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ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
vs.)	PCB 01-167
)	
ESG WATTS, INC.,)	
(TAYLOR RIDGE LANDFILL),)	
)	
Respondent.)	
_____)	

THE ABOVE-ENTITLED MATTER

came on for hearing before Carol Sudman, Hearing Officer, and reported by Heidi L. Weston, RPR, RMR, Certified Shorthand Reporter of the States of Iowa and Illinois, at the County Building, Third Floor, 1504 Third Avenue, Rock Island, Illinois, on Tuesday, the 3rd day of June, 2003, commencing at 11:08 a.m., 2003.

APPEARANCES:

THOMAS DAVIS, Assistant Attorney General, Office of the Attorney General, Environmental Bureau, 500 South Second Street, Springfield, Illinois 62706, appearing on behalf of the Complainant.

LARRY A. WOODWARD, Corporate Attorney, Watts Trucking Service, Inc., 525 17th Street, Rock Island 61201, appearing on behalf of the Respondent.

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

2

3 THE HEARING OFFICER: We'll go ahead
4 and begin. Good morning. My name is Carol Sudman,
5 and I'm a hearing officer with the Pollution Control
6 Board. This is PCB 01-167, People of the State of
7 Illinois versus ESG Watts, Inc. It is Tuesday,
8 June 3rd, 2003, and we are beginning at 11:08 a.m.
9 At issue in this case is the People's complaint
10 which alleges violations relating to the closure of
11 Respondent's Taylor Ridge Landfill. I'll briefly
12 describe what will happen today and after the
13 hearing. You should know that it's the Pollution
14 Control Board and not me that will make the final
15 decision in this case. My purpose is to conduct the
16 hearing in a neutral and orderly manner so that we
17 have a clear record of the proceedings. I will also
18 assess the credibility of any witnesses on the
19 record at the end of the hearing. We will begin
20 with opening statements from all parties and then
21 proceed with the People's case followed by
22 Respondent's case. We will conclude with any
23 closing arguments and discuss off the record a
24 briefing schedule which will then be set on the
25 record. I will note for the record that there is

1 one member of the public present, and the Board's
2 procedural rules and the Act provide that members of
3 the public shall be allowed to speak or submit
4 written statements at hearing. Any person offering
5 such testimony today shall be subject to
6 cross-examination by both of the parties. This
7 hearing was noticed pursuant to the Act and the
8 Board's rules and will be conducted pursuant to
9 Sections 101.600 through 101.632 of the Board's
10 procedural rules. At this time I will ask the
11 parties to make their appearances on the record.

12 MR. DAVIS: My name is Thomas Davis.
13 I'm an Assistant Attorney General on behalf of the
14 People in the State of Illinois.

15 MR. WOODWARD: Larry A. Woodward,
16 Corporate Counsel, ESG Watts, Inc., 525 27th Street,
17 Rock Island, Illinois.

18 THE HEARING OFFICER: Thank you. Are
19 there any preliminary matters to discuss on the
20 record?

21 MR. WOODWARD: I am moving to file
22 that -- This case was to be tried by Dick Kissel.
23 He withdrew on the 15th. His withdrawal came
24 after -- actually 16th. His withdrawal came
25 actually after the date that that was to be

1 submitted, so I was expecting him to do that, and I
2 don't believe Mr. Davis has any objections.

3 THE HEARING OFFICER: Is there any
4 objection, Mr. Davis?

5 MR. DAVIS: No, there's not. I
6 certainly reserve the right to later argue in the
7 post hearing briefs that some of these materials
8 aren't relevant. I'm assuming Mr. Woodward may do
9 the same with some of our exhibits.

10 THE HEARING OFFICER: Okay. Duly
11 noted. Well, I will label this Respondent's
12 Production of Evidence for Hearing as Respondent's
13 Exhibit No. 1.

14 MR. WOODWARD: I already have a
15 Respondent's Exhibit No. 1, if you'll note.

16 THE HEARING OFFICER: Oh, do you?
17 Oh, I see.

18 MR. DAVIS: This is just an exhibit
19 list.

20 THE HEARING OFFICER: Okay. We'll
21 just refer to this as the exhibit list. Thank you.
22 Mr. Davis, would you like to make an opening
23 statement?

