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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ESG WATTS, INC. (SANGAMON
VALLEY LANDFILL),
Petitioner,

vs. PCB Nos. 01-62, 01-63, 01-64
ILLINOIS ENVIRONMENTAL (consolidated)
PROTECTION AGENCY,
Respondent.

Proceedings held on December 10, 2001 at 11:07 a.m., at the
Illinois Pollution Control Board, 600 South Second Street, Suite
403, Springfield, Illinois, before Hearing Officer Steven C.
Langhoff.

Reported by: Darlene M. Niemeyer, CSR, RPR
CSR License No.: 084-003677

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A P P E A R A N C E S

WATTS TRUCKING SERVICE, INC.
BY: Larry A. Woodward
Corporate Counsel
525 - 17th Street
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On behalf of ESG Watts, Inc.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
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On behalf of the Illinois EPA.

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1 P R O C E E D I N G S

2 (December 10, 2001; 11:07 a.m.)

3 HEARING OFFICER LANGHOFF: Good morning, everyone. My name
4 is Steven Langhoff. I am the Pollution Control Board Hearing
5 Officer who is handling this matter and who will be holding the
6 hearing today. This is PCB 01-62, 01-63, and 01-64, consolidated
7 for hearing; that is, ESG Watts, Inc., versus Illinois
8 Environmental Protection Agency. On December 6th of 2001 the
9 Board granted the Petitioner's motion to dismiss cases PCB
10 00-206, 00-207 and 00-208.

11 For the record, it is Monday, December 10th of 2001, and we
12 are beginning at 11:07 a.m., after a recess from this morning of
13 9:00 a.m. I want to note for the record that there are no
14 members of the public present. Members of the public are
15 encouraged and allowed to provide public comment if they so
16 choose.

17 ESG Watts, Inc., or ESG Watts, is the operator of the Viola
18 Landfill and Taylor Ridge Andalusia Landfill and was formerly the
19 operator of the Sangamon Valley Landfill. The issue in these
20 cases that are consolidated for hearing is a request to approve
21 substitute financial assurances for the Taylor Ridge Andalusia
22 Landfill and Viola Landfill in the form of surplus lines
23 pollution liability policies and requests that financial
24 assurance in the form of a trust maintained at the Mercantile

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1 Bank be released for all three landfills.

2 On September 11th of 2000, the Illinois Environmental
3 Protection Agency, or Agency, sent ESG Watts a decision letter
4 that refused to accept the tendered pollution liability policies
5 as alternate closures and post-closure care financial assurances
6 for the Viola and Taylor Ridge landfills and refused to release
7 any trust funds.

8 It is my duty and responsibility to assess credibility of
9 any witnesses giving testimony today, and I will do so on the
10 record at the conclusion of the proceedings. We will begin with
11 opening statements from the parties and then we will proceed with
12 ESG Watts' case followed by the Agency having an opportunity to
13 put on a case in its behalf. We will conclude with any closing
14 arguments that the parties wish to make, and then we will discuss
15 off the record a briefing schedule which will be set on the
16 record at the conclusion of the proceedings.

17 The Board's procedural rules and the Act provide that
18 members of the public shall be allowed to speak or submit written
19 statements at hearing. Any person offering such testimony today
20 shall be subject to cross-examination by both of the parties.
21 Any such statements offered by members of the public must be
22 relevant to the case at hand. I will call for any statements
23 from members of the public at the conclusion of the proceedings.

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1 Board's rules and regulations and will be conducted pursuant to
2 Section 105.214 and Sections 101.600 through 101.632 of the
3 Board's procedural rules.

4 At this time I will ask the parties to make their
5 appearances on the record. For the Petitioner, ESG Watts.

6 MR. WOODWARD: It is Larry A. Woodward. A couple of
7 matters. You indicated that it is PCB 01-62, 63 and 64. I
8 thought it got -- all six cases got consolidated under the number
9 PCB 00-206.

10 HEARING OFFICER LANGHOFF: They did, but --

11 MR. WOODWARD: Even though that has been dismissed, all
12 these documents identified as --

13 HEARING OFFICER LANGHOFF: That's going to be fine.

14 MR. WOODWARD: Okay.

15 HEARING OFFICER LANGHOFF: In fact, the Board opinion still
16 had those numbers in the caption. I don't know why. But the
17 Board did dismiss those cases, PCB 00-206, and 7 and 8.

18 MR. WOODWARD: And then the second matter was, just for
19 your information, it is Andalusia.

20 THE COURT REPORTER: Could you spell that?

21 MR. WOODWARD: It is A-N-D-A-L-U-S-I-A.

22 THE COURT REPORTER: Thank you.

23 HEARING OFFICER LANGHOFF: I had Viola correct, right?

24 MR. WOODWARD: Viola is correct. And Larry A. Woodward,

7

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1 attorney for Petitioner, 525 - 17th Street, Rock Island,
2 Illinois, 309-788-7700.

3 HEARING OFFICER LANGHOFF: Okay. Thank you. For the
4 respondent, the Illinois Environmental Protection Agency.

5 MR. MERRIMAN: Daniel Merriman with the Illinois EPA.

6 HEARING OFFICER LANGHOFF: Thank you. Do we have any
7 preliminary matters that need to be discussed on the record? Do
8 you want to start with the stipulation or -- Mr. Merriman?

9 MR. MERRIMAN: Before we get to that, Mr. Hearing Officer,
10 I would like to offer a motion to leave the filing standard, the
11 Agency's administrative record. I have the original and five
12 copies of the motion. I have given one copy of the motion to Mr.
13 Woodward. I have copies here of the administrative record.

14 The motion -- I had better have one of these before I start
15 talking, just to make sure that I say what it says. The motion
16 is brought before you pursuant to Board Procedural Rule
17 101.502(a) that allows me to bring the motion to the Hearing
18 Officer. And it is brought pursuant to Rule 101.522 that
19 provides the Board or Hearing Officer with the motion and for
20 notice may extend the time for filing or doing any act which is
21 required by the rules to be done within a limited period of time
22 either before or after the expiration of time.

23 In this case, I think if you will look back on the record
24 far enough, although I realize there were other hearing officers,

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1 I think you will see that there was initially an agreement to
2 postpone the necessity to file the record until we knew there was
3 going to be a hearing for sure. There was extensive discovery.
4 All of the documents, to the best of my knowledge and belief,
5 every one of the documents that are included in the record have
6 already been provided earlier in this proceeding through
7 discovery to Counsel. Actually, a good many of them were
8 provided to the Agency from Watts.

9 I think that there is nothing in here that -- I have two
10 volumes that I would like to file. The first one was the record
11 for the cases 206, 207 and 208 that was recently dismissed.
12 However, it has some -- I think I would like to file it anyway as
13 a consolidated record because there is some background
14 information and material that has been used as exhibits in the
15 preceding motions and so on.

16 The second volume is the one directly involving these
17 cases, 01-62, 01-63, and 01-64, specifically the September -- the
18 July 6th of 2000 applications for substitute financial assurance
19 and the September 11th of 2000 denial letters and the relevant
20 correspondence.

21 The fact of the matter is these records are filed rather
22 late, but I believe there is no prejudice involved since all of

23 the documents, again, have been possessed by all parties, and up
24 until now the Board has not had the occasion to need the record.

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1 It will be available for the Board. So I would move that the
2 record be submitted. Plus I think that the Board needs the
3 record.

4 HEARING OFFICER LANGHOFF: Thank you. Mr. Woodward.

5 MR. WOODWARD: Well, except for the fact that none of the
6 exhibits or anything will refer to an official record, they will
7 refer to documents that are attached, which may make the Board's
8 review more difficult, I agree with everything he said.

9 HEARING OFFICER LANGHOFF: Okay. Thank you. I find that
10 there is sufficient good cause shown and I grant your motion, Mr.
11 Merriman. Do you want to just put the copies somewhere off to
12 the side over here?

13 MR. MERRIMAN: Yes.

14 HEARING OFFICER LANGHOFF: Okay. Do you have nine copies?

15 MR. MERRIMAN: You know, I do not. I think we had talked
16 earlier about -- again, I could supply the additional copies. I
17 brought with me one for Mr. Woodward, one for myself to use, and
18 let's see, five others. Let's see. One, two, three, four, five,
19 six. Six. I think there is six.

20 HEARING OFFICER LANGHOFF: This is volume one and this is
21 volume two?

22 MR. MERRIMAN: Yes.

23 HEARING OFFICER LANGHOFF: Okay. Let the record reflect
24 that I am going to contact the clerk's office and ask about the

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1 number of copies that we need filed of the record, and I will get
2 back to Mr. Merriman.

3 MR. MERRIMAN: Thank you. I have several more of volume
4 one, and they are just back at the Agency, I am afraid.

5 HEARING OFFICER LANGHOFF: If we need more -- four more
6 copies of volume two, we have to prepare those? You would need
7 to prepare them? You don't have them back at the office?

8 MR. MERRIMAN: It can be done within -- as long as it is
9 not me doing it, it can be done within a matter of an hour or
10 two.

11 HEARING OFFICER LANGHOFF: Okay. Thank you, Mr. Merriman.
12 Anything else, Mr. Merriman?

13 MR. MERRIMAN: I think preliminarily that's all I have.

14 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Woodward.

15 MR. WOODWARD: If you will bear with me just a moment, I am
16 about done here.

17 HEARING OFFICER LANGHOFF: Okay.

18 MR. WOODWARD: Your Honor, the parties have prepared a
19 joint stipulation of fact. It includes a number of exhibits
20 that -- attached to it are a number of joint exhibits. It does
21 incorporate by reference the request for hearings filed in

22 this -- the exhibits that were attached to the request for
23 hearing that was filed in this matter rather than reproducing
24 them. They are quite lengthy exhibits. And I will tender those

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1 as soon as -- we just need to sign the original.

2 HEARING OFFICER LANGHOFF: Okay.

3 (Mr. Merriman reviewing the document.)

4 MR. WOODWARD: Your copy is unsigned, but the original is
5 signed.

6 HEARING OFFICER LANGHOFF: Okay.

7 MR. WOODWARD: We have tendered Joint Exhibit A, which is
8 the stipulation. Attached to that is Joint Exhibit B. It
9 incorporates by reference Joint Group Exhibit C, which is Exhibit
10 C to the request for hearings filed in this matter. It has
11 attached Joint Exhibit D, Joint Group Exhibit E. There is no
12 Joint Exhibit F. There is no Joint Exhibit G. It incorporates
13 by reference Joint Group Exhibit H, which is Exhibit D to the
14 request for hearing filed in PCB 01-63 and PCB 01-64 and Exhibit
15 G to request for hearing filed in PCB 01-62 and it has attached
16 Joint Exhibit I and Joint Exhibit J. So we tender all of those
17 for admission.

18 HEARING OFFICER LANGHOFF: Thank you. Mr. Merriman, you
19 have reviewed and signed the stipulation?

20 MR. MERRIMAN: I have. Just for the record, it is a very

21 difficult thing to stipulate to anything. The factual matters
22 are not in dispute. The conclusions to be drawn from them, the
23 implications from them, of course, are. And we do not stipulate
24 to Petitioner's conclusions to be drawn from the underlying

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1 facts. But as far as these facts are concerned, we do agree.

2 HEARING OFFICER LANGHOFF: Thank you. I will accept the
3 stipulation of the parties in consolidated case PCB 00-206.

4 Are there any other outstanding or prehearing motions that
5 the parties would like to make before we begin?

6 Okay. Mr. Woodward, would you like to give a brief opening
7 statement on behalf of your client?

8 MR. WOODWARD: This case really boils down to two or three
9 issues. The first being whether Frontier Pacific Insurance
10 policies are those that are recognized by law as valid substitute
11 financial -- as valid financial assurance. It is not in dispute
12 that Frontier Pacific was not a licensed -- was not an insurer
13 licensed to transact business in the State of Illinois. However,
14 the policies are -- that were submitted contain surplus line
15 stamps affixed thereto by the Surplus Line Association of
16 Illinois. The statute, 415 5/21.1 authorizes, as a financial
17 assurance mechanism, surplus lines insurance. The Board
18 regulations for 811 landfills authorizes surplus lines insurance.

