was incompatible with
19 the OMC location. He will discuss the difficulties
20 in moving a gull colony once the gulls have nested
21 even one season.

22 He will address their stubborn tenacity for
23 a site and the difficult process of prompting them to
24 move. Dr. Southern will describe the various methods

1 that people considered and their pros and cons which
2 are often different in reality than practice.
3 Finally, he will present his recommendations, his
4 reasoning and his point that this approach presents
5 the humane method for moving and not destroying a
6 large number of adult gulls, their chicks, their eggs
7 and the embryos.

8 He will opine that this predominantly
9 nonfatal approach normally will take three to four
10 years to work. He will point out that absent the
11 cannons and under these conditions, a much greater
12 level of gull destruction will be necessary. OMC
13 adopted Dr. Southern's advice even reducing the
14 recommended number of pyrotechnic devices by half,
15 choosing instead to introduce other varying stimuli
16 at various times at increased expense in an effort to
17 prompt the gulls to move elsewhere.

18 You will hear that OMC sought and received
19 a permit from the United States Department of the
20 Interior's Fish and Wildlife Service for its
21 activities, that this process included a visit from
22 department officials that resulted in advice in
23 support for OMC's proposed approach.

24 Finally, the Board will hear that OMC does

1 not intend to follow this program indefinitely but
2 perhaps for the next two years or so that
3 Dr. Southern predicts it will take to break the
4 birds' tenacity for this sight and to begin nesting
5 elsewhere. You will hear that OMC hopes to reduce
6 the number of cannons in use over the next few weeks
7 and will soon begin their firing later in the day as
8 the sport and house boats begin to fill the harbor.

9 OMC will also note that this is not a
10 year-round or summer-long process and practice. The
11 cannons will cease before the summer equinox and
12 possibly much sooner depending upon the results and
13 when the gulls stop attempting to nest on the
14 property. We are confident that the Board will see
15 the Respondents -- that Respondents' evidence proves
16 that while Mr. Sweda's allegations may be his own
17 strong opinion and perhaps obsession, they're
18 unfounded under the facts of law.

19 HEARING OFFICER KNITTLE: Thank you,
20 Mr. Lupo. Ms. Aavang, do you have anything for the
21 City?

22 MS. AAVANG: Very briefly if I may. As has
23 already been alluded to by Mr. Lupo, this is
24 basically a two-stage complaint, the first being that

1 the noise levels have been exceeded as provided for
2 in the standards and as Mr. Lupo has indicated, Brian
3 Homans has performed testing in that manner following
4 the standards and procedures and has found that there
5 is no violation.

6 Further, I would note that that is with --
7 well, as Mr. Sweda puts it we like to think of
8 ourselves as a nice area. We are very much a
9 municipality. We have industrial. We have a variety
10 of noise factors and indeed in the summer the cannons
11 would be well outweighed by the train station which
12 is right down the street and the boaters when they
13 take full swing in the summer.

14 The second issue becoming the nuisance
15 value, the gulls themselves are a nuisance and indeed
16 pose a very real concern both to the businesses along
17 our lake front but also to the City of Waukegan
18 itself. In 1997 you will hear testimony that the
19 beach had to be closed numerous times due to fecal
20 material severely contributed by the gull population
21 not only the fecal material but also the gulls
22 themselves posing a problem to individuals wishing to
23 use the beach.

24 You'll also be hearing testimony from a

1 lifeguard who has likewise been someone who's been to
2 the beach a number of years and has worked on the
3 beach for a number of years of the factor that he,
4 himself, has seen a significant increase in the '90's
5 in the gulls and has noted a significant decrease in
6 the problem once the cannon measures and other
7 measures that were undertaken to make the gulls roost
8 elsewhere.

9 Finally, I would add that the cannons have
10 been a success along with other measures as you'll
11 hear from the testimony of Mr. Southern and continue
12 to be a success and that there are other citizens who
13 feel that the noise, quote/unquote, generated is no
14 worse than the noise generated by the other factors
15 in this community and indeed feel that the benefits
16 created by the dispersal of the gulls outweighs
17 perhaps an occasional noticeable pop in the
18 background. Thank you.

19 HEARING OFFICER KNITTLE: Thank you,
20 Ms. Aavang. Mr. Sweda, it's your case in chief. You
21 can call your first witness.

22 MR. SWEDA: I'll call myself.

23 HEARING OFFICER KNITTLE: Can you swear
24 Mr. Sweda in, please?

1 (Witness sworn.)

2 WHEREUPON:

3 LAWRENCE SWEDA,

4 called as a witness herein, having been first duly

5 sworn, deposeth and saith as follows:

6 DIRECT EXAMINATION

7 HEARING OFFICER KNITTLE: You can proceed

8 any time, Mr. Sweda.

9 MR. SWEDA: I heard you. I'm just --

10 HEARING OFFICER KNITTLE: I haven't said

11 anything yet.

12 MR. SWEDA: You said proceed any time you

13 want to. My name is Lawrence C. Sweda. I live at

14 923 North County Street in Waukegan, Illinois which

15 is just north of here, in fact, on County Street.

16 I'm disabled. I don't work. I had to give that up

17 about 12 years ago. I lived at the house at County

18 Street for 25 years. As I said in the opening

19 remarks, I came back to Waukegan after living in Ohio

20 and that's been a 25-plus years situation. I live at

21 that address with my wife and two dogs.

22 The rest of the testimony I'm about to give

23 is in two parts and I tried to break it up into two

24 different parts, some sort of organization. One --

1 the first one being the effects of noise and two, the
2 second part being a history of the awareness of the
3 noise specifically as it relates to me at 923 North
4 County Street and what I've done over the past almost
5 two years now to address this.

6 I might state here that I'm able to --
7 since I am disabled, I am able to work on this for
8 about an hour a day kind of thing and that's about
9 every other day. It's not something that I can do
10 that I used to be able to work kind of thing. So
11 it's a time-consuming task for myself. I just want
12 to make that a part of this. It's not which was
13 alluded to as an obsession. I was very upset with
14 that statement before. It's simply something that
15 needs to be done.

16 First point or the first part of the
17 testimony: Noise is basically variously described
18 and I variously described the noise that's been
19 referred to today in the hearing and will be referred
20 to continuously through the two days of the hearing.
21 It says noise -- I want to make it a little bit more
22 specific. I variously described it as single or
23 multiple cannons comparable to a 4th of July
24 fireworks display. I also described it as propane

1 cannon noise, blasts, propane guns, loud booming
2 noises, a severe noise problem.

3 I'll refer to -- definitions and things
4 like that will come up again throughout the hearing.
5 Noises began around mid-March and lasted until May of
6 1998 last year. That says 1998 and began this spring
7 on March 4th, 1999. The frequency was from dawn
8 until dusk at random intervals, five second intervals
9 kind of thing to five minutes. It also included a
10 couple of days continued past dusk.

11 I will provide or submit if I can or if
12 this is proper -- I don't know. Do I submit a sheet
13 of paper as stating to that effect?

14 HEARING OFFICER KNITTLE: Are you intending
15 to submit that as an exhibit before the Board?

16 MR. SWEDA: Yes. It was made part of my --
17 I've submitted it to the Board before. I just
18 brought it along just in case you needed -- I brought
19 exhibits along and I wanted to -- they follow the
20 order of my presentation if I could find it.

21 HEARING OFFICER KNITTLE: Yes, Mr. Lupo?

22 MR. LUPO: We don't intend to be
23 unreasonable in terms of Mr. Sweda's testimony.
24 Obviously, he's presenting himself, but to present a

1 document or an affidavit or something in support of
2 something he's testifying to, we don't think it falls
3 in any of the rules of evidence that might apply
4 here.

5 HEARING OFFICER KNITTLE: If Mr. Sweda can
6 lay the appropriate foundation, I'm going to allow it
7 to go in. Mr. Sweda, do you have something you're
8 trying to introduce as an exhibit in front of you
9 now? Have you found it?

10 MR. SWEDA: Yes. These were things that
11 the Board has got copies of and they've got copies
12 of. I didn't know what the procedure is whether
13 those are part of the record or not.

14 HEARING OFFICER KNITTLE: I don't know what
15 it is that you're referring to. Why don't you tell
16 us a little bit about the --

17 MR. SWEDA: It's a notation that I made in
18 real time on May 5th of 1988, that now propane guns
19 last until 10:00 p.m., could not sleep with two fans
20 on high speed and it's just a notation that I made on
21 a piece of paper, a notebook, in my living and I kept
22 it. And I submitted it in as part of my answers to
23 interrogatories and other information to all parties
24 concerned. It's been there for quite some time.

1 I didn't know whether or not -- and since I
2 had no legal advice, I was going on this myself, I
3 said I'll bring these things along and submit them as
4 I go along in my testimony this morning. To my
5 knowledge, I'm the only one that has any exhibits or
6 any information to pass along to be made a part of
7 this hearing.

8 HEARING OFFICER KNITTLE: Would you like to
9 see a copy of that before he offers it before you
10 make any objection, Mr. Lupo, or do you know what
11 he's taking about?

12 MR. LUPO: Just looking over, I'm familiar
13 with the document he's speaking of, but at the same
14 time, the relief he's requesting is the ceasing and
15 desisting of the use of the cannons. And it's not
16 part of our program to be firing cannons in the
17 evening or anything to that effect. So this -- to
18 add the document to his current testimony, we don't
19 believe adds anything.

20 HEARING OFFICER KNITTLE: Ms. Aavang, do
21 you have anything?

22 MS. AAVANG: I have nothing further.

23 HEARING OFFICER KNITTLE: Can I see what
24 you're talking about?

1 MR. SWEDA: It's a real-time note that I
2 made that in fact is a notation that if someone was
3 to make something for the record -- when I was
4 working, I have a record of Larry Sweda on May 5th,
5 1998 from the office of -- is what I did, but this is
6 what I do not working kind of thing. I may make
7 notes in my notebook which I carry around.

8 HEARING OFFICER KNITTLE: Do you have any
9 other objection to this?

10 MR. LUPO: No.

11 HEARING OFFICER KNITTLE: I'm going to
12 allow this in. Are you going to -- I'll mark it as
13 Complainant's Exhibit Number 1.

14 MR. LUPO: Mr. Knittle, we have some
15 labels. We'll be happy to help.

16 HEARING OFFICER KNITTLE: I think I'd
17 rather have an exhibit label if I can.

18 MR. LUPO: We'll be happy to help Mr. Sweda
19 mark his documents.

20 HEARING OFFICER KNITTLE: That would be
21 appreciated. Mr. Sweda, I've accepted this as
22 Complainant's Exhibit Number 1. You can proceed with
23 your testimony.

24 MR. SWEDA: Thank you. This is part one.

1 There are two parts and I'm going on to part one.
2 That's just the introductory part. The noise
3 frequency and duration was such that the following
4 kinds of activities on and in and around my property
5 were not possible, conversing, sitting outside,
6 reading, listening to some music, talking on the
7 phone, cooking. I do a lot of cooking outside that
8 may be early in the spring until late in the fall
9 until wintertime -- entertaining, the people next
10 door do that also. Entertaining, picking up litter,
11 playing with the dog, playing with the neighbor's
12 child, starting the grill, gardening, thinking,
13 resting, sleeping, napping and I had provided
14 responses to activities which I can't find at this
15 time that -- responses to interrogatories which list
16 ad infinitum -- here they are.

17 These are responses to interrogatories that
18 were provided to the parties which contain numerous
19 descriptions. I'm not going to go through the
20 numbers. It was confusing enough to myself and to
21 the parties involved. I'm labeling this as Exhibit 2
22 of activities that were not possible in the realm of
23 noise occurring as constantly and frequently as it
24 was occurring.

1 Rather than sit here and list lots and lots
2 of activities, I thought I would just reference my
3 responses, which were made public to all the parties
4 concerned of things that I could not do, and
5 reiteration of those things in terms of their further
6 questioning of could I be more specific about the
7 activities and I said these are the kinds of things
8 that I could not do. I could reference them.

9 HEARING OFFICER KNITTLE: Are you offering
10 that as evidence, this exhibit?

11 MR. SWEDA: Yes.

12 HEARING OFFICER KNITTLE: Do you want to
13 show the Respondents?

14 MR. SWEDA: They were the responses to
15 interrogatories.

16 MR. LUPO: We ask that he identify
17 specifically so that we're looking at the same one.
18 He probably doesn't have extra copies and we probably
19 have copies, so we'll work that way. We want to be
20 assured we're looking at the same things.

21 MR. SWEDA: Responses to interrogatories, I
22 listed them here.

23 HEARING OFFICER KNITTLE: Can you read off
24 exactly what that is, Mr. Sweda, for the record so we

1 have an idea?

2 MR. SWEDA: They were --

3 HEARING OFFICER KNITTLE: The day that they
4 were filed.

5 MR. SWEDA: 1/13/99, 2/1/99 and 4/4/99.

6 The last one, I think, was a response to

7 Ms. Aavang's --

8 HEARING OFFICER KNITTLE: Is that
9 sufficient to know what he's referring to?

10 MR. LUPO: Maybe just a little slower, but
11 it's sufficient.

12 MR. SWEDA: 2/1/99, 4/4/99 and 1/13/99.

13 They just illustrate a little better what -- rather
14 than me standing here --

15 HEARING OFFICER KNITTLE: Understood. Is
16 there an objection from the Respondents admitting
17 these discovery responses into evidence?

18 MR. LUPO: No objection.

19 HEARING OFFICER KNITTLE: Ms. Aavang?

20 MS. AAVANG: No.

21 HEARING OFFICER KNITTLE: Mr. Sweda, we'll
22 admit those in evidence. Do you have them marked as
23 Complainant's Exhibit Number 2?

24 MR. SWEDA: Just as Exhibit Number 2.

1 HEARING OFFICER KNITTLE: I don't want to
2 make you have to walk up here every time.

3 MR. SWEDA: I can walk.

4 HEARING OFFICER KNITTLE: If it's easier,
5 you can accumulate those at your table and bring them
6 up all at once.

7 MR. SWEDA: I'm winging it because I -- off
8 the record I guess. You know that, right, or do I
9 have to say that every time?

10 HEARING OFFICER KNITTLE: Everything's on
11 the record right now, Mr. Sweda, but if you want to
12 say something, feel free.

13 MR. SWEDA: Okay. I'll be careful now.

14 HEARING OFFICER KNITTLE: Just let me say
15 for the record that I've accepted Complainant's
16 Exhibit Number 2 which this is a response to
17 interrogatories filed on January 13th, 1999,
18 February 1st, 1999 and April 4th, 1999.

19 MR. SWEDA: To go on, if I could?

20 HEARING OFFICER KNITTLE: Yes.

21 MR. SWEDA: I would suggest that these
22 kinds of activities, those ones which I just talked
23 about and submitted to you like reading, cooking,
24 napping, watching the storm come up, that these kinds

1 of activities can be reasonably recognized as parts
2 of well-balanced physical and emotional health for
3 people.

4 Additional effects observed and these were
5 also referred to in the Exhibit Number 2. Also,
6 you'll find reference to effects on dogs, my two
7 dogs, Jasmine and Jordy. They would bolt at the
8 noise. I could not stay outside long with them
9 because they were disturbed by the noise and they
10 were bolting, so time was limited in terms of being
11 out there with both of the dogs. Things got better
12 after the noise stopped that year. Things returned
13 to normal.

14 I observed some animal behavior not as
15 either an ornithologist or biologist or animal
16 technician even. I just have an affinity for
17 animals, large and small, and I just observe them and
18 relate to them, I guess. My observations just from
19 being outside approximately 50 percent of the day,
20 that's less in the wintertime and less in the early
21 spring, but I go into the garage because it's a
22 little bit warmer in there, but it's just nice being
23 outside because the wife's usually at work and it's
24 something that I do and it's relaxing out there.

1 Anyway, the birds -- gulls were screeching
2 when the cannons were going off. They do not
3 normally screech as much as they normally screech
4 when cannons are going off and they fly into the west
5 and to the north normally from what I observed. We
6 will see gulls that are feeding on bugs and insects
7 occasionally, not occasionally, but a lot. I assume
8 that that's part of their food.

9 Geese were not flying. There's a flock of
10 geese that normally come to the -- I call them the
11 local geese, as I tell people in the neighborhood or
12 neighbors that come and fly down to the lake front in
13 the morning. During the propane cannon season, it
14 does not -- they do not appear to be there as
15 prevalent as other times of the year because there's
16 a point in the morning where they come down. There's
17 a point in the evening where they go back and that's
18 broken.

19 More pigeons that are flying -- and ducks
20 that are flying away from the lake when the cannons
21 are going off. Jays and crows also just happen to
22 be -- if you spend 12 years outside -- not 12 years
23 continuously, but you just observe them. Jays and
24 crows are less numerous during the season of the

1 propane cannons. When the noises aren't there, then
2 they're a little bit better out there, but normally
3 they're just not around.

4 Squirrels' behavior, newborns -- I
5 mentioned that and it's also contained in my
6 materials that I submitted. Newborns don't come
7 down -- they don't come down as newborns, but they
8 come down as early squirrels. Normally they'll come
9 down in mid to late spring. They aren't coming down.
10 I mentioned that in the interrogatories that as I
11 observed them, they come down after the noise stops
12 later on in June or July and it's normal that they
13 would be coming down in April and in May sometime and
14 even they would jump and bolt at the sounds of the
15 cannons as well as the birds and the jays.

16 Also, aftereffects -- aftereffects is sort
17 of like aftershocks. I described that in my
18 deposition, I think, to Respondents or at least part
19 of it that it took a couple of months to be able to
20 relax outside when I went outside because the
21 anticipation of -- I didn't control the cannons.
22 It's just going outside when it stopped at the end of
23 May and into June and July.

24 It took until late July to be able to go

1 out even the back door and go out in the backyard and
2 sit and relax and have a cup of coffee and do some
3 gardening or just sit there and relax and read a book
4 because you anticipated the noise because it was so
5 loud and continuous for such a long period of time.
6 So to get back to normal, there was the aftereffects
7 of it that took a couple months at least to get
8 there.

9 Part two is what I'm going to get into now.
10 It's the history of the awareness of the noise for
11 lack of better words. Again, I said it started in
12 about mid-March of 1998. It started the cannons.
13 What I did at that time in mid-March, not knowing
14 where the noise was coming from, my first response
15 was calling the police department after a couple of
16 days. And I called and talked to a dispatcher, I
17 assume that that's who I talked to on a nonemergency
18 line.

19 They didn't know an awful lot, but they did
20 look into it and I think I called them a couple days
21 later and talked to them again and they said that,
22 when I called the police department, that that was
23 possibly from what they knew that Outboard Marine
24 Corporation was trying to scare away some geese from

1 their property on the lake front.

2 I would like to submit two items, a letter
3 and a response to the secretary of the U.S.
4 Department of Health and Human Services, Donna
5 Shullalah, that I wrote. The main reason I'm asking
6 to submit this is because it gives a fairly good --
7 it did at the time and it still does -- it gives a
8 fairly reasonable description of what I'm going over
9 now in terms of the awareness of what the
10 progression -- some of it is in terms of major points
11 as well as a response from the U.S. Department of
12 Health and Human Services Agency to my concerns about
13 the noise. This was also given to your Board and to
14 the -- it also contains the response from the
15 Department of -- the Environmental Protection Agency
16 in Washington, D.C.

17 HEARING OFFICER KNITTLE: Thank you,
18 Mr. Sweda. Mr. Sweda has handed these documents to
19 Mr. Lupo.

20 Mr. Lupo, do you have any objection?

21 MR. LUPO: No objection.

22 HEARING OFFICER KNITTLE: Ms. Aavang, do
23 you have any objection?

24 MS. AAVANG: The only objection I would

1 have, Your Honor, is to the response by Ms. Shullalah
2 because she's not here to testify to it. You know, I
3 don't know what she might say if she heard more
4 information. That's my only concern.

5 If you're going to admit it solely for the
6 purpose of the effect that he wrote to Donna
7 Shullalah indicating what the problem was and she
8 wrote a response back, her response being simply that
9 she acknowledged receipt of the letter, I have no
10 problem with that. It's only going into the contents
11 of it. Do you understand my --

12 HEARING OFFICER KNITTLE: I understand your
13 objection.

14 MR. SWEDA: The only --

15 HEARING OFFICER KNITTLE: Hold on a second,
16 Mr. Sweda.

17 Does Outboard Marine Corporation have
18 something else? Do you have additional comments,
19 Ms. Aavang?

20 MS. AAVANG: Well, the only thing that they
21 showed me what I was presuming was some other
22 correspondence. Apparently, all this letter says is
23 that they don't have jurisdiction. So I guess --

24 HEARING OFFICER KNITTLE: You are

1 withdrawing your objection?

2 MS. AAVANG: I'm withdrawing my objection.

3 Thank you.

4 HEARING OFFICER KNITTLE: We'll admit that.

5 I don't know exact -- Mr. Lupo, do you have something

6 else?

7 MR. LUPO: I'd just like to clarify for the

8 record that there's no actual response from

9 Ms. Shullalah, but there is a response from a Kenneth

10 Feith, F-e-i-t-h, at the U.S. EPA. I don't know if

11 the two go together -- yes, it does refer back to

12 Ms. Shullalah's letter. We have no objection.

13 HEARING OFFICER KNITTLE: You have no

14 objection to those exhibits as offered? Okay.

15 Mr. Sweda --

16 MR. SWEDA: All I can say is the EPA

17 responded on behalf of -- since it was referred to

18 them from Donna Shullalah's office.

19 HEARING OFFICER KNITTLE: Understood. I'm

20 going to admit them. Let's just note for the record

21 we're admitting what's going to be called

22 Complainant's Exhibit Number 3, which is a letter

23 from Donna Shullalah consisting of three pages -- a

24 letter to Donna Shullalah, excuse me, of the U.S.

1 Department of Health and Human Services consisting of
2 two pages and response from Kenneth Feith to
3 Mr. Sweda. Mr. Sweda, you can resume.

4 MR. SWEDA: By late March, I'm thinking
5 that I should try and be a reasonable person trying
6 to figure out how to proceed since I didn't hear
7 anything from back from the police department. The
8 noise still continued and I called my alderman who
9 happens to be Alderman Tempest where I live in my
10 ward.

11 I made three or four calls and I talked to
12 him three or four times about the noise and he said
13 he'd check things out. That's also described in that
14 letter to Shullalaha. That's why I submitted that
15 one also. It's sort of the outlying of the process
16 that I tried to go through. I tried to spend time
17 with the alderman.

18 I also talked to the public affairs staff.
19 I don't have the names. It was a man and a lady at
20 Outboard Marine Corporation on the phone. I didn't
21 make any notations other than I made three or four
22 calls and talked to them during the period of March
23 and April possibly even into the first or second week
24 in May just asking them what they were doing and what

1 else was happening. And whether or not they could
2 stop the noise because of the irritation that was
3 going on.

4 At that time, I also had found Mr. Zack --
5 on a series of phone calls that I made just simply
6 trying to find out if there was anybody responsible
7 for dealing with a complaint such as mine. At that
8 stage, it wasn't even a complaint. I was still
9 talking with OMC and the City through the alderman.
10 I never heard again back starting in May from the
11 alderman, Mr. Tempest, and I took that as meaning
12 that the concerns over the noise were no longer his
13 concerns. I can't speak for him, but that's what I
14 had to assume because I -- at least a month passed by
15 where I heard nothing and he was trying to meet and
16 he had a couple meetings with OMC officials to try to
17 discuss my concern as well as ones that he
18 indicated -- Mr. Tempest indicated to me that he had
19 heard other people --

20 MS. AAVANG: I'm going to object at this
21 point to hearsay as to what Alderman Tempest may have
22 said.

23 HEARING OFFICER KNITTLE: Mr. Sweda?

24 MR. SWEDA: I'm just reporting what I

1 heard. I understand.

2 HEARING OFFICER KNITTLE: I'll sustain that
3 objection.

4 MR. SWEDA: Anyway, as I was saying, I
5 finally found after about two weeks of searching
6 governmental agencies responsibilities that I found
7 my way to the IEPA and I found Mr. Zack and I began
8 talking to him. At that point in time, there was no
9 complaint. I didn't know that I would be filing a
10 complaint. It was just talking to him about what I
11 could possibly do or was he aware of it -- becoming
12 aware of what the state does or could do in terms of
13 any concerns that I had regarding that. And that
14 started in April -- April-ish or May-ish.

15 When the noise -- the letter to
16 Ms. Shullalaha was around May 5th, I think it was, I
17 had also sent letters to Mr. Durkin, Mayor Durkin,
18 the Mayor of Waukegan and I think we're on four -- to
19 Mayor Durkin just pointing out problems with the
20 noise as I pointed them out to them. I'll read just
21 a couple sentences from the letters and just ask them
22 to be submitted as exhibits.

23 HEARING OFFICER KNITTLE: Mr. Sweda, why
24 don't we let Mr. Lupo take a look at them first and

1 Ms. Aavang as well. Any objection?

2 MR. LUPPO: We have no objection.

3 MS. AAVANG: No objection.

4 HEARING OFFICER KNITTLE: Those will be
5 submitted as Exhibit 4 and Mr. Sweda, you can go
6 ahead and read from those.

7 MR. SWEDA: Yeah, I'll just read from them.

8 Dear Sir, to Mr. Durkin, William Durkin, and to
9 Mr. David D. Jones, President and CEO of Outboard
10 Marine Corporation, the purpose of this letter is to
11 bring your attention to a severe noise problem from
12 your lake front property respecting adjacent
13 property, people domestic and maiden animals. As of
14 April 23rd, I and many others have been living with
15 this noise more than four weeks. In the letters -- I
16 won't read the one to Mr. Jones because it was
17 essentially the same. I ended them in the spirit of
18 one good neighbor to another, I ask that you solve
19 this problem in the shortest amount of time possible.

20 HEARING OFFICER KNITTLE: And for the
21 record, we're admitting two letters. One to William
22 Durkin and one to David Jones, both from Mr. Sweda
23 and both unsigned. I take it these are printed off
24 from your computer, Mr. Sweda?

1 MR. SWEDA: No. They're off just a copy
2 machine at a gas station.

3 HEARING OFFICER KNITTLE: There's no
4 objection to these exhibits, so they will be
5 admitted. You can proceed, Mr. Sweda.

6 MR. SWEDA: Thank you. The next thing I'd
7 like to present is a response that I received on
8 May 1st from Outboard Marine Corporation.

9 HEARING OFFICER KNITTLE: Mr. Lupo, I think
10 Mr. Sweda's trying to hand that to you.

11 MR. LUPO: Thank you. No objection.

12 HEARING OFFICER KNITTLE: We'll admit that
13 as well. Mr. Sweda, why don't you explain for the
14 record what it is you'll be admitting, Exhibit
15 Number 5.

16 MR. SWEDA: This is a response I take it
17 from Mr. Jones, the President and Chief Executive
18 Officer of Outboard Marine Corporation, to me dated
19 May 1st, 1998. Dear Mr. Sweda, thank you very much
20 for your letter of concern regarding our sea gull
21 cannons. We regret the noise and any inconvenience
22 to our neighbors and the people of Waukegan. I'm not
23 going to read the whole letter just as I did not read
24 the whole letter in the other ones. He asks that we

1 believe the cannons are the most effective and humane
2 way to encourage the gulls to leave. We ask us that
3 you bear with us during this period. Thank you very
4 much for your understanding. Just a matter of making
5 his response to my letter back a part of the record
6 for the Board.

7 HEARING OFFICER KNITTLE: Thank you, sir.

8 MR. SWEDA: Call me anything but sir.

9 HEARING OFFICER KNITTLE: Okay, Mr. Sweda.

10 This is, as stated, a letter to Mr. Sweda from David
11 D. Jones, May 1st, 1998. It's accepted as Exhibit
12 Number 5. Any time you're ready, Mr. Sweda, you can
13 resume.

14 MR. SWEDA: Thank you. I've submitted the
15 letters. As I said, I have not received any word
16 back from my alderman again and again I assume it was
17 no longer a concern of his.

18 MS. AAVANG: I'm going to object to that
19 just as an assumption, Your Honor.

20 HEARING OFFICER KNITTLE: Sustained.

21 Mr. Sweda, you can't testify as to what the alderman
22 believes or thinks.

23 MR. SWEDA: I believe that the alderman did
24 not get back to me. That's my fact observation from

1 that point on, from mid-April. He did not get back
2 to me, did not respond to my telephone calls. That's
3 my observation.

4 HEARING OFFICER KNITTLE: That's okay.

5 MR. SWEDA: Thank you. I never heard from
6 him again. In fact, that includes any messages on my
7 message machine at home that we have. I never
8 received a response from the mayor or anyone else at
9 the City and it was an observation of mine that by
10 reading and -- finally reading newspaper articles
11 just to hear that the -- again, I know that's hearsay
12 information that the City had joined in with Outboard
13 Marine Corporation in using the propane cannons to
14 discourage the gulls as OMC had. I didn't hear from
15 the City and I didn't hear from the alderman. I have
16 another exhibit such as this. Are we on Number 6
17 possibly?

18 HEARING OFFICER KNITTLE: Yes, we are.

19 MR. SWEDA: Exhibit Number 6, which was
20 made available to all parties again, which basically
21 it tabulates sunrise data and sunset data from the
22 Chicago Tribune sources -- a Chicago Tribune source
23 for the period of time that the cannons were going
24 off at the Waukegan lake front, in other words,

1 sunrise to sunset, dawn until dusk.