24 MR. DAVIS: Yes, I do. Thank you
25 very much, Miss Hearing Officer. We have submitted

1 into the record 18 exhibits including the written
2 testimony of Joyce Munie, the manager of the permit
3 section, and Kevin Bryant, the manager of accounting
4 and cash management of the Illinois EPA. This was
5 accomplished pursuant to the hearing officer order
6 and the Board's procedural rules. Respondent has
7 waived cross-examination and has failed to object to
8 the written exhibits. Gary Styzens, S-t-y-z-e-n-s,
9 Chief Internal Auditor to the Illinois EPA, will
10 present oral testimony today as our first witness,
11 the subject matter being the economic benefit
12 resulting from the continuing delays in the
13 completion of closure. Today we will also present
14 the testimony of Joe Whitley, a neighbor to the
15 landfill as to the continuing off-site impacts
16 caused by the gas emissions and storm water runoff
17 from the landfill. Exhibit 18 of our prefiled
18 written exhibits is a transcript of Mr. Whitley's
19 prior testimony on October 29, 1996, in PCB 96-107.
20 This prior testimony is relevant, because the
21 problems have continued unabated, and it is
22 necessary for the Board to have a context within
23 which to consider Mr. Whitley's present testimony.
24 I would note that Tanner Gerard is the only member
25 of the Board still serving from the time of the

1 previous enforcement proceeding. It is also
2 necessary to briefly summarize some of the events
3 since those hearings in 1996. In it's February 5,
4 1998, order the Board revoked the operating permit
5 issued to Watts and ordered that Watts must not
6 accept any more waste at the Taylor Ridge Landfill.
7 ESG Watts was ordered to cease and desist from
8 violations of the Act and the Board's regulations.
9 The Board specifically directed that "ESG Watts must
10 in accordance with the supplemental permits issued
11 by the agency perform the compliance requirements
12 including the initiation and timely completion of
13 closure and postclosure care, groundwater assessment
14 monitoring, and gas and leachate extraction." A
15 civil penalty of \$100,000 was imposed and attorney'S
16 fees of \$26,567 were awarded. Without filing a
17 petition to appeal or obtaining a stay from the
18 Board, Respondent continued to operate the landfill.
19 I filed a civil action in Rock Island County Circuit
20 Court to enforce the Board order. An injunction
21 order was entered on March 20, 1998, requiring the
22 landfill to cease waste disposal pending appeal.
23 ESG Watts received its final volume of waste at this
24 facility on or about March 20, 1998. The court
25 action was later amended to include allegations of

1 Respondent's failure to comply with the Board's
2 order in PCB 96-107 regarding the necessary
3 corrective and compliance actions. On December 29,
4 1999, a judgment and injunction order was entered by
5 the Court adjudicating the violations alleged in the
6 amended complaint including continuing odor and
7 runoff violations and requiring closure and remedial
8 measures to be timely implemented. This present
9 proceeding alleges in Counts 2 and 3 that odor and
10 runoff violations have continued subsequent to the
11 December 29, 1999, court order. I make this
12 representation so that we have a time frame to
13 consider those violations as opposed to the others.
14 The appeal of the Board's order was taken to the
15 Third District Appellate Court. However, it was
16 subsequently dismissed. The Illinois Supreme Court
17 denied a petition for leave to appeal. After the
18 termination of the appeal, the Respondent failed to
19 pay the penalty. I then filed a civil action in
20 Sangamon County Circuit Court to collect the
21 monetary sanctions imposed not only in PCB 96-107
22 but also PCB 96-233 regarding the Viola Landfill and
23 96-237 regarding the Sangamon Valley Landfill.
24 After finding that Respondent failed to comply with
25 the final orders of the Pollution Control Board, the

1 Circuit Court in October 2000 ordered the company to
2 pay \$30,000 per month to satisfy the penalties'
3 accrued interest. Mr. Bryant's written testimony
4 indicates that no payment has been made by Watts
5 since August 2001. Attached to his testimony is a
6 printout which indicates the payments that were made
7 as well as the accrued interest on not only this
8 penalty but also the other two cases. Generally
9 speaking, more than \$40,000 in interest has accrued
10 on the unpaid \$100,000 penalty previously imposed
11 for violations at the Taylor Ridge Landfill. We
12 believe it's important for the Board to recognize
13 that the substantial penalties previously imposed
14 have apparently had no impact, one reason being they
15 haven't been paid. This present proceeding was
16 initiated by complaint filed on June 12, 2001, in a
17 pre-filing meeting with the company and its lawyers,
18 and as the Respondent sets forth in its answer to
19 the complaint, the attorney general agreed to a
20 schedule whereby application for significant
21 modification permit would be submitted on or before
22 May 7, 2001. The application for such permit was
23 submitted on that date. It was subsequently denied
24 and appealed to the Board, and that appeal is
25 pending as PCB 02-55. Subsequently Watts submitted