19 However, for 814 and 807 landfills, the regulations 35
20 Illinois Administrative Code Part 807 and Part 814 do not

21 recognize surplus lines insurance. It is our -- it is the
22 Petitioner's position that the Board regulations, in Part 807 and
23 Part 814 are Ultra vires, that the statute clearly authorizes
24 surplus lines insurance, and the Board, when it failed to amend

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1 Part 807 and Part 814 after the passage of that Act that amended
2 the Illinois Pollution Control Act to authorize surplus lines,
3 acted in a way that was not permitted by statute.

4 The Agency has relied upon the fact that Frontier Pacific
5 Insurance Company was not licensed to transact business in the
6 State of Illinois to reject those policies as to Viola and as to
7 the Taylor Ridge Andalusia Landfill. It did not respond to the
8 Sangamon Valley submission. And by operation of law it is our
9 position that that insurance policy became approved as a matter
10 of law under 415 5/39 and 5/40.

11 As to the Taylor Ridge Landfill, it is not in dispute that
12 Taylor Ridge is required to seek significant modification permits
13 under 814 -- Part 814 and Part 811 of the 35 Illinois
14 Administrative Code. We believe that the insurance policy should
15 be construed under Part 811 for Taylor Ridge, and not Part 807.
16 The Agency's position is, well, you have not obtained an approved
17 significant modification permit, therefore, you are still subject
18 to the 807 regulations. We believe that to be in error, as a
19 matter of law.

20 The last major point is that the Agency took the position
21 that even if they had approved the insurance policy submitted,
22 that there would be insufficient amount to cover closure and
23 post-closure care at the three landfills. Well, actually, at the
24 two landfills, Viola and Taylor Ridge. And their theory was that

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1 you have a -- that the Petitioner has a unified trust document
2 dated in February of 1985, that has never been amended in
3 accordance with statute and the terms of that document. However,
4 in 1994, the Agency wrote us a letter saying -- transmitting
5 forms and in the letter it says must establish three separate
6 policies before transferring funds.

7 We submitted, in accordance with the forms that they sent
8 us, three separate documents, a trust fund for each landfill.
9 And we were never told that that did not create three separate
10 trust funds. The Agency did say in 1996, by letter, that there
11 was three separate trust funds, one for each landfill, and that
12 we could not transfer what we believed to be -- we, being the
13 Petitioner, believed to be surplus funds in one trust account to
14 another that was under funded without complying with excess --
15 the regulations dealing with excess funds. It was only the
16 September 11th response, the September 11, 2000 response, that
17 the Agency raised the unified trust fund doctrine since that
18 January 18, 1994 letter.

19 They also said in their response that no matter what we

20 would not approve the release of funds because you have not got a
21 sufficient amount of money posted in this trust fund to cover the
22 expected closure, post-closure care at Viola and Taylor Ridge.
23 This is where they -- after they have already denied or rejected
24 the insurance policies for Viola and Taylor Ridge, which were in

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1 the amount of the then approved closure, post-closure care plan.

2 We intend to present evidence that shows that subsequent to
3 September 11, 2000, the Agency approved a closure, post-closure
4 care plan for Taylor Ridge in the exact amount that we had
5 submitted in the July 7, 2000 submittal, and that subsequent to
6 September 11, 2000, they approved a lesser amount for a
7 post-closure care plan for the Viola Landfill, and indicated in
8 that letter, in that supplemental permit, that the post-closure
9 care plan period began October 20, 2000, which was a mere five
10 weeks after their denial in this case.

11 So we believed that when they stated that they had reason
12 to believe that there was additional money needed for closure,
13 post-closure care, the record won't reflect that they had such a
14 reason. That, in fact, they approved -- their actions afterwards
15 specifically counteract that statement, which was in the denial
16 dated September 11, 2000.

17 For those reasons, we believe that the policy should be
18 approved, that they should constitute the financial assurance for

19 Taylor Ridge and Viola and for Sangamon Valley, and that the --
20 as to Sangamon Valley, there ought to be a release of the trust
21 funds since we are no longer the operator/owner, and a release of
22 the insurer from the obligation to provide financial assurance at
23 Sangamon Valley since we are no longer the owner/operator of
24 Sangamon Valley. And that the remaining money in the trust fund

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1 ought to be released because we have adequate substitute
2 financial assurance posted.

3 That's how this case boils down, I believe, to those three
4 issues.

5 HEARING OFFICER LANGHOFF: Okay. Thank you, Mr. Woodward.
6 Mr. Merriman, would you like to give a brief opening statement on
7 behalf of your client at this time? Or you can reserve it.

8 MR. MERRIMAN: Actually, I would like to give a brief one
9 now.

10 HEARING OFFICER LANGHOFF: Okay. Thank you.

11 MR. MERRIMAN: It may come as no surprise that the Illinois
12 EPA believes that the focus and thrust of this case is somewhat
13 different from that presented by Watts. We think that this is a
14 case, more than anything, about administrative authority and
15 whether the Illinois EPA is required to follow the law. Or
16 whether it has the ability to ignore the law based on convenience
17 or its own interpretation of the Act. For example, the whole
18 issue of whether the insurance policies that were tendered as

19 substitute insurance are acceptable pursuant to Part 807
20 regulations. Watts has presented the argument that the statute
21 says that you don't have to be licensed in Illinois.
22 Nevertheless, Part 807 regulations say that you do. Watts
23 suggests that the 807 regulation is Ultra vires and that the
24 Agency ought to ignore it and just approve something.

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1 The problem that the Agency has is that the Agency is not
2 chartered or allowed to ignore the regulations but, in fact, its
3 grant of authority to issue permits requires that the permits
4 must comply with the Act and the regulations, both Section 21 of
5 the Act, 21(d), 39(a), and 21.1, the provision that was -- is at
6 issue here talks about approving closure and post-closure care
7 plans and instruments of financial assurance in accordance with
8 the Act and the regulations.

9 One of the things that is apparent from the record and will
10 be seen from the evidence is that a surplus lines company that is
11 not licensed to do business in Illinois, is not subject to the --
12 I believe it is -- I don't want to misstate the name of it. But
13 it is the Insurance Guarantee Fund, the State of Illinois
14 Insurance Guarantee Fund, which essentially covers insureds for
15 their losses in the event of the failure of an insurance company
16 to be able or to pay. If you are licensed in Illinois you are
17 subject to the fund and it is similar or somewhat analogous to

18 the FDIC for banks.

19 However, a nonlicensed company and the policies that were
20 submitted by Frontier -- from Frontier Pacific Insurance Company
21 had a stamp right on the face of the policy saying that notice to
22 policy owner, this contract is issued pursuant to Section 445 of
23 the Illinois Insurance Code by a company not authorized and
24 licensed to transact business in Illinois and as such is not

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1 covered by the Illinois Insurance Guarantee Fund. That may be a
2 sufficient reason why the Board should find that the 807
3 regulation is more protective of human health and the
4 environment, because the closure standards for 807, for example,
5 are less specific than the newer closure standards under Part 811
6 and, you know, there may be a legitimate policy reason for not
7 having amended the Part 807 regulations.

8 The thing of it is, Watts had the ability to exercise
9 administrative remedies if they wanted to use a surplus lines
10 carrier not licensed to do business in Illinois. They could have
11 sought an adjusted standard from the Board. They didn't do that.
12 Instead, they say that the Illinois EPA should have just ignored
13 the statute -- or excuse me -- just ignored the regulation. We
14 are not sure that we have -- we don't think we have the authority
15 as an Agency to do that.

16 We are not a quasi-legislative or a quasi-judicial body
17 when it comes to these type of matters. We are an executive

18 Agency. We do what the law says we have to do. If the law says
19 we have to issue permits consistent with the regulations, then
20 that is what we have to do until such time as the regulations are
21 changed. It may seem unduly bureaucratic, but I think that is
22 the situation that we find ourselves in. It is not a question
23 of -- it is a question of whether we -- it is a question of
24 whether we follow the law.

19

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1 The other thing is with regard to the trust. There is the
2 talk about the unified trust, and then at some point later on in
3 1994, at the request of Watts, forms were provided to Watts. And
4 then later in 1996 some correspondence was issued that appears to
5 be inconsistent with the unified trust. Nevertheless, the law in
6 Illinois is that a trust agreement, when it contains the manner
7 in which the trust may be terminated or modified, may only be
8 terminated or modified in that manner. And any attempt to do so
9 by anyone thereafter is void.

10 So we think that's what the issue focuses on, whether the
11 insurance policies were in compliance with the law, whether the
12 Agency is free to ignore the law, the regulations, in order to
13 deal with what Watts believes is an apparent conflict, and we
14 think that the evidence is going to show that the Agency acted
15 reasonably.

16 And speaking of acting reasonably, the Agency -- one last

17 point. I am sorry I mentioned that this was going to be a brief
18 opening statement. But one last point. There is a provision in
19 the financial assurance regulations where it comes time to pay
20 out that says that if the Agency has reason to believe that the
21 actual costs, the real costs of closure will exceed the amount
22 that has been approved as a cost estimate, they may retain the
23 amount and not release any supposed excess, financial assurance
24 until such time as they are satisfied that there is no liability

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1 in excess of the stated amount.

2 In this particular instance Watts admits and, in fact, has
3 stipulated that the Taylor Ridge facility, although still
4 issued -- still submitting biannual cost revisions under Part 807
5 and having cost estimates approved under the old 807 existing
6 closure plan, everyone agrees that they will ultimately have to
7 close pursuant to Part 811 standards, which are -- we will
8 provide evidence in the record, but I think the Board could
9 probably take administrative notice based on the requirements of
10 the regulation, that they are significantly more stringent, and
11 there are significantly more things that have to be done in
12 closure and post-closure care and, therefore, likely to cost
13 more.

14 So I think that's what the evidence will show. I guess
15 that's -- I will stop now. We will actually give you some
16 evidence rather than my statements.

17 HEARING OFFICER LANGHOFF: Thank you. Mr. Woodward, your
18 case-in-chief, please.

19 MR. WOODWARD: By agreement we are presenting John Taylor's
20 deposition testimony rather than Mr. Taylor, even though he is
21 here as the Respondent's witness. There is your copy, and it is
22 labeled Petitioner's Exhibit A.

23 HEARING OFFICER LANGHOFF: Thank you. Do you want to offer
24 this now?

21

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1 MR. WOODWARD: Yes.

2 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman?

3 MR. MERRIMAN: Just for the record, I agreed with -- for
4 the purpose of expediting this proceeding I agreed with Counsel
5 that we could submit the deposition. I do want to note that this
6 was a discovery deposition taken pursuant to Board discovery
7 rules and not an evidentiary deposition. So there is the matter
8 within the deposition that may not be directly material or
9 relevant to this proceeding. But I trust that the Board can
10 whittle their way through that and find the testimony that is
11 relevant, and so we are not objecting to that being offered in
12 this matter.

13 MR. WOODWARD: It is my understanding that Mr. Merriman
14 intends to call Chris Liebman as a witness, and that rather than
15 my calling him I would just reserve -- I have a couple of

16 additional exhibits that I wish to introduce, but I will
17 introduce those as part of his cross-examination. If that's not
18 what Mr. Merriman intends to do, then I need to call Mr. Liebman.

19 MR. MERRIMAN: We have discussed this earlier. I -- at
20 this point I intend to call Mr. Liebman. I understand the
21 request to reserve submission of exhibits. So even if Counsel
22 wishes to close their case-in-chief, subject to that I have no
23 objection.

24 HEARING OFFICER LANGHOFF: Okay. Thank you. I will admit

22

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1 Petitioner's Exhibit A.

2 (Whereupon said document was duly marked for purposes of
3 identification as Petitioner's Exhibit A and admitted
4 into evidence as of this date.)

5 MR. WOODWARD: I would ask the Hearing Officer and the
6 Board to take judicial notice of 215 ILCS 5/445, which are the
7 regulations dealing with surplus lines.

8 HEARING OFFICER LANGHOFF: For the record, I will reserve
9 that ruling or send that ruling to the Board under 101.630.
10 Thank you.

11 MR. WOODWARD: The Petitioner closes its case-in-chief.

12 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman?

13 MR. MERRIMAN: Thank you. We would call John Taylor.

14 HEARING OFFICER LANGHOFF: Mr. Taylor, would you come up
15 here and have a seat, please. Thank you.

16 (Whereupon the witness was sworn by the Notary Public.)

17 J O H N T A Y L O R,

18 having been first duly sworn by the Notary Public, saith as

19 follows:

20 DIRECT EXAMINATION

21 BY MR. MERRIMAN:

22 Q. Would you please state your name for the record.

23 A. John Taylor.

24 Q. What is your professional occupation?

23

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1 A. I am an attorney.