2 HEARING OFFICER KNITTLE: Okay.

3 MR. SWEDA: I had comments about it also.

4 HEARING OFFICER KNITTLE: Mr. Lupo, do you
5 have an objection to that?

6 MR. LUPO: Well, actually, as to relevance,
7 number 1, and number 2, as to reliability if
8 relevant.

9 HEARING OFFICER KNITTLE: Ms. Aavang, do
10 you have anything to add?

11 MS. AAVANG: Basically, I would join in
12 that objection if the actual information were
13 provided in lieu of that.

14 HEARING OFFICER KNITTLE: Pardon? I can't
15 hear you.

16 MS. AAVANG: Well, if he had the actual
17 newspaper information he's referring to. This is
18 hearsay, him taking down what he presumed the
19 newspaper said.

20 MR. SWEDA: It was from a computer source.
21 It wasn't from the newspaper. My son did it for me.
22 He got it off the computer.

23 MS. AAVANG: It takes farther --

24 HEARING OFFICER KNITTLE: Can I see it? Go

1 ahead, Mr. Lupo.

2 MR. LUPO: Also, perhaps an offer of proof
3 as to why it's relevant.

4 HEARING OFFICER KNITTLE: Yeah, Mr. Sweda,
5 if you could tell us why it's relevant, it would help
6 me make my decision.

7 MR. SWEDA: Why it is relevant is what I
8 did was I tabulated sunrise to sunset is when it says
9 from dawn until dusk. I wanted to get it in real
10 time and I did a tabulation as to what the duration
11 of that time period that the cannons were going off
12 cumulatively and that's what the effect was, so the
13 effect was to say that this occurred in that period
14 of time from mid-March through May for 70 days an
15 average of 13.24 hours per day for a total of 926.78
16 hours in that period of time.

17 MR. LUPO: An offer of proof and continuing
18 to testify, Your Honor, perhaps are two different
19 things.

20 HEARING OFFICER KNITTLE: Understood. I
21 want to take a look at it before I --

22 MR. LUPO: We don't --

23 HEARING OFFICER KNITTLE: Go ahead,
24 Mr. Lupo.

1 MR. LUPPO: There is no evidence that we
2 fired the cannons from dawn to dusk to the minute on
3 each day. It wasn't part of the program or intended
4 program. If they did, it would be a surprise to, I
5 think, OMC as well.

6 HEARING OFFICER KNITTLE: Can I see those?
7 Thank you, Mr. Sweda. Mr. Sweda, these are not based
8 on your observations as to when the cannons were
9 fired?

10 MR. SWEDA: They're based on my
11 observations of when the cannons were fired from
12 those periods of time, yes.

13 HEARING OFFICER KNITTLE: I mean, did you
14 on May 1st at 5:40 -- I don't really understand what
15 this is attempting to show, rise and set.

16 MR. SWEDA: Yes, sunrise and sunset.

17 HEARING OFFICER KNITTLE: Those are the
18 dates that the sun rose on May 1st.

19 MR. SWEDA: Those are the times of the day.
20 That's meteorological.

21 HEARING OFFICER KNITTLE: I understand
22 now. And these are the sunrise and sunset of --

23 MR. SWEDA: This is simply a recording of
24 what the sunrise and sunset were for those dates in

1 order for me to look at and provide the Illinois
2 Pollution Control Board and the parties involved
3 which was provided to them --

4 HEARING OFFICER KNITTLE: I'm going to
5 accept this as --

6 MR. LUPO: We would object further. His
7 offer of proof states that the cannons were fired
8 from the moment the sun came up to the moment the sun
9 went down and --

10 HEARING OFFICER KNITTLE: Right, I'm not
11 accepting this for any indication of when the cannons
12 were fired. I'm accepting this merely as Mr. Sweda's
13 attempt to state the sunrise and sunset time on each
14 day that he's listed here.

15 I'm also accepting it under the assumption that it's
16 not -- not something that is not easily refutable and
17 the Board will have this in front of them and they
18 can take a look and see when the sunrise and sunset
19 was if, in fact, it was different from these times
20 and something that's perfectly capable of
21 understanding.

22 MR. LUPO: And I move in limine as to any
23 testimony about OMC's firing from the moment the sun
24 came up to the moment the sun went down.

1 HEARING OFFICER KNITTLE: Well, that is
2 separate and aside from this exhibit. If Mr. Sweda
3 can testify to that based on his own personal
4 knowledge, I'm going to allow that. If he saw or if
5 he was up at the time the sun was up and then heard
6 at cannon being fired, I'm going to allow him to
7 testify to that. However, this will be accepted for
8 the purposes I've already stated and not, Mr. Lupo
9 and Ms. Aavang, of any indication on when cannons
10 were or were not fired on these specific dates.

11 MS. AAVANG: Thank you.

12 HEARING OFFICER KNITTLE: Go ahead,
13 Mr. Sweda.

14 MR. SWEDA: My observations are based on my
15 not being at 923 all that time from mid-March through
16 May, the end of May. I was not present there at the
17 house all that time. However, my observations are my
18 observations in terms of getting up in the morning
19 and going outside and also just observing the -- what
20 was reported to me by the staff of -- the public
21 relations staff of to my knowledge from OMC. As I
22 said, I had no communication from the City. All I
23 could do is listen to the noise and I tabulated those
24 times based on dawn until dusk.

1 HEARING OFFICER KNITTLE: Mr. Sweda, are
2 you testifying about Exhibit Number 6 here?

3 MR. SWEDA: Yes.

4 HEARING OFFICER KNITTLE: Are you stating
5 now that you were --

6 MR. SWEDA: I'm stating that -- all I'm
7 stating is that the period of time from March through
8 May was approximately 70 days.

9 HEARING OFFICER KNITTLE: Right. Let me
10 interrupt you for a second here.

11 MR. SWEDA: Seventy days of cannons going
12 off.

13 HEARING OFFICER KNITTLE: Hold on a second,
14 Mr. Sweda. I want to make sure this is information
15 that you or your son, excuse me, gathered from the
16 Tribune's website --

17 MR. SWEDA: I asked him to.

18 HEARING OFFICER KNITTLE: -- on sunrise and
19 sunset times.

20 MR. SWEDA: Right.

21 HEARING OFFICER KNITTLE: That's all this
22 exhibit is?

23 MR. SWEDA: That's all that is.

24 HEARING OFFICER KNITTLE: So that's clear.

1 Now, what are you testifying to about your
2 observations?

3 MR. SWEDA: My observation is that apart
4 from that is that -- but using that data since I
5 don't keep a daily log of when the sun -- I don't
6 wake up in the morning to wait when the sun comes up
7 and make a notation that this occurred for 70 days
8 approximately. And it occurred on a daily basis per
9 day for daylight hours, for 13.24 hours per, day in
10 that 70-day period and that that period of time
11 amounted to 926 and some hours in terms of total
12 hours of time elapsed between dawn and dusk in that
13 period of time, mid-March through May.

14 HEARING OFFICER KNITTLE: Mr. Lupo?

15 MR. LUPO: We're going to object. We don't
16 think he's laid a proper foundation for the
17 calculations and the statement he's made. He said he
18 wasn't up and at his home all those times to monitor
19 it to the degree he's using. He also is referring
20 back to the document he just gave you which is
21 sunrise to sunset. We also object to the
22 calculation.

23 HEARING OFFICER KNITTLE: I'll sustain.

24 Mr. Sweda, you can testify to what you saw or heard

1 or what you yourself know, but if you weren't present
2 that day, you can't say that something was happening.

3 MR. SWEDA: As I said before, I was not
4 there for 24 hours a day for 70 days nor do -- I'll
5 leave it at that. The last item I want to address is
6 during that period of time of March through May I
7 also had occasion, not planned, but I had occasion to
8 use a tape recorder actually two tape recorders to
9 make tapes of the noise that was occurring that I
10 heard.

11 At the time that I was making those tapes,
12 not being the sound engineer, my intent at that time
13 was to simply -- in making the tapes was and is not
14 to reproduce the quantity of measurement of noise but
15 rather to simply illustrate the ambiance of my
16 property's immediate area both with and without the
17 cannon noise. And that was it. It was not made to
18 make any calculable quantitative numerical
19 evaluations.

20 Even at the time, not being a sound
21 engineer, I would assume that that was not what I was
22 doing, but rather to simply illustrate what the
23 ambiance of the area is naturally. There were other
24 sounds and other noises in the background. The same

1 as which I might indicate not being a sound engineer
2 that references were made by Mr. Lupo to the
3 recording that was made by their Scheimer and
4 Associates that they noted that there were background
5 noises. There are also background noises in these
6 tapes that are essentially the same thing in a
7 nontechnical way, i.e., birds chirping, myself
8 speaking occasionally, a person starting a car, and
9 it could be used for comparisons to someone
10 listening.

11 And I have the dates that these were made
12 and the technical data that was in the interrogatory
13 things that I already gave you, but I'll submit them
14 again. It was a microcassette. One of them was a
15 microcassette and one was a Radio Shack cassette
16 player. I also have the people that did -- the
17 invoice from the people who did the recording of it
18 and I asked them to do -- and it says a real-time
19 cassette recording from the place that did the
20 recordings and made copies of it.

21 HEARING OFFICER KNITTLE: Let me interject,
22 Mr. Sweda. What are you submitting into evidence
23 right now?

24 MR. SWEDA: Two tapes, one of the -- one of

1 April 25th and one of May 7th.

2 HEARING OFFICER KNITTLE: Do you have those
3 with you?

4 MR. SWEDA: Yes, I do.

5 HEARING OFFICER KNITTLE: Respondents?

6 MR. LUPO: We object to the admission of
7 these tapes. They are not recorded pursuant to any
8 Board standard. They are also inherent in
9 reliabilities in the tape and the commercial recorder
10 as opposed to a professional recorder. Even the
11 commercial recorders have various aspects, gain
12 control automatic level control and so forth that
13 either magnify or capture certain sounds in play back
14 and so forth, so we don't think they'll be a fair and
15 accurate representation of the sound that might be
16 recorded -- that attempted to have been recorded.
17 Also a number of the tapes have been rerecorded and
18 we believe that has been submitted to the Board as
19 well.

20 HEARING OFFICER KNITTLE: In response to a
21 discovery request, is that what you're talking about?

22 Ms. Aavang, do you have any?

23 MS. AAVANG: My only objection would be
24 that the best evidence is Mr. Sweda's own testimony.

1 He's already testified to the nature of what he
2 observed and heard and I think the tapes because of
3 the inherent lack of quality control posed less of a
4 probative value than his own testimony and indeed
5 because of the lack of qualification of the quality
6 in the recording, it lacks value.

7 HEARING OFFICER KNITTLE: Mr. Sweda, any
8 response?

9 MR. SWEDA: Again, they were never intended
10 to quantify -- surely I'm not a sound engineer. I
11 wanted them to simply illustrate to the best of my
12 ability what the ambiance of the area is with and
13 without the presence of propane cannon noises from my
14 property. They were taken on two different dates
15 with two different recorders and the times were given
16 on them and there is some narrative on them
17 explaining what the times were and other than that,
18 just listening to them.

19 HEARING OFFICER KNITTLE: Mr. Lupo, you
20 were about to say something?

21 MR. LUPO: Well, even for qualitative
22 measurement, we don't believe they're fair and
23 accurate representations. There are various aspects
24 of these recorders that do not make them reliable and

1 we received no testimony as to whether automatic
2 level control or automatic gain control was on or
3 off. Microphones normally used in these commercial
4 recorders have different directivity, directional
5 components that are not testified to here and not
6 inherent in reflecting accurately a sound. And we
7 think that it would be prejudicial as the sounds
8 would be magnified also on the tape as well because
9 of these two inherent problems.

10 HEARING OFFICER KNITTLE: Mr. Sweda, if I
11 were -- go ahead. You have something to add?

12 MR. SWEDA: I would make a point that I
13 described the methodology I used in the
14 interrogatories which was submitted to you that
15 the --

16 HEARING OFFICER KNITTLE: Understood. If
17 I'm going to rule on this now, I'm going to deny the
18 tapes. Perhaps you could tell us a little bit more
19 how you made the tape recordings. Have you listened
20 to them afterwards? Do they, as Mr. Lupo suggested,
21 fairly and accurately depict what's going on at the
22 time, do you recall?

23 MR. SWEDA: Are you asking me if they do?

24 HEARING OFFICER KNITTLE: I'm asking you to

1 testify along those lines, if you can. As of now,
2 I'm going to deny the admission of those tapes. I'll
3 give you an opportunity to lay the appropriate
4 foundation and get those tapes in.

5 MR. SWEDA: I have not spent a great deal
6 of time. I probably listened to the tapes maybe
7 three times and the last time was yesterday just to
8 get which one was which tape and that was just enough
9 to get which one was which tape. And the other two
10 times were probably months ago just to compare them
11 to my mental reality and awareness of what the noise
12 was in comparison to what it was really because I
13 know tapes are tapes and their mechanical
14 reproduction.

15 It is my belief that they are accurate in
16 terms of what I propound them to be, i.e.,
17 illustrations of what the noises were in particular
18 specifically to listening to other background noises
19 whether it be an airplane from O'Hare Airport or
20 Mitchell Field going overboard -- overflight or a jet
21 taking off from Waukegan Airport or someone starting
22 a car or the birds chirping. And again the technical
23 data as to how I made those tapes is in there as best
24 as I can. I made them with no knowledge of or means

1 that I know of to enhance them at the time. I put
2 them on midlevel, but there's a scale of one to ten,
3 five. And I just recorded it. That's my point at
4 this level.

5 HEARING OFFICER KNITTLE: Any response?

6 MR. LUPO: We renew that no technical
7 foundation has been laid. I don't think we heard
8 anything new. We suggest that to the hearing officer
9 and also setting on midlevel has to do with playing
10 back sound not recording and there are other
11 components and aspects as we mentioned before. They
12 are not addressed by Mr. Sweda and therefore there's
13 no reliability to these tapes.

14 HEARING OFFICER KNITTLE: Ms. Aavang?

15 MS. AAVANG: Just join.

16 HEARING OFFICER KNITTLE: I'm going to
17 sustain the objection. I'm not going to allow the
18 tapes into evidence, but -- I usually accept -- I
19 take them in with me if they're not accepted into
20 evidence.

21 MR. SWEDA: Do you want them?

22 HEARING OFFICER KNITTLE: Well, you offered
23 them into evidence.

24 MR. SWEDA: Yes, I offered them.

1 HEARING OFFICER KNITTLE: I want them, but
2 the Board will not be listening to those tapes. And
3 I will note for the record that Exhibit Number 7 was
4 objected to and not admitted into evidence. Anything
5 else, Mr. Sweda?

6 MR. SWEDA: When I get back.

7 HEARING OFFICER KNITTLE: Sorry. I didn't
8 mean to rush you.

9 MR. SWEDA: I can't be rushed. I move
10 slowly. Can that be part of it also which I
11 mentioned?

12 HEARING OFFICER KNITTLE: I'm sorry. Are
13 you offering something else, Mr. Sweda?

14 MR. SWEDA: This is part of the material.

15 HEARING OFFICER KNITTLE: This is part of
16 Exhibit Number 7, Group Exhibit Number 7?

17 MR. SWEDA: This is just notation and this
18 is something that was offered to them, but they
19 didn't take it at the deposition who did the
20 recording for me.

21 HEARING OFFICER KNITTLE: Are you offering
22 that as part of Exhibit Number 7?

23 MR. SWEDA: Yes.

24 HEARING OFFICER KNITTLE: I'll accept that

1 as well, but we're not admitting any of that into
2 evidence.

3 MR. LUPPO: I'll note for the record that
4 one of those documents documents that the tapes were
5 indeed rerecorded after the initial recording.

6 MR. SWEDA: I have original tapes if you
7 want them. I did not bring them in because I was not
8 allowed to bring the recorder in with me or anything
9 like that.

10 HEARING OFFICER KNITTLE: Let me just state
11 for the record that I've taken two cassette tapes
12 which were not admitted into evidence and two pieces
13 of paper as part of Exhibit Number 7 all of which are
14 not admitted into evidence. Thank you, Mr. Sweda.

15 MR. SWEDA: This is not excluding them, but
16 if you want the original tapes, they're in my car?
17 All I'm saying is if you want the original tapes.

18 HEARING OFFICER KNITTLE: No, I think I'm
19 going to not request those right now. Mr. Sweda,
20 it's your turn. You're up.

21 MR. SWEDA: I was waiting for you.

22 HEARING OFFICER KNITTLE: Please, go ahead.

23 MR. SWEDA: Lastly, as indicated in my
24 introduction of part one, the cannon noise began this

1 year again on March 4th, 1999. That's my
2 observation. In fact, I was coming out of a
3 deposition being taken -- deposed by the Respondents
4 in Waukegan. On one of the days -- excuse me. The
5 March -- excuse me. Observation and exhibit
6 testimony observations of my own, March cannon noise
7 varied on a daily basis from extremely loud as last
8 year to sporadic days when it appeared that they were
9 trying to attempt to mute the noise with what sounded
10 like a loud sound bouncing off of something like a
11 metal object off of barriers.

12 That's just my observation being outside
13 that the noise was completely different that occurred
14 last year versus what had occurred this year, but
15 some days it was full blast and some days it seemed
16 that it was trying to be muted by OMC or the City
17 since I did not observe whose cannons were going off
18 at which time. And one of the days, mainly April
19 1st, the cannons were going off from 6:00 a.m.
20 approximately dawn lasted until 6:00 a.m. on the 2nd
21 of April which is 24 hours straight. It was
22 continuous cannons all day and all night and that was
23 not last year. That was on April 1st of this year
24 1999.

1 Again, the cannon firing this year 1999 has
2 been sporadic and slightly different but very, very,
3 very comparable to what occurred last year. But I
4 just wanted to bring up the one point of April 1st
5 where it was 24 straight hours approximately give or
6 take an hour or two either side of it. It was
7 comparable to -- that 24 hour period reminded me to
8 two things: One, the day or two last year which I
9 gave you notes to about that the cannon noise
10 occurred for a couple of hours at night, i.e., from
11 approximately dusk being maybe -- on May 5th maybe
12 was 7:00 p.m. that lasted for another two hours.
13 This, however, on the 24th was comparable to all
14 night.

15 The other thing it reminded me of was that
16 of the fireworks in Waukegan. The 4th of July
17 fireworks are on the water plant property which is
18 the property from which the City has been setting off
19 its cannons in the Waukegan harbor. And the April
20 1st one this year was comparable to having the
21 fireworks which lasts approximately one hour on the
22 evening of July 4th or close to that occur for
23 24 hours a day and we can hear the 4th of July -- I
24 can hear the 4th of July fireworks from my house. I

1 don't have to go to the lake front and that occurred,
2 as was said in my testimony before, of the noise what
3 was described as fireworks, 4th of July, only again
4 that April 1st was 24 hours straight. Thank you.
5 That ends my testimony.

6 HEARING OFFICER KNITTLE: Okay. We're
7 going to have cross-examination. First, I want to
8 take like a ten-minute recess, so let's meet back
9 here at 11:25.

10 (A recess was taken, after which the
11 following proceedings were had:)

12 HEARING OFFICER KNITTLE: We are back on
13 the record after a short recess. Mr. Sweda is still
14 on the stand and we have cross-examination by
15 Respondents. Are you going to start Mr. Lupo or
16 Ms. Aavang?

17 MR. LUPO: No, I'll go first.

18 HEARING OFFICER KNITTLE: Go ahead,
19 Mr. Lupo.

20 CROSS-EXAMINATION

21 BY MR. LUPO:

22 Q. Mr. Sweda, it's true that you have no
23 training in ornithology; is that correct?

24 A. That's true.

1 Q. And you have no training in any other
2 animal sciences; is that correct?

3 A. No, other than courses that I took that are
4 biological --

5 HEARING OFFICER KNITTLE: Mr. Sweda, you're
6 going to have to speak up so the court reporter can
7 hear you. Do you need that last question -- restate
8 your last answer, Mr. Sweda.

9 MR. SWEDA: No, I have no special training
10 in animal studies.

11 HEARING OFFICER KNITTLE: Thank you.

12 BY MR. LUPO:

13 Q. So no degrees?

14 A. No degrees in animal studies.

15 Q. Now, the observations you made about animal
16 behavior are your own lay observations; is that
17 correct?

18 A. That's correct.

19 Q. And you testified that your dogs do not act
20 normally in the yard; is that right?

21 A. They do not act normally when the noise is
22 occurring as opposed to not occurring.

23 Q. Isn't it true that during the time the
24 cannons were firing, your dogs' eating habits did not

1 change?

2 A. That's correct.

3 Q. Isn't it true that their sleeping habits

4 did not change?

5 A. I did not observe any changes in their

6 sleeping and eating habits.

7 Q. And you spend -- would it be fair to say

8 you spend a better part of the day with the dogs on

9 most days?

10 A. No, I don't spend the times with the dog

11 exclusively, no. I wouldn't say that. They're

12 inside. They're outside.

13 Q. Are you home with the dogs the better part

14 of each day?

15 A. I'm home the better part of the day but not

16 necessarily with the dogs.

17 Q. And you mentioned changes in the behavior

18 of certain -- I'll call them wild animals; is that

19 correct?

20 A. That's true.

21 Q. You said more birds were flying overhead

22 and screeching?

23 A. As I said, the birds appeared to be -- my

24 observations to be flying away from the noise, the

1 cannon noise, and that also that the geese were not
2 on their normal schedule, what appeared to be what I
3 observed to be their normal schedule.

4 Q. And that's a normal schedule pursuant to
5 some studies you've done or your own observations?

6 A. Just observations.

7 Q. Just for the court reporter's sake, you've
8 got to let me finish so she can keep up with anything
9 we are saying. You also mentioned that the young
10 squirrels seem to come out later in the season when
11 the cannons were firing?

12 A. That's an observation, yes.

13 Q. Same thing, a personal observation?

14 A. Just personal observations after about
15 12 years or more of doing that kind of thing.

16 Q. And is it true that you feed the squirrels
17 each day?

18 A. Yes, I feed them each day. That's not all
19 I do with them.

20 Q. What else do you do with the squirrels each
21 day?

22 A. I sit with them.

23 Q. When you say sit with them, will they come
24 up and sit on your lap?

1 A. If they want to, yes.

2 Q. But it does happen on occasion?

3 A. Yes.

4 Q. Do you agree that you spend more time
5 outside than most people during the March and April
6 time frame?

7 A. I don't know what most people do.

8 Q. Would you agree that you spend a few hours
9 a day outside in March and April?

10 A. I spend a great deal of time outside all
11 year round as much as tolerable.

12 Q. And that would include periods of time when
13 the temperature is below zero?

14 A. Very short time and inside the garage.

15 Q. But in the winter months, it's not unusual
16 for you to be outside?

17 A. No, for time periods and inside the garage
18 where it's protected.

19 Q. Now, isn't it true that in your talks and
20 correspondence with Outboard Marine Corporation
21 representatives that they mentioned that they had
22 considered other methods of dealing with the gull
23 colony problem?

24 A. They mentioned a couple of methods that

1 they used.

2 Q. And did they mention that they alone were
3 not successful?

4 A. They may have. I don't -- that's been a
5 contention of Outboard Marine Corporation as I read
6 documents that have been submitted to me by Outboard
7 Marine.

8 Q. Sir, you live approximately a mile away
9 from the noise source, is that accurate?

10 A. That was pretty accurate, yeah, I think it
11 was about a mile maybe less.

12 Q. Isn't it true that the cannon noise does
13 not drown out conversations where you are?

14 A. It can drown out conversations, yes.

15 Q. Isn't it true that you don't have to shout
16 in conversation when the cannons are firing?

17 A. I don't talk when it gets that loud because
18 you can't talk. You can't carry on a normal
19 conversation with the next door neighborhood.

20 Q. So it's your testimony that you can't carry
21 on a normal conversation with the next door neighbor?

22 A. Or anyone else in the yard who happens to
23 be visiting or entertaining.

24 Q. You mentioned a number of aspects of your

1 daily life that the intermittent firing of the
2 cannons interferes with. Can you tell me how it
3 interferes with taking out the mail?

4 A. Just it's existence opening the door --
5 that's the front door of the house which faces west
6 onto County Street. The loud noise can be so loud
7 that if I open up the front door and I'm slow because
8 I walk in an ambulatory way, that takes me time or if
9 I go on the front porch, take the mail out of the box
10 and sit on the front porch for a couple seconds, yes,
11 the noise is loud. It disturbs me so I have to go
12 back inside to compensate for not wanting to be
13 outside.

14 Q. Would you agree that your neighbors go out
15 and get their mail on a regular basis?

16 A. I don't observe how they go out and get
17 their mail.

18 Q. Can you tell me how the firing of Outboard
19 Marine's propane cannons interferes with cooking on
20 the grill?

21 A. Just being outside and having to be outside
22 to do anything one of those things is cooking on the
23 grill. To be in the environment and the ambiance of
24 the propane cannons is one at which you don't want to

1 be in, so you, therefore, do it less or not at all.
2 I indicated that to myself and to friends that last
3 spring was a nonentity for me and cooking is one of
4 those things which I enjoy inside and outside.

5 Q. So it's your testimony that the cannons
6 were so loud that it disrupts your --

7 A. Proclivity.

8 Q. Explain to me by proclivity?

9 A. It's something I enjoy doing, cooking
10 outside, cooking inside.

11 Q. And do you still cook outside?

12 A. I do cook outside, yes.

13 Q. During the spring months?

14 A. Very rarely now with the cannons out there.
15 I've cooked out once and that was before they started
16 on March 4th.

17 Q. And it's your testimony that --

18 A. I haven't since.

19 Q. It's your testimony that the cannons are so
20 upsetting that it interferes with your taking out the
21 garbage?

22 A. Yes, the same effect as the mail and
23 cooking.

24 Q. And with your bird and squirrel watching?

1 A. Correct.

2 Q. Picking up litter?

3 A. Yes.

4 Q. And getting the paper?

5 A. It's dirty out in the backyard and taking
6 out the garbage even. It doesn't get done as much as
7 it should.

8 Q. And it's also your testimony it takes you
9 two months to recover from the sounds of the cannons?

10 A. I estimate that it took me at least two to
11 three months just to not be able to walk out one of
12 the doors, front, back, side and go out to the
13 backyard and sit down and not anticipate that the
14 cannons were going to be there. I had no way of
15 knowing when the Outboard Marine or City or whoever
16 was doing the cannons at that particular point in
17 time were doing them.

18 Q. So this is an anxiety on your part, would
19 that be fair to say?

20 A. An anticipation, I wouldn't call it an
21 anxiety. I don't know what your definition of
22 anxiety is. I'm saying I was not held back by it or
23 anything else. It's just that anticipating being
24 able to go outside and enjoy without worrying about

1 whether the noise would occur took that length of
2 time.

3 Q. Do you believe that the cannon noise is
4 louder than a car starting in your driveway?

5 A. Depends on where you measure each item,
6 yes.

7 Q. The cannon noise is stationary in the sense
8 of being a mile away on the OMC site?

9 A. Yes, much louder.

10 Q. The cannon noise is louder?

11 A. Much louder.

12 Q. It would drown out the sound of a starting
13 car?

14 A. May not necessarily drown out the sound of
15 a starting car, but it will -- it's not comparable.

16 Q. Is it louder than planes flying overhead?

17 A. Yes.

18 Q. It is louder than trains down by the train
19 tracks?

20 A. May or may not be. At times, yes. At
21 other times, no, depends on what kind of train is
22 going by.

23 Q. Have you had construction in your
24 neighborhood in the past year?

1 A. Yes, there was construction in the

2 neighborhood for a sewer leak or a water leak.

3 Q. Was there any hammering or pounding as part

4 of the construction?

5 A. There was probably hammering and pounding,

6 yes.

7 Q. Not to your knowledge for sure though?

8 A. The same applies to my response to your

9 question as applied to previous questions I am not --

10 Q. You're not focused on those sounds?

11 A. No, I am not physically present. In other

12 words, I go to the store to get groceries and I go to

13 the gas station to get gas.

14 Q. Let me rephrase then. I'm not trying to

15 trick you. Did you hear any pounding or hammering?

16 A. Yes.

17 Q. Relative to those construction activities?

18 A. Yes.

19 Q. Were those louder than the cannon noise?

20 A. On occasion, yes.

21 Q. Were they equally upsetting to you?

22 A. No, they were normal noises, i.e., I knew

23 what was going on and I assume that just as train

24 noises or ComEd noises or any other noises that occur

1 in the near north side of Waukegan are normal and
2 acceptable noises -- and airplanes going over.

3 Q. Sir, you're also a member of a number of
4 wildlife organizations, are you not?

5 A. I belong to them, yes.

6 Q. And that would include the National
7 Wildlife Federation?

8 A. Yes.

9 Q. The Audubon Society?

10 A. That's correct.

11 Q. The Natural Resources Defense Counsel?

12 A. Correct.

13 Q. National Conservancy?

14 A. Nature Conservancy.

15 Q. Nature Conservancy, thank you.

16 A. That's correct.

17 Q. Any more?

18 A. I belong to Ravinia. They conserve
19 national resources also.

20 Q. Ravinia the --

21 A. The festival, they dedicate trees and parks
22 and maintain them and they do use cannons once a year
23 for the 1812 overture, the Labor Day special.

24 Q. Now, you've compared the cannon noise to

1 the fireworks. Do you believe that the cannon noise
2 is louder than the fireworks on the 4th of July?