1 a closure, postclosure plan permit application to
2 the EPA, which the EPA has deemed incomplete, and
3 that Watts has responded to those deficiencies, and
4 now the permit application is under review in final
5 action by the agency. This answer filed by the
6 Respondent obviously in conjunction with the amended
7 complaint frames the factual and legal issues to be
8 addressed during today's hearing.

9 I'll turn my attention now count by count.
10 Count 1 deals with closure violations, and in
11 paragraph 3 the Respondent does admit that it ceased
12 accepting waste on March 20, 1998. In paragraph 9
13 Respondent admits that it had failed to comply with
14 final orders of the Board regarding the payment of
15 penalties and admits that it was ordered by the
16 Circuit Court of Sangamon County to pay \$30,000 per
17 month toward those debts. Paragraph 10, Respondent
18 admits only that it has failed to complete
19 groundwater assessment monitoring, and it further
20 alleges that those actions "had been made futile by
21 the IEPA's requiring that it move waste in order to
22 close the landfill." In a similar vein in paragraph
23 12 the Respondent contends that it began the
24 implementation of the closure plan on December 18,
25 2000, with the performance of assessment monitoring

1 of the groundwater. Paragraph 14, Watts denies that
2 it has failed to finally initiate and complete the
3 closure of the Taylor Ridge Landfill in accordance
4 with the Board's order in PCB 96-107 and the permits
5 issued by the agency. This denial is in the context
6 of having just a couple paragraphs proceeding
7 admitted through a judicial contention that it had
8 began the implementation of the closure plan
9 December 2000, and it had also obviously admitted
10 that it had ceased accepting waste in March of '98.
11 Our evidence will show that closure, if initiated,
12 has certainly not been completed. In Count 1 the
13 Respondent denies that it has knowingly or willfully
14 committed these closure violations. Paragraph 16,
15 it admits, however, that it has previously been
16 adjudicated in violation of Section 21 of the Act.
17 There is a defense to Count 1, and this is a
18 paragraph 17 pleaded by the Respondent even though
19 it has clearly denied the allegations of violation.
20 The Respondent improperly attempts to plead some
21 sort of affirmative defense. We've responded to
22 that in a pleading filed on May 14, 2003. I don't
23 need to reiterate those arguments here except to
24 indicate for purposes of emphasis that you cannot
25 have an affirmative defense and deny the

1 allegations.

2 Turning now to Count 22, this pertains to
3 odor violations. The Respondent denies that it had
4 been required by the 1996 permit to effectuate the
5 installation of a gas collection system. It
6 contends that this permit merely allowed the
7 installation and operation of the system. In
8 paragraph 16 Watts admits that gas recovery wells
9 for the primary purpose of energy production had
10 been installed by December 12, 1996. It admits that
11 a flare was connected to 30 of the wells on or
12 before April 3, 2000. The flare has been
13 nonfunctional since at least February 2003.
14 Paragraph 20, Respondent denies that it has caused
15 or allowed the emissions of landfill gas so as to
16 unreasonably interfere with the enjoyment of life
17 and property by the neighbors. Paragraph 21,
18 Respondent denies that it has violated its permit by
19 failing to implement the gas system, denies in 22
20 that it has caused air pollution, however in 23 it
21 admits that it has previously been adjudicated in
22 violation of Sections 9A and 21D. For the landfill
23 gas emissions -- And once again, in a pleading, an
24 additional paragraph 17, the substance of paragraph
25 17 of Count 1 and Count 22, the Respondent also

1 attempts to plead some sort of affirmative defense.