2 Q. Are you a practicing attorney?

3 A. Yes, I am in private practice as a sole practitioner.

4 Q. Where do you practice?

5 A. In Springfield, Illinois.

6 Q. How long have you been practicing in Springfield,

7 Illinois?

8 A. Just a little less than three years.

9 Q. Prior to being engaged as a private sole practitioner,
10 how were you employed?

11 A. I was employed by the Illinois Environmental Protection
12 Agency.

13 Q. In what capacity?

14 A. I worked in the Bureau of Land or what is now known as

15 the Bureau of Land. I was a financial assurance reviewer.

16 Q. Approximately how long did you do that?

17 A. Eleven years.

18 Q. Just so that we can -- I don't -- since your deposition
19 testimony has already been admitted in evidence, I don't think I
20 have to worry about laying too many foundations. So we will try
21 and cut to the chase. You were the reviewer of the tendered
22 financial assurance that is at issue in these three cases now
23 before the Board; is that right?

24 A. Yes, that is correct.

24

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1 Q. Can you briefly tell us what the process of review
2 involved?

3 A. Reviewing financial assurance submissions is fairly
4 straightforward. You basically read the document that is
5 tendered, document or documents, and compare them to the relevant
6 rules and regulations and statutes and make a determination as to
7 whether or not the tendered package or documents, whatever they
8 may be, comply with the relevant rules, regulations and statutes.

9 Q. You heard -- you were here when the parties made their
10 opening statements. I assume that you are familiar with the
11 issues involved in this case?

12 A. Yes, I believe so.

13 Q. On September 11th of 2000, there are three Agency
14 determinations that were made, final determinations. Are you

15 familiar with those?

16 A. Yes, in general.

17 Q. I take it when you say in general, you are referring
18 perhaps to the lapse of time?

19 A. Yes. There were a lot of issues or a lot of documents
20 involved and generally, yes, I remember them fairly well but not
21 each and every detail.

22 Q. In fact, did you draft those denial letters?

23 A. Yes.

24 Q. Okay. One of them rejected the request to substitute

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1 financial -- as financial assurance for the Viola facility an
2 insurance policy, right?

3 A. Yes.

4 Q. And you stated your reasons for denial in that September
5 11th letter; is that right?

6 A. Yes, I believe I did.

7 Q. And among those reasons there was a statement with
8 respect to the licensing. Do you recall that and can you
9 elaborate on that?

10 A. Yes. Among the many other reasons for denying or not
11 accepting that insurance policy one of the reasons was that the
12 insurance company who produced -- issued the policy was not
13 licensed by the Illinois Department of Insurance.

14 Q. In fact, I believe that there is testimony with respect
15 to this in your deposition that has been already admitted here.
16 Did you, in fact, contact the Illinois Department of Insurance to
17 inquire as to the status of the licensing of Frontier Pacific
18 Insurance Company?

19 A. Yes, I did. I don't remember the date, though. But I
20 believe there is some correspondence in the file and perhaps in
21 the record that would support that.

22 Q. What response did you get from the Illinois Department
23 of Insurance?

24 A. That the insurance company that I inquired about was not

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1 licensed by the Illinois Department of Insurance.

2 Q. What significance was that to you?

3 A. Of the many requirements for an acceptable insurance
4 policy under the Board rules and regulations, one of them was
5 whether or not the insurance company issuing the policy was
6 licensed by the Illinois Department of Insurance.

7 Q. So that became one of the reasons for denial?

8 A. That's what I recall, yes.

9 Q. Now, the policy that was submitted was entitled a
10 pollution liability policy; is that right?

11 A. I believe so.

12 Q. Were there a number of documents and a number of
13 conditions and other endorsement attached to the policy?

14 A. Yes, that's my recollection.

15 Q. I am going to show you what has been -- what does appear
16 at page 96 of volume two of the record, and ask you if you can
17 identify what that document would be?

18 A. It appears that it is a -- it is labeled pollution
19 liability declaration. It appears to be part of an insurance
20 policy issued by Frontier Pacific Insurance Company.

21 Q. Is there any indication there what facility?

22 A. This is for the Sangamon Valley Landfill.

23 Q. Do you recall having received a policy from Watts with
24 respect to the Sangamon Valley Facility on or about the 6th of

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1 July of 2000?

2 A. Yes.

3 Q. Did you make a specific rejection of that policy as
4 financial assurance for Watts, as you testified that you did for
5 the Viola and the Taylor Ridge?

6 A. No, we took no action.

7 Q. Why was that?

8 A. ESG Watts was not required to provide financial -- as I
9 recall, I believe that was after the site was transferred to a
10 different owner, and ESG Watts was no longer required to provide
11 financial assurance for that site.

12 Q. In fact, then, on February 18th of 2000, some months

13 before this submission, the permit had been transferred; is that
14 right?

15 A. I believe that sounds right.

16 Q. Just for the record, I am going to show you appearing at
17 pages 79 and following in volume two of the Agency record, what
18 purports to be a supplemental permit dated February the 18th of
19 2000; is that right?

20 A. Yes.

21 Q. Is that a copy of the permit that transferred the
22 operating rights from Watts' development and operating permit to
23 the new owner?

24 A. Yes. In the second paragraph it states that it approves

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1 the transfer of the facility permits from ESG Watts, Inc., as
2 owner and operator, to Sangamon Valley Landfill, Inc., as owner
3 and operator, among other things.

4 Q. So it is your understanding that from and after that
5 date Watts no longer had any interest in the Sangamon Valley
6 facility?

7 A. They had -- it would be my understanding that they had
8 no -- they no longer were associated with the permit and they had
9 no obligation to provide financial assurance or, for that matter,
10 anything else related to the Sangamon Valley Landfill.

11 Q. Now, as I understand it, the amount of the policies that
12 were submitted to you and tendered to the Agency as financial

13 assurance for the Taylor Ridge and Viola facilities, were the
14 amount of the then current approved cost estimates?

15 A. I believe that's right.

16 Q. Is that based on your recollection?

17 A. Just on my recollection, yes.

18 Q. If there was already a certain amount of cash posted in
19 the trust account for those facilities and an alternate or a
20 substitute form of financial assurance was submitted, what
21 happened?

22 A. Any number of things can happen. If the alternate form
23 of financial assurance is acceptable and the amount by itself is
24 equal or exceeds the approved current cost estimate, then

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1 generally the old financial assurance mechanism, whatever it may
2 be, would be released. The rules provide for that in various
3 ways.

4 Q. In the applications that were submitted to the Agency
5 July 6th of 2000 for the Viola and Taylor Ridge facilities that
6 included the insurance policies, was there a request made to make
7 a determination that money held in trust for the closure and
8 post-closure care of those facilities be deemed excess and
9 released?

10 A. In some fashion or in some manner, yes.

11 Q. If those policies had been acceptable, would the Agency

12 have been able to comply with that request?

13 A. Maybe, because the -- possibly, yes. But there are
14 other regulations -- there are other factors that play. It
15 depends on whether or not the -- assuming that the financial
16 assurance mechanisms tendered are acceptable and in an
17 appropriate amount ordinarily, yes, as I said, the old financial
18 assurance documents or whatever would be released or the trustee
19 would be released. However, if there are other problems, if
20 there is the possibility or likelihood that the true cost of
21 closure and post-closure care may be far higher than the
22 financial assurance tendered at that time, then the answer may be
23 no, the Agency is obligated to not release the trust funds.

24 Q. Again, just for the record, as an example, I am going to

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1 point you to page 236 of volume two of the Agency's record. This
2 would be a letter dated September the 11th of 2000, relating to
3 the Taylor Ridge facility. In that first paragraph of that
4 letter there is a reference, is there not, to a determination
5 that -- or a statement that the Agency has reason to believe that
6 the costs of closure may exceed -- well, could you, just for the
7 record, read that?

8 A. Yes. This is a letter that I wrote. I believe the
9 first paragraph, second sentence reads thusly, further, the
10 Agency has reason to believe that the cost of closure and
11 post-closure care of the Viola Landfill and the Taylor Ridge

12 Landfill will be significantly greater than the total value of
13 financial assurance tendered for all of the ESG Watts, Inc.
14 Facilities, regardless of the acceptability thereof.

15 Q. What were you referring to?

16 A. As I recall, at the time there was some question as to
17 groundwater contamination. There were some -- there are others
18 who could answer this question better than I now. But there were
19 groundwater and corrective action studies underway that -- and it
20 was thought that once the sites were fully permitted under the
21 Section 811 regulations, the Subtitle D regulations, that the
22 true cost of closure and post-closure care would be many times
23 what the current cost estimates were.

24 Q. In your experience as a reviewer of financial assurance,

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1 had you ever dealt with facilities that were permitted under Part
2 807 and obtained significant modification permits under Part 811
3 and, if so, did that have an affect on financial assurance?

4 A. Yes. Just from observation, financial assurance
5 requirements for landfills permitted under the Subtitle D,
6 Section 811 regulations were generally much higher, sometimes a
7 multiple of what they were under the previous 807 permits.
8 Although I should add that there are others who could probably
9 give you a better answer to that question than I.

10 Q. Okay. Watts had a trust for financial assurance; is

11 that right?

12 A. Yes, that's what I recall.

13 Q. In your review of this policy, these policies, and your
14 review of the tendered financial assurance, did you have occasion
15 to review the Agency files and records to determine the history
16 of the financial assurance at the site?

17 A. Yes, for all three sites.

18 Q. I am going to refer you to page 314 of volume two of the
19 Agency's record, and ask if you can identify that document?

20 A. It is a cover -- it is a cover letter from Jerald Ilyers
21 (spelled phonetically) who was then Vice President of ESG Watts,
22 Inc., to an Illinois EPA Bureau of Land employee.

23 Q. And the letter refers to a submission to the Agency of
24 what?

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1 A. A cost estimate under some interim form rules that were
2 in affect at the time, plus a trust agreement for the -- as
3 financial assurance for the Watts facilities, which is in effect
4 to this day.

5 Q. What date does that appear?

6 A. February 28th of 1985.

7 Q. Does the trust bear that date, as well?

8 A. It seems to, yes. Yes, it appears to have the same
9 date.

10 Q. How many trusts were submitted, trust agreements?

11 A. One.

12 Q. Does it designate individual facilities covered or the
13 percentages or shares of individual facilities?

14 MR. WOODWARD: The document speaks for itself.

15 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman, is there
16 any --

17 MR. MERRIMAN: That's fine. I will withdraw that.

18 HEARING OFFICER LANGHOFF: Okay. Thank you.

19 Q. (By Mr. Merriman) Now, I think you have testified that
20 there was one trust submitted, and do you recall -- this is going
21 back some time. Do you recall some correspondence, communication
22 between First Star Bank and the Agency dating from October of
23 1991?

24 A. Yes, I believe I do.

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1 Q. I am going to once again just point you to -- I will try
2 to speed this up. I will point you to page 321 of the record,
3 volume two of the Agency's record. Is that the October
4 correspondence that you were referring to?

5 A. Yes.

6 MR. WOODWARD: He said yes.

7 MR. MERRIMAN: Oh, I am sorry. I didn't hear. Okay.

8 Q. (By Mr. Merriman) Can you briefly explain what the
9 circumstances were that resulted in that document or that letter

10 being written?

11 A. There was some question as to what had become of the
12 Watts Trust. I wrote this letter. I recall at the time -- in
13 April of 1990, it was not very long after I had began working at
14 the Agency reviewing financial assurance documents, that I had
15 contacted First Star Bank and had inquired about the status of
16 the trust for the Watts sites. I believe that, as it states
17 here, someone said that the Watts Trust had been dissolved and
18 split up somehow or the other. So we wrote this letter to them
19 explaining that, in effect, the law does not allow for that. It
20 is very specific as to how you can terminate or modify one of
21 these trust agreements.

22 Q. Do you recall whether you received any response to that,
23 correspondence?

24 A. Yes. It is actually in the record. I believe it is

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1 directly following this letter.

2 Q. Can you indicate a page number?

3 A. Yes, it is page 326.

4 Q. Okay. What was that response?

5 MR. WOODWARD: I would object. First of all, the response
6 is not by any member of Watts, so it is not a statement against
7 interest. It is somebody from a bank, and it is hearsay. And it
8 is -- there is nothing in that letter can that can be attributed
9 to Watts.

10 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman?