3 A. The fireworks is a general term. The
4 cannon noise is a specific term.

5 Q. Let me ask the question again. Are the
6 cannon noises louder than the 4th of July fireworks
7 in your opinion?

8 A. Yes.

9 Q. You've stated you're a member of a number
10 of national wildlife organizations. Do you read
11 their publications?

12 A. Not always, but I read them as I can.

13 Q. And do you study elements of nature as much
14 as possible?

15 A. Yes, it's something that I enjoy doing and
16 have enjoyed doing since I was knee high to a
17 grasshopper.

18 Q. Do you favor the humane treatment of
19 animals?

20 A. I respect the humane treatment of animals,
21 yes. I would object to any inhumane treatment of
22 animals that I might think of as looking in studies
23 and research and that kind of thing versus individual
24 choice, yes.

1 Q. Do you agree that sometimes in nature large
2 scale animal colonies are incompatible with the
3 location of human beings?

4 A. Taking that as a human viewpoint, I may say
5 that occasionally humans may consider that to be
6 correct, yes.

7 Q. Do you believe, not the humans but do you
8 believe that nature can sometimes provide a large
9 scale animal colony that is incompatible with the
10 presence of people?

11 A. It may be, yes.

12 Q. Do you believe that the presence of animals
13 especially on a large scale can present a health or
14 safety concerns to human beings?

15 A. Possibly.

16 Q. If in this case OMC had determined with
17 expert advice that this colony of sea gulls should be
18 moved, would you favor a more humane approach or an
19 approach that caused greater destruction to the gulls
20 and their offspring?

21 A. I'm not an expert in ornithology or gulls
22 or anything else. I'm addressing the noise issue
23 and --

24 Q. Well, the Board's going to consider certain

1 factors, so the question has I believe little to do
2 with being an expert in ornithology. Do you prefer a
3 nonfatal approach or a large-scale fatal approach?

4 A. I don't think those are -- if I take those
5 two choices only?

6 Q. Yes.

7 A. Only those two choices?

8 Q. That's the question.

9 A. Nonfatal.

10 Q. Are you aware that OMC used fewer cannons
11 than Dr. Southern had recommended?

12 A. Yes, I'm aware of that.

13 Q. You testified earlier that you knew of
14 other methods to control gulls. What are those
15 methods?

16 A. What are those methods, one is landscaping
17 which is also pointed out in Dr. Southern's report.
18 In fact, I have other comments about that that there
19 are a number of different techniques and alternatives
20 that Dr. Southern has already pointed out before I
21 was even probably aware of Dr. Southern's report not
22 looking at any hearsay evidence, i.e., newspapers at
23 that period of time, but rather simply talking to
24 people that there are other methods available, i.e.,

1 I took the trouble of calling a city in West Virginia
2 called Martinsburg --

3 Q. Well, I don't want to get into hearsay
4 either. What other methods are you aware of?

5 A. Methods like spraying some grape fog is
6 what it's called, some materials that discourage
7 animals, birds in this case, from flocking or
8 congregating on property. Vegetation, animals -- my
9 observations of animals is that animals like certain
10 kinds of vegetation and do not like certain other
11 kinds of vegetation and the site of OMC's property
12 and the water treatment plant can be revegetated in
13 some other different manner.

14 Q. Would you agree that vegetation takes time?

15 A. I would agree that vegetation is
16 time-consuming, yes.

17 Q. And how long would someone have to emit
18 this grape fog --

19 A. I have no idea.

20 Q. -- for the gulls?

21 A. I have no idea.

22 Q. Do you believe it would be throughout all
23 of daylight hours?

24 A. I do not know.

1 Q. Do you think it would be practical to emit
2 it through all of daylight hours?

3 A. From what was described to me, which is
4 hearsay information, it is not a continuous process.

5 Q. You would agree that winds blow often
6 around the lake front?

7 A. I do not know the effects of it. I'm
8 saying that other than it does according -- it's
9 hearsay information was -- it's all hearsay
10 information that it does discourage gulls, not gulls,
11 birds from congregating.

12 Q. You testified that the noise sounds are
13 different this year. Are you aware of any other lake
14 front businesses or people using gull deterrence
15 methods?

16 A. No, I don't and it's different in --

17 Q. The question is do you know or not?

18 A. No, I'm not aware of anyone.

19 Q. And are you aware that OMC continues to use
20 other nonfatal or more humane methods in trying to
21 address the gulls to reduce the use of cannons?

22 A. I can hear other kinds of pyrotechnic
23 devices from my yard also. Like on the 4th of July,
24 the period of time that people have sky rockets and

1 they're all over the neighborhood, yes, I can hear
2 those kinds of things and I assume that that noise is
3 coming -- because it's coming from that direction
4 that that is occurring, yes.

5 Q. Are you aware that OMC adds different
6 variance to its process throughout the course of the
7 70 or so days that it runs the cannons?

8 A. I am not aware of their technical
9 processes.

10 Q. So you're not aware that they add gridding
11 to their sites?

12 A. I had studied those. I am not aware of all
13 that information, no.

14 Q. You're not aware that individuals -- that
15 OMC has individuals drive around the site and chase
16 the gulls?

17 A. I'm aware of what Dr. Southern proposed or
18 said that OMC should undertake, yes. I read that
19 material.

20 Q. Are you aware -- I guess I'm asking whether
21 you're aware of any of the steps that OMC has taken
22 that don't involve noise to enhance the use of the
23 cannons and finish this process more quickly other
24 than the gridding which you mentioned?

1 A. And the running around and the smaller --

2 Q. I didn't know that you were aware of those.

3 A. Yes, I was.

4 Q. Are you aware of any other method, any
5 other steps?

6 A. There is also some chemicals that were
7 suggested or -- in one of the studies also.

8 Q. Those were to coat and essentially kill the
9 embryo and the eggs; is that right?

10 A. I didn't know what that went into. I
11 didn't know if I could go in to see if that was
12 vegetation coverage or whether that was for killing
13 embryo.

14 Q. Are you aware that OMC has not adopted that
15 method for that very reason?

16 A. No, I'm not, not specifically, but I just
17 heard that they have by hearsay information, yes.

18 Q. Would you agree that people can be bothered
19 by anything they choose to be bothered by?

20 A. If they want to be, yes.

21 MR. LUPO: That's all I have.

22 HEARING OFFICER KNITTLE: Ms. Aavang?

23 CROSS-EXAMINATION

24 BY MS. AAVANG:

1 Q. Briefly, thank you. Mr. Sweda, you've
2 already mentioned that there's other noises in your
3 neighborhood that you're aware of. You mentioned the
4 trains because the train yard is just a couple of
5 blocks down; isn't that correct?

6 A. That's true.

7 Q. And also you've talked about the Sheridan
8 Road which of course is a pretty major thoroughfare
9 through Waukegan and you heard traffic there on and
10 off during the day; isn't that correct?

11 A. That's correct.

12 Q. But you did talk about something called
13 normal acceptable noises and that was when you were
14 referring to the train yard, the traffic, the
15 construction work. What's your definition of normal
16 acceptable noises?

17 A. Normal acceptable noises are that I've
18 lived there for 25 odd years and it's just simply
19 through observation of what acceptable noises are or
20 what regular kinds of noises are in terms of
21 expectations of you know that you're not moving into
22 a drop-forge area or you know you're not moving into
23 an O'Hare Airport.

24 You have reasonable assurances that in your

1 own mind as -- making a decision as to a place of
2 residence is one choice. And that's what I'm saying
3 in terms of I chose the area. We chose the area
4 because of it's ambiance as well as what the house
5 and property was.

6 Q. So you accept the train yard. You accept
7 Sheridan Road. You accept every Tuesday at 10:30 the
8 siren going off. That's acceptable?

9 A. Normal noises, if I hear an abnormal noise
10 like there are abnormal noises which are not abnormal
11 noises, i.e., the 4th of July parade, that's a
12 regular occurrence that happens once a year, the 4th
13 of July celebration of fireworks which is down by the
14 water works. That's an acceptable accepted limited
15 period of time in one hour. Yeah, those are normal
16 acceptable kind of things.

17 Q. I take it those noises still are noises to
18 you. In other words, you don't like them, but
19 because you know what they are and you know what
20 they're coming from, you kind of disregard the
21 annoyance they cause you?

22 A. I'm aware of them. Let's just put it that
23 way.

24 Q. Is the difference then -- what is the

1 difference then? Is the difference in this case the
2 repetitiveness or the sound level that makes this
3 noise different?

4 A. It's the sound level and the duration and
5 frequency of it.

6 Q. But you've already testified that at times
7 the sound level from the train yard, from Sheridan
8 Road and I'm sure from the boaters in summer can meet
9 or even exceed the sound level; isn't that correct?

10 A. Rarely.

11 Q. You mentioned earlier about the 4th of
12 July. I take it you don't go to the 4th of July
13 festivities, you don't enjoy that type of --

14 A. I enjoy it. It's just difficult for me to
15 walk and be in crowds kind of a situation.

16 Q. And it wouldn't bother you -- the noise
17 down there wouldn't bother you again because it's
18 within a certain realm, a certain limited time frame
19 for a certain purpose; is that correct?

20 A. Right, and you go there with the
21 expectation that you enjoy it because it's the 4th of
22 July celebration.

23 Q. I take it similarly that even though you
24 are aware of what the purpose is for the noise in

1 this instance, it's not acceptable again because of
2 the sound level and the repetitiveness, correct?

3 A. Rephrase the question or restate the
4 question.

5 Q. You've kind of been stating that a normal
6 acceptable noise to you is a noise which albeit may
7 be louder than what we're dealing with here with the
8 propane cannons, but because it's only louder at
9 certain instances and it's -- how can I say it, a
10 knowable factor, you don't have the same problem with
11 it as you do with the propane cannons?

12 A. Probably not in the sense that if a
13 corporate jet and not an OMC corporate jet takes off
14 from Waukegan Airport and goes over my neighborhood
15 area at a very unelevated thing, I will notice that,
16 yes, but I know where that's coming from. I would
17 hope that it would not crash. If that were to become
18 a daily occurrence, yes, I would do something about
19 it.

20 Q. You testified earlier about the effects on
21 the wildlife in your area specifically the squirrels.
22 You indicated they've come down later. Do the
23 squirrels react at all to the other noises? For
24 example, when the siren goes off the first Tuesday of

1 every month at 10:30, do the squirrels react to that?

2 A. Yes.

3 Q. I take it similarly that the squirrels when
4 the construction was going on in your neighborhood
5 reacted to that also?

6 A. Yes, they're not around as much.

7 MS. AAVANG: I have nothing further.

8 HEARING OFFICER KNITTLE: Mr. Sweda, do you
9 have any redirect on yourself?

10 MR. SWEDA: No, I'm not an attorney, but I
11 think I know what that means.

12 HEARING OFFICER KNITTLE: So you don't want
13 to talk again? When they cross-examine you, you have
14 the opportunity to address what -- some of what they
15 said on their cross-examination through a redirect if
16 you want to. You don't have to.

17 MR. SWEDA: No, I don't.

18 HEARING OFFICER KNITTLE: Thank you very
19 much, sir. You're excused as a witness. Do you have
20 another witness you want to call before we break for
21 lunch or do you want to break for lunch now?

22 MR. SWEDA: What time is it?

23 HEARING OFFICER KNITTLE: It's
24 12:00 o'clock.

1 MR. SWEDA: Let's break for lunch.

2 HEARING OFFICER KNITTLE: We have something
3 from Mr. Lupo.

4 MR. LUPO: We wouldn't object to
5 proceeding. It's my understanding that the other
6 gentleman is a teacher and a coach, so I didn't know
7 if that intefered.

8 HEARING OFFICER KNITTLE: Let's go off the
9 record.

10 (A recess was taken, after which the
11 following proceedings were had:)

12 HEARING OFFICER KNITTLE: Mr. Sweda, it is
13 still your case. Do you have a witness you want to
14 call at this point?

15 MR. SWEDA: Yes, I'd like to call Mr. John
16 Neff.

17 HEARING OFFICER KNITTLE: Mr. Neff, you can
18 have a seat right there and the court reporter will
19 swear you in.

20 (Witness sworn.)

21 WHEREUPON:

22 JOHN NEFF,
23 called as a witness herein, having been first duly
24 sworn, deposeth and saith as follows:

1 DIRECT EXAMINATION.

2 HEARING OFFICER KNITTLE: Mr. Sweda, it's
3 yours.

4 BY MR. SWEDA:

5 Q. Welcome back. Can you state your name?

6 A. John Neff. I live at 320 Stewart in
7 Waukegan. 320 Stewart, Waukegan is approximately --
8 well, it's about two blocks south of Victory Hospital
9 and two blocks west of Sheridan, so I would guess the
10 approximate distance from the Johnson Motors would be
11 around two miles. I've lived there for 30 some
12 years. I'm a school teacher, a football coach at
13 Waukegan High School. I've been a teacher for 36
14 years.

15 Q. I was going to say approximately how far is
16 it from your house to my house or your property to my
17 house?

18 A. You know --

19 Q. If you remember.

20 A. You know, I don't know the exact distance,
21 but I'd say it's quite a little ways yet. You know,
22 I'd say -- you know like I say I'm almost at Victory
23 Hospital.

24 Q. Couple blocks?

1 A. Uh-huh.

2 Q. And you live with your -- do you live at
3 your address with anybody?

4 A. I live with my wife Mary. We have four
5 children. We are empty nesters right now and due to
6 health problems, she's been in the home the last
7 couple years since the summer of -- since the summer
8 of '97 by herself and so both of us live there at
9 320.

10 Q. But you're there because -- you work, but
11 she's there during the day kind of situation?

12 A. Right.

13 Q. And you're employed with the school
14 district?

15 A. Correct.

16 Q. I'm going to ask you a couple remaining
17 questions basically about what might be the
18 approximate date you first noticed a noise and I'm
19 just asking you questions in terms of general
20 questions at this point?

21 A. Well --

22 MS. AAVANG: I'm going to object, Your
23 Honor. It's kind of a broad -- noise foundational
24 background.

1 HEARING OFFICER KNITTLE: Please call me
2 Mr. Hearing Officer or Mr. Knittle and your objection
3 is sustained. Mr. Sweda, perhaps you could rephrase
4 that, give me a little more background -- just some
5 information as to what you're looking to elicit from
6 this witness.

7 BY MR. SWEDA:

8 Q. Number 1, did I stop at your house last
9 year sometime and call you before that, preceding
10 that?

11 A. Yes.

12 MS. SMETANA: Objection, it's leading the
13 witness.

14 HEARING OFFICER KNITTLE: Mr. Sweda, you're
15 not supposed to, when you ask your questions, provide
16 the answer for him. You're supposed to let him
17 provide the answers, so try to ask him questions that
18 will not necessarily lead to a yes or no answer, but
19 I am going to give him -- just so the Respondents
20 know, I'm going to give the Complainant some leeway
21 here when he asks his questions and I'm not going to
22 be too strict on whether it's a leading question in
23 the future. So if you could try one more time,
24 Mr. Sweda.

1 BY MR. SWEDA:

2 Q. Did I call you approximately last year
3 sometime?

4 A. Right.

5 Q. About? What did I call you about?

6 A. You called me in regards to the noise and I
7 think if I recall right you probably talked to my
8 wife first and I think she talked to some other
9 people and they talked to you that -- because she was
10 home by herself and because she was under disability,
11 it was a particularly troublesome type thing for her
12 as well as myself.

13 Q. So I talked -- you know from hearsay from
14 your wife that I talked to her?

15 A. Right.

16 Q. Did you return a call to me?

17 A. That's right. That's correct.

18 Q. And what was the substance of that call?

19 A. Well, we talked about the nature of the
20 disruption and the noise and of course I pointed out
21 not only was it something that was extremely annoying
22 to me and I can state the reasons why it's annoying
23 to me, but also the fact that it was very annoying
24 for my wife because she has --

1 MS. SMETANA: Objection.

2 MS. AAVANG: Objection.

3 MS. SMETANA: Hearsay.

4 THE WITNESS: I don't believe it's hearsay
5 when I'm dealing with a woman that has serious health
6 problems.

7 HEARING OFFICER KNITTLE: Mr. Neff, it's
8 not your determination whether it's hearsay or not.
9 It's my determination so please refrain --

10 THE WITNESS: Well, I think --

11 HEARING OFFICER KNITTLE: Please, refrain
12 from arguing with the attorneys on the other side and
13 if there's an argument to be made, it's for Mr. Sweda
14 who is --

15 MR. SWEDA: May I make a point here?
16 Earlier on last year -- I have known Mr. and
17 Mrs. Neff for a number of years although we have not
18 been close. We are acquaintances kind of thing and I
19 didn't know that his wife was disabled. And I had
20 earlier last year asked whether she could provide
21 herself in this case and she answered to me that it
22 was impossible for her to do that.

23 And I got to John in terms of his living
24 there and John and Mary are husband and wife and they

1 have been for years. John works somewhere else, so
2 he's not there all the time either just like no one
3 is one place at all times and places. Let's put it
4 this way, she's very worse off than I in terms of
5 walking abilities, et cetera and compatibility, so
6 I'm just saying that that's why she couldn't be here.

7 HEARING OFFICER KNITTLE: That's fine. I'm
8 going to allow him to give some testimony on why this
9 is an issue with his wife, but you're just trying to
10 explain why she's not here, right?

11 MR. SWEDA: Yes, that's all.

12 HEARING OFFICER KNITTLE: Is there any
13 other response from Respondents on this issue?

14 MS. SMETANA: We would just object
15 subsequently to Mr. Neff testifying as to how --
16 whatever on behalf of his wife rather than how in his
17 own observations.

18 HEARING OFFICER KNITTLE: And that's
19 overruled, but I'll note your objection and I'm sure
20 the Board will consider that when they go to the
21 weight of this testimony.

22 BY MR. SWEDA:

23 Q. I think you were saying something and I
24 can't remember.

1 HEARING OFFICER KNITTLE: Ask him another
2 question.

3 BY MR. SWEDA:

4 Q. You had called me -- excuse me. Did you
5 call me last year and have an extended conversation
6 with me and you can say how long it was approximately
7 or whatever, however you would describe it?

8 A. From my observation, it was probably a
9 conversation of 20 to 25 minutes.

10 Q. And what was discussed in that
11 conversation?

12 A. We discussed, as I said before, the
13 annoyance and I described how it affected -- impacted
14 me first as an individual and how it impacted me
15 because of how it impacted my wife which impacted me,
16 you know, in that situation. And, of course, she is
17 unable to do anything about this, so that's why I
18 indicated that I had an interest in it.

19 And I had an interest in it too from a
20 standpoint that, you know, I believe citizens are
21 entitled to certain rights and certain privacy and,
22 you know, would be able -- not just my wife and
23 myself to be able to come to my home, to go to my
24 backyard particularly in the spring and the summer to

1 have the privacy, to have the sanctity.

2 You know that's important to me too, and
3 for us we're outside, you know, a good share of the
4 time in the spring and the summer. One of the few
5 things that's brought her back to life has been the
6 ability to garden and work outside and so this
7 impacted us.

8 Q. How long approximately have you lived at
9 your present address?

10 A. We've lived there 30 years.

11 Q. 30 years. Any other places that you lived
12 at in between that time?

13 A. We lived about one block -- our first year
14 in Waukegan, we lived about one block further south
15 on Ridgeland just almost exactly a block over.

16 Q. You said you heard a noise. Can you
17 approximate what date that noise was heard by you
18 first?

19 A. Well --

20 Q. Approximately, I'm not asking for a
21 specific date.

22 A. We began noticing the noise or I began
23 noticing the noise for the reason I gave. Starting
24 in late March and through April, we began working

1 outside, working in our gardens and working outside
2 and, you know, it becomes very obvious because
3 it's -- to me it's a clear-cut. It sounds like a
4 gunshot all the time.

5 Q. I was going to get into that. Can you
6 describe --

7 A. But then we noticed really through what I
8 would describe all of the times of the year that
9 you're really working in your yard late March
10 throughout April, throughout May, through early June.
11 Of course I'm not in school, so again in the
12 summertime, you know, to be able to go out in the
13 backyard and spend time there and all that sort of
14 thing is important to me and it was there for let
15 alone the fact that once we went on the time change
16 and all that, there were many times that I woke up in
17 the mornings to the gun fire.

18 Q. Can you say how frequent they were in terms
19 of duration or how long they may have been, to your
20 knowledge?

21 A. At times they were very, very frequent. My
22 observation would be that the time was somewhere
23 certainly less than -- certainly intervals far less
24 than four minutes and very repetitive. You know, the

1 thing about the noise that upset me is it's not just
2 the fact that it's loud and I guarantee you, where I
3 live, you can hear it very clearly, but the fact that
4 it's repetitive. It's on and on and on and on.

5 And then also the linking that has occurred
6 to me in my mind being a school teacher and living in
7 Waukegan a town full of violence, full of guns and
8 there are many times you cannot distinguish this from
9 a gunshot. And, you know, again being a teacher and
10 being in a very violent school, I feel strongly about
11 zero tolerance towards violence and guns so every
12 time it occurs, you know, it's -- and I lost three or
13 four football players to guns, so it's there and it
14 affects both of us that way.

15 Q. You used a couple words to describe the
16 noise. Is there any other way to describe the noise
17 that you thought of or used in terms of your
18 experience?

19 A. Like I say the noise to me is -- sounds
20 like a big gun. I immediately -- again, you know,
21 one of the reasons you work in your backyard is to
22 get away from things, to have some privacy, to have
23 some moments of thoughts, to have some time with your
24 wife and then you go in your backyard and you hear

1 gunfire on a repetitive basis let alone the times
2 that it occurs in the evening or even you can hear it
3 in your home if you're inside or you wake up to it in
4 the morning.

5 Q. How long during a period of time during the
6 day was this noise occurring to your observation?

7 A. You know, there are --

8 Q. Was it an hour or was it two hours?

9 A. Many times it went on the entire day. As I
10 said we were out in -- of course, in the springtime,
11 I get home approximately 3:00 o'clock and it'd be
12 going then. When I left in the morning, quite often
13 it was going.

14 Q. I was going to say what time do you leave
15 in the morning to work?

16 A. When I leave in the morning to work
17 approximately 7:00 o'clock.

18 Q. Did you hear the noise --

19 A. I usually get up 6:15. There are many
20 times that I heard it before I got up at 6:15. There
21 are times I woke up to it.

22 Q. So are you talking about -- did this happen
23 every day or did it happen -- were there lulls and
24 then occasionally --

1 A. There were occasional lulls and, you know,
2 most recently we had spring break the last week of
3 March which is holy week, Easter week. It went on
4 every day.

5 Q. Is that -- excuse me. Is that --

6 A. That's this year.

7 Q. -- this year?

8 A. The last week of March it went on every day
9 within less than five minute intervals. Holy
10 Thursday, I remember hearing the sounds of the
11 gunfire to the church bells on Good Friday. The only
12 thing, I think -- the only day they possibly knocked
13 off was Easter Sunday.

14 Q. Do you remember last year when it finally
15 stopped or did you already say that?

16 A. I know it was after the 4th of July. I
17 know it was somewhere well into July because I know
18 when we were outside on the 4th, we heard gunshots.

19 Q. You talked about the outside activity. I
20 think you also indicated you could hear it before you
21 got up in the morning. Was that on more than one
22 occasion?

23 A. Yes.

24 Q. During that whole period of time?

1 A. Yes, quite often I hear it in the morning
2 but several times I woke up to the sound of gunfire.
3 It's clear. It sounds like nothing but gunfire.

4 Q. Can you explain other or make a detail
5 quick glance at activities that you may have -- with
6 which, I think, you indicated were disrupted?

7 A. I think the main thing -- I guess you have
8 to understand I thought about this when the attorney
9 for the City talked about acceptable environment and
10 to answer your question, you know, I expect to hear
11 certain kinds of noises when I go down town. I
12 expect to here certain noises in my front yard. You
13 know, I expect to here certain noises on the 4th of
14 July, but to go in your backyard -- I think all of us
15 understands what a backyard is.

16 And you go in your backyard, first of all,
17 when you're by yourself and you're raking and doing
18 those things you want to do and you want some quiet
19 time, you want some privacy, you want some
20 relaxation, this is totally disrupted by that
21 number 1. Number 2, to associate it as I do in my
22 particular experience with a community full of
23 violence and gun problems, we lose a number of
24 teenagers every year to that. That's the second

1 factor.

2 And then the third thing, when my wife and
3 myself are out in the yard, of course she's on one
4 side of the yard. I'm in another part of the yard
5 and there are times when we try to carry on
6 conversations. Sometimes you can't hear each other,
7 but more than that, the serenity, the violation of
8 privacy that takes place and can you accept it?
9 Maybe if you're perfectly healthy and everything is
10 right, you can roll with it, but you shouldn't have
11 to.

12 Q. How would you describe the place that you
13 live, your residence in terms of what -- you've lived
14 there 30 years. How would you describe your area and
15 your residence in terms of its ambiance, it's ability
16 --

17 A. Well, we have a reasonably quiet
18 neighborhood. It's an older neighborhood. It's got
19 a boulevard running down the middle. We selected the
20 neighborhood based upon the fact that it's quiet.
21 It's approximately only two blocks long. We don't
22 have a lot of noise, but it's disruptive to the
23 neighborhood.

24 Q. Do you hear other noises like I said that

1 there are other noises that you would expect?

2 A. There are other noises, but, you know,
3 there are other noises, but first of all, you expect
4 certain kinds of noises and they don't take place all
5 the time. And they're not connected with violence
6 and they're not -- you know, you go out your front
7 yard, you expect to hear certain things. You go
8 down, you expect hear certain things. I don't expect
9 to hear something like this constantly when I go in
10 my backyard.

11 Q. Do you have any pets or animals that you --

12 A. No.

13 Q. You're probably better off without them. I
14 think that's basically about all I have with
15 Mr. Neff. Subject to Barbara Lopez not testifying so
16 because she's not able to --

17 A. I don't know whether I have the liberty to
18 say there is one thing that seriously bothered me
19 that's connected with this whole thing.

20 Q. Go ahead and say it.

21 MS. SMETANA: I'll object. There's no
22 question that's been asked.

23 HEARING OFFICER KNITTLE: You have to
24 respond to questions asked from Mr. Sweda.

1 BY MR. SWEDA:

2 Q. We've talked before briefly on the phone
3 when I made contact with Mr. Neff to make
4 arrangements to the time and place of this hearing
5 and date. I can't remember everything that occurred,
6 but I asked Mr. Neff and I asked him now to state any
7 of the concerns and issues that he may have regarding
8 the noise and it's effect on him and his family.

9 A. Well --

10 Q. Particularly since he's lived there, I
11 didn't know, longer than I have.

12 A. I'm assuming I can say from how it's
13 affected me, but the ability of my wife to be able to
14 go into her backyard and garden and do those kind of
15 things is important to her recovering at all. She's
16 been very seriously ill. That's number 1.

17 The other thing that seriously impacted
18 both of us is that we saw that both in the case of
19 the City and Johnson Motors, my own observation, that
20 they recognize this had a connection to violence
21 because to make the sounds more effective, they hired
22 city policemen, and this is a fact, to go down to the
23 beach and shoot the sea gulls. I'm not so concerned
24 about the sea gulls being shot or not. I'm not an

1 expert in birds, but I know the kind of message that
2 sends in a community full of violence.

3 Q. I recall.

4 A. You remember talking.

5 Q. I recall talking about that and one other
6 question probably to the last of one or two is that
7 how is it to wake up in the morning like you said to
8 the sound or the noise getting up in bed?

9 A. It's not the way you want to start the day
10 and like I said almost every moment of my day is
11 spent worrying about my wife's health. She needs all
12 the sleep she can get. She needs all the relaxation
13 she can get. That's not the way to start the day.
14 It's not the way to end the day. It's not the way to
15 go through the day.

16 MR. SWEDA: I think that's all at this
17 point.

18 HEARING OFFICER KNITTLE: No more
19 questions, Mr. Sweda? Who from Outboard Marine
20 Corporation is going to begin cross-examination?

21 MS. SMETANA: I will.

22 HEARING OFFICER KNITTLE: Ms. Smetana, you
23 can go ahead.

24 CROSS-EXAMINATION

1 BY MS. SMETANA:

2 Q. Mr. Neff, how do you know Mr. Sweda?

3 A. I know Mr. Sweda as a neighbor.

4 Q. How long have you known Mr. Sweda?

5 A. We're not close personal friends. I've
6 known of him for probably a long period of time.

7 Q. Is it --

8 A. More like I say like you know people in
9 your neighborhood. We're not -- we're by no means
10 personally acquainted or anything like that.

11 Q. Is it correct that Mr. Sweda called you
12 first with regard to this noise that you've been
13 discussing?

14 A. I think the way that it came about was that
15 my wife was talking to people in the community and
16 the neighborhood that were concerned about this. And
17 some of those people talked to him and I think -- and
18 then he knew from those conversations that it
19 particularly affected her and then he called her and
20 then eventually --

21 Q. I think you testified just a few moments
22 ago that it was Mr. Sweda who called you and your
23 wife first about the noise?

24 A. He called us first.

1 Q. Just answer yes.

2 A. Yes, he called us first and then we called
3 him. I'm just trying to give you the background on
4 how it took place.

5 Q. Thank you. Is your house on the same
6 street that Mr. Sweda lives?

7 A. No.

8 Q. Is your house north of where Mr. Sweda
9 lives?

10 A. Yes, it is.

11 Q. Is your house more than two blocks north of
12 where Mr. Sweda lives?

13 A. Yes.

14 Q. Is it more than half a mile north?

15 A. I wouldn't be sure of that.

16 Q. Is your house further away from the
17 Waukegan harbor than Mr. Sweda's house?

18 A. Yes, it is.

19 Q. Last year between March and May did you
20 ever visit Mr. Sweda's house?

21 A. No, I did not.

22 Q. Your house has a yard; is that correct?

23 A. That's correct.

24 Q. Do you spend more than one hour a day

1 outside in your yard?