2 Count 3 is runoff violations. The
3 Respondent denies that it has caused or allowed the
4 discharge of storm water runoff in 17. In paragraph
5 18 denies that it has failed to implement the
6 control plan required by its permits. In 19
7 Respondent denies that runoff from the landfill has
8 created a nuisance. 20, it denies that it has
9 violated its permits by failing to implement plans,
10 and it denies in 22 that it has caused water
11 pollution. However, in 23 Respondent admits it has
12 previously been adjudicated in violation for runoff
13 problems in contravention of sections 12A and 21D of
14 the Act.

15 Count 4, overflow violations, there is also
16 a defense to this count, and quite properly the
17 Respondent has admitted the violations, the
18 allegations of violation in Count 4. For instance,
19 in paragraph 14 Watts admits that prior to
20 January 1, 1995, it had deposited approximately
21 34,100 cubic yards of waste in areas of the landfill
22 and exceeding the maximum permitted elevation of 754
23 feet mean sea level and admits that this waste
24 remains in the overflowed areas of the landfill.
25 Similarly in paragraph 15 Watts admits that by

1 exceeding the permit limitations regarding the
2 contours waste disposal it has violated Section 21D
3 one of the Act. However, Respondent contends that
4 this violation is barred by res judicata, because
5 the overfill it contends was known to the Illinois
6 EPA as of January 1, 1995. In paragraph 16 of
7 Count 4 Respondent admits that it has been
8 previously adjudicated in violation of Section 21D
9 of the Act for exceeding its permitted maximum
10 vertical elevations of the Sangamon Valley Landfill
11 and the Viola Landfill. Now, the defense to res
12 judicata has been responded to in the pleading filed
13 on May 14, 2003. In my opening statement we would
14 simply emphasize that Respondent has made a factual
15 allegation in support of its purported defense that
16 the overfill was known to the Illinois EPA and the
17 Respondent has thereby assumed an evidentiary
18 burden. The last count is Count 5 regarding
19 violations. These allegations are admitted, and
20 there is no defense. Specifically no reports have
21 been submitted for groundwater monitoring to the
22 third and fourth quarters of 2001 and the first and
23 second quarters of 2002. That's what's pleaded in
24 the amended complaint. In the written testimony of
25 Joyce Munie she goes on to testify that subsequently

1 the quarterly reports that were required for
2 quarters three and four of last year and the first
3 quarter of this year have also not been submitted.

4 That summarizes, I hope, succinctly where
5 we stand as far as what allegations have been
6 admitted and what have been denied. I will not try
7 to summarize all of our evidence except to say that
8 both the '96 permit, which is Exhibit 2, and the '99
9 permit, Exhibit 3, explicitly required Respondent to
10 initiate implementation of the closure plan within
11 30 days after the site received its final volume of
12 waste. This is in addition to the generally
13 applicable regulation, which is Section 807.506 that
14 requires all landfills to initiate implementation of
15 closure plan within 30 days of the final volume. So
16 we believe that the closure allegation will be
17 proven by the testimony of Joyce Munie as well as
18 the permits I just mentioned. Her testimony
19 summarizes the following subjects, the regulatory
20 and permit obligations applicable to the Taylor
21 Ridge Landfill, secondly, the significant
22 modification requirements, and thirdly, the possible
23 costs of compliance. As I mentioned, we have live
24 testimony, if you will, from Gary Styzens. Through
25 that testimony we will prove that the company has

1 accrued significant economic benefits. His
2 calculations reveal in his opinion an amount of
3 \$284,383. He'll explain certainly how he came to
4 derive that figure. We will prove that the company
5 failed to initiate and complete closure in a timely
6 fashion thereby deferring the expenditure of some
7 \$1,183,545 in closure costs. That figure is the
8 figure submitted recently by the company in a
9 pending sig mod application. Those are 2003 dollars
10 as Mr. Styzens will emphasize. Now, the evidence
11 will show that closure has not been completed
12 because the overfill has not been relocated, that
13 the overfill has not been relocated because the
14 closure plan has not been revised, that the closure
15 plan has not been revised because of the pending sig
16 mod application has not been approved. The evidence
17 will show that the runoff problems have not been
18 corrected because the storm water control plan has
19 not been implemented. It has not been implemented
20 because final covering, cover, hasn't been
21 installed. Final cover has not been installed
22 because the overfill has not been reopened.