11 MR. MERRIMAN: With respect to that, there are three
12 parties to the trust agreement, one of which is the Illinois EPA,
13 and one of which is the trustee, and one of which is Watts. And
14 this is correspondence from the trustee, who is a fiduciary of
15 Watts writing and acting on behalf of Watts.

16 HEARING OFFICER LANGHOFF: Okay. What about the hearsay
17 argument?

18 MR. MERRIMAN: I don't believe that it is hearsay. I mean,
19 it is a business document. It is a business record. It is a
20 business record exception. It is the kind of thing that under
21 the Board rules, with respect to hearsay, something that might be
22 hearsay if it is the kind of thing that would reasonably be
23 accepted by someone in conducting their daily affairs or business
24 affairs, then it is still admissable.

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1 I would --I could ask further foundation, but I believe
2 that the Illinois EPA financial assurance unit corresponded with
3 the trustees on a somewhat regular basis and assumed that the
4 information provided by the trustees regarding the status of the
5 trust was accurate.

6 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Woodward,
7 anything further?

8 MR. WOODWARD: I would point out that not only are they the

9 fiduciary of Watts, they are the fiduciary of the Illinois EPA.
10 That's the whole idea of a trust, is that they are protecting the
11 interests of both parties. But their statements as to how they
12 characterize a document which, first of all, the document speaks
13 for itself. You don't need a trustee to give you an explanation.
14 But, secondly, their characterization does not go to any issue in
15 this case. The issue is how the Illinois EPA has treated that
16 document and how Watts has treated that document.

17 HEARING OFFICER LANGHOFF: I am going to overrule your
18 objection on the grounds that I find that it is a business record
19 and is admissible under Section 101.626, and I also find it
20 relevant.

21 Q. (By Mr. Merriman) Okay. Back to where we were, then. I
22 guess you were about to explain what the response was.

23 A. It is a response from a trust administrator at First
24 Star Bank, stating that they had not dissolved, terminated or

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1 amended the original trust. They couldn't. But they pointed out
2 what they had actually done were for record keeping purposes had
3 put the Watts funds into three separate subaccounts or accounts,
4 however they wanted to treat them, so that there would be a
5 separate accounting for each of the Watts Landfills.

6 Q. Do they continue to refer to the trust thereafter, based
7 on your recollection, with respect to the three subaccounts?

8 A. Yes.

9 Q. Do you recall at this time approximately how much money
10 was in trust for Watts?

11 A. No, not offhand.

12 Q. Okay. In the application or the request for approval of
13 the insurance policies, dated the 6th of July, Watts included, in
14 addition to the policy, documents from First Star Bank. Can you
15 tell us -- for example, there would be one found at pages 231
16 through 235 of the record, with respect to Taylor Ridge. Can you
17 tell us what that is?

18 A. Okay. At 231 through 235 of the record was a monthly
19 statement from First Star Bank, a statement of account for the
20 account that they were holding for ESG Watts, Andalusia site.

21 Q. Does it give a valuation?

22 A. Yes, I believe it does. Market value as of -- it gives
23 several, but the end of the period, May 31st of 2000, the market
24 value was \$514,344.00.

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1 Q. Okay. I know it has been some time, but if you recall,
2 there were similar documents attached to the application for
3 approval of an insurance policy as financial assurance for the
4 Viola facility. Would that also list the market value of the
5 account held for Viola?

6 A. Yes, and the Agency also received these routinely from
7 First Star. Do you want the value for --

8 Q. If you have it, please?

9 A. It is in the record at page 303. The value of the trust
10 account for the Viola Landfill on that date was \$29,993.00.

11 MR. WOODWARD: We have stipulated to the aggregate amount
12 as part of Joint Exhibit A.

13 MR. MERRIMAN: Yes. I just wanted to describe that they
14 were part of the application, and that the amounts were there. I
15 think that has been covered.

16 Q. (By Mr. Merriman) Mr. Taylor, if you didn't act on the
17 request to find or to approve an insurance policy as alternative
18 financial assurance for the Sangamon Valley facility, what was
19 your decision in that case?

20 A. I am sorry. I don't --

21 Q. Okay. Maybe I -- I am going to -- I guess I had better
22 have my record back. The Sangamon Valley facility, you testified
23 that there was a request that the Agency approve insurance for
24 that site and, in fact, you testified that you didn't act on it

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1 because it is your belief and understanding that they have no
2 obligation to provide financial assurance for that facility?

3 A. I believe we wrote them a letter and told them exactly
4 that. I would have to look, but my recollection is that is what
5 we said in our response.

6 Q. I am going to refer you to page 141 of volume two of the
7 Agency record. Can you just tell us what that is?

8 A. It is a letter I wrote specifically -- I believe this
9 was in the request for the release of the trust fund for the
10 Sangamon Valley site or trust fund monies, what have you.

11 Q. So there were actually two requests for Sangamon Valley
12 made by Watts, right? One was to approve the insurance policy
13 and the other one was to release funds because of the sale or
14 transfer of the facility?

15 A. Yes. There were three separate sets of requests for
16 acceptance of alternate financial assurance in the form of the
17 insurance policies and requests for release of trust fund monies,
18 as I recall, in the year -- roughly in the year 2000.

19 Q. Okay.

20 A. And in those the -- in some or all of them they asked
21 the Agency to accept a policy for -- a closure insurance policy
22 for Sangamon Valley Landfill. However, we pointed out that they
23 had no obligation to provide any form of financial assurance for
24 Sangamon Valley Landfill at all since the transfer of the permit

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1 had negated that obligation.

2 Then secondly they asked for release of trust monies. And
3 we denied that based on our understanding of the regulations that
4 ESG Watts had a trust. There was one trust document. The trust
5 is a legal entity or what have you, like a corporation, and they
6 don't appear and disappear out of the blue. It was simply one

7 trust. They have tax ID numbers and things like that and pay
8 taxes and so on and so forth. To our knowledge, there was one
9 trust and it covered all of Watts' sites generally.

10 And if he -- he or -- Watts is not a he. But Watts, as a
11 corporation, successfully sold one of their sites and transferred
12 the permits to another entity, the trust and the monies held in
13 trust were available for whatever sites they had left, however
14 many they might have, one or dozens. And the fact that they sold
15 the Sangamon Valley Landfill meant that they no longer had a
16 financial assurance obligation for Sangamon Valley Landfill, but
17 it did not really affect anything else.

18 Q. So the decision not to release the trust funds for the
19 Sangamon Valley site was not because the Agency believed that
20 Watts had an obligation to continue providing financial assurance
21 for Sangamon Valley?

22 A. No, it was after the letter of February 28th, which is
23 actually a permit -- after the permit action of February 28th of
24 2000, Watts had no obligation to provide anything for Sangamon

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1 Valley Landfill, that I am aware of, financial assurance or any
2 records or anything else. They were simply no longer associated
3 with the site.

4 Q. Was the trust fund, again, to your recollection, for the
5 Taylor Ridge facility equal or in excess of the then current cost
6 estimates?

7 A. I don't believe -- for example, the account for Taylor
8 Ridge --

9 Q. Right.

10 A. -- to be specific. I don't believe it was, but I just
11 don't recall. I would have to look at the record.

12 Q. But your determination at the time was that even with
13 the sale of the Sangamon Valley facility the amount of money in
14 the trust fund was insufficient to cover the two remaining
15 facilities?

16 A. My recollection is that under the existing permits at
17 the time, and this could be wrong, but it is my recollection that
18 the two remaining sites had current cost estimates totaling
19 something like 2.4 million dollars, and that the trust accounts
20 in aggregate, the money held in trust was something like 1.4 or
21 1.5 million. There was some million dollar difference. But that
22 is probably not very accurate. But it was something like that.
23 I could check. It would just take a few moments.

24 Q. The documents are in the record.

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1 A. Okay.

2 Q. And it is discernible from that; is that right?

3 A. (Nodded head up and down.)

4 MR. MERRIMAN: I think in view of the hour and the fact
5 that we have the deposition and we have the stipulation and the

6 record, I don't think that there is anything more I need to
7 belabor here.

8 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Woodward.

9 CROSS EXAMINATION

10 BY MR. WOODWARD:

11 Q. When you were talking about reason to believe that the
12 then approved current cost estimates were not sufficient to cover
13 the actual closure or post-closure care costs at Viola and Taylor
14 Ridge, you said there were other people that would be better able
15 to answer that, what reasons there were; is that correct?

16 A. I recall that I got the information -- the information I
17 had I got from others in the permit section, and that there was
18 an ongoing current corrective action study and that sort of
19 thing.

20 Q. Do you recall in your deposition saying that the
21 information generally was received from either Joyce Munie or
22 Chris Liebman?

23 A. Do I recall saying that in my deposition?

24 Q. Yes.

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1 A. No. I will take your word that I did, but I don't
2 remember it.

3 Q. You didn't use the word receive. You said generally
4 flowed from.

5 A. Okay.

6 Q. Is that who you obtained your information from, about
7 the reason to believe that there was -- that the currently
8 approved cost care estimate for closure and post-closure care was
9 insufficient to meet the actual costs of closure, post-closure
10 care?

11 A. It sounds reasonable. There would not be anyone else
12 that I could get that information from. That's part and parcel
13 of what the permit section does.

14 Q. They didn't give you a number, did they? They just said
15 that there were costs that were not accounted for? Nobody ever
16 gave you a number that should be posted?

17 A. No, that would not be possible either. It would require
18 waiting until the corrective action studies were done or whatever
19 the case may be. You can always guesstimate, but until that
20 time --

21 Q. Do you recall writing a letter dated January the 18th of
22 1996 to the trustee of Watts trust accounts?

23 A. Yes, I believe I have seen all of those.

24 Q. Okay. And in -- where is my stipulation. I am sorry.

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1 It is dated January the 19th of 1996. I am showing you what has
2 been labeled as Joint Exhibit J. I would direct your attention
3 to the last full paragraph that starts on the beginning of the
4 first page.

5 A. Okay. Sure.

6 Q. Is that statement consistent with the one trust
7 doctrine, the unified trust, however you want to call it, that
8 you have expounded upon here?

9 A. Clearly not, but my mislabeling something does not
10 create corporations or does not create trusts.

11 Q. I just asked you if it was consistent.

12 A. It is --

13 MR. WOODWARD: I would ask that you strike all his other
14 remarks as not being responsive to the question.

15 HEARING OFFICER LANGHOFF: Mr. Merriman?

16 MR. MERRIMAN: I think it was responsive to the question.
17 I think that he asked the question whether it was consistent and
18 the answer, to be complete, was given by the witness. I think
19 that it should stand.

20 HEARING OFFICER LANGHOFF: Anything further, Mr. Woodward?
21 Any further argument?

22 MR. WOODWARD: Well, it is -- the question was something
23 that could have been answered yes or no. He said clearly not and
24 then he volunteered that he did not have the authority to change

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1 what the law was. All I asked him was what his statement was and
2 whether it was consistent with his other statements.

3 HEARING OFFICER LANGHOFF: I will sustain your objection,
4 and I will let Mr. Merriman reform the witness if he feels that

5 he needs to.

6 MR. MERRIMAN: Thank you.

7 HEARING OFFICER LANGHOFF: I will grant the motion to
8 strike everything after the answer. I believe it was no; is that
9 correct, Mr. Taylor?

10 THE WITNESS: Either no or clearly not, one or the other.

11 HEARING OFFICER LANGHOFF: Thank you.

12 Q. (By Mr. Woodward) Do you recall receiving three separate
13 trusts approximately March of 1994, three trust agreements, one
14 for each of the three Watts Landfills?

15 A. To my knowledge the Agency never received anything like
16 that, no.

17 Q. Were you with the Agency in 1994?

18 A. Yes.

19 Q. You were still doing the same job, that you had
20 testified to?

21 A. Yes.

22 Q. Okay. I am handing you what has been marked as Joint
23 Group Exhibit E. Do you recall ever seeing those?

24 A. It appears to be my writing on it. No, I really don't

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1 remember those.

2 Q. Those purport to be a separate trust agreement for each
3 separate landfill, do they not?

4 A. Yeah.

5 Q. Do you recall ever telling Watts after receipt of those
6 that they did not effectuate separate trust agreements between
7 the date of receipt and this September 11th of 2000 response?

8 A. I am sorry. I don't understand.

9 Q. My question is did you ever tell Watts in writing or any
10 other way that upon receipt of -- after receipt of these
11 documents dated March 9th of 1994, to your September 11th of 2000
12 response to the request to release trust funds, that these
13 documents did not effectuate separate trust agreements for the
14 three separate landfills?