2 A. Oh, yes, yes.

3 Q. Every day?

4 A. First of all, while school is going on, I
5 would say once we get to -- once we get to spring
6 break that whole week is out there.

7 Q. When does the school season end?

8 A. The school ends around the first week of
9 June, so from then on, we're out there. We're out
10 there sometimes from sunup until sundown.

11 Q. Last spring and summer did you continue to
12 garden outside in your yard?

13 A. We continued to garden, yes.

14 Q. Do you ever eat outside?

15 A. We do some.

16 Q. Did you eat outside last spring and summer?

17 A. We ate outside some.

18 Q. Is it true, you said earlier that you live
19 a few blocks from the hospital?

20 A. Uh-huh.

21 Q. Yes?

22 A. Yes, I live two blocks south of the
23 hospital.

24 Q. Do you ever hear sirens from the hospital?

1 A. Very rarely, very little noise from that
2 area.

3 Q. When you are out in your yard, do you ever
4 talk -- have occasion to talk with your wife?

5 A. Yes, I mentioned we do.

6 Q. And were you able to speak at normal tones
7 when you were next to each other having a
8 conversation?

9 A. Probably if we were very, very close to
10 each other, but if we got as far from me to
11 Mr. Sweda, there are many times I'd have to say what
12 did you say or she'd ask me what did you say or
13 didn't hear, that sort of thing.

14 Q. You described the sound as an annoyance; is
15 that correct?

16 A. Yeah, a real annoyance.

17 Q. What time in the morning do you generally
18 wake up?

19 A. I get up at 6:00 to 6:15.

20 Q. Did you know that OMC was not using the
21 cannons at all last July?

22 A. You know --

23 Q. Just yes or no.

24 A. You know, no, I don't know. I just know

1 that it was enough that it became pretty much a
2 habit.

3 Q. But last July you don't know if OMC was
4 using the cannons or not?

5 A. I would fairly guess that they were still
6 using the first week of July.

7 MS. SMETANA: I have no further questions.

8 HEARING OFFICER KNITTLE: Ms. Aavang, do
9 you have any questions?

10 CROSS-EXAMINATION

11 BY MS. AAVANG:

12 Q. Just a few, please. Mr. Neff, you are a
13 coach at Waukegan High School; is that correct?

14 A. Uh-huh.

15 Q. And you've indicated a big portion of your
16 dislike of this is the fact that the sound is similar
17 to gunshots and you've lost --

18 A. I think I've given three or four reasons
19 for my dislike.

20 Q. But that is a big factor?

21 A. That's one.

22 Q. And in fact, you were upset when we even
23 went so far as to shoot the gulls again not so much
24 the shooting but the fact that we were using guns in

1 a society that you feel is already too populated with
2 guns?

3 A. And this is to me a clear sound of a
4 gunshot. Then there are times that you cannot
5 recognize -- we have gunshots in our community and
6 we've had them in our neighborhood, so this is not an
7 unrealistic situation, so sometimes you jump. You
8 don't know whether it's this cannon or whether it's a
9 gunshot. I mean we have gunshots.

10 Q. So you've had gunshots in your
11 neighborhood?

12 A. Yeah.

13 Q. And you can't tell whether it's from the
14 cannons or if it's just a gunshot in your
15 neighborhood?

16 A. Yeah, the only way you can tell is these
17 things are repeated, repeated, repeated, repeated.

18 Q. So that's --

19 A. It's repetitive.

20 Q. But the tone and the loudness are exactly
21 the same as a gunshot you might hear someone shooting
22 off a gun in the neighborhood; is that correct?

23 A. Correct.

24 Q. Now, as a coach and a football coach, you

1 go to those football games, correct?

2 A. Uh-huh.

3 Q. And there's a lot of noise at those

4 football games too, correct?

5 A. Correct.

6 Q. But I take it that noise isn't bothersome

7 because you know what it's from and you know what

8 it's about, correct?

9 A. That and the fact that if you're a coach,

10 you're so heavily involved in what you're doing that

11 you really become oblivious to anything that's going

12 on other than what's going on on the field.

13 Q. But here if you're in your backyard, you're

14 focusing on that noise, is that it?

15 A. I think you're -- when I go in my backyard,

16 to answer your question on focusing, what I focus on

17 is quietness, serenity, privacy and togetherness.

18 Q. But admittedly that backyard is a backyard

19 in the City of Waukegan?

20 A. That's correct.

21 Q. And the City of Waukegan is a city which

22 has sounds, some of them expected, some of them

23 unexpected, correct?

24 A. Uh-huh.

1 MS. AAVANG: Nothing further.

2 HEARING OFFICER KNITTLE: Sir, you have to
3 say yes or no so the court reporter can get it.

4 THE WITNESS: I thought I did. Yes.

5 MS. AAVANG: Nothing further.

6 HEARING OFFICER KNITTLE: Mr. Sweda, do you
7 have any redirect for Mr. Neff?

8 REDIRECT EXAMINATION

9 BY MR. SWEDA:

10 Q. Might you have in reference to the
11 question, I don't know how to phrase these things for
12 redirect, but in your responses to her questions
13 about the gun noises, did you in fact make any
14 efforts or did you in fact talk to anybody about gun
15 noises or call the police department?

16 MS. AAVANG: I'm going to object that this
17 is beyond the scope of the cross.

18 HEARING OFFICER KNITTLE: Overruled. You
19 can answer the question.

20 THE WITNESS: Alderman Tempest and Alderman
21 Hyde I've known for over 30 years and are very close
22 personal friends. And I'm very sad to say that even
23 though they're both very close friends, when I
24 brought it to their attention, they made it known to

1 me that other forces had bigger clout and were more
2 important than myself.

3 MS. AAVANG: I would just object to that
4 response.

5 THE WITNESS: They said that to me.

6 MS. AAVANG: Hearsay.

7 HEARING OFFICER KNITTLE: Sustained.

8 Anything else Mr. Sweda?

9 MR. SWEDA: That's all.

10 HEARING OFFICER KNITTLE: Any recross on
11 that question?

12 MS. SMETANA: No.

13 MS. AAVANG: No.

14 HEARING OFFICER KNITTLE: Thank you, sir.

15 You can step down. Mr. Sweda, do you have any other
16 witnesses.

17 MR. SWEDA: Unless Mr. Zack is here, I have
18 no other witnesses.

19 HEARING OFFICER KNITTLE: Are you planning
20 on calling any other witnesses through the duration
21 of this hearing aside from -- are you planning on
22 calling any other witnesses aside from Mr. Zack?

23 MR. SWEDA: No. My original witnesses were
24 Ms. Lopez and Mr. Zack and if neither of them are

1 here, then -- for various different reasons. I tried
2 reaching Mr. Zack when I went on break and I could
3 not reach him.

4 HEARING OFFICER KNITTLE: Do you have a
5 copy of the subpoena you sent to Mr. Zack?

6 MR. SWEDA: Probably somewhere in this
7 pile.

8 HEARING OFFICER KNITTLE: Do you have one?
9 I was looking for my copy.

10 MR. SWEDA: Yes, I have.

11 HEARING OFFICER KNITTLE: Let's go off the
12 record for a second.

13 (Short interruption.)

14 HEARING OFFICER KNITTLE: I've taken a look
15 at the subpoena of Greg Zack who's apparently not
16 available, Mr. Sweda.

17 MR. SWEDA: He's not here. I called and
18 left a message on his office machine. I do not know
19 him personally. I never met him. He has never met
20 me. He does not know me personally, but over the
21 last two years, this is not characteristic of him.

22 I'm concerned about his whereabouts let's put it that
23 way.

24 HEARING OFFICER KNITTLE: Did you talk to

1 Mr. Zack about a specific time to attend the hearing?

2 MR. SWEDA: Yes, I talked to him about a
3 specific time.

4 HEARING OFFICER KNITTLE: When was that?

5 MR. SWEDA: When was that?

6 HEARING OFFICER KNITTLE: When was he
7 supposed to be at the hearing?

8 MR. SWEDA: 9:30 this morning. He was
9 going to be here for two days. He told me, this was
10 a month ago or two months ago, that he would be here
11 for the hearing. And when it was changed, I called
12 him back to let him know that the hearing date had
13 been changed and the court house and the room number
14 was changed and I told him the time and he said he
15 would be here for both days.

16 HEARING OFFICER KNITTLE: Aside from
17 Mr. Zack though and this Barbara Lopez, you don't
18 have any other witnesses or anybody to call?

19 MR. SWEDA: Nobody else I intend to call.

20 HEARING OFFICER KNITTLE: You said
21 something about reserving your right. What were you
22 talking about?

23 MR. SWEDA: I reserve the right to find out
24 what happened to Mr. Zack.

1 HEARING OFFICER KNITTLE: Do you want to
2 call him later? What are you trying to say?

3 MR. SWEDA: I'm simply making --

4 HEARING OFFICER KNITTLE: Are you reserving
5 the right to find out what happened to Mr. Zack?

6 MR. SWEDA: Yeah, and I'd like, if at all
7 possible, to have Mr. Zack testify.

8 HEARING OFFICER KNITTLE: Do you have a
9 response to that?

10 MR. LUPO: We certainly do, Mr. Knittle.
11 We've had a number of issues relative to Mr. Zack.
12 Mr. Sweda's identified him as an expert and despite
13 we think making a repetitive record, citizen
14 complainant or not, we've continued to request his
15 information, any payments, process and so forth that
16 may go with that.

17 Now, we're faced Mr. Sweda essentially
18 during his case raising the issue that he would like
19 the right to perhaps call a witness at a later time
20 and we think the burden is on them to present their
21 witnesses -- present his witnesses at the appropriate
22 time. And that's how we plan to suit our defense
23 based on what's presented.

24 HEARING OFFICER KNITTLE: Ms. Aavang, do

1 you have anything to add?

2 MS. AAVANG: Nothing to add other than --

3 HEARING OFFICER KNITTLE: Does the City of
4 Waukegan object to the calling of Mr. Zack at a later
5 point in time?

6 MS. AAVANG: At this point, the only thing
7 I would say is I would give him another opportunity
8 to make a phone call now because it is an hour later
9 and perhaps he can locate Mr. Zack now.

10 HEARING OFFICER KNITTLE: Okay. Mr. Sweda,
11 you were about to say something else -- well,
12 Mr. Lupo has something else.

13 MR. LUPO: Further, we did depose Mr. Zack
14 and it did go on for an hour and a half, two hours,
15 but anyone reviewing the transcript would realize not
16 much was said. We tried to get into some of his
17 methodology -- you know, if you haven't prepared for
18 this case, what would you normally do, you know, that
19 sort of thing. And, frankly, very little came of
20 that.

21 What he did say was he was going to prepare
22 his case in what we consider an orthodox manner and
23 also relative to any rules of evidence which is sit
24 and listen to the testimony and then come up and give

1 an opinion. And he hasn't been here to hear the
2 testimony of the Complainant's witnesses. He may not
3 be here to hear the testimony of the primary OMC
4 witnesses.

5 Our second motion in limine which you
6 denied earlier but we plan to raise again at a later
7 date or a later point in this hearing was premised on
8 the fact that he was going to be testifying in areas
9 beyond his expertise substituting his knowledge and
10 opinion for that of the Board as to what may or may
11 not be a nuisance. And so I guess we've raise two
12 things.

13 Number 1, we object to his testifying at a
14 later time. It's the Complainant's burden to put on
15 his case and number 2, that he would testify with his
16 opinions as to what may or may not constitute as a
17 nuisance, reasonable or unreasonable interference
18 with life and lawful business or other activities as
19 he's not heard the evidence. We feel we have a
20 proper objection for that to begin with whether he's
21 heard it or not.

22 HEARING OFFICER KNITTLE: Understood.
23 Mr. Sweda?

24 MR. SWEDA: Yes, I object to his statement

1 there, one, and I could go on and say why. In part
2 of that deposition that was taken, Mr. Zack described
3 his role and his duties and responsibilities as noise
4 advisor to the state IEPA and one of those was that
5 he works with -- this is hearsay because it's from my
6 recollection of the deposition that was taken
7 telephonically that Mr. Zack did indicate that he
8 interviewed a lot of people because of the complaints
9 and there's a couple thousand complaints a year.

10 My questioning to Mr. Zack, probably the
11 first three-quarters of it, was in fact what merely
12 his responsibilities and duties are as state noise
13 advisor some of the same things that were brought up
14 in the deposition not exactly that kind of thing, but
15 those kinds of things. Obviously if he's not here,
16 he's not here.

17 HEARING OFFICER KNITTLE: Right. I'm going
18 to -- well, those are the only two witnesses
19 remaining. I'm going to allow you to recall Mr. Zack
20 at a later point in time if in fact he becomes
21 available. His testimony onto the opinions or what
22 he's going to talk about, clearly he will not be able
23 to testify what went on here if he wasn't here. If
24 he has any relevant testimony, then we will allow

1 that testimony to be heard.

2 MR. SWEDA: I understand that.

3 HEARING OFFICER KNITTLE: I am going to
4 take, like Ms. Aavang suggested, a five-minute break
5 and let you -- give you a chance to give him a call
6 and see if he is planning on being here tomorrow, but
7 if in fact he is going to show up, I would give you
8 leave to call him and have direct examination of him.

9 MR. LUPO: Mr. Knittle, I foresee an issue
10 coming up, just as a heads up, as to what is and
11 isn't relevant testimony. I mean --

12 HEARING OFFICER KNITTLE: Well, are you
13 going to reargue your motion in limine here because I
14 made a decision on the motion in limine and this
15 seems to be the same, like you said is the second
16 motion in limine.

17 MR. LUPO: You raised the point that we
18 could at the appropriate times raise our issues and I
19 think the crux of that issue has come up again and
20 this is an objection to, number 1, his testimony and
21 number 2 --

22 HEARING OFFICER KNITTLE: Right. I
23 understand. I'm not going to listen to objections to
24 his testimony until we know what he's going to

1 testify to. I don't know what's he going to testify
2 to. I know what you're telling me he intends to
3 testify to and what Mr. Sweda says he's going to
4 testify to, but I'm not going to make a ruling on
5 objection to testimony that I haven't heard yet.

6 So that wasn't the nature of the motion in
7 limine which was denied which you do have the right
8 to bring up to the Board and they can definitely
9 reconsider the decision and I'm sure they will if you
10 want them to. So let's take a five-minute break.

11 Mr. Sweda, please try to call Mr. Zack and find out
12 what's going on. We'll meet back in five minutes.

13 (Short interruption.)

14 HEARING OFFICER KNITTLE: We are back on
15 the record. Mr. Sweda was able to contact Mr. Zack
16 and Mr. Zack is planning on attending, Mr. Sweda?

17 MR. SWEDA: He will be here tomorrow, yes.

18 HEARING OFFICER KNITTLE: He said he'd be
19 here tomorrow at what time?

20 MR. SWEDA: For 9:30 time and he'll be here
21 all day Tuesday.

22 HEARING OFFICER KNITTLE: I'm going to
23 allow him to testify tomorrow at 9:30 and if you have
24 objections to his testimony, you can make them then.

1 If you have anything you want to say now that is not
2 reargument of the motion in limine, you may do so.

3 MR. LUPO: Reserving our objection, of
4 course, but we just ask that he goes in early in the
5 hearing as possible.

6 HEARING OFFICER KNITTLE: Yeah, I think we
7 can have him at 9:30 in the morning that would be
8 fine with me. It's going to be up to you when you
9 want to break it up if you're still going on with
10 your case in chief.

11 MR. SWEDA: The time is irrelevant. It's
12 just because he'll be here all day tomorrow so --

13 MR. LUPO: Well, it's relevant for other
14 reasons.

15 HEARING OFFICER KNITTLE: Right. I
16 understand. Okay. Let's proceed then with the
17 Respondents' case. I don't know how you want to work
18 this. Are you calling your own witnesses,
19 Ms. Aavang?

20 MS. AAVANG: I have some of my own.

21 HEARING OFFICER KNITTLE: Will she be also
22 directing your witnesses?

23 MS. AAVANG: No, they're taking --

24 HEARING OFFICER KNITTLE: Totally separate?

1 Okay. Let's proceed then.

2 MR. LUPO: The City is welcome to and we've
3 agreed, I think, on tentative orders based on
4 schedules.

5 HEARING OFFICER KNITTLE: I'm merely trying
6 to figure out procedure and how you want to go about
7 it. There's a witness on the witness stand.

8 MR. LUPO: It's our witness.

9 HEARING OFFICER KNITTLE: Can you swear the
10 witness?

11 (Witness sworn.)

12 WHEREUPON:

13 JOHN ROGER CRAWFORD,
14 called as a witness herein, having been first duly
15 sworn, depose and saith as follows:

16 DIRECT EXAMINATION

17 HEARING OFFICER KNITTLE: Mr. Lupo?

18 BY MR. LUPO:

19 Q. Sir, please state your name?

20 A. John Roger Crawford.

21 Q. And your occupation?

22 A. I'm director of Environmental Health and
23 Safety for Outboard Marine Corporation.

24 Q. How long have you been in that position?

1 A. Approximately 18 years in total with
2 Outboard Marine Corporation, the first 16 years as
3 director of Environmental Affairs and the last two
4 years, we combined the safety programs into those
5 departments.

6 Q. Would you describe your education, please?

7 A. I received a bachelor's degree in general
8 engineering from the University of Illinois in
9 Urbana, Champaign and a master's degree in civil
10 engineering, both chemical and environmental options
11 at the same university.

12 Q. And where do you live?

13 A. 1228 Courtland Avenue in Park Ridge,
14 Illinois.

15 Q. And can you describe some of your community
16 involvement, please?

17 A. I've had a number of activities. I've been
18 involved in the community as an elected public
19 official, served eight years on the Park Ridge City
20 Counsel and was chairman of the finance and budget
21 committee and for the past three years have served on
22 the Maine Township District 207 Board and the last
23 two years I served as president of the board.

24 Q. And that's the school board?

1 A. It's the school board. It's a high school
2 board of approximately 6500 students.

3 Q. Sir, in the course of your
4 responsibilities, are you familiar with OMC's effort
5 to move a sea gull colony from the premises?

6 A. Yes, I am.

7 Q. And how are you familiar with that?

8 A. It's my department that is charged with the
9 responsibility of administering the program.

10 Q. And in the course of your position, do you
11 also interact with management of the company?

12 A. Yes, I do.

13 Q. In what respects?

14 A. I provide management reports on a regular
15 basis and on a specific basis should any issues arise
16 that involves public participation or potential
17 complaints in order to make the management aware of
18 any situation from environmental or safety standpoint
19 that I believe they need to have knowledge of.

20 Q. And based on your time with OMC and your
21 interaction with management, are you familiar with
22 OMC's involvement in contribution to the local
23 community?

24 A. I'm generally familiar with that.

1 Q. Can you state some of the things you know
2 and can share?

3 A. I know we certainly contribute annually to
4 the United Way and there are number of other
5 organizations. I have seen a list that there are
6 some 20 to 25 organizations in the Lake County area
7 that we regularly contribute to. We also have a
8 number of our employees that are involved in
9 community-related events including we sponsored and
10 provided meals for the annual beach sweep which is in
11 design to try to keep the beach area as clean as
12 possible on an annual basis.

13 Q. And can you state how many employees OMC
14 has in the Waukegan area?

15 A. Approximately 1300.

16 Q. Do you know what the contribution of these
17 employees might be in the area in terms of OMC's
18 finances, payroll and so forth?

19 A. I certainly don't know the direct
20 contributions they make other than the goods they buy
21 and services they purchase. Our annual payroll is
22 approximately \$52 million.

23 Q. Is that limited to the Waukegan area?

24 A. That's the Waukegan employees, yes.

1 Q. Are you familiar with how much OMC pays in
2 taxes to the local community?

3 A. I don't know precisely of the taxes. I
4 know in the property tax area it's several hundred
5 thousand dollars, over 200,000 and less than a half a
6 million, but I don't know precisely.

7 Q. How long has OMC been in Waukegan?

8 A. The Corporation was actually consolidated
9 as Outboard Marine Corporation in approximately 1936.
10 Prior to that time, Johnson Motors was in operation
11 beginning in approximately 1925 occupying a portion
12 of the lake front area here for its manufacturing
13 facility. Johnson Motors was merged into another
14 company that was owned by Ralph Everett, the Everett
15 Motors and combined operations became the beginning
16 of Outboard Marine Corporation.

17 Q. Sir, are you familiar with the layout of
18 the OMC plants and property along Lake Michigan?

19 A. Yes, I am.

20 MR. LUPO: May I approach the witness,
21 please?

22 HEARING OFFICER KNITTLE: Yes.

23 MR. LUPO: I have a map that's marked as OMC
24 Exhibit Number 1 for identification. I'm offering

1 Mr. Sweda a smaller version of the map. I can show
2 him the one I plan to hand to the witness.

3 MR. SWEDA: If it's the same map, go ahead.

4 BY MR. LUPO:

5 Q. Thank you. Sir, I'm handing you a document
6 marked as OMC Exhibit Number 1 for identification, if
7 you could study it for a moment.

8 A. Yes, sir.

9 Q. And do you recognize this document?

10 A. I recognize the document, yes.

11 Q. What is it?

12 A. It's an internet-based map off of a Map
13 Quest map of the Waukegan area and lake front
14 including the Waukegan harbor and various streets and
15 highways located throughout a portion of the City of
16 Waukegan.

17 Q. And in your view, does it fairly and
18 accurately represent the area that it depicts?

19 A. I think it fairly and accurately represents
20 the land masses. There are certain -- at least on
21 the lake front side, there are the man-made
22 structures that appear to be absent from this map.

23 MR. LUPO: I'd offer this as Exhibit
24 Number 1.

1 HEARING OFFICER KNITTLE: Mr. Sweda, any
2 objection?

3 MR. SWEDA: No.

4 HEARING OFFICER KNITTLE: That will be
5 admitted.

6 BY MR. LUPO:

7 Q. Sir, if you would, using my red pen, would
8 you generally circle the area where OMC's location
9 covers?

10 A. (Witness complies.)

11 Q. And if you would, would you write OMC in
12 that section?

13 A. (Witness complies.)

14 MR. LUPO: And I have a few more questions
15 actually. Mr. Sweda, would you like to view these
16 markings?

17 MR. SWEDA: Sure.

18 MR. LUPO: If you could step up, it might
19 help, so we don't go back and forth with each
20 marking.

21 MR. SWEDA: Okay.

22 BY MR. LUPO:

23 Q. If you would, sir, would you mark the area
24 in which the gull colony that you previously stated

1 you were familiar with is generally located?

2 A. (Witness complies.)

3 Q. And if you would just write gulls?

4 A. (Witness complies.)

5 Q. Sir, would you also mark the general area

6 where the city's water plant is on the south side of

7 the peninsula?

8 A. (Witness complies.)

9 Q. And just write city?

10 A. (Witness complies.)

11 Q. I'm handing Mr. Sweda an OMC Exhibit

12 Number 2 for identification as well. Sir, I am

13 handing you a second document marked OMC Exhibit

14 Number 2 for identification. Do you recognize this

15 document?

16 A. Yes, I do.

17 Q. And what is it, please?

18 A. It's a depiction of the OMC Waukegan lake

19 front properties surrounding the Waukegan harbor and

20 also includes the designation of the National Gypsum

21 Company which is located on the west side of the

22 harbor.

23 Q. Does it fairly and accurately represent the

24 properties and areas you've described?

1 A. Yes, it does.

2 MR. LUPO: We offer this as Exhibit

3 Number 2.

4 HEARING OFFICER KNITTLE: Mr. Sweda, any
5 objection?

6 MR. SWEDA: No.

7 HEARING OFFICER KNITTLE: That too is
8 admitted.

9 BY MR. LUPO:

10 Q. Sir, if you would, using the same red pen,
11 will you mark the area that the gull colony is
12 currently located?

13 A. (Witness complies.)

14 Q. And if you would, write gulls.

15 A. By my markings on this drawing marking gull
16 colony, I'm marking areas of primary nesting. The
17 gulls extend -- the actual birds extend beyond this
18 area, but in doing so I'm understanding your question
19 to mean colony of being nesting area.

20 Q. Thank you. And, sir, if you would, there's
21 a designation on here marked as plant number 1.
22 Could you tell us how many OMC employees work in and
23 around plant number 1?

24 A. I don't know precisely the number, but it's

1 on the order of 600 to 700 employees.

2 Q. And if you would, over plant -- and what is
3 between plant number 1 and the gull nesting area?

4 A. There's a fairly narrow parking area that's
5 located between plant number 1 building and the gull
6 nesting area. And the parking area is used both for
7 transportation of goods as well as employee access
8 and parking for the building. In addition, also one
9 part of the area is used for training purposes. We
10 operate a service center in the plant and so we
11 regularly have a number of our dealers who are
12 sending employees to our training center for purposes
13 of training.

14 Q. And then if you look to the east side of
15 the gull colony area, there are a number of small
16 buildings marked on the map. Can you tell us what
17 those are?

18 A. There are two buildings that I'm aware of
19 on the east side of the gull colony area, although,
20 at times they have been included in the gull colony
21 area. Those two buildings are -- one is the
22 environmental health and safety building and the
23 second building is the OMC information technology
24 building where we do data processing for our

1 worldwide operations.

2 Q. Are each of those buildings inhabited by
3 OMC employees?

4 A. Yes, they are.

5 Q. And are there parking lots around those
6 buildings?

7 A. Yes, there is.

8 Q. And if we were to look further to the east,
9 what's located across the street from OMC's -- from
10 the gull nesting area?

11 A. That area is not precisely shown on the
12 drawing in front of me, but that area is --
13 constitutes public beach area and includes a
14 boardwalk and parking area servicing the beach and
15 boardwalk area.

16 Q. Would you also describe the area further
17 surrounding the OMC campus, the nature of the area?

18 A. The nature of the area generally is as
19 depicted on this drawing surrounding the Waukegan
20 harbor. It is primarily industrial in use with the
21 exception of the public beach. Further to the north
22 of the OMC plants is the -- are certain operations of
23 the north shore sanitary district and to the south as
24 shown on the earlier drawing, figure number 1, is the

1 city water treatment plant.

2 MR. LUPO: Thank you. Mr. Knittle, we
3 intend to use each of these exhibits again, so if you
4 don't mind, we'll hold onto them for a moment.

5 HEARING OFFICER KNITTLE: Definitely.

6 MR. SWEDA: I have one objection to a
7 statement that was made.

8 HEARING OFFICER KNITTLE: If you have an
9 objection while Mr. Lupo or the attorney is asking
10 questions, you should interject them. It's going to
11 be hard for us to go back now to previous statements
12 that were already made. You can state your objection
13 if you want.

14 MR. SWEDA: The statement was made that the
15 harbor is primarily industrial that -- there are
16 other uses of the harbor that are there.

17 HEARING OFFICER KNITTLE: Mr. Lupo?

18 MR. LUPO: I don't think that's an
19 objection to either form or nature or the substance
20 of my question.

21 HEARING OFFICER KNITTLE: I agree. You can
22 object to the questions that are asked, but it --
23 you'll have an opportunity to cross-examine this
24 witness and if you have any clarification about his

1 testimony, that will be the time to do it. Mr. Lupo,
2 you can proceed.

3 BY MR. LUPO:

4 Q. Which building do you work in,
5 Mr. Crawford?

6 A. I work in the Environmental Health and
7 Safety building.

8 Q. And you described that as being on the
9 border of the gull colony area?

10 A. Yes, it's on the border and we have not had
11 nesting on our particular roof.

12 Q. And you've worked out of that building for
13 a number of years now?

14 A. Yes, I have.

15 Q. And would you describe the normal -- would
16 you describe the type of sounds you normally hear
17 when you're outside of the building setting aside the
18 gulls for the moment, day-to-day sound?

19 A. Normal sounds would be roadway traffic,
20 occasionally boom boxes from the city beach front,
21 lawn mowers, trucks that would go in and out of the
22 entrance way adjacent to our building that would be
23 delivering products to and from the Outboard Marine
24 manufacturing facility, but generally vehicular

1 traffic on the harbor side occasionally.

2 We have an engine testing facility that we
3 operate in the harbor which you occasionally can
4 hear. We also, from time to time, have fairly large
5 ocean-going vessels dock and come into the harbor
6 that are delivering cement and/or gypsum to other
7 industrial facilities located on the harbor and you
8 will hear noises associated with the harbor,
9 occasionally boat horns and other kinds of things as
10 well.

11 Q. Are these sometimes loud sounds in your
12 opinion?

13 A. They're noticeable.

14 Q. What's the current use of the property
15 which you've marked gull colony?

16 A. Currently, the property is, with exception
17 of the information technology building parking lot
18 which currently is not but at one time had nesting on
19 its roof area or begin to have nesting on its roof
20 area, the property is largely vacant at this point.

21 Q. And does OMC own that property?

22 A. We own the majority of that property, the
23 vast majority of that property. A small portion of
24 the property is currently owned by Larson Marine.

1 Q. Have you ever had operations on that
2 property?

3 A. We've had certain testing operations that
4 we've done on that property, but we've never had any
5 other buildings or structures on that property. We
6 purchased the property in approximately 1972 from the
7 General Motors Corporation. There were certain
8 buildings and structures on that at that time and
9 those were removed from that property prior to our
10 use for testing purposes.

11 Q. Is there a reason you haven't developed
12 that property as of yet?

13 A. From a business standpoint, obviously
14 there -- it was purchased at a time, as I understand
15 it, that we did at one time contemplate potential
16 construction of another manufacturing facility to
17 bridge between plants 1 and 2. For a variety of
18 business reasons, that decision to proceed with that
19 construction was never made.