23 As to the odor problems, Watts blames its
24 contractor, RTC, which is in bankruptcy and disputes
25 that the landfill is even required to operate the

1 gas collection system. Our evidence will show that
2 the single flare has been nonoperational since
3 February of this year. Mr. Whitley will testify as
4 to the effects of that. As to the reporting
5 violations, I don't want to gloss over those.
6 They're admitted as alleged. They are important.
7 Ms. Munie in her written testimony, as I mentioned,
8 would say that there are three additional reports
9 that are missing. No excuse or explanation has been
10 pleaded. The Pollution Control Board well realizes
11 the importance of these types of reporting
12 violations. It has previously adjudicated this
13 company to be in violation of those requirements at
14 this landfill. This company has refused to obey the
15 pending orders of the Pollution Control Board and
16 the Circuit Courts. Thank you.

17 THE HEARING OFFICER: Thank you,
18 Mr. Davis. Mr. Woodward, would you like to make an
19 opening statement?

20 MR. WOODWARD: I'll reserve it.

21 THE HEARING OFFICER: Okay.

22 Mr. Davis, you may proceed with your case.

23 MR. DAVIS: We will call Gary
24 Styzens.

25 THE HEARING OFFICER: Mr. Styzens,

1 will you sit right here, please.

2 GARY STYZENS,

3 was called as a witness and, having first been duly
4 sworn to testify to the truth, the whole truth, and
5 nothing but the truth, was examined and testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. DAVIS:

9 Q. Sir, tell us your name and please spell your last
10 name.

11 A. My name is Gary Styzens. That's S-t-y-z, as in
12 zebra, e-n-s.

13 Q. And what is your current occupation?

14 A. I'm the Chief Internal Auditor at the Illinois
15 Environmental Protection Agency.

16 Q. Can you briefly describe for us your duties as
17 the chief internal auditor?

18 A. I work for the director of the agency. I provide
19 independent objective consulting and assurance
20 reviews, internal audits for the agency, part of
21 a two-year audit plan that I put together that's
22 approved by the director. In that two-year audit
23 plan there's a variety of internal auditor
24 projects that are approved by the director. The
25 projects include items such as audits involving

1 safeguarding assets, compliance issues,
2 efficiency effectiveness of programs, economic
3 benefit analysis, things of that nature.

4 Q. Okay. Now, you just mentioned economic benefit.
5 Would this be providing essentially litigation
6 support for cases being brought by the agency's
7 division of legal counsel by the Attorney
8 General's Office?

9 A. Well, I perform internal audits of economic
10 benefit. Basically what I'm doing is I'm
11 providing our legal staff and the director of the
12 agency information on an independent objective
13 evaluation and trying to focus in as accurate as
14 possible on what the economic benefit is for a
15 particular case. The audits are referred to me
16 by Joseph Svoboda, who's the chief legal counsel
17 at EPA.

18 Q. And this would pertain, I take it, Gary, to cases
19 that would actually come to trial or hearing as
20 well as many more cases where your work is simply
21 to support a penalty recommendation?

22 A. Correct, in the settlement process as well
23 there's a lot of settlement process that goes on
24 in penalty situations.

25 Q. Now, as far as providing testimony, have you

1 testified before the Pollution Control Board
2 related to these economic benefit audits?

3 A. One other time I testified.

4 Q. That was the Panhandle Pipeline case?

5 A. Correct.

6 Q. Do you hold any professional licenses or
7 certification?

8 A. I'm a certified internal auditor. I received it
9 back in I think 1988. It's similar to a
10 certified public accountant, but it specializes
11 more in internal auditing.

12 Q. And this was issued by the Illinois Department of
13 Professional Regulation?

14 A. Correct.

15 Q. What are your academic qualifications just
16 briefly?

17 A. I have a master's in business administration from
18 Southern Illinois University back in 1983.

19 Q. And at my request did you bring copies of your
20 resume?

21 A. Yes.

22 MR. DAVIS: I would ask, Ms. Hearing
23 officer, that these be marked as an Exhibit 19.

24 THE HEARING OFFICER: Is there any
25 objection?

1 MR. WOODWARD: I have to see it first.

2 I mean, I don't have any objection to marking it.

3 BY MR. DAVIS:

4 Q. While counsel is looking that over, let me just

5 simply ask if this document, which is now

6 Exhibit 19, is up to date and current and

7 accurate?