15 A. I was not aware of the existence of those documents,
16 therefore, no.

17 Q. That does appear to be your writing?

18 A. It appears to be.

19 Q. And if they were obtained from the Agency they would
20 have been in your files maintained by you, would they not?

21 A. Myself and others, yes.

22 Q. Okay. So if you don't recall ever receiving them,
23 obviously, you never responded to them, right?

24 A. Yes, that is my testimony.

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1 Q. Do you recall testifying in PCB 96-107, PCB 96-233, and
2 96-237, cases dealing with financial assurance for the three
3 separate landfills, among other matters?

4 A. Not specifically, no.

5 Q. You don't recall testifying on --

6 A. I testify a lot. No, I don't know which one.

7 Q. In Aledo, Illinois as to --

8 A. Yes, I testified in Aledo, Illinois. I don't recall if
9 that was one case or more than one case.

10 Q. And in that testimony did you make a calculation -- do
11 you recall making calculations of the economic benefit obtained
12 by Watts, ESG Watts, for not fully funding the trust agreements?

13 MR. MERRIMAN: I think I am going to object to this as
14 being outside the scope of direct examination. I don't think it
15 is relevant or material.

16 HEARING OFFICER LANGHOFF: Okay. I am going to deny or
17 overrule your objection. I think it is proper for cross.

18 THE WITNESS: Yes, I believe I did something like that.
19 But I did that for I believe all of the Watts sites. I don't
20 recall any of the specifics.

21 Q. (By Mr. Woodward) When you made those economic
22 calculations, did you use the amount in the aggregate among all
23 three trust accounts, or did you use the amount in the separate
24 account for that particular landfill that you were testifying in?

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1 A. Well, I am sure under the circumstances it would have to
2 be the account for that landfill.

3 Q. Okay. So you didn't treat it as a unified trust in that
4 testimony; is that a correct characterization?

5 A. In accordance with the rules, yes, that is how I would
6 have to treat it.

7 Q. Now, you stated on direct testimony that you pointed out
8 to Watts that they didn't have an obligation to provide financial
9 assurance for SVL. Can you point to me --

10 A. For what?

11 Q. For Sangamon Valley Landfill.

12 A. Oh, okay.

13 Q. Can you point to me where you made that disclosure to
14 Watts from the record? Is there anything in the record that you
15 were -- I mean, you were looking at page 141 when you made that
16 testimony.

17 A. (The witness reviewing documents.) That's what it says
18 to me. Perhaps somebody else wouldn't read that into it. But I
19 can't imagine that ESG Watts didn't know this. It would be
20 absurd to believe that they were that unsophisticated. This was
21 in response to a request for the release of trust funds in the
22 account for the Sangamon Valley Landfill. Obviously, Watts and
23 the Agency and everyone knew that they had no financial assurance
24 obligation for Sangamon Valley. I believe it is implicit in the

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1 tone of the letter.

2 Q. So it is not expressly pointed out? It is something

3 that you have to infer from the letter?

4 A. Sure. I can't imagine that -- it boggles the mind.

5 Q. Do the regulations allow Watts to just go to the trustee
6 and take money out or go to the insurer that has provided -- go
7 to the insurer and say we can cancel your policy? Aren't one of
8 the -- well, do the regulations allow that, when there is no
9 obligation for financial assurance, or the obligation ceases to
10 exist?

11 A. You are asking a several part question there. No, an
12 owner or an operator of a landfill cannot just simply tell
13 them -- order the trustee under the terms of the trust, the
14 language, to release funds. However, they can stop paying for
15 insurance policies, and the policies lapse under the terms of the
16 rules.

17 Q. Aren't the policies required to contain a provision that
18 they are not subject to termination except for nonpayment?

19 A. Something like that, sure.

20 Q. And this policy that was submitted was not the first one
21 that Watts had submitted, correct, from Frontier Pacific, in
22 volume one of the record?

23 A. There were a plethora of policies.

24 Q. Okay. And in none of those applications did you ever --

1 strike that.

2 After February 18th of 2000, did you ever expressly state
3 that Watts had no obligation, further obligation to provide
4 financial assurance, and any insurer would be released from any
5 obligation for policies posted or that the trustee would be
6 released?

7 A. No. That was part and parcel of the permit issued by
8 someone else in another part of our bureau. I don't -- that has
9 nothing to do with me. Watts no longer has any obligations of
10 any kind to the facility by operation of a permit. It is not my
11 place or responsibility. I suppose you could say it is not my
12 responsibility and it is certainly not my place to sort of
13 randomly notify former permit holders of various things they no
14 longer have to do, including financial assurance.

15 Q. But they were submitting to you, were they not, new
16 policies or revisions to existing prior submitted policies to
17 obtain approval so that they could get the trust funds released.
18 Wasn't that what they were doing?

19 A. I don't know what they were doing.

20 Q. Okay.

21 A. I have no idea what their motive --

22 Q. You can't infer that, but we can infer from your letter?

23 A. I have no idea what your motives were. As far as I know
24 they were submitted by you, and I know you were told that you had

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1 no obligation by others, and I believe I was present at one time

2 or another, and you knew full well that you had no obligation for
3 the site. I don't know where you are going with your
4 questioning.

5 MR. WOODWARD: That's all.

6 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Merriman,
7 anything further?

8 MR. MERRIMAN: Yes, thank you. Just a follow-up.

9 REDIRECT EXAMINATION

10 BY MR. MERRIMAN:

11 Q. To your knowledge, was Watts conducting a waste disposal
12 operation or an indefinite storage operation at the Sangamon
13 Valley facility after February 18th of 2000, when the permit was
14 issued transferring its permit rights to Sangamon Valley
15 Landfill, Inc.?

16 A. I wouldn't know anything -- no, I have no idea that they
17 would be doing something like that.

18 Q. Okay. Were they -- as to that facility after that
19 permit was issued, was Watts still the operator of that site?

20 A. No.

21 Q. So obligations under the regulations that apply to an
22 operator would not have applied to Watts?

23 A. Yes.

24 Q. Your letter of January of 1996, which was in Joint

1 Exhibit A, also contained in the Agency record, you testified --
2 you were asked whether the last paragraph was consistent with the
3 doctrine that there was one trust and that one trust had not been
4 modified. Is it your understanding that you had the ability to
5 modify the Watts 1985 trust?

6 A. No. The only possible way to modify that trust
7 agreement -- or that trust is contained in the agreement language
8 itself. It requires various things, various signatures and
9 approvals.

10 Q. And that was never done?

11 A. No, not to my knowledge.

12 Q. I am going to show you -- merely because you have my
13 copy of the record, I am going to show you in terms of Joint
14 Exhibit I, I believe you were asked about this as well, a January
15 1994 letter. Who wrote that letter?

16 A. I did.

17 Q. And to whom was it directed?

18 A. To Jerald Ilyers, who was an officer of ESG Watts at the
19 time.

20 Q. Do you read that letter as something directing Watts to
21 modify their trust?

22 A. No.

23 Q. Is that your intent or understanding at the time you
24 wrote that letter?

1 Sangamon Valley Landfill, Inc., is dated February 18th of 2000;
2 is that correct?

3 A. That's my understanding, yes.

4 Q. Okay. Now, the policy that was submitted to you for
5 approval, does it cover a period prior to February the 18th of
6 2000?

7 A. Are you talking about the one that --

8 Q. Just look on page 96. I believe there is a statement
9 about the policy period.

10 A. Okay. Yes. It says retroactive date, January 26, 1998.

11 Q. But there is a policy period, is there not, also? It
12 says from 01-26-00 to 01-26-01, right?

13 A. Okay. Yes, I see that.

14 Q. All right. Did Watts, prior to February the 18th of
15 2000, have an obligation to provide financial assurance at the
16 Sangamon Valley Landfill?

17 A. Yes, that is what the law requires.

18 Q. Wouldn't this policy have been submitted in response to
19 that obligation?

20 A. I suppose.

21 Q. You didn't act on this policy, did you, the one about
22 Sangamon Valley?

23 A. I don't think so, no.

24 Q. Okay. So you didn't respond to a legitimate request

1 about an obligation to provide financial assurance on a policy
2 that covered a period in which Watts had to provide financial
3 assurance?

4 A. I don't even understand your question. This policy was
5 submitted to the Agency sometime after April the 13th of 2000, so
6 it --

7 Q. But it covers a period in which Watts had an obligation
8 to provide financial assurance, is that correct, from January
9 26th, 2000 to February 18th of 2000?

10 A. That's a retroactive date of January 26th of 1998. It
11 has a policy period of January 26th of 2000. Whether or not it
12 is even enforceable under the insurance laws, I have no idea.
13 But we didn't get this thing until sometime after April for a
14 site that Watts had long since sold.

15 Q. And in 1998 and 1999 did Watts have an obligation to
16 provide financial assurance for Sangamon Valley?

17 A. Of course.

18 Q. Okay. And wouldn't this policy have met that
19 obligation?

20 A. Obviously not. It was unacceptable in all respects.

21 Q. I am talking about time-wise. Doesn't it cover that
22 period?

23 A. After the fact. It is some sort of retroactive policy.
24 I have no idea. That raises many other issues I couldn't answer

1 in an afternoon. Whether or not it is worth the paper it is
2 written on for that period of time is something that --

3 Q. He has answered the question.

4 HEARING OFFICER LANGHOFF: Okay. Thank you.

5 MR. WOODWARD: That's all.

6 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman?

7 MR. MERRIMAN: I do.

8 FURTHER REDIRECT EXAMINATION

9 BY MR. MERRIMAN:

10 Q. I mean, I am compelled to ask the question. The
11 insurance policy is designed to make payments for closure -- I
12 mean, presumably it is designed to make payments for the cost of
13 closure or post-closure care that might be incurred by Watts
14 during the future at some point if Watts does not themselves make
15 those -- pay those costs. How does an insurance policy that is
16 designed to work prospectively to costs that may be incurred in
17 the future apply to a retroactive period of time? I am confused
18 about that. Can you --

19 MR. WOODWARD: I would -- unless there is a foundation as
20 to his expertise on insurance law, I am going to object to his
21 answering the question. Even though he is a lawyer, there has
22 been no foundation laid that he has any expertise in the area of
23 insurance law.

24 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman?

1 MR. MERRIMAN: I guess I can ask some foundational
2 questions, but I assuming that in his 11 years as a financial
3 assurance analyst with the Illinois EPA he has become fairly
4 familiar with how mechanisms of financial assurance operate.

5 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Woodward,
6 anything further?

7 MR. WOODWARD: No.

8 HEARING OFFICER LANGHOFF: Okay. I am going to overrule
9 your objection. You can answer, Mr. Taylor, if you know.

10 THE WITNESS: The closure insurance, as required by the
11 Pollution Control Board rules and regulations for these kinds of
12 sites, required the insurer to pay for closure and post-closure
13 care regardless of who does it, whether or not the owner does it
14 themselves or whether or not they hire someone else, or whether
15 the Agency hires someone in the case of the inability of the
16 owner or the owner's designee to do the work.

17 The obligation starts on the part of the insurer, I
18 suppose, when the policy is issued. I can't think of a situation
19 where there would be any kind of retroactive obligation, because
20 the day the policy is issued, the insurance company is on the
21 hook for the entire cost of closure and post-closure care,
22 however many millions of dollars it may be. They are required to
23 pay it. They are required to collect enough premium to cover the
24 entire cost of closure and post-closure care, which makes the

1 policies exorbitantly expensive, I believe, in practice.

2 Q. (By Mr. Merriman) If it is a claim made type of policy
3 and the claim period has come and gone, is it actually insuring
4 anything?

5 A. I don't know how to answer that. The peculiar kind of
6 insurance required for closure and post-closure care, financial
7 assurance under the Illinois rules don't have anything to do with
8 claims. Once the policy is issued, the insurer is on the hook
9 for everything, you know, absent failure to pay the premium.
10 They are required to pay closure and post-closure care up to the
11 limits of the policy.

12 Q. Would you analogize it to a liability policy?

13 A. I don't know that -- well, it is effectively more like a
14 whole life policy whereas at the time of closure there would be a
15 cash value of the policy equal to effectively closure and perhaps
16 most of the post-closure care, given some interest earning
17 ability over the 30 year post-closure care period. It would
18 analogize closely to whole life insurance, where if you die at 70
19 you would get the face value of the policy, or if you live to 70
20 you get the face value anyway because your premiums have built up
21 that cash value.