20 Q. Is there anything else holding up
21 construction on that, any potential construction out
22 there?

23 A. The property is -- there is an
24 environmental situation on the property which is

1 currently being undertaken, a study is being
2 undertaken and a remedial action plan and feasibility
3 study has been prepared by People's Gas Company,
4 North Shore Gas Company. That was an arrangement
5 that was voluntarily entered into between the U.S.
6 EPA and North Shore Gas Company in approximately 1991
7 or '92 time frame. And it was the former site
8 operations of a town gas plant operated that for
9 approximately 20 to 25 years and then subsequently
10 was modified to some extent and operated by General
11 Motors as a coking plant.

12 Q. Sir, changing topics somewhat, you stated
13 that your department has a responsibility for the
14 gull control project. Can you describe the history
15 or the development of the gull colony as you
16 understand it from your position?

17 A. A part of the property was used in the
18 early 1990's for construction and implementation of
19 the Waukegan Harbor Superfund Site Remediation Plan
20 and there were construction activities and
21 construction trailers including a core of engineers
22 as well as other governmental agency representatives
23 and the construction contractor office were out --
24 for the Waukegan harbor trust that implemented the

1 remedy. At that time I frequented the site certainly
2 on a monthly basis and I did not notice any
3 appreciable gull activity on the site.

4 Q. What years would that be, year or years?

5 A. That was approximately beginning in 1989
6 through approximately 1993, '92, '93.

7 Q. And how about the following year or two?

8 A. The construction activities largely ceased
9 in approximately 1993. Some of the area that had
10 been more heavily vegetated, had been accessed as
11 part of the construction activities and that area was
12 largely denuded of its vegetation and is commonly
13 referred to as the sand pile. So the site was left
14 pretty much intact with the exception of much of the
15 sand pile area which is located on the western side
16 of the property adjacent to and running in a
17 northerly and southerly direction along the harbor's
18 edge which would --

19 Q. This would have been around 1993 or '94?

20 A. Well, the construction activities had
21 substantially been completed approximately 1993 and
22 the site was vacated approximately at that time.

23 Q. And during the following year or two, did
24 you notice any gull activity at that time?

1 A. We did notice an increase in gull activity
2 although it was probably 1994, '95 before it became
3 noticeable. Noticeable meaning that normally around
4 harbor or water's edge you see some gulls or you see
5 geese or other kinds of birds and so at that time, it
6 had gone from what I would refer to as typical or
7 casual observance of birds on a relatively frequent
8 basis to the noticing that a number of those birds
9 were starting to sit on the property for extended
10 periods of time.

11 Q. At this point, did OMC have any problems
12 with the presence of the gulls?

13 A. No.

14 Q. How about the following season?

15 A. The following year the numbers of birds
16 that were choosing to sit on the property increased
17 fairly dramatically.

18 Q. And with that did you hear of any problems
19 or complaints?

20 A. Not initially, but as time went on
21 especially at the end of the season.

22 Q. And this would be 1995 or so?

23 A. About 1995, the end of the season 1995.

24 End of season meaning the gull reproductive cycle

1 season. There were --

2 Q. Just to define it for the record,
3 ornithologist or not, what period do you understand
4 that to be, the nesting season?

5 A. I understand it to be primarily a 30 to
6 45-day period in which nesting activity will occur
7 and commences sometime in approximately April and
8 will proceed for the next 30 to 45 days and then the
9 hatching of those eggs that are laid during that time
10 period may actually proceed up through August.

11 Q. Now, you were testifying also that about
12 this time you were starting to hear of concerns or
13 problems. What would those have been?

14 A. During the time period it was fairly
15 noticeable on the coming to and from my place of
16 employment that there were a number of small chicks
17 that had found their way off the property to the
18 roadways and either due to dehydration or to being
19 struck by automobile traffic that used the access
20 roads, that these chicks were starting to be
21 extremely noticeable laying in the roadways.

22 Q. Did OMC do anything at that point?

23 A. We didn't do anything specifically at that
24 point. There was some activity attempting to clean

1 up the carcasses of those chicks. I think the City
2 also participated in that process, but I don't know
3 for certain who actually participated in that
4 process.

5 Q. In 1996 did the number of gulls increase?

6 A. I believe they did, although, we did not
7 have accurate counts. That was based on a general
8 observation. Certainly, the activity and the
9 presence I want to say in about 1995 -- we had a
10 complaint from one area of our operation that being
11 the engineering area that gulls were trying to nest
12 on the roof area of that building and had actually --
13 and tried but they were removing gravel and building
14 nests and had damaged the roof areas so repairs had
15 to be performed on those roofs. That was the first
16 area of complaint that we received in our department
17 of this activity and that was approximately 1995.

18 Q. And in 1996 any other problems or
19 complaints?

20 A. The number of birds seemed to be growing on
21 the site. I think in 1996 we deployed some gull
22 distress noisemakers. That was not actually
23 instituted by our department but by two of our
24 building operators if you will. Even though it's one

1 company, there are separate organizations within
2 certain building sectors and at that time they
3 operated somewhat separately.

4 The engineering department had deployed one
5 of the noisemakers as well as ones that went in
6 place, the information technology folks shortly
7 thereafter requested to get a noisemaker as well. It
8 seems that the engineering folks were somewhat
9 successful in removing the birds from their roof and
10 they next selected the information technology
11 building roof, so that was the origin of their
12 request.

13 Q. In 1996 were there any gull counts
14 conducted?

15 A. I don't recall specifically. I know we had
16 either in 1996, early 1997, I believe it was
17 Northwestern University, but a university group that
18 were doing student studies and for whatever reason
19 they started to select this gull colony to do counts,
20 so in the end of '96 early '97 time period, there was
21 counts being taken, but the information that I
22 received was only causally attained.

23 Q. Were any other issues or measures
24 conducted -- arise or conducted in 1996?

1 A. I don't think there were any scientific
2 issues conducted. I would say the parking lot color
3 test was starting to be performed by various
4 employees and that the blacktop in many cases was
5 more white than black by the end of the season.

6 Q. Are you aware of any employee complaints at
7 this point?

8 A. We started to receive, not only our
9 department but other departments including our vice
10 president of human resources, a number of complaints
11 in 1996.

12 Q. What was the nature of these complaints?

13 A. I think generally just the nuisance factor
14 of having cars continually bombarded. We had a
15 couple of employees that reported to me that had some
16 fear of going to their cars during certain portions
17 of the time. Apparently when the chicks would hatch
18 and would be out in the parking areas, people would
19 try to access their cars, parent gulls would try to
20 be protective of those chicks and so we had a few
21 employees that actually wanted to be escorted from
22 the door to their vehicles.

23 Also, we had some complaints of people
24 starting to raise is this a health hazard issue

1 because the amount of bird feces on the property had
2 grown extensively. In fact, the information
3 technology parking lot was extremely bad and so a
4 number of complaints came from that area as well.

5 Q. Moving on to 1997, what issues and impacts
6 did you face that might differ from 1996?

7 A. Well, 1996 convinced us that the problem
8 wasn't casual and it certainly wasn't routine and we
9 did not have the means or understanding in and of
10 ourselves to attack this issue. We had done some
11 research activities in 1996 trying to identify
12 control techniques that might be utilized and in fact
13 tried to identify experts that might be utilized to
14 assist us in implementing some controls.

15 And so in early 1997, we had narrowed that
16 list to a few individuals and we conducted some
17 interviews and attained the services of an expert to
18 assist us in performing an analysis of the current
19 situation and to help us prepare a plan to address
20 the birds.

21 Q. Could you characterize the change between
22 1994 or so and 1997?

23 A. Certainly. The number of complaints we
24 received internally had escalated expediently as much

1 as I guess the bird population had and gone from a
2 situation that I would describe as a minor annoyance
3 at least to me to one which there were considerable
4 concerns raised. And during some evenings of that
5 time period, it was the site -- when someone would
6 try to access their car from the parking area, it was
7 a scene more akin from Alfred Hitchcock's *The Birds*
8 than it was a normal beach front area. Literally the
9 sky would be virtually blocked out when the birds
10 would start to fly.

11 Q. In light of this, you stated you researched
12 experts and interviewed some. Did you ultimately
13 hire someone?

14 A. Yes, we did.

15 Q. Who did you hire?

16 A. Dr. Bill Southern.

17 Q. What did you ask him to do then?

18 A. To study the situation and prepare a plan
19 or advise us as to what kind of techniques we might
20 utilize to try to control the gull population.

21 Q. By 1997 do you know if a gull count had
22 been performed?

23 A. I know Dr. Southern -- other than the one I
24 mentioned previous with the university folks,

1 Dr. Southern did, as a part of his report, performed
2 a gull count or an estimate, if you will.

3 Q. Was that number reported to you?

4 A. Yes, it was.

5 Q. Do you know what it was?

6 A. My recollection is Dr. Southern -- and this
7 was, I think, about June or July of 1997 that he took
8 this count was on the order of 2500 pair, so 5,000
9 birds or so. We had deployed earlier in 1997 certain
10 control techniques and then additional control
11 techniques.

12 Q. Were these implemented by OMC independent
13 of Dr. Southern?

14 A. Yes, they were.

15 Q. Describe those, please.

16 A. The area of principal nesting activity
17 appeared to be the sand pile that I referred to
18 earlier and through our literature and research and
19 contact with other parties, we had determined that
20 the use of fishing line strung on two to three foot
21 centers would act to deter gulls landing in an area
22 and so we had constructed poles -- had a contractor
23 construct poles and strung fishing line throughout
24 the majority of the sand pile area that principally

1 had been denuded now and had started to redevelop
2 vegetation but was still a large area of concern.

3 In addition, we were required pursuant to a
4 U.S. EPA consent agreement to maintain a -- both
5 monitoring wells and what is commonly referred to as
6 a PNA storage cell on the site and by 1996 that site
7 was becoming largely inaccessible due to the amount
8 of the birds and bird droppings on the cover
9 material, so we did string the fishing line across
10 that area as well.

11 Q. You mentioned regrowing or returning
12 vegetation. Did you consider vegetation in the area?

13 A. We considered a number of techniques as we
14 reviewed the literature. We didn't have any
15 independent expertise prior to this experience in
16 controlling bird populations, but the literature
17 referred to three or four techniques that could be or
18 has been used in various locations.

19 It seems that the gull population growth
20 since I guess the mid-1960's has been growing
21 dramatically in the United States and certainly the
22 number of people in the last several years having
23 these problems seems to be growing dramatically as
24 well.

1 Q. You mention -- moving back to Dr. Southern,
2 you mentioned you hired Dr. Southern. When was that?

3 A. I don't recall specifically, but it was
4 probably April or May of 1997.

5 Q. And did you interact with Dr. Southern
6 yourself?

7 A. I interacted briefly in that I interviewed
8 Dr. Southern very briefly and had met him and then
9 one of our project managers interfaced with him
10 regularly throughout the project.

11 Q. But that was within your area and you were
12 essentially managing the overall --

13 A. That person did report to me, yes.

14 Q. Do you know if Dr. Southern was given any
15 guidance or guidelines in terms of OMC's preferred
16 general approach?

17 A. I think certainly Dr. Southern would have
18 been aware of any constraints as to control
19 techniques that we thought might be utilized to
20 familiarize Dr. Southern with U.S. EPA requirements
21 that we had access to the site, that we -- and not
22 only that, U.S. EPA had ordered us to provide North
23 Shore Gas and General Motors Corporation access to
24 the site for purposes of implementing the remedial

1 investigation phase of their work, so we did acquaint
2 him with the environmental circumstances associated
3 with the property.

4 Q. Do you know if your department also
5 provided him with any guidance on the treatment of
6 the gulls?

7 A. I did not explicitly -- I don't know. I'm
8 not aware of any direct conversation that way.

9 Q. Can you describe Dr. Southern's report as
10 you understood it from your position?

11 A. As I understood his report, as I mentioned
12 earlier, he said that there are about 2500 pairs of
13 birds at that time. My recollection in reading the
14 report was that that was a lower number than I had
15 previously been told and I think the other university
16 folks had said something like 10,000, but perhaps our
17 control techniques had some bearing and the time of
18 season may have had some bearing on that.

19 I also recall that he said the tasks we
20 were starting to undertake was not something you
21 could undertake casually. It would be a very
22 difficult task to relocate these birds. They have
23 extremely strong instincts in the nesting area once
24 established. He did offer some alternatives for

1 control, one being the use of noisemaking devices.

2 I recall that the techniques he
3 preferred -- I think his preference was could we have
4 done it, completely covered some 25 acre of site with
5 netting, fish netting, fish line. That was
6 impossible due do the requirements to maintain access
7 to the property and the expense of doing so was also
8 very considerable. Not only did you string the net,
9 you would have to remove any birds that would perhaps
10 get caught in the net and we -- those are the two
11 techniques I remember him talking more about. We did
12 also -- we had determined some other techniques that
13 people had used in coating the eggs with oil to
14 essentially suffocate the chicks or the embryos prior
15 to hatching.

16 Q. Did OMC favor that approach?

17 A. Certainly, my conversation with employees
18 that reported directly to me, we wanted to be as
19 sensitive as we possibly could to the killing of
20 chicks, the taking of chicks. We simply wanted to
21 relocate the birds so that they were not a problem to
22 us so that that -- from a guiding principal
23 standpoint -- we had also communicated with the U.S.
24 Fish and Wildlife Service by that time and they too

1 had a strong preference for any control program to
2 have as little injury to the bird population as
3 possible. This population being covered by the
4 Federal Migratory Bird Regulations.

5 Q. What was involved in OMC's interaction with
6 the Fish and Wildlife Service?

7 A. Dr. Southern, as I recall, had subjected
8 the same and we had in trying to seek advice
9 professionally on what techniques and/or methods we
10 might use to control the birds, we contacted a number
11 of the parties as I had said, the U.S. Fish and
12 Wildlife Service being one. Dr. Southern also made us
13 aware explicitly of the application permit
14 requirements in order to harass migratory birds and
15 disturb their nest and/or control them.

16 So sometime in about that same time frame
17 in '97, we became aware of the permitting
18 requirements and so we had also done some independent
19 follow-up on what would be required for the permit.

20 And as I recall, Dr. Southern provided substantial
21 documentation in his report or an appendix to his
22 report that covered the permit application
23 requirements.

24 Q. Did the Fish and Wildlife Service

1 representatives actually visit the site?

2 A. Well, as a part of the permit process, they
3 are required to make a site visit to give a damage
4 assessment and a condition assessment, if you will,
5 so subsequent to our filing the application, as I
6 recall two representatives of that department did
7 make a site visit.

8 Q. What did Dr. Southern ultimately recommend
9 under the circumstances then?

10 A. Well within the constraints that OMC had
11 provided him being that we had to maintain access to
12 the property that it was a superfund site, he
13 recommended the deployment of noisemaking devices as
14 well as -- those were both the propane cannons, the
15 use of certain pyrotechnic devices that made
16 different sounds that were largely launched from a
17 handheld device. I think whistlers I don't recall
18 the scientific term, but whistlers is what we call
19 them. They make a distinct different sound and the
20 continued use of the fish netting in areas that we
21 feasibly could use that kind of controlled device.

22 Q. Did OMC accept this recommendation?

23 A. Yes, we did.

24 Q. Did you modify it at all?

1 A. As I recall from Dr. Southern's full
2 recommendation, we choose to segment it into phases,
3 if you will. As I recall he originally had
4 recommended that we potentially would have to use six
5 to eight propane cannons and a number of devices. We
6 had in doing so -- I recall the cost estimate varied
7 for implementing the plan, but it was -- and we had
8 independent quotes in addition from Dr. Southern's
9 where it was somewhere between 60 and \$120,000 for a
10 season to implement the full plan.

11 MR. SWEDA: Mr. Knittle, I object to a
12 number of things that our coming out, specifically in
13 terms of Mr. Southern can speak for himself. If he's
14 going to be a witness, I'd rather have him talk
15 instead of someone else in terms of his studies and
16 recommendations.

17 MR. LUPO: I believe he's testifying as to
18 OMC's input and decisions and response to the input
19 that they had commissioned.

20 MR. SWEDA: No, he's making comments about
21 Mr. Southern --

22 THE WITNESS: My attempt is only to
23 characterize the reports I received from
24 Dr. Southern.

1 MR. LUPPO: I think he's clearly just saying
2 OMC's decisions in response to the inputs they
3 received and that's foundational information.

4 HEARING OFFICER KNITTLE: I allow the
5 testimony if that's what his intention is for.
6 Overruled, Mr. Sweda.

7 BY MR. LUPPO:

8 Q. Did the Fish and Wildlife Service also
9 approve this approach?

10 A. Yes, they did.

11 Q. And did they issue a permit to you in this
12 respect?

13 A. Yes, they did.

14 Q. How long did Dr. Southern say this program
15 would take?

16 A. As I recall Dr. Southern's report said it
17 takes several years, at least three. We also had
18 other information and other reports that suggested
19 that maybe five years, three to five years.
20 Obviously, it depended somewhat on the tenacity of
21 the birds for the site.

22 Q. What is your understanding of the word
23 tenacity for the site?

24 A. Pardon?

1 Q. What is your understanding of the word
2 tenacity for the site?

3 A. How strong an affinity they have for this
4 site and potentially whatever alternative sites might
5 be available to them that they would find more
6 hospitable in this site given the disturbances.

7 Q. Did OMC undertake this gull relocation or
8 gull control project?

9 A. In addition to the earlier described
10 activities of fish netting and gull distress
11 warnings, we undertook in 1998 a full deployment of
12 this plan.

13 Q. And describe what you mean by full
14 deployment?

15 A. We established, purchased and put into
16 operation the cannons, the propane cannons.

17 Q. How many?

18 A. As I recall, we purchased four. We put
19 three up on our site and had one in reserve for
20 potential use. One of the things Dr. Southern's
21 report had said is the question is you may be able to
22 move them, but the question is where will they go.
23 So part of the plan in our thinking was that whatever
24 system we use had to be flexible that could be moved

1 or deployed if the birds decided to move to other
2 portions of the property. And we deployed three, so
3 I also recall the city water plant had requested at
4 some period through this time to potentially use a
5 cannon and we had taken our spare and loaned it to
6 them for use in their activities.

7 Q. In the course of the implementation and
8 progress of the program, did you make any
9 modifications or variances to what you were doing?

10 A. For Dr. Southern's full program, we
11 basically started with what we characterized to our
12 management as phase one of the program. And phase
13 one as I said included the deployment of three
14 cannons. We reduced the activities somewhat from
15 what Dr. Southern had originally recommended.

16 I think he recommended that we shoot them
17 from dawn until dusk and that may be necessary
18 through a portion of the time. We may have started
19 at 7:00 a.m., but most of the time we started at
20 8:00 a.m. or later and would stop any activity before
21 dusk usually by 6:00 p.m. but on occasion to
22 8:00 p.m.

23 Q. And throughout the course of the season,
24 did you introduce any other changes?

1 A. I think the only other -- I don't know that
2 we introduced any changes. It was more at that point
3 Dr. Southern had -- we still did consultation with
4 him and part of it was applying an appropriate amount
5 of deterrent to get the birds to move. Once the
6 birds moved, we suspended the activity to the
7 greatest extent possible, so the plan that
8 Dr. Southern did lay out said you had to be flexible
9 enough to move with the birds and we did.

10 Q. Did you move the cannons at all?

11 A. Yes, we did.

12 Q. Did the overall program appear to have an
13 effect?

14 A. The overall implementation of the program
15 had an effect, yes, sir.

16 Q. And would you describe the effect -- the
17 difference between 1997 and 1998 in terms of the gull
18 nesting?

19 A. In terms of the gulls arriving to the site,
20 I don't know that there was a dramatic difference.
21 There seemed to be certainly the numbers we had
22 before and perhaps even greater numbers of birds
23 arriving to the site, but as the birds attempted to
24 start nesting, part of the plan included the serving

1 of the nests and taking of eggs as the permit allowed
2 us to do. I think we took on the order of 300 or so
3 eggs in that early time period and we would disturb
4 the nest. So we had personnel that we hired that
5 would go on the site and attend the cannons and
6 disturb the nest to try to deter the birds from that
7 area.

8 Q. So the overall number of nests decreased
9 between 1997 and 1998?

10 A. Certainly, our program became extremely
11 effective before the birds fully nested. I don't
12 know how many actual nests were hatched in 1998, but
13 they were, in terms of number of chicks, virtually
14 nonexistent on the site at that time frame.

15 Somewhere during the course of the
16 deterrent activities our plan escalated the -- one of
17 the things Dr. Southern had told us in the report and
18 verbally was that essentially you had the birds
19 adapted fairly quickly and fairly quickly to us
20 became a week. Any variation would take them a week
21 or less to adapt to that variation as a disturbance
22 and the permit also provided that -- certain taking
23 of the gulls.

24 Q. What do you mean by taking of the gulls?

1 A. Taking that -- essentially to shoot some of
2 the gulls, to reinforce that the sounds that were
3 being made were in fact danger and not just sounds,
4 so that was a part of the program as well.

5 Q. And did OMC ultimately do -- did OMC
6 ultimately take some gulls?

7 A. OMC retained the services of the City of
8 Waukegan policemen. The permits required that a
9 specific party, a named party, be included in the
10 permit application and it only allows parties that
11 are authorized to take gulls under the permit. The
12 permit also limited the number of gulls that could be
13 taken.

14 Q. How did OMC determine when to take some
15 gulls?

16 A. Essentially at the initial outset of the
17 nesting season and it became very apparent when that
18 was and that was early April, I don't recall specific
19 days, that that period was the time that both in
20 Dr. Southern's conversations and from our growing
21 experience with these matters that if we could
22 relocate the birds during that time period, their
23 instincts to nest would perhaps outweigh their
24 instincts to return to our site where disturbances

1 were occurring, so that I want to say sometime in --
2 shortly after the nesting had begun in earnest, we
3 had contacted the Waukegan police and had requested a
4 person to come to the site and take some of the
5 birds.

6 Q. And why not just continue the cannons at
7 that time?

8 A. Well, essentially we -- first of all, the
9 cannons were -- even though we were moving them and
10 even though we were using the whistler devices or
11 pyrotechnics, they were not moving from the site very
12 readily. In fact, they were adapting in some cases
13 in a matter of two to three days during the change in
14 activity and returning to the site where their
15 instincts to nest were stronger than our deterrents.

16 So at that point, the last part of the
17 process of our permit and as I previously said U.S.
18 Fish and Wildlife strongly encourages nonlethal means
19 of control to the greatest extent possible and so we
20 had to exhibit in our permit that we had fully
21 implemented any nonlethal deterrent methods we had
22 before we could take any gulls. And at that time we
23 concluded that we were not going to be able to move
24 them without that use of that technique.

1 Q. So OMC decided to take some gulls?

2 A. Yes, we did.

3 Q. And do you know how many they took?

4 A. The reports contained -- I wasn't present
5 at the time. The reports contained -- I think we
6 took 20 birds in one general time period.

7 Q. And this is pursuant to the permit the Fish
8 and Wildlife Service had issued?

9 A. I think the permit actually allowed us to
10 take 200 birds, but this was the beginning part of
11 that process. We took 20 birds in the first round of
12 deterring and attempting to implement this technique.

13 Q. Did it work in deterring the gulls from
14 staying on the site?

15 A. It was extremely dramatic. It exceeded our
16 expectations greatly. Literally within the following
17 day and the day following, within three days, there
18 were virtually -- I don't want to say there were no
19 gulls, but there were virtually no gulls on the
20 property. They had relocated. It was extremely
21 dramatic.

22 Q. Did OMC take any further gulls during the
23 1998 season?

24 A. No, we did not.

1 Q. Do you know how long the cannons ran in
2 1998 date-wise?

3 A. I don't know precisely when we ended.

4 Q. How about generally?

5 A. I would guess we ended in probably June --
6 probably in June, late June.

7 Q. Do you know how long OMC plans to run the
8 cannons this year?

9 A. Well, our permit allows us to run them --
10 give us authorization to harass the birds as long as
11 necessary, but certainly our intention has and has
12 been and continues to be to operate those deterrent
13 devices only to the extent necessary to deter the
14 birds. And if the birds are deterred and if taking
15 of birds accelerates that process, then we would
16 certainly consider using that again, but only to the
17 extent necessary to deter the birds.

18 Q. And last year when you -- after you did
19 take 20 of the however many gulls the permit allowed,
20 did you cut back on the use of the cannons?

21 A. Yes, we did.

22 Q. In what with respect if you know?

23 A. Both the frequency and duration of use.

24 Q. Do you have any plans this year to vary the

1 use of the cannons?

2 A. We will again try to reduce the amount of
3 cannon use to the minimum level that we can deter the
4 birds from the site. To that extent, I would say
5 beginning sometime in the last week -- we had started
6 seeing nesting about two weeks ago and last week we
7 had introduced people to the site that being another
8 variable and it appears by the end of last week,
9 early this week, now that variable, this being the
10 nesting season has made a dramatic difference already
11 so that the birds on site right now are fewer and we
12 are proportionally reducing the cannon use.

13 Q. And so have you already started to reduce
14 the cannon use?

15 A. Yes, it's a continuous process where we try
16 to minimize the use of those devices.

17 Q. Sir, are you aware of any other wildlife
18 that occupies the site?

19 A. From time to time, this year I know we have
20 observed personally my office window and on one
21 occasion it appears to be at least two or more small
22 coyotes that are now frequenting the site at certain
23 times of probably the evening -- night but were
24 present in the morning.

1 Q. Are there any geese around?

2 A. There may be. They're not noticeable on
3 our property compared to what the gulls were.

4 Q. And has the vegetation come back at all?

5 A. The site has continued to revegetate and
6 the sand pile hill that I referred to has continued
7 to revegetate, although, we still maintain the
8 fishing line that I had talked about.

9 In addition, because we had some heavier
10 snows this year and from clearing of the highways,
11 snows were placed on portions of the property and
12 that had disturbed vegetation in other areas, so we
13 have constructed more netting areas to cover up those
14 denuded areas. So we've actually -- those are the
15 activities that we have undertaken.

16 MR. LUPO: That's all I have.

17 HEARING OFFICER KNITTLE: Mr. Sweda, any
18 cross-examination?

19 CROSS-EXAMINATION

20 BY MR. SWEDA:

21 Q. Yes. I'm sorry. I'm trying to remember
22 your name.

23 A. Call me Roger.

24 Q. Roger?

1 A. Sure.

2 Q. Anything but sir.

3 HEARING OFFICER KNITTLE: Actually, let's
4 keep it on a last name basis if we can. Will you
5 state your name again, sir?

6 THE WITNESS: John Roger Crawford.

7 MR. SWEDA: Mr. Crawford.

8 HEARING OFFICER KNITTLE: Is that
9 acceptable.

10 THE WITNESS: It's acceptable to me, yes.

11 BY MR. SWEDA:

12 Q. Are you or was your department aware of any
13 regulations for the state IEPA Act when you were
14 getting into this process whenever that may be
15 starting back in 1991 or did you ever become aware of
16 the -- any regulations that may cover anything else
17 besides the superfund site or the Fish and Wildlife
18 Service regulations in terms of the gulls'
19 protection? Were you aware of -- did you do any
20 research in terms -- or the department do any
21 research in terms of what other acts, prohibitions or
22 kinds of things might be involved in those times?

23 A. I'm not certain of what the question is.

24 MR. LUPO: If he can clarify the time

1 period he's speaking of.

2 BY MR. SWEDA:

3 Q. The time period was -- I'm taking it from
4 his going back all the way to your questioning in
5 terms of 1993 up until now, but I'll make it to the
6 period of time when the cannons started which was
7 1998. Prior to that -- prior to 1998 were the
8 cannons used?

9 A. No, they were not.

10 Q. Were you aware then starting in 1998 until
11 this point in time of any regulations that may have
12 covered the cannon use?

13 A. As I stated in my earlier testimony, I was
14 aware that certain permits were required. We are
15 generally aware of Illinois EPA Regulations as well
16 if that was part of your question.

17 Q. Were you specifically aware of any noise
18 regulation?

19 A. We are aware of noise regulations.

20 Q. Were you aware of them at the time in 1998
21 beginning your program? Was the department aware of
22 noise regulations?

23 A. We're generally aware of noise regulations,
24 yes.

1 Q. What noise regulations were you aware of?

2 A. We're aware both from a community
3 standpoint and from a state standpoint that most
4 every area that we operate has some noise
5 regulations.

6 Q. And can you specifically say what you
7 researched in terms of what those regulations were?

8 A. I didn't personally do any independent
9 research into those regulations. We have those
10 regulations at our disposal on a regular basis.

11 Q. Is the OMC property as such fenced -- just
12 a question. Since I'm like looking at those maps and
13 things, I see a number of little squiggles?

14 A. Which particular property of OMC are you
15 referring to?

16 Q. Particularly the part south from the drive
17 and to the gull -- turn and face the gull area?

18 A. South from you mean Sea Horse Drive?

19 Q. Yes.

20 A. Yes.

21 Q. Is that fenced internally? I know where
22 the beach is.

23 A. The majority of the property is fenced in
24 that area, yes.

1 Q. You indicated that site where the gull area
2 is, which is a primary nesting area, I think in your
3 words of gulls you indicated near the sand pile?

4 A. That was the initial nesting area. Once we
5 deployed the fish line, they largely moved out of
6 that area. We still had some gulls nesting there
7 that would essentially during the evening hours walk
8 back under the netting, but largely had moved from
9 that area and were now nesting on other portions of
10 the area that I had designated as a gull colony area.