8 A. Yes.

9 MR. DAVIS: At this time we would move
10 its admission.

11 THE HEARING OFFICER: Mr. Woodward, do
12 you have any objection?

13 MR. WOODWARD: I'd like to perform
14 some voir dire.

15 THE HEARING OFFICER: I'm sorry. I
16 can't hear you.

17 MR. WOODWARD: I'd like to perform
18 some voir dire.

19 THE HEARING OFFICER: Okay.

20 VOIR-DIRE EXAMINATION

21 BY MR. WOODWARD:

22 Q. Are you required to take a test in order to be a

23 Certified Internal Auditor for the State of

24 Illinois?

25 A. Yes.

1 Q. Are you required to have any prior on-the-job
2 experience like a CPA is required to have?

3 A. For what purpose? I'm sorry.

4 Q. In order to obtain the certified internal
5 auditor --

6 A. You take a two-day exam to show you're qualified
7 for the designation.

8 Q. And what courses have you had in economic
9 forecasting?

10 A. Economic forecasting versus economic benefit
11 analysis? What's your specific question?

12 Q. In economic forecasting.

13 A. What courses?

14 Q. (Nods head yes.)

15 A. As part of my M.B.A. program and the courses I
16 took before I entered the M.B.A. program of
17 various economic and business courses as well as
18 studying for the CIA exam, there were a few
19 courses and coverage of economics and macro and
20 micro economics that will delve into certain
21 aspects of forecasting.

22 Q. And do you take many of the same courses that a
23 public accountant takes?

24 A. Yes. Correct.

25 MR. WOODWARD: I don't have any

1 objection.

2 THE HEARING OFFICER: Thank you. We
3 will admit as Peoples' Exhibit 19 the resume of
4 Gary Styzens.

5 DIRECT EXAMINATION (continued)

6 BY MR. DAVIS:

7 Q. Okay. To resume the direct exam, then, Gary, we
8 have asked you to provide written testimony
9 regarding the economic benefit accrued by ESG
10 Watts in delaying the closure of the Taylor Ridge
11 Landfill for approximately five years. I have a
12 series of general questions before we go into
13 specifics of any of your conclusions. First of
14 all, what is the objective or purpose of an
15 economic benefit calculation?

16 A. Well, as you look through the literature from the
17 Federal Register, the Office of Enforcement and
18 Compliance Assurance, the US EPA Civil Penalty
19 Policy, they talk about the cornerstone of the
20 enforcement program is economic benefit recovery.
21 One of its major goals is to make management of
22 companies financially indifferent towards making
23 the decision to spend the necessary money to
24 comply with the environmental laws, to comply on
25 time versus making the incorrect or the wrong

1 decision about delaying those or avoiding those
2 expenditures over time. It's a very important
3 aspect of deterrence, not only for the company
4 that is potentially in violation, but to similar
5 companies that may consider not spending the
6 money on time and spending the money when they
7 should to comply.

8 Q. Now, under the Environmental Protection Act in
9 Illinois, economic benefit is part of the Board's
10 penalty determination analysis. Is your
11 performance of an economic benefit calculation
12 intended to be a component of a civil penalty?

13 A. Yes.

14 Q. And I think you mentioned to recapture the
15 economic benefits accrued by the violator in
16 delaying compliance?

17 A. Delaying or avoiding compliance.

18 Q. You also used the word indifferent. Can you
19 explain that a little bit?

20 A. Well, basically the critical nature of capturing
21 the economic benefit is at a point in time
22 management of a company has to make a decision to
23 invest capital in pollution control equipment to
24 stay in compliance, and at that point that that
25 decision needs to be made, you know, frequently

1 at the beginning of the noncompliance period,
2 let's say, management needs to sit down and let's
3 say we need to invest a million dollars in
4 capital in pollution control equipment to stay in
5 compliance, and what you're trying to do is make
6 that decision as far as financial indifference is
7 to let management know that if they make the
8 wrong decision, whether by accident or on
9 purpose, that eventually there's going to be
10 recovery of any economic or financial benefit
11 once the violation is identified, and that
12 allows -- by management knowing that that system,
13 that key control system exists, when they sit
14 down to make the decision, it encourages them to
15 make the correct decision, because there will be
16 no financial gain once they get caught, and
17 there's the difference as far as they know they
18 need to make the right decision because they
19 won't benefit financially in the future.