22 MR. MERRIMAN: I don't think I have any further questions.

23 HEARING OFFICER LANGHOFF: No further questions? Okay.

24 FURTHER RECROSS EXAMINATION

1 BY MR. WOODWARD:

2 Q. Are you familiar with the term tail attached to
3 insurance policies, claims made insurance policies?

4 A. I have heard the term. I am not familiar with it, no.

5 Q. You understand claims made policies to mean that a claim
6 has to be made while the policy is in force otherwise it is not a
7 valid claim? So a person could be insured against a risk for the
8 period January 1, 2000 to -- January 1 of 2000 to January 1 of
9 2001, and if somebody was injured or had some cause, some risk
10 arose that gave rise to a claim under the policy but they didn't
11 make their claim until February of 2001, the insurance company
12 does not have to pay. Is that your understanding of claims made
13 policies?

14 A. Yes, it is my understanding that it certainly would be a
15 valid claim. It is just that the insurance company has no
16 obligation to pay it.

17 Q. Now, a tail, does that not extend the period in which
18 you can -- the risk arises that you can make your claim so that
19 if a retroactive date, such as listed on that policy, says
20 January 1, 1998, the insurance company would have to pay a claim
21 that was made in the year 2000, even though the claim arose from
22 acts in 1998? Is that your understanding of a retroactive
23 period --

24 A. I have no --

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1 Q. -- and a tail?

2 A. I have two things to say. One is that it is completely
3 irrelevant to this kind of policy. How --

4 Q. I am just asking you what your understanding of the tail
5 is. I am not asking you --

6 A. I have no --

7 Q. -- to judge relevancy.

8 A. Okay. First of all, under this policy you can't have a
9 prior claim. How could you possibly have a claim prior to the
10 date the policy is issued unless there is a closure order?
11 That's the first thing. The second thing is that I have no idea
12 what a tail is.

13 Q. Okay. So that is the answer to the question, you have
14 no idea what a tail is?

15 HEARING OFFICER LANGHOFF: Is that it, Mr. Woodward?

16 MR. WOODWARD: Well, I would like to explore some of his
17 other area of expertise in the insurance business since he
18 doesn't know what a tail is.

19 Q. (By Mr. Woodward) If the same insurance company had
20 issued insurance policies for the same risk in prior years, and
21 it is a claims made policy, is there any basis for saying --
22 extending the filing requirement, filing of a claim, when you
23 have a --

24 A. There are no claims. A claim for what?

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1 Q. A claim to pay for the closure. Unless there is a
2 closure order submitted to an insurance company they have no
3 obligation under a policy. Is that your understanding of the
4 insurance policy?

5 A. Not the insurance policies that are approved under the
6 Illinois rules. They are obligated to pay for it regardless.

7 Q. Only if a claim is made, though. They don't come
8 forward on the first instance and pay, do they? They expect the
9 operator to make that payment.

10 A. Not under Illinois law.

11 Q. Where in the Illinois law does it say that, when it says
12 that it authorizes insurance?

13 A. I believe -- I will just refer you to the Section 807
14 and the Section 811 Rules and the Board comments that went with
15 those during promulgation. They explained it clearly. It is
16 effectively a whole life policy. The insurance company is
17 required to pay for closure, regardless of who does it, claims or
18 no claims. That's the law. That's the interpretation the Feds
19 put on it, and that's the interpretation that the Board put on
20 it, and it was explained to you several times in these --

21 Q. That's your understanding of it; isn't that correct?

22 A. -- denial letters. I stand by my research.

23 Q. Have you seen any policies approved, insurance policies
24 approved for other operators as valid insurance policies covering

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1 financial assurance risk in the State of Illinois?

2 A. Yes, there was some for waste management, for example.

3 Q. Did they do what you are saying?

4 A. Not exactly, but they had an adjusted standard.

5 Q. Okay. You have not seen the one that was approved for
6 Allied Waste, have you, or for Sangamon Valley, Inc.?

7 A. No, I have not.

8 MR. WOODWARD: Okay. That's all.

9 HEARING OFFICER LANGHOFF: Okay. Thank you, Mr. Taylor.

10 THE WITNESS: Thank you.

11 (The witness left the stand.)

12 HEARING OFFICER LANGHOFF: Okay. We are off the record for
13 just a second.

14 (Discussion off the record.)

15 HEARING OFFICER LANGHOFF: Okay. We are back on the
16 record. Please call your next witness.

17 MR. MERRIMAN: Thank you. I call Chris Liebman to the
18 stand, please.

19 HEARING OFFICER LANGHOFF: Thank you.

20 (Whereupon the witness was sworn by the Notary Public.)

21 C H R I S L I E B M A N,

22 having been first duly sworn by the Notary Public, saith as
23 follows:

24 DIRECT EXAMINATION

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1 BY MR. MERRIMAN:

2 Q. Please state your name for the record.

3 A. My name is Chris Liebman.

4 Q. And your occupation?

5 A. I am the Manager of the Solid Waste Unit in the Permit
6 Section of the Bureau of Land of the Illinois EPA.

7 Q. How long have you been employed by the Illinois EPA?

8 A. Sixteen years.

9 Q. And how long have you been in the Solid Waste -- the
10 Permit Section?

11 A. Sixteen years.

12 Q. And how about the Solid Waste Unit of the Permit
13 Section?

14 A. Ever since there was one.

15 Q. Okay.

16 A. Which I think would be about ten years now.

17 Q. Okay. Let's start with -- I guess we could go into
18 detail, but I want to avoid that if I can. Let's start with what
19 you didn't do. Permit me if I lead this a little bit to make it
20 go quicker. You didn't review the requests for approval of
21 financial assurance in this case, did you?

22 A. No.

23 Q. Okay. Are you familiar with ESG Watts?

24 A. Somewhat, yes.

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1 Q. Are you familiar with the facilities, in your capacity
2 as a Manager of the Solid Waste Unit, with the Viola and Taylor
3 Ridge facilities?

4 A. Well, I am very familiar with the Sangamon Valley
5 Landfill. The other two landfills, Viola and ESG Watts, I am
6 less familiar with. But I believe I have visited both those
7 sites at least once.

8 Q. The reason I called you is I would like to ask you a
9 question about closure and post-closure care with respect to the
10 Illinois regulatory scheme. Can you briefly state for the record
11 the difference between a closure under Part 807 and a closure
12 under Part 811?

13 A. Sure. Under 807 closure, the final cover has to consist
14 of at least two feet of compacted soil and then on top of that
15 there must be at least six inches of top soil that is capable of
16 supporting vegetation. There is also a requirement under 807
17 closure that there be an adequate groundwater monitoring program.

18 Under 811 closure, the final cover has to be or consist of
19 three feet of compacted soil with a maximum hydraulic
20 conductivity of one times ten to the minus seventh centimeters
21 per second. And then on top of that there must be at least three
22 feet of protective soil.

23 The monitoring systems required under 811 standards are

24 also much greater. Typically the groundwater monitoring network,

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1 that's the wells used to monitor the groundwater, there are more
2 of them in an 811 network than there would be under an 807
3 closure. There is also a requirement that gas be monitored in an
4 807 closure or that there be networks set up capable of
5 monitoring gas migrating from an 811 facility. That would
6 include below ground monitoring devices, both within the waste
7 and outside the waste boundaries, ambient air monitoring devices,
8 and continuous methane monitoring devices within all buildings at
9 the site. There is also a requirement under an 811 closure that
10 leachate be extracted from the facility, and that's not something
11 that is required under an 807 closure.

12 Q. Does your unit that you supervise review permit
13 applications and closure plans for landfills that are subject to
14 both regulatory schemes, 807 and 811?

15 A. Yes.

16 Q. What is a biannual revision?

17 A. It is a requirement under 807 that every two years
18 landfill operators come in with a revised cost estimate for their
19 closure and post-closure care plans.

20 Q. Okay. And have you ever reviewed any of those kinds of
21 permits?

22 A. Certainly.

23 Q. Are they submitted in the form of an application for
24 supplemental permit?

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1 A. Yes, they are.

2 Q. And when approved, are they issued as a supplemental
3 permit?

4 A. Yes.

5 Q. When you review the closure cost estimate, revised
6 closure cost estimates as part of biannual revision, do you
7 review the financial assurance instruments or the form of the
8 financial assurance, or do you just look at the numbers?

9 A. We just look at the numbers proposed in the permit
10 application.

11 Q. And do you compare those with the -- well, what? I
12 mean, how do you --

13 A. We compare those to the previously approved cost
14 estimate.

15 Q. The Taylor Ridge facility was permitted under Part 807
16 and has a Part 807 closure plan; is that your understanding?

17 A. That's my understanding, yes.

18 Q. And it has been suggested that -- and I think we have
19 stipulated to the fact that it will ultimately be required to
20 complete closure under Part 811. Do you understand that?

21 A. Yes.

22 Q. And I take it from the differences that you outlined

23 earlier in your testimony between the 807 closure and the 811
24 closures, there are some significant things under -- required by

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1 the 811 regulatory scheme that are not required by the 807; is
2 that right?

3 A. Yes.

4 Q. In your experience reviewing cost estimates, are these
5 differences significant in their cost as well?

6 A. Yes.

7 Q. If a facility is going to but has not yet obtained a
8 significant modification to be upgraded from 807 regulatory
9 requirements to the Part 811 regulatory requirements, do they
10 still submit biannual revisions?

11 A. Yes.

12 Q. Are these biannual revisions submitted pursuant to their
13 existing closure plan?

14 A. Yes.

15 Q. So in the instance of Taylor Ridge they submit their
16 biannual revisions pursuant to what is essentially a Part 807
17 closure plan?

18 A. Yes.

19 MR. MERRIMAN: Okay. I think that is it, if you want to
20 cross. I have no further questions.

21 HEARING OFFICER LANGHOFF: Okay. Thank you.

22

CROSS EXAMINATION

23

BY MR. WOODWARD:

24

Q. Who is Joyce Munie?

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1 A. Joyce is the manager of the permit section. She is my
2 boss.

3 Q. Does she sign all of the supplemental permits or do you
4 sign them, or do you just give them to her and say these should
5 be approved and she signs them?

6 A. She signs all permit letters, yes.

7 Q. Okay. Do you know what the particulars of the Taylor
8 Ridge Andalusia Landfill closure, post-closure care plan was
9 prior to September the 11th of 2000? Were you familiar with
10 that -- with the particulars of the plan?

11 A. No.

12 Q. So you don't know whether it had the six feet of cover,
13 the three feet of impervious, and the three feet of vegetative
14 cover already included in there, do you?

15 A. No, I do not.

16 Q. Okay. And you don't know whether it had the groundwater
17 monitoring in it, do you?

18 A. No.

19 Q. And you don't know whether it had the gas monitoring, do
20 you?

21 A. No.

22 Q. Now, if it has gas wells there and a flare in operation,
23 would that have to be included in the -- or by regulation would
24 that have to be included in the 807 closure, post-closure care

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1 plan if it is already in place?

2 A. Yes.

3 Q. Okay. And do you know whether the Taylor Ridge
4 Andalusia Landfill does have gas wells and gas flares in place?

5 A. I believe I have been told that there are some gas
6 flares there, yes.

7 Q. Okay. Are you -- do they have groundwater monitoring
8 going on at Taylor Ridge, and did they have that back in
9 September of 2000, going on at the Taylor Ridge Andalusia
10 Landfill?

11 A. I don't really know for a fact. I assume that they did,
12 but I also don't know that it would meet the 811 standards.

13 Q. Did you ever give Mr. Taylor advice that said that the
14 amount posted in the insurance policy for Taylor Ridge was
15 insufficient to cover the actual closure, post-closure care
16 required at that landfill?

17 A. I don't recall that, no.

18 Q. Do you know whether your boss did?

19 A. I don't know whether she did, no.

20 Q. You never had a discussion with her about it?

21 A. I do recall her telling me something about discussing
22 the financial assurance for ESG Watts with John Taylor.

23 Q. I am going to hand you what has been marked as
24 Petitioner's Exhibit B. Would you identify that, please?

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1 A. It appears to be the first two pages of the permit
2 letter for permit number 2000-458-SP.

3 Q. Okay. Now I am going to direct your attention to the
4 second page, numbered paragraph three. By the way, what is the
5 date of this letter?

6 A. March the 2nd of 2001.

7 Q. Okay. Now I will direct your attention to numbered
8 paragraph three, on page three. Now, what does numbered
9 paragraph three purport to do?