11 Q. You indicated that that area had been used
12 in terms of some process of the superfund site or
13 investigations and that basically it was denuded; is
14 that correct?

15 A. The sand pile area had been denuded.

16 Q. And you indicated in your testimony that
17 there was some -- you observed or someone observed
18 some vegetation coming back. Were there any attempts
19 at that time to reintroduce vegetation on the part of
20 OMC to those areas?

21 A. We basically obtained quotations and
22 estimates from people that provided that kind of
23 service as to what the success might be and the cost
24 might be to try to revegetate the hill. That was

1 actually prior to using the fish line because the
2 deployment of the fish line was not an inexpensive
3 operation and what we had determined was that while
4 it might be effective only after a few years, that we
5 did not believe it would be effective in a shorter
6 term basis.

7 Q. Actually, I'm not talking about -- let's
8 back up a minute. Were talking about -- you
9 indicated that in the 1993-94 era time period that
10 the area was basically used for construction and
11 equipment and storage and that kind of stuff?

12 A. That was 1992-93.

13 Q. And that was basically denuded. What I'm
14 saying is prior -- you indicated in your -- I recall
15 you indicating in your testimony that the gulls
16 were -- or were the gulls a problem at that time?

17 A. They were not a specific problem that I'm
18 aware of as I said. Certain portions of OMC
19 operations saw the problem before it was generally
20 widespread. The engineering building being the first
21 building to be attacked.

22 Q. What I'm asking you is were there any
23 attempts on OMC's part in that period of time, i.e.,
24 '93, '92, '94 to seek vegetation irregardless of

1 gulls?

2 A. No, there were not.

3 Q. Assuming that --

4 A. There was no reason.

5 Q. There was no reason to, so you left the
6 site basically the way it was and if any vegetation
7 would appear on its own, what you were trying to
8 say --

9 A. The site was a controlled access because it
10 was now a part of a U.S. EPA investigation and so
11 literally the only activities authorized for the site
12 were those authorized by U.S. EPA in terms of
13 accessing the site for purposes of taking
14 measurements and/or maintenance of activities or
15 monitoring wells that had been deployed on the site,
16 so it could not be used by OMC and for other
17 activities.

18 Q. I understand why you said that it wasn't
19 anything there. Jumping ahead to '96. You indicated
20 that there was increase of -- '95, '96 of increased
21 gulls. One of the questions I guess is this was
22 prior to or maybe you had already been talking to
23 Mr. Southern or probably consulted him. I think you
24 were saying you were interviewing some people in '96

1 maybe to --

2 A. We started doing serious research on it in
3 1996. I think it was 1997 where we actually spoke to
4 Mr. Southern.

5 Q. And referring to Mr. Southern saying there
6 is at that time or whoever else was a consultant
7 prior to Mr. Southern being picked that he could get
8 the birds to move from one area to another and to get
9 them out, but they seemed -- you mentioned that they
10 specifically moved from one building that there are
11 local actions in that building. I don't know how
12 your administrative staff works, but you said that
13 they were doing something and they moved over to
14 another building?

15 A. That's correct.

16 Q. I just want to make that point clear that
17 one building of your corporation did some actions,
18 then it got the gulls to move from their building to
19 another building. Was there any thought in terms of
20 where these birds were going to go finally or what
21 they were going to through kind of thing to get from
22 one building to another and what those actions were
23 and where were the birds going to go?

24 A. We didn't know precisely where the gulls

1 were going to go. We had consulted Dr. Southern once
2 he had been retained as to that and it appears that
3 it's -- while you might have some ability, he as an
4 expert to prognosticate as to areas that were more
5 favorable to their relocation.

6 It was virtually impossible to predict
7 where they would pick next to go. So that was part
8 of the thinking when we selected the system that we
9 did that it had to be both flexible enough to be
10 moved, if you will, redeployed on a fairly rapid
11 basis should the gulls for whatever reason select
12 another area of the property to locate on.

13 Q. And in fact, did not that happen and -- did
14 that not happen in terms of the City of Waukegan,
15 i.e., the water treatment plant?

16 A. I can't speak specifically for what
17 happened at the City of Waukegan.

18 Q. You are not familiar with any testimony or
19 filings of Mr. Neusinski?

20 A. I'm not familiar with any details that I
21 could -- no.

22 Q. But somehow the City of Waukegan was given
23 a cannon to use from OMC?

24 A. Yes, they were.

1 Q. What purpose do you know of that that
2 cannon was being used for by the City?

3 A. I assume it was being used for removal of
4 the gulls.

5 Q. You didn't govern that?

6 A. My project manager at the time actually
7 communicated with the City on that. And certainly I
8 was generally aware that their request was because
9 they had gull problems as well. We had also, as a
10 part of our process, attempted to contact all our
11 neighbors, the City, the police to try to make a
12 general awareness that we were going to be carrying
13 this program out and had widely publicized it prior
14 to actually implementing the program in order to make
15 people aware of the circumstance.

16 Q. Was there a mass mailing or anything to
17 people that might be affected over the bluff area?

18 A. There was no mass mailing to anybody in the
19 bluff area. There was general people in the harbor
20 area and the City of Waukegan and any of the public
21 agencies were notified.

22 Q. I as a homeowner of 25 years was not
23 notified, but what was -- was there any -- I'm not
24 aware of anyone else being notified or giving notice

1 other than the letter which I presented in my
2 testimony from Mr. Jones of OMC. That was the first
3 I ever heard officially other than my phone calls.
4 One question as to what I initially started that you
5 had indicated that the harbor is mostly industrial.
6 Are there any other uses of the harbor area and the
7 lake front area besides industrial?

8 A. Well, the majority of the harbor area is
9 industrial. You have -- there's National Gypsum on
10 the west side of the harbor. There's Heron Cement on
11 the west side of the harbor. Outboard Marine
12 occupies most of the eastern shore of the harbor. At
13 the very northern edge of the harbor is Larson
14 Marine. It's a commercial, industrial slash
15 recreational use. Larson Marine does boat
16 maintenance activities. It is the only engine repair
17 facility between, as I understand, Milwaukee and
18 Chicago, full service repair.

19 Q. Is there anything else? What's south and
20 east of the water plant area which is adjacent to
21 your property?

22 A. There is a recreational harbor that is
23 south of the Waukegan harbor area I referred to
24 that's immediately south of the break water.

1 Q. And how many -- how large a facility do you
2 estimate that might be?

3 A. I don't recall the precise number of slips
4 that are operated there, but it's probably on the
5 order between 800 or so to 1,000.

6 Q. So a substantial amount?

7 A. It's a substantial size harbor, yes.

8 Q. Do they have a meeting place or something
9 there also?

10 A. There is a port district headquarters.

11 Q. That has meeting rooms. Are there any
12 private facilities in the area that you're aware of?

13 You mentioned --

14 A. Other private --

15 Q. -- National Gypsum?

16 A. There are other businesses that are located
17 along --

18 Q. Are there other businesses?

19 A. Yes.

20 Q. What kinds of businesses are they that
21 you're aware of?

22 A. General marine support businesses. There
23 are a few food establishments that service people
24 that frequent the harbor area. Those are the other

1 types of businesses that I'm aware of.

2 Q. I'm just trying to clarify what you said in
3 terms of -- you were speaking again in terms of your
4 knowledge of the study of Mr. Southern that was
5 finally selected. Can you refresh my memory in terms
6 of the amount of time that might be involved
7 according to you in terms of what the study suggests
8 as to the amount of time that it would take the
9 propane cannons to be used along with other sources
10 for the gull relocation activity?

11 MR. LUPO: I'm going to object. It's not a
12 clear question.

13 MR. SWEDA: I'm just trying to --

14 MR. LUPO: Do you mean in terms -- does he
15 mean in terms of length of time?

16 HEARING OFFICER KNITTLE: Sustained. Why
17 don't you rephrase the question, Mr. Swed?

18 BY MR. SWEDA:

19 Q. I'm trying to recall the amount of time
20 that you're aware that the cannon program may occur
21 according to the studies that you're aware of, the
22 gull relocation study?

23 A. Are you talking about the daytime hours
24 or are you talking about --

1 Q. No, length of time, i.e., years?

2 A. Years, I think I did previously state in my
3 testimony that Dr. Southern had said it would be on
4 the order of three years plus depending on the
5 tenacity of the birds. We had also read reports that
6 I also previously mentioned in my testimony that had
7 suggested in some areas they had attempted to be
8 controlled over a five-year period and they had not
9 completely eliminated the colony from those
10 locations, so we were aware of the three to five
11 years time frame.

12 Q. Do you recall when -- since you
13 mentioned -- do you recall when the -- you said you
14 employed the City of Waukegan police department to
15 come and take, is the words you used, some gulls. Do
16 you remember what you talked about, but I don't
17 remember a date?

18 A. I don't recall precisely a date that was
19 set forth in our plan. Our project manager at that
20 time had advised that -- I knew of the gull nesting
21 activity that had been substantial and that we knew
22 that the deterrent devices in and of themselves,
23 without real threat of danger being present, were not
24 acting as a deterrent as sufficiently to deter any

1 longer. I want to say that was in --

2 Q. I think I heard you.

3 A. -- in May of 1998, but I don't recall the
4 precise date.

5 Q. It would be good to know what that
6 precise -- early in May, mid-May, late May?

7 MR. LUPPO: Your Honor, there is no
8 question.

9 HEARING OFFICER KNITTLE: Sustained.

10 Mr. Sweda you can ask him, but I think he's already
11 testified he doesn't know the exact date.

12 BY MR. SWEDA:

13 Q. You indicated that after the taking
14 process, that it was quite effective and that you had
15 to reduce and you cut back on your noise program?

16 A. We didn't have to. We voluntarily choose
17 to.

18 Q. That's what I'm saying is that you said you
19 voluntarily, for whatever means, you cut back on your
20 noise program and it was related to the effect of
21 taking of the gulls by whatever means, guns?

22 A. Yes, that's correct.

23 MR. SWEDA: And that recollection as to the
24 date would be important, Mr. Knittle, in that it

1 establishes a time when --

2 HEARING OFFICER KNITTLE: I have no problem

3 with you asking the question and I'll let you ask

4 again even, but I know he --

5 MR. SWEDA: If he does not recall the date,

6 he --

7 HEARING OFFICER KNITTLE: If he doesn't

8 recall, he can't answer because he doesn't know and

9 we don't want him to guess, but you can ask him that

10 question one more time if you want.

11 BY MR. SWEDA:

12 Q. Was it early May, late May?

13 A. I don't recall specifically.

14 Q. Thank you. And where did the birds go at

15 that time?

16 A. I don't know.

17 Q. They just what?

18 A. They left our property.

19 Q. They left your property?

20 A. My permit is called a B-Class permit which

21 allows us to harass the birds on our property and

22 only on our property.

23 Q. One last question, was in reference to --

24 you made some statements that you try not to use the

1 propane cannons until like 8:00 o'clock in the
2 morning or something to that effect. I think I
3 recall you saying that. Is that correct that you
4 try --

5 A. That was generally the practice that we
6 used. It corresponded with the arrival time with
7 certain employees and we modified that depending on
8 the success of the use of the cannons and the
9 intensity of the birds coming to the site.

10 Q. Do you recall what your noise program was
11 on or about April 1st of this year in terms of
12 propane cannons and what was occurring?

13 A. I don't recall specifically, no. I have a
14 project manager that actually attends to that that
15 knows the parameter of the program.

16 MR. SWEDA: Thank you. No other questions.

17 HEARING OFFICER KNITTLE: Ms. Aavang, you
18 didn't have any questions for this witness?

19 MS. AAVANG: No.

20 HEARING OFFICER KNITTLE: I just wanted
21 that on the record. Do you have redirect?

22 MR. LUPO: No, sir.

23 HEARING OFFICER KNITTLE: Thank you, sir.
24 You could step down. Do you have another witness you

1 wish to call?

2 MR. LUPO: We do. Dr. William E. Southern.

3 HEARING OFFICER KNITTLE: We're back on the

4 record. Mr. Lupo, I think this is your witness.

5 MR. LUPO: Yes.

6 HEARING OFFICER KNITTLE: Could you

7 identify him, please?

8 MR. LUPO: William E. Southern.

9 HEARING OFFICER KNITTLE: Can you swear the

10 witness, please?

11 (Witness sworn.)

12 WHEREUPON:

13 WILLIAM E. SOUTHERN,

14 called as a witness herein, having been first duly

15 sworn, depose and saith as follows:

16 DIRECT EXAMINATION

17 BY MR. LUPO:

18 Q. Sir, would you state your full name,

19 please?

20 A. Dr. William E. Southern.

21 Q. And will you describe your occupation -- or

22 state your occupation?

23 A. Well, I've have a dual occupation.

24 Currently I'm with West Ecological Consulting. We

1 are now located in Wisconsin. Prior to that time, I
2 was president of NCAP Incorporated located in
3 De Kalb, Illinois and prior to that from 1959 through
4 1990 I was a professor at Northern Illinois
5 University.

6 MR. LUPPO: Off the record for a moment.

7 (Short interruption.)

8 BY MR. LUPPO:

9 Q. Sir, please describe your education.

10 A. I have a bachelor's degree from Central
11 Michigan University in biology. I have a master's
12 degree from the University of Michigan in zoology
13 with an emphasis in ornithology. Ph.D. from Cornell
14 University with a major in animal behavior
15 specializing in birds and also minors in wildlife
16 ecology and wildlife management.

17 Q. What year did you receive your Ph.D.?

18 A. 1967.

19 Q. You've mentioned a field of ornithology.

20 Would you describe that for the Board, please?

21 A. Yes. Ornithology is the study of birds,
22 their biology, their behavior, ecology, management
23 live history.

24 Q. And you mentioned a tenure as a professor.

1 About how long were you a professor?

2 A. Thirty-one years.

3 Q. And was that all at Northern Illinois?

4 A. Yes, I was at Northern for 31 years, but
5 also during that period I taught at the University of
6 Michigan biological station for three summers. I
7 taught ornithology there at that time. I also taught
8 for one year down in Balice at a research station
9 there, the associated universities the midwest
10 operates and I've had other short-term positions as
11 an ornithologist also during the summer months and so
12 on.

13 Q. And you mentioned a consulting career. How
14 long were you involved in consulting?

15 A. Well, NCAP Incorporated was founded in 1974
16 by myself and three colleagues. I operated that
17 business until 1990 when I sold it and then from 1990
18 up to -- excuse me -- up to 1994 and from 1994 on,
19 I've been with West Ecological Consulting which I
20 also started.

21 Q. What was the expertise of NCAP?

22 A. NCAP had a variety of expertise. The four
23 biologists who started it all had their own
24 specialities. I was the ornithologist. We had a

1 plant taxonomist, an ichthyologist, general ecologist
2 and then we have employees that represent other
3 subdisciplines within those areas.

4 Q. And you mentioned West Consulting?

5 A. Yes.

6 Q. What's the specialty of West Consulting?

7 A. The sole function of West Consulting at
8 this time is to do bird control programs for industry
9 and anyone else who asks for our services.

10 Q. And in the course of your career, have you
11 worked for governmental entities?

12 A. Yes, I have, federal, state and local
13 governments.

14 Q. And how many states have you consulted?

15 A. As far as bird control is concerned, we've
16 been doing projects in neighboring states and two
17 Canadian provinces.

18 Q. Have you authored or coauthored any
19 articles in your field, ornithology?

20 A. Yes, I've published in excess of 150
21 scientific papers, book chapters, monographs and
22 things of that sort plus probably thousands of other
23 reports, unpublished reports.

24 MR. LUPO: I'd offer Dr. Southern as an

1 expert in ornithology.

2 HEARING OFFICER KNITTLE: Mr. Sweda?

3 MR. SWEDA: I have no problem with that.

4 HEARING OFFICER KNITTLE: Okay. He will be
5 so accepted.

6 BY MR. LUPO:

7 Q. Are you familiar with Outboard Marine
8 Corporation and the presence of a sea gull colony on
9 its ground?

10 A. Yes, I am.

11 Q. And how did you become involved with -- or
12 how did you come to know about this?

13 A. I believe I was first contacted in 1996 by
14 a single phone call telling me that they had a
15 problem and nothing else transpired at that time. I
16 was just alerted to the fact they had a problem and
17 they might be interested in doing something about it.

18 In 1997 I was then contacted and asked to
19 prepare a management plan or bird control plan for
20 the site and I agreed to do so following a site
21 visit. It allowed me to determine just what the
22 problem was or the size of the colony and other types
23 of details.

24 Q. You mentioned a management or site control

1 program. What would that -- what is that?

2 A. Management plan or bird control plan, the
3 control plan would be a plan that would help deter
4 birds from nesting at a location where they are not
5 considered to be desirable because of conflicts with
6 human activities.

7 Q. And do you recall approximately when you
8 were retained?

9 A. I believe it was in May and I made a sight
10 visit in early June.

11 Q. Of 1997?

12 A. Yes.

13 Q. And what did you find during your site
14 visit?

15 A. At that time, we were well into the nesting
16 season. We did a quick survey of the birds present
17 and estimated at least 2500 pairs of ring-billed
18 gulls nesting on the site and at least one pair of
19 herring gulls. These birds were scattered about
20 on -- well, designated as the southern half of the 20
21 or so acre area that is recognized as the superfund
22 site. The birds were making their presence known
23 over the parking areas. There's a great deal of bird
24 fecal material administered over the parking areas on

1 the rooftops where the birds were perching and it was
2 an ongoing breeding colony of gulls.

3 Q. So in your opinion this was indeed a sea
4 gull colony?

5 A. Without question.

6 Q. And it was established?

7 A. It appeared to be well-established, yes.

8 Q. Based on what you observed, what's your
9 opinion as to the compatibility of this gull colony
10 with its location on the OMC premises?

11 A. In general, gull colonies are not
12 compatible with areas of human activity, that is,
13 where people are carrying on their normal either work
14 or recreational activities. Gulls indeed have
15 educational value and at a proper location, a gull
16 colony would be an asset, but next to an industrial
17 facility such as this, it is far from being an asset.
18 It is indeed a detriment and there are various
19 reasons for that.

20 Q. What are some of the reasons that make it a
21 detriment?

22 A. One, it is a message they create. Gulls --
23 and when you have 5000 individuals, that is, 2500
24 pairs as we discovered in June plus later in the

1 season and probably you can figure on average there's
2 going to be something like 2.4 progeny per nest that
3 will survive well into the juvenile period. You're
4 having a lot of birds that are causing a great
5 quantity of fecal material in a relatively small
6 area.

7 This material carries high levels of
8 coliform bacteria. Gulls and other birds often carry
9 salmonella. This is very, very common and so there
10 is a pathogenic problem that's a potential as far as
11 human health -- it's a potential risk insofar as
12 human health is concerned.

13 Q. What are some of the risks to health?

14 A. One of the primary ones and one that I have
15 personally studied the most and my students have
16 looked at in the past is a condition in humans
17 histoplasmosis. This is caused by a fungus that
18 grows in organically rich soils and soils that
19 typically are enriched by either bird feces or feces
20 from other animals, so it could grow in manure piles.
21 It could grow in compost piles and also in areas
22 where birds such as gulls drop their droppings there,
23 their fecal material on a regular basis.

24 And in a gull colony, you may have a

1 sizeable area where the gulls -- the adult gulls and
2 their chicks deposit this material and the soil
3 becomes richer year after year and finally it reaches
4 a point where this fungus can apparently grow there.

5 And if that fungus then reaches the lungs of humans,
6 it cause a condition I mentioned as histoplasmosis.

7 Q. And just generally speaking, what is the
8 condition in humans?

9 A. The usual symptoms at the onset are
10 pneumonia-like and so the person may think they're
11 having a cold or something of this sort and it may
12 become chronic. Sometimes a person may not become
13 sick enough to be treated for that condition and it
14 may not be until they have a chest x-ray that a
15 physician will discover scarring to the lung tissue.

16 And we have accounts in Michigan where we
17 did an extensive study of this where people actually
18 had operations of lung cancer only for the surgeon to
19 find upon entering into the lungs that it is
20 histoplasmosis and not lung cancer the person had.

21 The organism can also spread into the bone marrow and
22 some of the other tissues and cause some very serious
23 problems there and in some cases, it can be lethal.

24 Q. Have you personally investigated gull

1 colonies where histoplasmosis was transmitted to
2 humans?

3 A. Yes, in fact, I believe my students and I
4 actually studied the first colony in which
5 histoplasmosis was discovered.

6 Q. And that was sometime ago?

7 A. Yes, this was back in probably the 1970's,
8 early 1970's, in Michigan and that happened to be an
9 industrial facility.

10 Q. What are some of the other factors that
11 make this location a problem?

12 A. Well, it was described in Mr. Crawford's
13 testimony about gulls dive-bombing humans that get
14 near their chicks and eggs and this is indeed a
15 reality. And I've experienced this numerous times
16 during my field studies with gulls.

17 If you get near their chicks, they will
18 come down and make loud screeching sounds during a
19 very deep dive at you. And there are times when they
20 misjudge those dives and strike people and I've been
21 stunned by them actually. I've seen stars as a
22 result of birds hitting me on the head and we always
23 wear hard hats when we're in colonies.

24 Even with some head protection, still you

1 can be hit pretty hard and I had one student who was
2 knocked unconscious by one of these on occasion and
3 it's not because the birds are trying to do that. I
4 think they misjudge the depth of their swoop and
5 they're coming in at the speed of perhaps 30 miles an
6 hour or so on these swoops and they misjudge and they
7 hit you a little harder than you anticipated.
8 Nevertheless, it can be rather nerve-racking to a
9 person going to their car who could be hit by one of
10 these, so this is a potential problem.

11 Q. Are odors associated with the colonies?

12 A. Yes, this is another problem and this
13 progresses as the breeding season progresses. Again,
14 the fecal material accumulates in the colony and also
15 a sizeable number of chicks die. Figure in a colony
16 of 2500 pairs, there's probably going to be at least
17 2500 young that die sometime during the nesting
18 season and these are going to decay and create a
19 fairly good stench in the colony area.

20 It's something that biologist get used to
21 when working gull colonies, but if you aren't
22 accustomed to it, it can be a very foul smelling
23 place. On a wet day, it's especially noticeable.
24 The order is intensified and then will carry on a

1 breeze and it's not a pleasant thing. Also in
2 parking lots and areas like that that are covered
3 with enough fecal material can become very slippery
4 when they're wet because the bird feces are almost
5 like ice when wet.

6 Q. And during your visit, did you see enough
7 fecal material to possibly satisfy that last factor
8 you mentioned?

9 A. No, it wasn't to that extent, but it was
10 obviously accumulating and the chicks had not yet
11 started wondering on to the parking areas. And
12 they're the ones who would be depositing a great deal
13 of that on the parking area, so later it could have
14 become that severe, but I did not witness it that
15 way.

16 Q. You mentioned the chicks in the parking
17 areas. What other issues may arise with chicks in
18 the parking areas or other areas?

19 A. Gull chicks are not the smartest things in
20 the world and they do not get out of the way of
21 automobiles very well or even out of the way of
22 people that quickly, so it is possible for people to
23 essentially trip over clusters of chicks and
24 certainly vehicles could kill some and so on. And so

1 there are many people that are potentially disturbed
2 by the fact that they are running over chicks and
3 have that sort of obstacle course to run in order to
4 get their vehicles out of the parking lot. So while
5 this isn't a danger per se to people, it certainly is
6 something that is not an acceptable alternative to
7 them.

8 Q. What about -- are these gulls capable of
9 property damage?

10 A. Yes, they are. There are several kinds of
11 things that they've been accused of doing and there's
12 verification that they did do it. They have caused
13 damage to flat rooftops. There's a number of places
14 in the country now where gulls have elevated
15 themselves to flat rooftops when they're short of
16 nesting places and while there, they will, for some
17 reason we didn't know why, peck at the tar and
18 actually peck holes in the roof. It seems to make no
19 sense, but it's documented that they do it.

20 Also they tend to carry enough nesting
21 material up onto the rooftops that plug up the drain
22 pipes and so now the roof will have a layer of water
23 on it following rain and this in turn can cause some
24 problems. It can find a low spot and seep into these

1 holes and leak into the buildings.

2 They'll also defecate on vehicles and this
3 may be more of a nuisance than actual damage, but
4 people fear at least that it could damage the paint
5 jobs to their vehicles and so forth. Personally,
6 again working in colonies, we had to wash our vehicle
7 essentially daily after being in a gull colony.

8 Q. Sir, how long does it take to establish a
9 gull colony?

10 A. Well, a colony is established once a group
11 of birds nest there, at least it's established for
12 that particular season. But -- well, let me back up
13 on that. That's not necessarily true. If they breed
14 successfully that season, then one could call it
15 having been established or a successful colony for
16 that season, but it's very tough for the birds to
17 nest at a given site for that first time.

18 Apparently there's a great deal of social
19 behavior that goes into a gull colony forming and
20 these birds don't always get this act together the
21 first time they try it. So the first year they may
22 be there. They may actually go through nest building
23 and they may lay a few eggs and so forth, but they
24 may not produce any progeny.

1 So it's hardly looked upon as being a
2 successful colony, but then if they've been at a spot
3 doing that for a year, the probability is high
4 they'll come back and try it again next year. And
5 then gradually they become attached to that
6 particular site and that is now their home, that is,
7 the place they can return to each year at the end of
8 migration to start nesting.

9 Q. How strong is that attachment?

10 A. Very strong. The birds tolerate an extreme
11 amount of distraction, injury, anything short of
12 death almost before they will leave a colony site.
13 And I say this again from personal experience from
14 the kind of things we put birds through in colonies.
15 We've captured them in large nets fired by cannons
16 and put them in boxes and shipped them across the
17 country in migration studies and orientation studies,
18 and the birds still come back.

19 I mean they've been -- looked back on it
20 and they're really manhandled, so they were abused a
21 lot, still they came to that particular site to nest
22 after that. So they're very, very attached to that
23 site and that attachment grows with each year having
24 nested there.

1 Q. Is it possible for a gull colony to grow
2 from year to year?

3 A. Yes, and that has been the pattern since
4 sometime in the 50's. Gull colonies have been
5 growing especially ring-billed gull colonies, the
6 species have been highly successful in recent
7 decades.

8 Q. Is there anything -- well how much might a
9 colony grow from year to year?

10 A. Well, it's highly variable, but it's not
11 uncommon for colonies to grow 10 to 20 percent per
12 annum if there's a sufficient number of birds
13 produced, of course, is prudent.

14 Q. Is there a room for extension of the -- at
15 least the colony you saw in 1997 on the OMC premises?

16 A. Yes.

17 Q. What factors contribute to that growth or
18 possible growth?

19 A. Well, just primary spacial factors and that
20 site is large enough. It's 20 acres and I don't know
21 the exact size of the site, but if it's about 20
22 acres in size, you can figure ideally or maximally
23 there could be one pair of birds nesting per square
24 liter of space in that 20 acres. So I think if you

1 do some quick rough guesstimates, you can come up
2 with maybe 20,000 birds being on that 20 acres easily
3 and it's probably going to exceed that 20,000 pairs
4 if everything went well and the birds were not
5 disturbed and there's sufficient birds for
6 recruitment.

7 Q. And given the setting that we're
8 describing, do you have any concerns about the
9 proximity of the colony to the public beach across
10 the street?

11 A. Yes, certainly if we think in terms of this
12 colony growing over time, which it's almost bound to
13 if it were not controlled, the probability of
14 contaminants reaching the beach via the gulls would
15 increase also. Birds that are not in attendance or
16 the gulls that are not in attendance at the nest
17 spend time loafing for lack of a better word. We
18 don't know exactly what they're doing. They're
19 socializing. They're standing around some place and
20 so biologists refer to it as loafing, so they'll be
21 at a particular location doing their social things
22 and defecating while they're doing it, so this fecal
23 material accumulates on the beach and those deposits
24 then can get washed into the water and certainly

1 raise the coliform count on the lake front.

2 Q. As a result of your visit to the site and
3 expertise and reflections, did you consider and
4 recommend a course of action?

5 A. Yes, I did.

6 Q. And what was that?

7 A. I recommended an integrated plan actually
8 where a variety of methods are used and this is a
9 typical approach because there's always the risk that
10 the birds are going to habituate any single technique
11 or that conditions will change in some way they can't
12 anticipate and we'll have to modify that.

13 So we recommended that if they could not
14 put a grid, a wire grid, throughout the site which
15 there is some restrictions on because of the
16 contamination that existed on the site, but if they
17 did not put a grid, then we emphasized the
18 pyrotechnics. And I mention two forms of pyrotechnic
19 use from propane charged cannons and then also the
20 pistol fired whistlers and so-called bird booms that
21 fired from the pistols.

22 And the pyrotechnics we've been using
23 across the country find they are the most dependable
24 way of moving the gulls quickly and this is one of

1 the things that we wanted to do here was to get the
2 gulls off of that site as quickly as we could so we
3 break this tenaciousness that we are talking about.

4 Q. How long did you suggest this program might
5 take?

6 A. Well, it's purely guesswork and it's based
7 on again prior experience at other locations and it
8 was based on our using pyrotechnics. And here we
9 figured that it would take about three years to break
10 this habit assuming the birds were completely forced
11 out of the given area and moved outside of the harbor
12 area. If they remained in the harbor, it's another
13 site. This then remains a problem for OMC, but if
14 they moved out of the harbor area, then they're
15 probably gone in three years without any problem.

16 Q. When you described using pyrotechnics
17 across the country, what do you mean by that?

18 A. We do work at airports and landfills in
19 order to control bird aircraft hazards and also to
20 prevent gulls from concentrating at landfills where
21 there can be various types of problems either for
22 landfill operators or to community water supplies in
23 a given area or whatever. And the standard method
24 that we now use there are pyrotechnics and we have

1 programs such as the one we described here in
2 operation in California, Ohio, Texas, Illinois,
3 Toronto, Alberta, so on.