10 MR. MERRIMAN: I am going to interject an objection for the
11 record at this point, because of the date, that it was testified
12 that it postdates the permit decision at issue and, therefore,
13 anything that transpired after that date is immaterial.

14 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Woodward?

15 MR. WOODWARD: Well, I believe it has great relevance to
16 the issue of whether there was reason to believe that the
17 closure, actual closure, post-closure care costs exceeded that
18 amount that was submitted on July the 7th of 2000, which was the
19 stated reason -- one of the stated reasons for denial, that they
20 had reason to believe.

21 Well, this is evidence of what they actually did after that
22 date. It goes to whether there was, in fact, a reasonable
23 belief, which is what you have to decide. I mean, what the Board
24 has to decide. Was there a reasonable belief in September of

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1 2000 that the actual cost exceeded that amount that was
2 submitted. You can't prove it except by the costs that have been
3 recognized. This is what this does.

4 HEARING OFFICER LANGHOFF: Okay. Let me see it.

5 (The Hearing Officer reviewing the document.)

6 HEARING OFFICER LANGHOFF: But your argument that I just
7 heard is that this shows what they did after that time. It does
8 not reflect what they might have -- what kind of information they
9 might have had at the time that they made their decision.

10 MR. WOODWARD: Well, this --

11 HEARING OFFICER LANGHOFF: How would it meet that test in
12 105.214 that the hearing will be based exclusively on the record
13 before the Agency?

14 MR. WOODWARD: Well, first of all, there was no record
15 until today. Secondly --

16 HEARING OFFICER LANGHOFF: Well, that's not true and that's
17 not the point.

18 MR. WOODWARD: Secondly, the issue that they are -- they
19 claim on September the 11th of 2000 that they -- Mr. Taylor

20 claims in his deposition, that he relied upon Ms. Munie and Mr.
21 Liebman for information as to whether the actual costs of
22 closure, post-closure care reasonably could be considered to
23 exceed the amount that was submitted. That was the -- one of the
24 basis for denial of release of trust funds. In fact, it was the

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1 reason for denial of the trust funds, because they had already --

2 HEARING OFFICER LANGHOFF: Okay.

3 MR. WOODWARD: And if that basis -- if I can't test the
4 basis of the reasonableness of that belief, then I have no -- I
5 am not able to make a case.

6 HEARING OFFICER LANGHOFF: And how does this do that?

7 MR. WOODWARD: Well, this goes on information that was
8 submitted --

9 MR. MERRIMAN: On November 27th.

10 MR. WOODWARD: On November 27th, a short time after the
11 action taken, and they approved the same amount. They don't
12 disapprove it. They don't say you have to increase it by
13 \$200,000.00. They approve the exact same amount that we
14 submitted in July.

15 HEARING OFFICER LANGHOFF: And you are talking about the
16 number in paragraph three of \$2,031,549.00, right?

17 Okay. Mr. Merriman, anything further?

18 MR. MERRIMAN: Well, only to say that the November -- that
19 the application that was submitted to the Agency that supported

20 these numbers postdates the decision, the September to November,
21 and we have already had testimony about the difference between
22 the 807 and the 811 closure. This is a biannual cost revision
23 under 807. It still does not speak to the issue of what the
24 costs will be.

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1 As stipulated, the Petitioner was required to obtain a
2 significant modification permit for the Taylor Ridge Andalusia
3 Landfill pursuant to 35 Illinois Administrative Code Part 811,
4 and even though it has made several attempts to obtain the
5 significant modification permit, has failed to obtain approval.
6 So it has yet to get an 811 permit.

7 HEARING OFFICER LANGHOFF: I am going to overrule your
8 objection. I am going to find that it has yet to be proved that
9 it is relevant, but it could be relevant to the Agency's decision
10 on September 11th. I would ask that you have -- do you have the
11 entire document?

12 MR. WOODWARD: For some reason -- I mean, maybe it is in
13 this pile or it is in that box, but I didn't pull it out. I will
14 look for it.

15 HEARING OFFICER LANGHOFF: Thank you. I apologize. Do you
16 want to ask the question again? I would rather you have -- I
17 would rather you be able to ask the question again than have the
18 court reporter read it back, but it is up to you.

19 Q. (By Mr. Woodward) I think I directed your attention to
20 paragraph number three on page two, and asked that you tell us
21 what that purported to do?

22 A. Well, if I am understanding your question right it
23 starts with pursuant to Section 39(a) of the Illinois
24 Environmental Protection Act, Act, and 35 Illinois Administrative

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1 Code 807.210, this permit is issued subject to the development,
2 operating and reporting requirements for solid waste landfills in
3 35 Illinois Administrative Code Part 807. The standard
4 conditions attached hereto and the following special conditions.
5 In the case of conflict between the permit application and these
6 conditions, both standards and special, the conditions of this
7 permit shall govern.

8 Q. Okay. What does numbered paragraph three purport to do?
9 Now that we have the qualifying conditions in, what does
10 paragraph three purport to do?

11 A. Financial assurance shall be maintained by the operator
12 in accordance with 35 Illinois Administrative Code, Subtitle G,
13 Part 807, Subpart F, in an amount equal to the current cost
14 estimate for closure and post-closure care. The current total
15 cost estimate is \$2,031,549.00.

16 Q. Okay. So they are approving \$2,031,549.00 as the amount
17 required for financial assurance?

18 A. Under 807, yes.

19 Q. Okay. I am handing you what has been marked as
20 Petitioner's Exhibit C. Would you identify that, please?

21 HEARING OFFICER LANGHOFF: Do you have a copy for Mr.
22 Merriman?

23 MR. WOODWARD: Yes.

24 MR. MERRIMAN: Yes, I have received one. Thank you.

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1 HEARING OFFICER LANGHOFF: Okay. Thank you.

2 THE WITNESS: It appears to be a partial copy of
3 supplemental permit number 2000-278-SP.

4 Q. (By Mr. Woodward) Okay. And what landfill is that for?

5 A. It is for the Viola Landfill.

6 Q. What is the date of the supplemental permit?

7 A. August the 6th of 2001.

8 Q. Does it indicate the date on -- of the information that
9 it is based upon or the application date for that supplemental
10 permit?

11 A. Well, there are two dates given in the first paragraph.
12 It appears that the -- that Mr. Watts signed it on July 27th of
13 2000, and John Noyes of Environmental Information Logistics
14 signed it on July the 25th of 2001.

15 Q. Okay. I am going to direct your attention to page two,
16 numbered paragraph two. What does it purport to do?

17 A. Would you like me to read that?

18 Q. Fine.

19 A. The operator must maintain financial assurance greater
20 to -- excuse me -- equal to or greater than the current cost
21 estimate at all times. The current cost estimate approved by
22 permit number 2001-461-SP is \$294,900.00.

23 Q. Okay. Supplemental permit number 2001-461-SP is this
24 particular permit; is it not?

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1 A. Well, that's not -- let's see. That is not what is
2 indicated by the cover page. The cover page shows that this
3 particular permit is number 2000-278-SP.

4 Q. Are you aware that there were two separate letters
5 issued about the same time, August 3rd of 2001 and August 6th of
6 2001, dealing with the Viola?

7 A. No.

8 Q. You are not aware of that?

9 A. No.

10 Q. Anyway, as to numbered paragraph two, is it your
11 understanding that supplemental permit number 2000-278-SP is
12 approving that amount as financial assurance?

13 A. No.

14 Q. What is your understanding of that?

15 A. Well, I have not had a chance to research this much, but
16 my guess is that 2000-278-SP is reiterating a cost estimate
17 approved by permit number 2001-461-SP.

18 Q. But it is not changing the amount, so it is reiterating
19 the approval; is it not?

20 A. Correct.

21 Q. Okay. And is that just for -- I am going to direct your
22 attention to numbered paragraph three. What does that paragraph
23 purport to do?

24 A. It is informing the operator that he needs to file a

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1 revised cost estimate whenever there is a change to the
2 closure -- or excuse me -- the post-closure care plan that
3 increases the cost.

4 Q. Is it significant that it does not mention closure care,
5 that it just mentions post-closure care?

6 A. I don't know.

7 Q. Okay. Let me direct your attention to page number
8 three, numbered paragraph seven.

9 A. When I said this appeared to be a partial copy I said
10 that because there is not a page three.

11 Q. Okay. Well, let me give you this.

12 MR. MERRIMAN: I don't have a page three either.

13 MR. WOODWARD: That one just didn't copy then, because here
14 it is. Or I have it down here or something. There is a page
15 three.

16 MR. MERRIMAN: Okay. I am sure there is.

17 THE WITNESS: Could you repeat the question, please?

18 Q. (By Mr. Woodward) I asked you to direct your attention
19 to the very top paragraph, numbered paragraph seven, and I asked
20 you to tell us what that purported to do?

21 A. Well, it states that this facility is subject to a
22 minimum 15 year post-closure care period, and that the
23 post-closure care period began October 20th of 2000.

24 Q. Did that mean that it achieved final closure on October

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1 20th of 2000?

2 A. Yeah. Yes, it means that the Illinois EPA has approved
3 the closure certification for the facility and that we determined
4 that closure activities were completed on October 20th of 2000.

5 Q. Okay. Did you -- were you receiving monthly reports
6 about the closure activities at that landfill prior to the July
7 27th, 2000 date and prior to the October 20th of 2000 date?

8 A. Could you repeat your question?

9 Q. I asked if you received monthly reports about the
10 closure activities that were taking place at the Viola Landfill
11 prior to the date of submission of this permit application and
12 prior to the date that you certified that it closed?

13 A. I don't recall.

14 Q. You don't recall?

15 MR. MERRIMAN: Just, again, for the record, I would like to
16 renew my objection to the documents as being beyond the date of

17 the decision and just, for the record, again, moving to strike
18 all this.

19 HEARING OFFICER LANGHOFF: Thank you. The same arguments,
20 and that objection is overruled on the same grounds.

21 Q. (By Mr. Woodward) Okay. Back on the Taylor Ridge
22 Landfill, prior to September the 11th of 2000, were you aware of
23 any leachate collection permits issued for the Taylor Ridge
24 facility and disposal?

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1 A. Krishna Brahmandam may have mentioned something to me
2 about that. But, no, I don't have really a specific recall of
3 that.

4 Q. So the number \$2,031,549.00 may have included a leachate
5 collection and disposal system and may have included a gas
6 collection and monitoring and flaring system, and may have
7 included additional ground -- additional depth of final cover and
8 vegetative cover? But you just don't know whether that is true
9 or not, do you?

10 A. Well, perhaps what you are saying is correct, but they
11 most certainly were not systems that the Illinois EPA had
12 determined met the requirements of 811.

13 Q. So even if you knew these systems were in place, your
14 position would be that there might be additional costs associated
15 with closure and post-closure care of the Taylor Ridge facility

16 just because you had not approved them yet?

17 A. Not because we had not approved them. Just because such
18 systems were in place would not necessarily mean that they met
19 the requirements of 811.

20 Q. Now, you had received several sig mod applications on
21 Taylor Ridge, had you not?

22 A. I believe that's correct, yes.

23 Q. Did any of those sig mod applications include
24 identification of existing leachate collection and monitoring and

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1 disposal, additional existing final and vegetative cover, and
2 existing gas collection systems and disposal systems?

3 A. I don't really know. I would guess that they included
4 at least some of those things, but I know that none of them were
5 ever approved.

6 Q. And the reason -- why aren't the sig mods being
7 approved, the sig mod applications for the Taylor Ridge facility
8 being approved?

9 A. Because the permit applications had not demonstrated
10 that the proposals made in the permit applications meet the 811
11 requirements.

12 Q. Has the Agency, in particular your section, even
13 reviewed them or have you stopped at the fact that the sig mods
14 do not propose lowering the height of the landfill?

15 A. I don't know.

16 Q. Okay. Would your section be the one that reviews it?

17 A. Yes, my section would. As far as I know, we have not
18 had one of those permit applications submitted to us since I
19 became the unit manager.

20 Q. I see. When was that?

21 A. I became the acting unit manager in February of 1999.

22 Q. As far as you know you have not had a sig mod
23 application submitted?

24 A. For --

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1 Q. For Taylor Ridge?