4 Q. Is the use of the pyrotechnics a commonly
5 accepted practice throughout your field?

6 A. Yes, and I think generally all
7 ornithologists look upon it as the acceptable
8 methods, but there are various methods that people
9 try because everyone is looking for a simple solution
10 and I wish we had a simple solution, but everyone is
11 still trying to find it.

12 So you can see new methods being introduced
13 all the time and for a while someone may propose
14 these as the solution, but they don't end up as being
15 as dependable as pyrotechnics. And even if there is
16 a method that has some degree of success, it usually
17 ends up being supported by pyrotechnics and this is
18 true of the overhead wires as OMC discovered. They
19 tried to hang overhead wires and they found birds
20 walking under those wires, so now you use
21 pyrotechnics to convince those birds that walk under
22 the wires that that's a no-no and they have to avoid
23 the wires.

24 And so it's a matter of reinforcement

1 speaking in behavioral terms that you set up a
2 particular situation and hope the birds avoid it or
3 honor it and if they don't honor it, then you give
4 them a reason to honor it. It's like raising kids.
5 It's the same kind of thing that you do there that
6 you reinforce behavior upon your children and you
7 reinforce it here on the gulls.

8 Q. You recommended a certain number of
9 cannons. Do you recall how many you recommended for
10 this site?

11 A. Well, we went for overkill because we never
12 know what's going to happen when we're gone. We can
13 come and look at a particular site and say, okay, put
14 up one cannon and try it and if it doesn't work, add
15 two to three more, but that doesn't always happen, so
16 it's better to come in and say use four, use five,
17 use six, whatever and be ready for that so the
18 program can go ahead.

19 And I think we suggested they start out
20 with possibly six and see how that worked and if they
21 needed more, add more to the situation, but we
22 envisioned what might happen here is that if they
23 started discouraging the birds from using the ground
24 substrate that they move back to the rooftops and so

1 we figured it would be a good idea to have cannons in
2 reserve so they can put one on each of the rooftops,
3 flat rooftops and prevent the bird from being there,
4 so intent was they were to have eight cannons
5 operating in the same general little area at one
6 time. The idea was to have those available to use
7 where they became necessary or if they became
8 necessary.

9 Q. Were you given any general guidance or
10 preferences from OMC in formulating your opinion?

11 A. Yes, we discussed a variety of bird control
12 methods that were available and the pros and cons of
13 those, many of which I didn't put in my report
14 because we ruled them out. And the main reason for
15 ruling them out was that this did result in a high
16 level of mortality for either embryos or young or
17 both and the desired approach was to have the lowest
18 mortality possible and progress with a method such --
19 guarantee us more success, but yet didn't have that
20 risk factor associated with it.

21 Q. Sir, earlier we had some testimony about
22 the taking of gulls. Is that an accepted approach
23 relative to the use of the cannons?

24 A. Yes, and I think this is made obvious by

1 the fact the permitting agency put that on the permit
2 on their own and without OMC or myself suggesting
3 they do so and that's pretty standard. And this
4 comes back to reinforcement. The Fish and Wildlife
5 Service people and the U.S. EPA Animal Control people
6 all know the problems associated with convincing
7 gulls to go somewhere else. And they know that while
8 propane cannons and some other methods worked quite
9 well, birds can sometimes habituate to them. And
10 you'll also just seem to have hard-sell cases and
11 this is where more extreme methods are required. And
12 so taking those individual birds on an as-needed
13 basis can indeed make the whole process far more
14 effective.

15 Q. Sir, what other options were considered or
16 would you normally consider in this case?

17 A. Well, things that we talked about are
18 things that others have used and some still advocate
19 these and they have uses in some situations. Oiling
20 eggs is one possibility. This is usually using
21 mineral oil and so you go out into the colony and
22 cover each of the eggs with mineral oil and it
23 suffocates the embryo inside the egg, so in this case
24 through having had the flip side at 2500 nests times

1 three, that's how many embryos you're killing as a
2 result of this process.

3 Plus sometimes there will be some relaying
4 during all of this and so you have to go back out and
5 make sure you get those eggs coated. If you don't,
6 those eggs are going to hatch and you now have to go
7 out and kill those chicks.

8 Q. Is that normally an effective method in
9 moving a colony?

10 A. No, that method -- well, the theory behind
11 the use of that method and some of the others is that
12 if the gulls are unsuccessful in their breeding
13 attempts, that they will recognize that colony site
14 as being unsuitable and they'll then move.

15 Well, that sounds good, but they don't
16 recognize it that quickly. And we worked in colony
17 sites where foxes had been raiding colonies on a
18 nightly basis for over six years killing every gull
19 chick that hatched in that colony so that the birds
20 had zero productivity for six years and they're still
21 nesting there. And this was a colony of roughly 10
22 to 12,000 pairs and the birds just persisted to come
23 back to the site in spite of zero productivity.

24 So the same thing would likely happen here

1 that we would go in and oil the eggs or break the
2 eggs, destroy the nest, any of these techniques that
3 someone might mention along those lines and still
4 have to put up with the birds for that long or
5 longer.

6 I originally refereed a paper for a
7 scientist in Ohio who was working on rooftops of some
8 industrial buildings and he had six years of data
9 where they had been doing this type of thing, oiling
10 eggs, destroying nests and so forth and the birds
11 were still there. The numbers of nests had declined
12 over that time, but they still had a breeding colony
13 that was quiet viable, so it takes a long time.

14 Q. What other options could be considered?

15 A. Well, I mentioned oiling, breaking eggs,
16 those all go together in what we call manual methods.
17 There's also various types of animals that you could
18 use to destroy eggs for you in order to chase the
19 birds away. Dogs are used on a number of sites.

20 Q. Do dogs work?

21 A. They can. They work best in keeping birds
22 away from a new colony site where they haven't
23 developed tenacity as yet or if you have a real small
24 site, dogs can easily cover that or they work well at

1 airports. And this is where dogs are used most
2 commonly to keep birds off of runways and in fact,
3 next month I'll be at Vancouver where Border collies
4 will be demonstrated as a tool for keeping gulls and
5 other birds off of the runway at Vancouver Airport.

6 Q. Would dogs work on a sight such as you
7 observed in 1997?

8 A. No, it would not be an effective way. The
9 site is too large. You have to have several dogs and
10 you have to have them out there all the time working
11 and it just - by itself it's not a productive way of
12 doing it. The birds will work around the dogs.

13 Q. What other animals might be used?

14 A. We had one colony site where hogs were
15 introduced into it. I know that's kind of a gory
16 approach to the whole problem. You know, the hogs
17 are out there chomping down on the eggs and gull
18 chicks, but here again all they do is destroy the
19 productivity potential for that particular season.
20 The hogs are there and the gulls still come back the
21 next year and try it again, so it's again a long-term
22 thing and probably eventually you could convince them
23 to leave, but it's not a quick turnaround like we are
24 trying to do here.

1 Q. Were there other issues related to the use
2 of animals on this particular site?

3 A. Yes, this was where contamination on the
4 site become an issue. Certainly it would not be
5 feasible to have hogs running around on this
6 particular site and maybe even dogs. I should think
7 that the dog owners, especially if they have Border
8 collies and chose to do that, that's an issue you
9 would be very concerned about for the welfare of the
10 animals so that might not have been wise.

11 Another issue that I just encountered
12 recently regarding Border collies is apparently
13 they're very intolerant to heat stress and so I'm not
14 sure if Border collies would be able hold up to
15 working in a gull colony either. They may work well
16 in the airport where they're just infrequently
17 chasing away birds, but where they're doing it all
18 day long, I think you might find that you have dog
19 mortality and certainly the owners would not tolerate
20 that.

21 Q. What other approaches could be considered?

22 A. Falcons have also been used in some areas,
23 but again use of falcons is very labor intensive
24 because you have to have a person there handling the

1 bird and there's no question what gulls respond to
2 birds of prey coming over. They fly up in alarm and
3 temporarily leave the site, but as soon as the bird
4 preys the gulls, they're back doing their thing. And
5 so it's not really looked upon as an effective way of
6 doing it. It's kind of a novelty in my mind.

7 As far as other nonlethal ways of doing it
8 is what we might refer to as chemical or physical
9 barriers. The overhead wires that we've already
10 described are very effective in some situations, but
11 in breeding colonies, they become less effective
12 because of site tenacity. And the birds are very
13 prone to walk under the wires and to try to penetrate
14 them in other ways. So it makes it tough, but they
15 can contribute, but you usually have to reinforce
16 those again with pyrotechnics.

17 Chemicals, there is no chemical that I'm
18 aware of at this time that effectively keeps birds
19 out of a gull colony. There are various chemicals
20 that can be used on the surface of water to
21 discourage birds from drinking or using the water.
22 There's chemicals you can put on food items,
23 agriculture crops like the grape seed compound that
24 was mentioned earlier by someone. That is fine for

1 putting on agricultural crops because it's nontoxic
2 to human and will discourage birds from eating
3 particular fruit crops and the like, but it will not
4 discourage birds as far as I know from standing on
5 the ground in a gull colony. There's no effect
6 unless they eat it.

7 Other compounds that have been used at
8 landfills, commercial substances such as a compound
9 called rejectics. This substance again just keeps
10 birds from getting at the food items that had been in
11 that last load of garbage and it does not do anything
12 beyond that, so the birds will be standing on it.
13 They just won't eat it. Here what you have is gull
14 colonies that is something that the birds don't want
15 to walk on, they don't stand on and there's nothing
16 of that sort that I'm aware of.

17 There have been chemicals in the past that
18 have been used to keep birds off of various
19 substrates, but most of those have been banned now by
20 EPA because of toxicity and the undesirable side
21 effects of the birds dropping out of the sky at
22 various places and people have not liked that
23 happening, so those have been banned.

24 Then there are lethal methods beyond that

1 that one could rely on and there are examples of them
2 out on the east coast at Kennedy Airport where the
3 last count that I knew of they had shot 49,000 gulls.
4 They had started out with a gull colony of 7600 pairs
5 I believe at the end of the airport runways at John
6 F. Kennedy Airport and they still have a colony there
7 of some 3200 birds, but they shot 49,000 gulls from
8 who knows where. You can wear out the gun barrels
9 before you can destroy a colony it seems.

10 Q. How about habitat modification?

11 A. Yes, very important one that I've seen.
12 Habitat modification is a good one, but it takes time
13 and it's hard to do that while you have birds there
14 because the birds actually alter the habitat. Bird
15 fecal material has a very high nitrogen content just
16 ask any chicken farmer, you don't put raw chicken
17 manure on your gardens or in your field because it
18 burns the crops and the same things happen in the
19 gull colony.

20 It's difficult for wheat seeds to get
21 started and it's very difficult for plants to grow
22 and those are very, very costly conditions. What
23 you'll find now if the gull is kept away from the OMC
24 site is that probably each year there's going to be

1 more and more natural regeneration of vegetation and
2 seeds come in there and plants can once again grow.
3 And so my prediction in a few years is that site is
4 not going to be suitable for gulls any longer unless
5 it's modified by man in some way.

6 Q. At the time that you were considering
7 options, were you aware that some of the soil might
8 some day be fully removed?

9 A. Yes, if that site was reclaimed as part of
10 the superfund project that is proposed, then one can
11 go in and actually do some tillage and do some real
12 planting out there and expedite the whole process.
13 Right now, agriculture on that land, so to speak, is
14 not feasible because of the contamination.

15 Q. Sir, how long is the mating or nesting
16 season for gulls in this part of the country?

17 A. You can envision the time that it takes to
18 build a nest, lay the eggs, incubate the eggs and
19 rear their young to be roughly 11 to 12 weeks in
20 length. The time that they start each year is
21 somewhat dependent upon the season, but the birds
22 begin arriving in March and they go south for
23 migration and immediately they start setting up
24 territory, start building nests and beginning the

1 whole mating process. And so usually egg laying will
2 start sometime in April and then the cycle continues
3 from there.

4 One thing that's critical about gulls is
5 that it's a very synchronized thing that you don't
6 find this spread out like you do in robins and other
7 birds. Instead all the birds tend to be on about the
8 same schedule and their social behavior that
9 guarantees that, so that any one who's out of sync is
10 not a successful breeder that year and so their
11 chicks are left behind and the rest of the colony
12 leaves, so you don't have laggards staying out there
13 and breeding much later.

14 Q. And when would you suggest that mating or
15 nesting season would end in this area, date-wise,
16 time-wise?

17 A. Usually the young will be flying out of the
18 colony site in -- by early August, late July early
19 August and the first young maybe able to fly sometime
20 in July and then will depart the colony site in
21 August.

22 Q. But in terms of efforts to prevent the
23 nesting?

24 A. If one prevents them from actually starting

1 the nesting process, then it's unlikely that any of
2 them would continue to try to nest much after the
3 early part of June. In fact, if you prevent there
4 being a critical mass of birds on the ground, it may
5 even break up sooner than that.

6 The key thing here is that gulls aren't
7 mainland critters. They're really marine birds and
8 so they are most comfortable at sea and early in the
9 nesting cycle, the birds won't spend a night in that
10 colony. They'll come in there during the day and do
11 all of their nest building and their social activity,
12 they may even have some eggs, but when night comes,
13 they're so nervous about nocturnal predation, they're
14 back out on the lake and out there they flock kind of
15 seeking protection there.

16 Then come daylight, they're back in the
17 colony again, but eventually they build up enough
18 confidence or enough attachment to those nest sites,
19 especially since the eggs are there, that now they
20 stay overnight. And so if you can stop those first
21 ones from developing the nesting cycle up to the
22 point where they're not comfortable spending, then
23 it's pretty easy to keep them away after that point.
24 And it's hard to just say when that would be during

1 the disturbance process, but I'd say easily by early
2 June you should be past that threshold.

3 Q. Sir, do you stand by your earlier
4 recommendation of the pyrotechnics along with the
5 other efforts that are underway by OMC?

6 A. Yes, I think it's good to reinforce it and
7 especially if the cannons reinforce the pistol firing
8 pyrotechnics, I think this is a must because the
9 cannons are located close to the ground. They're at
10 a given location and the birds soon realize that this
11 thing isn't going to chase them and so if they just
12 stay away from it, they're relatively safe. So this
13 is where pistol fire techniques or alarm calls or
14 humans roaming about or something else of this nature
15 tends to reinforce all of that. And you just have to
16 have -- you have to go one step farther than the
17 birds go and so the more you can add on to it, the
18 better -- more flexible you can be, the better.

19 Q. What would the effect be if OMC ceased its
20 use of the pyrotechnics today?

21 A. If they ceased using the pyrotechnics
22 today, I think you would have birds beginning to set
23 up nesting sites there almost tomorrow and probably
24 within a week or two, you would have nests and the

1 colony resuming its presence on that site.

2 Q. And are you aware of any other potential
3 liability concerns that could be associated with the
4 presence of a gull colony?

5 A. Yes, one -- well, there's two major
6 concerns in that area. One would be concerned about
7 the water supply perhaps because of the water
8 treatment facility nearby, I don't know the nature of
9 the structure of that facility, but certainly in many
10 other countries, there have been a great deal of
11 concern about gull activity around reservoirs or
12 around any water treatment facility that serves a
13 particular city. So if there's a chance that any
14 contaminants could get into that system as a result
15 of birds being around it, then I think that is a
16 major concern.

17 Another one and one I look at even more
18 seriously from OMC's standpoint is their liability to
19 respect bird/aircraft collision at Waukegan Regional
20 Airport. The airport has scheduled air service. It
21 has business jets that come into it. We did a study
22 there for another client a few years back and gulls
23 are definitely using that airport. They loaf on the
24 runways. They forge along the ends of the runways

1 particularly after rains. Ring-billed gulls eat
2 earthworms in large quantities and also June beetle
3 larvae, the white grubs that you find in your lawns,
4 they eat those in great quantities. And you find
5 those most prolifically after rain storms and so as
6 soon as you have a rain you will probably notice
7 gulls flying inland in vast numbers and going into
8 either farm fields or football field or on people's
9 -- if they have large enough lawns, feeding on those
10 lawns looking for worms and other insects.

11 Airports are a great place for that to
12 happen, so the birds forge along the runways. In
13 fact, not too many years ago the air force came up
14 with a way to keep worms off the runways. You've all
15 seen worms on your sidewalks and streets. The air
16 force actually put metal gutters along the edge of
17 the runways so the worms didn't crawl up onto the
18 runways, so they had worm barriers along their
19 landing strips.

20 So what I envisioned here is so long as
21 gulls are able to nest at this site, there's high
22 potential for them flying out to the airport and
23 sooner or later there's going to be a bird strike.
24 Each year there's some 2,000 or more reported bird

1 strikes on commercial aviation in the United States
2 and at least that's more around military aircraft and
3 some of these are fatal and most of them cause
4 millions of dollars worth of damage, so there's a
5 potential for lives being lost and OMC could be
6 liable for this.

7 Q. Sir, have you had occasion to observe this
8 site of the gull colony since 1997?

9 A. Yes.

10 Q. And what have you seen?

11 A. I was there yesterday and I was also there
12 again this morning early and there are no gulls. On
13 either of those occasions, there were no gulls using
14 any part of the site where they were last time and
15 the cannons were firing effectively.

16 There was a person on site most of that
17 time who was patrolling it and walking about and
18 adding further stimuli to the whole process. There
19 was an alarm call playing from the roof of building
20 190 I believe and all of this combined was doing a
21 spectacular job.

22 In fact, the majority of the gulls that we
23 saw in the area were not even flying over the sight.
24 Instead almost to my surprise, they're flying a

1 north-south vector avoiding the OMC site and coming
2 in from the north and coming down toward the National
3 Gypsum site where they are beginning to nest at this
4 time and going to that particular location, but the
5 OMC site was clean and the birds were avoiding it
6 without any question.

7 MR. LUPO: That's all I have.

8 HEARING OFFICER KNITTLE: Ms. Aavang, did
9 you have any questions of this witness?

10 MS. AAVANG: No.

11 HEARING OFFICER KNITTLE: Mr. Sweda, do you
12 have cross-examination?

13 MR. SWEDA: Yes, I do.

14 HEARING OFFICER KNITTLE: You can proceed.

15 CROSS-EXAMINATION

16 BY MR. SWEDA:

17 Q. Is this a copy of the -- I don't know if
18 you can see that far -- of your study?

19 A. Probably, the title page looks familiar,
20 yes.

21 MR. LUPO: We have a copy that could be
22 marked and given to the witness instead of --

23 MR. SWEDA: I'm just asking if this is --

24 HEARING OFFICER KNITTLE: Are you objecting

1 to what he's doing?

2 MR. LUPO: I'm objecting. If he's going to
3 show the witness, it should be part of the record and
4 the witness should be able to see it.

5 MR. SWEDA: I won't show him. I'll ask
6 him.

7 MR. LUPO: I have no objection, but I'd
8 like a copy marked and handed to the witness.

9 HEARING OFFICER KNITTLE: Mr. Sweda, do you
10 want to ask questions under those parameters?

11 MR. SWEDA: What parameters?

12 HEARING OFFICER KNITTLE: I think they're
13 objecting unless you submit that into evidence, the
14 report, is that correct?

15 MR. LUPO: Sorry?

16 HEARING OFFICER KNITTLE: You're objecting
17 unless he submits that report into evidence?

18 MR. LUPO: My objection is if he's going to
19 question the witness about the report, he should
20 provide him the copy.

21 HEARING OFFICER KNITTLE: And you want that
22 admitted into evidence; is that correct?

23 MR. LUPO: I don't object to it being
24 admitted, but if he's going to show him it --

1 MR. SWEDA: I object to his objection
2 because we just got through with 20 minutes of
3 testimony based on studies that Mr. Southern
4 purportedly did and now I'm not --

5 HEARING OFFICER KNITTLE: I'm not going to
6 not allow you to ask questions about the report and
7 neither are the Respondents objecting to that. I
8 think they just want to make sure he has it in front
9 of him if you're going to ask him questions.

10 MR. LUPO: That characterizes my objection.

11 HEARING OFFICER KNITTLE: Do you have a
12 problem with that, Mr. Sweda?

13 MR. SWEDA: I don't have an extra copy,
14 possibly I do.

15 MR. LUPO: We agree that the report is
16 relative and substantive to his testimony.

17 MS. SMETANA: We have an extra copy.

18 HEARING OFFICER KNITTLE: Do you want to
19 take a look at it, Mr. Sweda, and make sure it's all
20 right?

21 MR. SWEDA: It looks about the same thing,
22 yes, it does.

23 HEARING OFFICER KNITTLE: Do you have a
24 problem with the witness referring to this as you

1 cross-examine him, Mr. Sweda?

2 MR. SWEDA: He can refer to, yes.

3 HEARING OFFICER KNITTLE: Then why don't we
4 give him a copy of that so that way we speed things
5 up a little bit.

6 MR. SWEDA: What exhibit number should I
7 give this one?

8 HEARING OFFICER KNITTLE: I didn't know we
9 were going to be submitting this as an exhibit.

10 MR. SWEDA: I didn't either, so that's why
11 I'm asking.

12 MR. LUPO: It's up to you. I guess whether
13 you want to mark it since he'll be giving it to the
14 witness.

15 MR. SWEDA: Since he requested it, that's
16 why I --

17 HEARING OFFICER KNITTLE: Well, is either
18 side offering this as an exhibit? Are you guys
19 offering his report as an exhibit?

20 MR. LUPO: We'll be happy to offer it as an
21 exhibit.

22 HEARING OFFICER KNITTLE: Why don't you
23 mark it as OMC Number 3.

24 MR. LUPO: I guess if I'm offering, I'm

1 waiting to see whether it's admitted or there's
2 objection or --

3 HEARING OFFICER KNITTLE: I'm going to
4 admit it. I'm going to admit it as OMC Number 3.
5 Mr. Sweda, do you have any questions?

6 MR. SWEDA: Yes, I do.

7 HEARING OFFICER KNITTLE: You can proceed.

8 BY MR. SWEDA:

9 Q. Are you the author of this study and
10 proposal?

11 A. Yes, I am.

12 Q. Thank you. The questions I'm asking or a
13 number of them will be from that study, i.e., did you
14 make these statements that are contained in that
15 report?

16 On page 4 of the report, does it in fact
17 say or did you in fact say that under suggested
18 procedures, schedules and personnel requirements for
19 the program a combination of methods is recommended
20 and experience shows that they will work if necessary
21 effort and resources are provided?

22 A. Yes, that's what it says.

23 Q. Thank you. And you further stated in that
24 same paragraph following is a list of steps I

1 recommend to address the problem. Modifications to
2 the recommendations will reduce your chances for
3 success or increase the amount of effort required by
4 site personnel.

5 A. Is that a question?

6 Q. I asked you if that was your paragraph?

7 A. Yes, that's what it says.

8 Q. I'm just asking for an affirmation or
9 negation. On page 5 of that same report, was it also
10 your statement that the frequency of firing is
11 necessary to drive and the desired effect cannot be
12 predicted. It will have to be determined by
13 observation of gull responses and modified as needed?

14 A. Where are you on the page?

15 Q. Page 5 at the bottom.

16 A. Where, at the bottom?

17 Q. At the bottom, the last paragraph starting
18 parking lot problem.

19 A. Uh-huh.

20 Q. I suggest an initial firing frequency of
21 once every five minutes and then adjust this up or
22 down as time passes?

23 A. Yes.

24 Q. In other words, it can be -- the time

1 you're saying can be adjusted one way or the other?

2 A. Correct.

3 Q. Thank you.

4 HEARING OFFICER KNITTLE: Let me interject.

5 Mr. Sweda, are you going to read much more of this

6 document and ask him whether or not those are his

7 statements?

8 MR. SWEDA: Yes, I'm going to ask questions

9 that refer to them too.

10 HEARING OFFICER KNITTLE: Mr. Lupo, did you

11 have something you wanted to say?

12 MR. LUPO: We'll offer to stipulate to

13 anything that's in the report and also waive any

14 hearsay objections to anything that's stated in the

15 report.

16 HEARING OFFICER KNITTLE: I was going to

17 ask if you wanted to stipulate. Mr. Sweda, he's

18 stipulating then that what is in that report is

19 something that was said by this witness, is that a

20 correct characterization, Mr. Lupo?

21 MR. LUPO: That's correct.

22 HEARING OFFICER KNITTLE: So there's no

23 need for us to go through and ask whether or not he

24 said all of the different items in this report. If

1 you want to ask him questions about what he meant or
2 what they mean.

3 MR. SWEDA: I'll rephrase the question.

4 HEARING OFFICER KNITTLE: Do you see what
5 I'm saying? We're accepting everything there as
6 something he said.

7 BY MR. SWEDA:

8 Q. On page 7 can you clarify paragraph C on
9 pyrotechnic devices? Can you explain further anymore
10 about given the constraints explained to me by
11 Patricia Sutton, this appears to be the best approach
12 to use during the 1998 season? What are the
13 constraints specifically?

14 A. Primarily the contamination of the site.

15 Q. Are there other constraints besides the
16 contamination?

17 A. Well, the size of the site certainly plays
18 a role because it is a fairly large site to have
19 certain types of techniques used on them. Cost has
20 to be considered, so, yes, there would be some other
21 factors to consider.

22 Q. In your reference to the size, you
23 indicated in your testimony that you said that
24 considering the size of this site which is

1 approximately 28 acres?

2 A. Approximately, yeah, I thought I knew what
3 it was and I heard a different figure since, so I'm
4 not sure now.

5 Q. And then there was a reference -- all I'm
6 making is a reference to your comment that -- later
7 on in your testimony to a point about -- in
8 referencing the size of that site of OMC comparing it
9 as too large for the use of dogs in comparison to
10 what's being used at airports. Can you compare what
11 is the size of airports to this site of 28 acres?

12 A. Dogs don't run the entire airport. Dogs
13 are transported by vehicles to where the birds are
14 and then turned loose and told sick 'em. And they do
15 their thing and then they go back in the vehicle and
16 are taken back somewhere else, so the dogs are not
17 roaming 10,000 acre airports.

18 Q. So are you comparing the 10,000 acre
19 airport that dogs are getting transported to a 28 --

20 A. No, what I'm saying is that at this site
21 you can't drive around with vehicles to take dogs to
22 the locations, so the assumption would be you'd have
23 dogs roaming the site maybe with a handler or not,
24 but that person -- the dogs, however many dogs you

1 have, would be responsible for all the places that
2 the gulls are trying to nest and that is quite a
3 large area say for one dog if that's all you had out
4 there.

5 Q. I had asked -- the original question or the
6 question of the previous witness Mr. Crawford that is
7 the site of the gull area fenced and I'm asking that
8 again. Is the area primarily fenced?

9 A. Yes, in fact, this is one of the reasons
10 why gulls nest in there. They do get a fair degree
11 of protection.

12 Q. So in other words -- what I'm saying is
13 that it's possible -- is it possible that if the area
14 is fenced that dogs would be contained within that
15 28 acre area?

16 A. One could do it if you weren't concerned
17 about the contamination.

18 Q. I mean it's possible?

19 A. Yes, I think -- I don't know what the shape
20 the fence is in, but there is a fence around it, so I
21 don't know if dogs would be held by that fence or
22 not.

23 Q. And two remaining questions -- I think
24 there's only two remaining questions on page 11. I

1 think it's your conclusion. In conclusion I must
2 stress again that the task before you is not a simple
3 one. There is no easy solution that will not involve
4 personal time and equipment costs. The program
5 recommended herein is a compromise that places more
6 emphasis on pyrotechnics than I would normally
7 recommend to move a breeding colony. Can you go over
8 what brought you to that conclusion?

9 A. Which part of it?

10 Q. That this requires more pyrotechnics than
11 you would normally recommend?

12 A. The fact that we could not put wires over
13 more of the colony, but what we normally would have
14 done in a situation of this order is go in and drill
15 holes and put in fiberglass poles or PBC poles and
16 stretch a fairly extensive setup of hundred pound
17 tested fishing line across that entire area.

18 Q. Was not the -- when I made my faux pas
19 about the report and you saying it's submitted as
20 evidence. Is that your -- was a multilevel approach
21 that you were using and pyrotechnics was one of those
22 approaches in your report and it indicated that --
23 your report indicated that -- the topic of other
24 options. Are there other options that can be used to

1 control the gull situation at whatever stage that you
2 recommended pyrotechnics, but you also recommended in
3 your report as I read it that there were other things
4 like a grid system could be maintained or used again?
5 The other things of the people running around with
6 pistols and that kind of thing --

7 A. Yes, I think --

8 Q. -- and taking birds?

9 A. I think I began by saying something to the
10 effect that since a grid system was not feasible, a
11 complete grid system was not feasible because of the
12 toxic problems or contamination problems at the
13 particular site, we would go ahead with pyrotechnics,
14 but normally as I said we would have put in a grid
15 system. That would have been our primary
16 recommendation, a grid system and reinforce it with
17 pyrotechnics, but instead what we're doing here is
18 using the pyrotechnics because the other alternatives
19 aren't available to us at this particular site until
20 it is cleaned up.

21 We can't go in and drill the holes and do
22 the things that would be required to put up the kind
23 of grid system that would work. The grid system that
24 OMC has put in themselves is a good start, but it is

1 not the kind I would have recommended if you were
2 going to put in one that had to hold up for several
3 years and one that had to be put up at a site where
4 they had to run vehicles under it all the time. I
5 recommended what we do at landfills. We have one
6 that's up 20 feet in the air to drive vehicles in and
7 out you'd have to, but you're talking about a big
8 operation. You can't do that when you've got a
9 contaminated site.

10 Q. I think you've adequately addressed the
11 questions I had regarding your conclusion in terms of
12 recommending a little bit more and there were other
13 things that could be used. I would lastly ask you
14 that -- there's not a page on it, but there's some
15 fliers that were in that report that talked about the
16 automatic cannons and that report is already
17 submitted.

18 MR. LUPO: I object that he's not properly
19 characterizing either the report or his testimony.

20 HEARING OFFICER KNITTLE: Sustained.

21 Mr. Sweda, perhaps you can rephrase that. I don't
22 quite understand what you're trying to ask him.

23 BY MR. SWEDA:

24 Q. Was a part of your report -- did part of

1 that report which you have in front of you illustrate
2 some cannons and that could be used in the program
3 that you had advocated for OMC?

4 A. I attached these as potential vendors.

5 Q. Right.

6 A. Right.

7 Q. Can you describe what it says above the
8 fine print with the word produces --

9 A. Produces harmless --

10 Q. -- what that says? I assume that you
11 looked at it since you were providing it to them as a
12 consultant. Produces --

13 A. Harmless thunderclap explosions fired at
14 irregular intervals.

15 Q. What would you describe thunderclap as a
16 sound as?

17 A. I'm not the author of this particular
18 document.

19 MR. LUPO: Objection.

20 HEARING OFFICER KNITTLE: Sir, if you would
21 hold on and let him make his objection before you
22 answer.

23 MR. LUPO: Actually, I think the witness
24 stated it for me. He's asking him about what is

1 stated here, but Dr. Southern is not the author of
2 this document. He's just provided options or
3 suggested manufacturers.

4 MR. SWEDA: I object to that because he
5 is -- his whole premise of his programs is based on
6 cannon usage and this was an integral part. In fact,
7 this was not an isolated incident. There are other
8 things which go into price lists for cannons, price
9 lists for containers that provide the cannons, the
10 ammunition for the cannons, detailed discussions of
11 maintenance and upkeep of the cannons ad infinitum in
12 this report and other places which have not even been
13 asked or entered into the testimony.

14 MR. LUPO: I'm sorry. I guess I'm a little
15 bit lost and I guess I'd ask for an offer of proof if
16 anything.

17 HEARING OFFICER KNITTLE: What was your
18 question again, Mr. Sweda?

19 MR. SWEDA: My question was did he produce
20 a report that indicated a -- now that I know, is
21 examples of the propane cannons that were recommended
22 by Dr. Southern in the program that OMC should
23 undertake to discourage gulls.

24 HEARING OFFICER KNITTLE: Is this in the

1 report that he's holding in his hands? They've
2 already stipulated that he didn't --

3 MR. LUPO: It's attached, but he's not the
4 author of the document. It appears that he's pulled
5 fliers or pages out of catalogs to provide some
6 information to his client OMC.

7 MR. SWEDA: That's what I'm asking, but I'm
8 asking also did he read -- did Dr. Southern read and
9 know what this said from a vendor of this --

10 HEARING OFFICER KNITTLE: I'll allow that
11 question.

12 MR. SWEDA: -- item that was to be provided
13 to OMC?

14 HEARING OFFICER KNITTLE: Mr. Lupo?

15 MR. LUPO: I think the nature of his -- as
16 I understand, the nature of his comments changed.

17 HEARING OFFICER KNITTLE: Well, yeah, and
18 frankly I would have sustained the earlier objection
19 based on the earlier question, but if he's going to
20 ask the question he just stated that he wanted to
21 ask, I'm going to allow that. I'm not sure if he's
22 not going to ask the other question anyway that
23 there's an objection that can be made. I don't
24 think -- are you worried about what was stipulated

1 to?

2 MR. LUPO: I'll listen to the question.

3 HEARING OFFICER KNITTLE: Let's start over.

4 MR. LUPO: If your other objection is

5 sustained, I'll listen to the next question.

6 HEARING OFFICER KNITTLE: Let's move on.

7 The earlier objection was sustained. Mr. Sweda, ask

8 the witness a question and we'll see what happens.

9 Do you want your last question read back?

10 (Record read as requested.)

11 BY MR. SWEDA:

12 Q. We've established that Mr. Southern is the

13 author of this report and --

14 MR. LUPO: Objection, Your Honor, if that's

15 a question.

16 HEARING OFFICER KNITTLE: You're not asking

17 that to Dr. Southern, are you?

18 MR. SWEDA: I'm commenting. I'm making a

19 statement out loud. We already know that

20 Mr. Southern did this report.

21 HEARING OFFICER KNITTLE: Aside from the

22 attachments at the end which they -- he did not

23 author those attachments.

24 BY MR. SWEDA:

1 Q. If they were not authored, why were they in
2 the report?

3 HEARING OFFICER KNITTLE: If you keep
4 asking the question why you attached those --

5 THE WITNESS: I already answered that I
6 thought -- they were the vendors list. I simply
7 indicated to a client where they might obtain the
8 items. They are not instructed to buy them there.
9 They are simply given examples of where they can
10 purchase those particular items.

11 BY MR. SWEDA:

12 Q. What are the examples of? Who are the
13 vendors --

14 A. Who the vendors are and the items that
15 those vendors have.

16 Q. What do they advertise for usage by
17 potential clients or customers since they're trying
18 to sell something since you identify a vendor?

19 A. Cannons for one thing, pistol fire
20 pyrotechnics, other types of devices that they aren't
21 using, but they're modifications of pistols and those
22 are listed there too just for their information.

23 Q. And the purpose of putting them in there
24 was?

1 A. For their information so they know what is
2 available and where they can obtain it.

3 MR. SWEDA: Okay. The report is in there
4 and it's been accepted. It's part of the testimony.
5 I'm not getting anywhere else.

6 HEARING OFFICER KNITTLE: Well, the report
7 has been offered and admitted into evidence, so it
8 will be before the Board, but it's not necessarily
9 his testimony.

10 MR. LUPO: But the attachments are not his
11 testimony.

12 HEARING OFFICER KNITTLE: They are not his
13 testimony, but they are part of OMC Exhibit Number 3,
14 correct?

15 MR. LUPO: Correct. We don't waive any
16 hearsay objections as to the attachments.

17 HEARING OFFICER KNITTLE: I understand.
18 The stipulation that you offered --

19 MR. LUPO: The report we offered.

20 HEARING OFFICER KNITTLE: And I understand
21 that and I think the Board understands too that when
22 you stipulated that Dr. Southern was responsible for
23 that exhibit, you only were stipulating to the report
24 he created not to the attachments.

1 MR. SWEDA: I agree with that.

2 HEARING OFFICER KNITTLE: Is that a correct
3 characterization, Mr. Lupo?

4 MR. LUPO: Yes.

5 HEARING OFFICER KNITTLE: Let's move on.
6 Mr. Sweda, do you have anything else?

7 MR. SWEDA: Yes, I have a couple more
8 questions if you bear with me.

9 HEARING OFFICER KNITTLE: Yes.

10 BY MR. SWEDA:

11 Q. To your knowledge, Dr. Southern, about how
12 long have gulls been in Waukegan?

13 A. I haven't the faintest idea. Probably
14 since gulls existed on Lake Michigan.

15 Q. Thank you. Have there been any
16 histoplasmosis found on any documented cases in
17 Waukegan or in the lake front area that you are aware
18 of?

19 A. You'd have to check with the health
20 department. I don't know.

21 Q. Thank you. Are there documented cases of
22 people being hurt by gulls at the Waukegan harbor or
23 the Waukegan area that you're familiar with as a
24 consultant to OMC and as an expert in ornithology?

1 MR. LUPO: I'm going to object that it's
2 beyond the scope.

3 HEARING OFFICER KNITTLE: Overruled. You
4 can answer that.

5 THE WITNESS: I have not monitored that.

6 MR. SWEDA: Mr. Southern indicated that
7 this was a very distinct possibility and I'm just
8 asking the question.

9 HEARING OFFICER KNITTLE: Mr. Sweda, I
10 allowed the question and he answered that he -- well,
11 he answered that he didn't monitor that.

12 MR. SWEDA: Okay. Thank you.

13 THE WITNESS: I have not been here to
14 monitor that, so I have no way of nothing.

15 BY MR. SWEDA:

16 Q. I'm just asking a question. Thank you.

17 A. If you would like to know the frequency of
18 other gull colonies that I've been --

19 Q. No, I'm not asking about the frequency of
20 other gull colonies. I'm concerned with this area
21 here. You said something about -- a lot of your
22 testimony appeared to be about fecal matter. You
23 indicated that gulls produce -- you didn't call it
24 scat. You called it fecal matter and some other

1 words.

2 I'm not denying that gulls do poop.
3 Everybody poops and produces fecal matter. Have you
4 observed any other animals in the vicinity of the OMC
5 area and/or the beach that had made, produced fecal
6 matter?

7 A. Yes, but not in similar numbers.

8 Q. Have you noticed any -- what kinds of
9 creatures -- let's put it that way that runs from
10 insects to people?

11 A. Well, I think they're some 800 employees
12 there each day.

13 Q. No, I meant on the ground. I assume the
14 employees don't go out on the ground.

15 A. There are geese about. There are gulls on
16 the beach that aren't necessarily associated with a
17 colony. There's lots of other kind of birds. There
18 are mallards there. These last two days I've seen
19 robins actually nesting in the site that don't seem
20 to mind the cannons. There's common grackles who
21 were also building nests on the site in spite of the
22 cannons. There are starlings flying, squirrels. I
23 can go through a list of birds that are there
24 currently. All of these things certainly defecate,

1 but they aren't there in the same density as gulls.

2 Q. What do gulls feed on?

3 A. Depends on the season, a good part of their
4 diet when they first arrive in spring may end up
5 actually being things they get from farm fields
6 because it's so hard to find food. Once the lake is
7 open, then they tend to concentrate on gizzard shad,
8 alewife and smelts early in the season and then later
9 in the season whenever conditions are suitable, they
10 shift over to large quantities of insects and earth
11 worms and grubs and things of that sort.

12 Q. Again, have you ever observed any insect
13 masses or numbers at the Waukegan lake front or at
14 the OMC site?

15 MR. LUPO: I'm going to object as to
16 relevance.

17 HEARING OFFICER KNITTLE: Yeah, Mr. Sweda,
18 explain to me why this is relevant.

19 MR. SWEDA: It's relevant because that's
20 what gulls eat apparently.

21 HEARING OFFICER KNITTLE: Right, but how is
22 this relevant to the noise pollution that you've
23 alleged in this case?

24 MR. SWEDA: I'm just asking what they eat

1 and their presence there may be -- I'm just trying to
2 explain some of the presence of the gulls there.

3 HEARING OFFICER KNITTLE: I'm going to
4 sustain the objection and ask you to ask another
5 question.

6 BY MR. SWEDA:

7 Q. You indicated, Dr. Southern, that there
8 were other ways -- I think you went to quite a bit of
9 length that there are other ways that have been
10 considered or are possible consideration for bird as
11 well as gull relocation kind of things. You
12 indicated in part of your testimony that there was
13 and maybe you can rephrase it, but I heard the words
14 that speed of riding the gulls and cannons for
15 quickness in terms of an evaluation for OMC's
16 recommendations made by you?

17 MR. LUPO: I'm going to object.

18 MR. SWEDA: I'm asking for a clarification.

19 HEARING OFFICER KNITTLE: Let him make his
20 objection first, Mr. Sweda. Yes, sir.

21 MR. LUPO: I believe the question is
22 unclear.

23 HEARING OFFICER KNITTLE: Can you make that
24 more clear, Mr. Sweda? I have to admit I had a

1 little trouble following it myself.

2 BY MR. SWEDA:

3 Q. Sometimes I do too. I recall, and that's
4 my basis of questioning, a statement made by Dr.
5 Southern and I'm asking him if he can recall
6 something to the effect of that a decision was made
7 by someone along the line that whether it was your
8 decision or OMC's discussion that speed, i.e., was a
9 necessary item for getting the gulls out and cannons
10 were a speedy kind of process to remove the gulls.
11 Can you clarify what -- I remember these cannons for
12 quickness --

13 A. Yes, I can put that in perspective. There
14 is no question that gulls are a problem. OMC
15 recognized the gulls as being a problem at the site.
16 I agreed with their evaluation that there was a
17 problem and we alluded all of those problems here
18 recently and going into those into some detail, so
19 there was a problem.

20 So in order to solve that problem, a fairly
21 quick solution was desirable and the fastest way to
22 get gulls out of the site was with the pyrotechnics
23 with the use of cannons and the pistols firing
24 devices. Any of the other methods, as I testified to

1 before, take time, so if eggs were destroyed, if
2 nests were destroyed, those things would take years.

3 Q. That's the part of your presentation that I
4 was -- thank you for putting that into perspective.
5 I'm asking you are you familiar with an affidavit
6 that was -- it's not produced here and I'm not going
7 to introduce it unless I have to by Mr. Neusinski who
8 is the waterworks person. I don't know who the
9 Waukegan waterworks person is describing his
10 experience with the gulls and the use of cannons?

11 MR. LUPO: I'm going to object that this is
12 beyond the scope of what Dr. Southern was retained
13 for and certainly beyond the scope of his testimony.
14 If he wants to ask him a question about gulls or
15 behavior, movement of gulls around the site --

16 MR. SWEDA: I'll rephrase the question.
17 Can I try it?

18 HEARING OFFICER KNITTLE: You can rephrase
19 the question. If you're going to rephrase, I'm not
20 going to rule on the objection, so go ahead.

21 BY MR. SWEDA:

22 Q. I recall Dr. Southern stating that the
23 gulls move from one area to another and because they
24 get chased away or something is used and is effective

1 to chase them away, but you don't know necessarily
2 where they're going to go?

3 A. That was Mr. Crawford's testimony, but I'll
4 talk to that if you ask me a question.

5 Q. Mr. Crawford I think remembers saying
6 something about that, but I remember you saying
7 that --

8 MR. LUPO: I'm going to object that there's
9 no question pending at this point.

10 HEARING OFFICER KNITTLE: Mr. Sweda --

11 MR. LUPO: I'm not trying to interfere with
12 Mr. Sweda's questions, but I'm not hearing any.

13 HEARING OFFICER KNITTLE: I'll sustain his
14 objection. Mr. Sweda, you can ask him some
15 questions, but there really wasn't a question on that
16 last one I don't think.

17 BY MR. SWEDA:

18 Q. Are you aware of the City of Waukegan using
19 cannons, propane cannons to scare gulls away?

20 A. I heard that they had used a cannon maybe
21 briefly at the water treatment facility, but I don't
22 know any of the details. I have not been involved in
23 that.

24 MR. SWEDA: Okay. No further questions at

1 this time.

2 HEARING OFFICER KNITTLE: Is there a
3 redirect?

4 REDIRECT EXAMINATION

5 BY MR. LUPO:

6 Q. Briefly. Sir, in your experience are dogs
7 an effective deterrent in a nested colony?

8 A. No, in fact, I've done some research along
9 that line just on my own with a hunting dog that I
10 have and I would take him into gull colonies and run
11 some trials and while it would cause a disturbance,
12 it did not deter the gulls from coming back and
13 nesting at the site. And the dog tired himself out.
14 It was a German shorthair pointer who was usually
15 rigid from the time he arrived at the colony until he
16 left. He was on point the entire time just running
17 around chasing birds, so he had no energy left and he
18 had no possible way of keeping the gulls away from
19 there nest sites.

20 We've also done experiments with other
21 mammals along the same line. There was no question
22 that gulls are frightened off. This is why gulls
23 primarily nest on islands. It's atypical for gulls
24 to nest on the mainland location such as here and to

1 my knowledge, the only places where gulls do
2 successfully nest at mainland locations in the Great
3 Lakes area are industrial sites. And it's because
4 they're usually fenced areas and they can get some
5 protection from predators, coyotes, foxes, dogs,
6 raccoons, skunks, that whole list of critters, but
7 they're scared to death of them and so here is a
8 fence that keeps out those predators.

9 They get a degree of protection and they
10 build a successful colony. So if one could introduce
11 them, you could scare them and maybe cut down on
12 their productivity, but you don't necessarily get
13 them to move as I described before. South Manitou
14 Island colony that I worked on in Lake Michigan at
15 least six years of total mortality of foxes, total
16 chick mortality and the gulls were still nesting
17 there, so we're still talking long-term.

18 So even if dogs or some other predator
19 would come in at this stage and take all of the eggs
20 or all of the young, chances are that the adult bird
21 is coming back next year and you have not yet solved
22 the problem, so again what I was trying to recommend
23 and design was a solution, something that I was
24 fairly confident would get rid of the birds. And I

1 think we achieved that and the evidence shows that
2 when one goes out and looks at the site.

3 MR. LUPO: That's all I have.

4 HEARING OFFICER KNITTLE: Mr. Sweda, do you
5 have any recross on that question?

6 MR. SWEDA: The recross is limited to a
7 question that Dr. Southern --

8 HEARING OFFICER KNITTLE: That question and
9 his response, yes.

10 MR. SWEDA: I'm sorry?

11 HEARING OFFICER KNITTLE: The recross is
12 limited to the one question that Mr. Lupo asked and
13 the response of the witness.

14 MR. SWEDA: Leave it.

15 HEARING OFFICER KNITTLE: Okay. Thank you,
16 sir. You can step down. Let's go off the record.

17 (Discussion off the record.)

18 MS. SMETANA: We're going to call Tom
19 Elsen.

20 HEARING OFFICER KNITTLE: Mr. Elsen, would
21 you have a seat up here, please? Would you swear in
22 the witness, please?

23 (Witness sworn.)

24 WHEREUPON:

1 THOMAS ELSSEN,
2 called as a witness herein, having been first duly
3 sworn, depose and saith as follows:

4 DIRECT EXAMINATION

5 HEARING OFFICER KNITTLE: It's your
6 witness.

7 BY MS. SMETANA:

8 Q. Please state your full name for the record?

9 A. Thomas G. Elsen.

10 Q. Mr. Elsen, where are you currently
11 employed?

12 A. I'm employed by Outboard Marine.

13 Q. And how long have you been with OMC?

14 A. It will be 32 years.

15 Q. In what department at OMC do you presently
16 work?

17 A. I work in the engineering department for
18 the facility operations and security.

19 Q. And what is your job title in that
20 department?

21 A. I am manager of facility operations and
22 security.

23 Q. What does that mean?

24 A. I take care of the facility as far as any

1 utilities, the HPAC, systems repairs. I'm also in
2 charge of the security for the campus.

3 Q. And how long you have been in that
4 department?

5 A. I've been in engineering for 32 years.

6 Q. What areas of the OMC facility are you
7 responsible for?

8 A. I'm responsible for the total Waukegan
9 campus security. Along with that, I'm responsible
10 for all of the corporation buildings which number
11 four buildings that are of the corporation.

12 MS. SMETANA: If I may approach the witness
13 and show him?

14 HEARING OFFICER KNITTLE: Yes.

15 BY MS. SMETANA:

16 Q. I'm going to show the witness what has been
17 marked Exhibit 2, OMC Exhibit 2. If you can identify
18 on here which buildings you're responsible for.

19 First name the building and then I'll have you --

20 A. I'm responsible for the plant 1 complex.

21 Q. Where is that located on OMC's facility?

22 A. It would be directly -- in relation to
23 what, the superfund site?

24 Q. In relation to the coke plant area?

1 A. To the coke plant area, it would be
2 directly to the south of the coke plant.

3 Q. And can you just circle plant 1 and put
4 your initials next to it?

5 A. (Witness complies.)

6 Q. And what other areas are your responsible
7 for?

8 A. I'm responsible for the environmental
9 building which would be directly to the east of the
10 superfund site.

11 Q. Can you write ENV for environmental and
12 which other building?

13 A. I'm responsible for the IT, the information
14 technology building which is directly east of the
15 superfund site.

16 Q. Any other building?

17 A. Finally, I'm responsible for the
18 corporation building which is due north of the
19 superfund site across from Sea Horse Drive and I
20 believe it's got to be here.

21 Q. If you know where it is. Thank you. Do
22 you have a budget for maintenance and repairs?

23 A. Yes, I do.

24 Q. Are you responsible for this budget?

1 A. Yes, I am.

2 Q. And what does that budget cover?

3 A. That budget would cover any usual repairs
4 to the building from the roof to the equipment that
5 takes to operate the facility to the budget for the
6 security pinkerton guards that we have.

7 Q. Are you aware of sea gulls on OMC's
8 property prompt?

9 A. Am I what?

10 Q. Aware of sea gulls on OMC's property?

11 A. Yes, I am.

12 Q. When were you first aware of the sea gulls?

13 A. In large numbers?

14 Q. Yes.

15 A. Probably starting in late '95, '96 where I
16 could see an increase in the size.

17 Q. When you say large numbers, what would you
18 consider -- what did you look like?

19 A. It looked like there was always sea gulls
20 flying overhead and fecal matter in the parking lots.
21 The cars were being covered by the droppings on a
22 more than normal basis including my vehicle.

23 Q. As a result of the sea gulls, has there
24 been any damage to any of the buildings?

1 A. Yes, there has been damage to our roof
2 building.

3 Q. What part of the building?

4 A. Plant 1 has had extensive damage to the
5 roof.

6 Q. Can you explain what kind of damage that
7 is?

8 A. The gulls have landed on the roof and using
9 their beaks, they have pecked small holes in the roof
10 structure and they proceeded to peck in other areas
11 creating larger depressions.

12 Q. And how big are the holes?

13 A. The holes can be anywhere from the diameter
14 of the beak to up to two feet in the diameter and six
15 to seven inches deep.

16 Q. Why are the holes bad for the roof?

17 A. Why are the holes --

18 Q. Bad for the roof?

19 A. I have no idea why they peck.

20 Q. No, why are the holes bad for the roof?

21 A. The holes are bad because the water
22 penetrates through the membrane and then leaks into
23 the interior of the building.

24 Q. What are the roofs made of?

1 A. It's a urethane foam that was applied over
2 steel sheeting of the roof and over the urethane foam
3 they spray a silicon seal to prevent the sun's rays
4 from deteriorating the foam which is used for
5 insulation.

6 Q. Was there any damage to the interior of the
7 buildings?

8 A. In some of the rooms, we suffered water
9 damage in the ceiling tiles.

10 Q. How did you first know there were holes in
11 the roof?

12 A. We first had known just by doing -- first,
13 we had some leaks and we went up on the roof and then
14 we started seeing the depressions that were being
15 created by sea gulls.

16 Q. Did OMC repair these roofs?

17 A. We had our roofing contractor -- our roof
18 was recently done about eight years ago and we had a
19 ten-year contract or warranty with them, so they came
20 in at no cost to OMC and did the initial repairs
21 there.

22 Q. Was there any repair before the roof
23 contractor came out?

24 A. There was repairs, small repairs we made

1 through out budget utilizing silicon seal just to
2 patch up the smaller holes that we had seen prior to
3 the large ones developing.

4 Q. How much did it cost to repair the smaller
5 holes?

6 A. I'd say we spent somewhere in the area of
7 \$2,000.

8 Q. And how much did it cost to repair the
9 larger holes?

10 A. The larger holes I don't know because it
11 was under warranty, so I don't know what the roofing
12 company turned in for the warranty.

13 Q. What would you estimate knowing the damage?

14 A. I would estimate it would be somewhere
15 around \$5,000.

16 Q. Since that time -- when were those repairs
17 made?

18 A. The roof repairs were made I believe in
19 '96, '97.

20 Q. And since that time, has there been further
21 damage to the roofs?

22 A. There has been small minor damage not as
23 great as previously.

24 Q. Has there been any other building

1 maintenance that's been required as a result of the
2 gulls?

3 A. Yes, over at the IT building directly east
4 of the gull's site because of the odor, I had to
5 purchase deodorant blocks to mask the odor coming
6 into the building. Also the amount of feathers being
7 drawn into air intakes of the air conditioning
8 systems, we had to change the filters on a more
9 regular basis.

10 Q. Regularly how often do you have to change
11 the air conditioning filters?

12 A. Usually we would change filters every three
13 to four months, but we've been changing filters every
14 two months because of the increased feathers.

15 Q. And how much does each filter cost?

16 A. The filter costs about \$200 per filter and
17 there are three units in the system that we have to
18 maintain on a daily basis.

19 Q. And where do you place the air sanitizer?

20 A. The canisters are placed right inside the
21 air handling system.

22 Q. Were odors entering through the building?

23 A. Were what?

24 Q. Were the odors coming through the building?

1 A. Yes, the odor from the fecal matter were
2 coming into the building and by putting --

3 Q. How did you know that?

4 A. The employees called me and told me that
5 there was an odor, a strange odor that they had never
6 observed before.

7 Q. Was there any additional cleaning that
8 needed to be done for the building?

9 A. Initially, we had to -- the windows are
10 being cleaned on a more frequent basis due to the
11 droppings.

12 Q. How often do you clean them?

13 A. The windows were cleaned every quarter, but
14 we set that up to every two months, one month
15 depending upon how bad the windows are hit.

16 Q. Are you aware of any efforts OMC has made
17 to address the gull problem?

18 A. Yes, I am.

19 Q. To your knowledge, what are those efforts?

20 A. Those efforts were the canisters and the
21 noisemakers that were being used in the field area to
22 dissipate the birds from congregating in one area.

23 Q. Have you been involved in installing any of
24 the equipment used anywhere?

1 A. No.

2 Q. You had mentioned before that since the
3 roof repairs were made, the damage has been minimal,
4 why is that?

5 A. I think due to the help of the noisemakers
6 and the canisters they've dissipated the birds.

7 Q. When you refer to canisters, what do you
8 mean?

9 A. The projectiles that are being shot from
10 the pistols and then the noise cannons.

11 Q. Is there anything placed on top of the
12 buildings?

13 A. Yes, on top of the building, we have
14 manufactured by Bird-X, they're a noisemaker. The
15 company tells me they create a noise that signifies
16 to the gulls that a bird is in distress and they will
17 not land in that area. They just flock overhead and
18 fly around.

19 Q. When were those installed?

20 A. Those were installed starting in late '95
21 early '96.

22 Q. And who installed those?

23 A. My people installed them, the maintenance
24 staff.

1 Q. Which buildings were they installed on?

2 A. We have two units on the plant 1 complex,
3 one unit on the IT building complex and then a unit
4 out in the field area on the edge of our parking lot.

5 Q. Have these Bird-X units been effective?

6 A. I believe they've been effective, yes.

7 Q. How can you tell?

8 A. Now longer do the birds congregate on the
9 flat roof monitor areas that we have. Our roofs are
10 totally flat. There is no pitch to them, so they
11 were free to land at any location and it appears they
12 have dissipated that.

13 Q. How much did each Bird-X monitor cost?

14 A. Approximately \$450 for each unit.

15 Q. Are you able to hear the Bird-X monitors?

16 A. Yes, you are.

17 Q. Are you able to speak at normal
18 conversation levels when the Bird-X monitors go off?

19 A. Yes, there's no problem.

20 Q. Since the gull relocation project and the
21 use of cannons and these bird monitors, what has been
22 the damage to the building in 1998 if any?

23 A. Very minimal. The biggest thing is
24 cleaning the windows. They're still getting hit, but

1 not with the intensity that we were getting hit with
2 in '97, '96. Otherwise, it appears that -- and I've
3 been up on the roofs and looked and we are not
4 incurring the roof damage that we previously had.

5 MS. SMETANA: I have no further questions.

6 HEARING OFFICER KNITTLE: Ms. Aavang, do
7 you have anything?

8 MS. AAVANG: No.

9 HEARING OFFICER KNITTLE: Mr. Sweda, do you
10 have any cross-examination?

11 MR. SWEDA: No.

12 HEARING OFFICER KNITTLE: Thank you, sir.
13 You can step down. Is your other witness about that
14 length of time?

15 MS. SMETANA: Probably about that length.

16 HEARING OFFICER KNITTLE: Mr. Sweda, do you
17 have one more in you?

18 MR. LUPO: It goes similar to OMC's
19 experience not something that has to do with the
20 cannon noise if that will affect Mr. Sweda's
21 decision, it may help.

22 HEARING OFFICER KNITTLE: I'm sorry?

23 MR. LUPO: The testimony goes to OMC's
24 problems with the gulls --

1 HEARING OFFICER KNITTLE: Okay.

2 MR. LUPO: -- less so with the cannon noise
3 and we didn't know if that would affect Mr. Sweda's
4 decision to know that.

5 MR. SWEDA: It doesn't make any difference.
6 I would still like to get out of here, just this is
7 beyond my time.

8 HEARING OFFICER KNITTLE: We will meet
9 again tomorrow at 9:30. Did you have something?

10 MS. SMETANA: Is it possible to begin
11 earlier than 9:30?

12 HEARING OFFICER KNITTLE: Let's go off the
13 record.

14 (Whereupon, these were all the proceedings
15 had in the above-entitled matter.)

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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF DUPAGE)

3 I, MICHELE J. LOSURDO, CSR, do hereby state
4 that I am a court reporter doing business in the City
5 of Chicago, County of Cook, and State of Illinois;
6 that I reported by means of machine shorthand the
7 proceedings held in the foregoing cause, and that the
8 foregoing is a true and correct transcript of my
9 shorthand notes so taken as aforesaid.

10
11

12 MICHELE J. LOSURDO, CSR
13 Notary Public, DuPage County, IL
14 Illinois License No. 084-004285

15 SUBSCRIBED AND SWORN TO
16 before me this _____ day
17 of _____, A.D., 1999.

18 _____
19 Notary Public

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