2 A. For ESG Watts, yes, as far as I know that's the case.
3 You may well be able to show me that I am wrong.

4 Q. You are not aware of a denial that was just issued in
5 August of 2001 for a submittal that was made in May?

6 A. No, I don't recall.

7 Q. Okay. But back to the question, are you -- is your
8 section reviewing sig mod applications made by ESG Watts for the
9 Taylor Ridge facility as to compliance with the other
10 requirements of 811, or is it just looking at it and saying that
11 this does not propose lowering the maximum height of the Taylor
12 Ridge Landfill and the statute requires that it be either cited
13 or moved?

14 MR. MERRIMAN: I am going to object.

15 HEARING OFFICER LANGHOFF: On what grounds?

16 MR. MERRIMAN: Well, it seems to me that this is getting
17 into issues relating to other permits, other permit denials,
18 other permit actions, not this witness' testimony about the
19 difference in the costs between an 811 closure or an 807 closure.
20 I think we have gone way beyond the scope of the direct and we
21 are getting into asking about other permits and other permit
22 actions.

23 There is some reference to a sig mod denial in August and
24 asking for the basis for that denial, or the question is about

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1 the scope of the review. And I think it is just way beyond what
2 we have been doing here.

3 MR. WOODWARD: It is my understanding that he offered Mr.
4 Liebman's testimony to show that the number \$2,031,549.00 may not
5 accurately reflect the closure, post-closure care costs for the
6 Taylor Ridge facility. I mean, that's the whole purpose of that
7 testimony is, hey, this is an 807 closure plan and it is required
8 to close under 811. I have tried to test Mr. Liebman's knowledge
9 of that by asking him what he knows about the 807 closure plan
10 for the Taylor Ridge facility, does it include most of the things
11 that are --

12 HEARING OFFICER LANGHOFF: But your last line of
13 questioning was not on that. It was about review of other
14 permits for other --

15 MR. WOODWARD: Exactly. But those other permit
16 applications have -- or the question originally was did they have
17 those things in there, and he said that they may well have. So,
18 I mean, the issue gets back to is Mr. John Taylor reasonable in
19 September 11th of 2000 of saying that the actual costs are not
20 reflected in the \$2,031,549.00, because that is where you get to
21 where we can get released, if you get past the issue of the
22 appropriateness of the insurance policies. If you don't allow me
23 to test this guy's knowledge then his whole testimony is --

24 HEARING OFFICER LANGHOFF: But you have already tested his

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1 knowledge, and this really was not -- well, other than being in
2 the scope of the direct examination, you have already tested
3 that, and I don't see how this question -- this line of
4 questioning goes to that. I am going to sustain the objection.

5 MR. WOODWARD: All right. That's all of the questions I
6 have. Subject to my finding the missing pages --

7 HEARING OFFICER LANGHOFF: Okay.

8 MR. WOODWARD: -- I offer Petitioner's Exhibit B and
9 Petitioner's Exhibit C.

10 HEARING OFFICER LANGHOFF: And, Mr. Merriman, your
11 objection?

12 MR. MERRIMAN: I continue to object based on the relevance,
13 lack of materiality, the date being beyond the final Agency

14 determination.

15 HEARING OFFICER LANGHOFF: I am going to overrule your
16 objection and accept Petitioner's Exhibit B and Petitioner's
17 Exhibit C into evidence.

18 (Whereupon said documents were duly marked for purposes
19 of identification as Petitioner's Exhibits B and C and
20 admitted into evidence as of this date.)

21 HEARING OFFICER LANGHOFF: Okay. Mr. Merriman, anything
22 further for Mr. --

23 MR. MERRIMAN: No, I don't think so.

24 HEARING OFFICER LANGHOFF: Okay. Thank you.

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1 THE WITNESS: Okay. Thank you.

2 (The witness left the stand.)

3 MR. WOODWARD: I do have all of the pages for Exhibit C
4 here.

5 HEARING OFFICER LANGHOFF: Okay. Thank you. Mr. Merriman,
6 anything further?

7 MR. MERRIMAN: No, I have no further testimony to offer. I
8 think that the stipulation exhibits, the deposition, and the
9 records are submitted.

10 HEARING OFFICER LANGHOFF: Okay. Mr. Woodward, I am going
11 to offer you a brief rebuttal if you need to put on something in
12 rebuttal.

13 MR. WOODWARD: Here is the remaining pages for Petitioner's

14 Exhibit B.

15 HEARING OFFICER LANGHOFF: Okay. Thank you. Do you have
16 anything further, Mr. Woodward?

17 MR. WOODWARD: Mr. Merriman has tried to characterize our
18 argument as --

19 HEARING OFFICER LANGHOFF: Do you have any other witnesses?

20 MR. WOODWARD: Oh, I am sorry. No. I thought you were
21 wanting rebuttal argument.

22 HEARING OFFICER LANGHOFF: I think before we get to any
23 closing argument I am going to look at the availability of the
24 record. So we are going to go off the record for a moment.

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1 (Discussion off the record.)

2 HEARING OFFICER LANGHOFF: Okay. Back on the record. We
3 have just had an off-the-record discussion regarding the filing
4 of post-hearing briefs. The parties have agreed to a briefing
5 schedule. Before we get to any closing arguments, I will go
6 ahead and read that schedule into the record. The transcript of
7 these proceedings will be available from the court reporter by
8 December 20th. I will establish a public comment period of I
9 believe it is 15 days.

10 ESG Watts' brief will be due by January 24th, and the
11 mailbox rule will apply. The Agency's brief will be due by
12 February 8th, and the mailbox rule will apply.

13 The transcript of today's hearing is usually put on the
14 Board's website within a few days after its availability. I will
15 just note again that our website address is www.ipcb.state.il.us.
16 Any public comment must be filed in accordance with Section
17 101.628 of the Board's procedural rules. Public comments must be
18 filed by December 26th. The mailbox rule set forth at 35 Ill.
19 Admin. Code 101.102(b) and 101.144(c) will also apply to any post
20 hearing filings.

21 At this time I want to ask again if there are any members
22 of the public present that want to make any statements on the
23 record? There are no members of the public present.

24 Mr. Woodward, do you have a closing argument?

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1 MR. WOODWARD: Well, we believe that we have established
2 that policies were submitted in the amounts of the then approved
3 financial assurance and that there was no reasonable basis to
4 believe the actual cost of closure, post-closure care would
5 exceed the amounts that we submitted.

6 We also -- I think the argument has been misconstrued. The
7 Petitioner would recognize that the Agency has to follow the
8 regulation that is in effect. However, we believe that
9 regulation to be Ultra vires and they are acting on an Ultra
10 vires regulation does not make their action lawful. That means
11 that the Board must decide whether that regulation is, in fact,
12 Ultra vires. We say it is. That means that those insurance

13 policies should have been approved and that once you have
14 approved the insurance policies and once you have determined that
15 they are in the amount of the then approved financial assurance,
16 we should -- are entitled to our money back out of the trust
17 fund.

18 The unified trust doctrine we believe that the Agency has
19 for a period of six years, from 1994 to -- from 1994 to 2000
20 treated those as separate and distinct trust funds. We submitted
21 trust documents, separate trust documents, and they never
22 responded in any way, shape, or fashion to say that those trust
23 documents did not effectuate three separate trusts. They used
24 the separate trust doctrine to their benefit whenever they wanted

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1 to prevent ESG Watts from doing anything. Then when it came time
2 to releasing money to ESG Watts all of the sudden they reverted
3 to the unified trust doctrine. We believe that creates an
4 estoppel on their part and they cannot use that unified trust
5 doctrine to prevent us from getting the money back for Sangamon
6 Valley, and Viola, and Taylor Ridge. And we believe the evidence
7 that has been submitted establishes that. That's all.

8 HEARING OFFICER LANGHOFF: Okay. Thank you.

9 MR. WOODWARD: Thank you.

10 HEARING OFFICER LANGHOFF: Mr. Merriman.

11 MR. MERRIMAN: Thank you. Whether you want to call it a

12 single trust or a unified trust doctrine, it is the law in the
13 State of Illinois and the law appears to be that any attempts to
14 alter the trust other than the methods set out in the body of the
15 trust once a trust undertakes to set out that method is void.
16 And the Appellate Courts have recognized that it is void and that
17 means that whatever was done inconsistent with that is of no
18 legal effect. That is the legal argument.

19 The practical argument is that if the record reveals that
20 in 1991 that an effort was made by or at least there was some
21 indication that the trust was modified by Watts or the trustee
22 and the Agency inquired and the response was, oh, no, no, we are
23 just keeping track of these separately in three separate
24 subaccounts for our own convenience. They are going to be listed

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1 separately with separate amounts, but we have not modified, or as
2 you have pointed out, we have not followed the steps in order to
3 modify or terminate the 1985 trust. We are not doing that. This
4 is just the way we are dealing with these accounts for our own
5 internal convenience. And that method of dealing with the Agency
6 and dealing with these accounts or subaccounts is what the record
7 shows continued.

8 I think that, you know, one can construe the language as,
9 oh, these are three separate trusts or you can look at it and say
10 no, they are three separate funds or three separate accounts or
11 three separate subaccounts. The question really is what does the

12 law require. The law says you can't modify that trust without
13 following the methods set out in that trust. By the way, the
14 1985 trust is the one from Appendix A, Attachment A, of Part 807.
15 So it is also incorporated in the existing regulations. That's
16 the issue. I think the record shows a little different view.

17 The issue of estoppel, even if the Agency made a mistake,
18 even if the Agency had just received over time correspondence
19 from the trustee showing these three separate subaccounts and
20 came to believe that they were three separate trusts and treated
21 them as such, I think the Board precedent and Appellate Court
22 precedent is such that the doctrine of estoppel in a regulatory
23 matter does not apply.

24 What we are talking about is submission of insurance

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1 companies that clearly, plainly, admittedly under the stipulation
2 don't comply with existing Illinois regulations. And saying
3 accept these and take away -- it will take 1.4 million or
4 something in cash out of our trust, and you can have the
5 insurance policies not licensed in Illinois, not on forms
6 approved by the Department of Insurance, just whatever. The
7 denial letters set out more than one reason for rejection based
8 upon the regulations. That's what was done here.

9 I think we understand Watts wanting to get the trust funds
10 back. We understand it is their decision as to what insurance

11 company to use, whether to use an Illinois licensed company or
12 one that is not Illinois licensed. And, again, they could have
13 sought an adjusted standard from the Board maybe because that
14 regulation has not been done yet, or they could have started a
15 rulemaking to amend 807. We just don't think we can do it.
16 Watts thinks that maybe the Board can, and maybe the Board can,
17 but we certainly can't.

18 The issue, I think in this case, is was the decision that
19 the Agency made based on the record before the Agency at the time
20 proper, and so that's what this case is about.

21 HEARING OFFICER LANGHOFF: Okay. Thank you. Is there
22 anything further?

23 MR. WOODWARD: None from the Petitioner.

24 MR. MERRIMAN: No.

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1 HEARING OFFICER LANGHOFF: Okay. Thank you. I am required
2 to make a statement as to the credibility of the witnesses
3 testifying during this hearing. This statement is to be based on
4 my legal judgment and experience. Accordingly, I state that I
5 have found both of the witnesses testifying to be credible.
6 Credibility should not be an issue for the Board to consider in
7 rendering its decision in this case.

8 At this time I will conclude the proceedings. It is still
9 Monday, December 10th of 2001, at approximately 2:07 in the
10 afternoon. We stand adjourned. I want to thank you all for your

11 participation, and wish everyone to have a good day.

12 MR. WOODWARD: Thank you.

13 MR. MERRIMAN: Thank you.

14 (Hearing exhibits were retained by
15 Hearing Officer Steven C. Langhoff.)

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1 STATE OF ILLINOIS)
) SS
2 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

4

5 I, DARLENE M. NIEMEYER, a Notary Public in and for the
6 County of Montgomery, State of Illinois, DO HEREBY CERTIFY that
7 the foregoing 90 pages comprise a true, complete and correct
8 transcript of the proceedings held on the 10th of December A.D.,
9 2001, at 600 South Second Street, Suite 403, Springfield,

10 Illinois, in the case of ESG Watts, Inc., versus Illinois
11 Environmental Protection Agency, in proceedings held before
12 Steven C. Langhoff, Hearing Officer, and recorded in machine
13 shorthand by me.

14 IN WITNESS WHEREOF I have hereunto set my hand and affixed
15 my Notarial Seal this 18th day of December A.D., 2001.

16

17

18

19

Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter

21

CSR License No. 084-003677

22

My Commission Expires: 03-02-2003

23

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