20 Q. Now, secondly, what information was provided to
21 you as to the underlying facts of this case?

22 A. Basically when we set out to do an internal audit
23 on economic benefit, we're looking for a couple
24 of key items. One is the noncompliance period,
25 and that was provided to me by our -- the

1 Illinois EPA attorneys, and the other key factor
2 is the delayed or avoided capital expenditure
3 associated with that noncompliance period. Those
4 are your two key items that we analyze.

5 Q. Okay. As to the first, the time period of
6 noncompliance, I take it you were advised by
7 counsel regarding the pleadings -- the stuff I
8 talked about in my lengthy opening statement, the
9 fact that the company admitted that they had
10 ceased operating on such and such a date and that
11 pursuant to the regulations or the permits,
12 closure should have been completed later that
13 year?

14 A. Yes. They don't give me a lot of details, just
15 briefly that there is a noncompliance situation
16 and the noncompliance period information.

17 Q. So to summarize, we all know, because they've
18 admitted it, that they quit accepting waste for
19 disposal in March of 1998, and that's been
20 relayed to you?

21 A. Correct.

22 Q. Now, also as part of that, let me show you now
23 Peoples' Exhibit No. 4. Is this a document that
24 was provided to you by counsel?

25 A. By Illinois EPA attorneys.

1 Q. And does it appear to be a one-page summary of
2 closure cost estimates?

3 A. Yes, it does.

4 Q. Is this a document that you're somewhat familiar
5 with, this particular document?

6 A. Yes, it was an indication that this information
7 on delayed cost expenditures for closure was
8 supplied by the company ESG Watts is what I was
9 told.

10 Q. And what is the total estimated closure cost?

11 A. \$1,183,546.

12 Q. This document is in 2003 -- it's a 2003
13 submittal?

14 A. I believe it's current data, 2003 dollars.

15 Q. Now, as an expert witness, you understand that
16 you can rely upon the testimony of other
17 witnesses and the facts already in the record?

18 A. Yes.

19 Q. I can represent to you that the regulations
20 generally require, as I stated in my opening
21 statement, that the initiation of closure occur
22 within 30 days of the final receipt of lease, and
23 I can also represent that landfill closure is a
24 process or series of actions governed by the
25 specifically applicable permits. Do you see

1 that?

2 A. Yes.

3 Q. Now, I will also represent to you that the
4 expenditures detailed in Exhibit 4 have not been
5 made as of the present date. Now, my question
6 is: Is it your understanding then that the
7 relevant time period for your calculations is
8 from approximately October '98 when closure
9 should have been completed reasonably through May
10 of 2003?

11 A. Yes. It was my understanding that there's
12 approximately a 200, 211-day period that allows
13 the company to implement the closure, so that is
14 the reason it went from March of '98 up through
15 October and brought the noncompliance period up
16 to October 16th of '98 and then performed our
17 analysis through May 31st of 2003.

18 Q. So for purposes of emphasis and common sense, as
19 much as anything, you're not contending that the
20 landfill should have been closed the day that it
21 stopped accepting waste?

22 A. No. We're after a reasonable estimate, a fair
23 and reasonable estimate of the economic benefit,
24 so that wouldn't be a reasonable assumption to
25 make them close it all at once on one day.

- 1 Q. Let's get back to that calculation. Can you
2 explain the generally accepted financial
3 principles or concepts that are employed in an
4 economic benefit audit?
- 5 A. Yes. When you're analyzing delayed or avoided
6 capital expenditures, the basic financial
7 concepts that you look at are the time value of
8 money, which discusses that -- that financial
9 discusses that money has value in effect, because
10 you can earn interest income by investing that
11 money over time, so over time money has value.
12 You have to look at inflation as a major
13 principle where if you're dealing with 2003
14 dollars, you can deflate that back to the
15 beginning of a period to make reasonable
16 adjustments using an inflation index like the
17 plant cost index is what we use. You look at tax
18 implications of the capital expenditures. I
19 think that's some of the major financial
20 principles. You have to identify a reasonable
21 estimate of rate of return on investment of
22 capital, avoided delayed capital expenditures.
23 Frequently the financial concept that's brought
24 into that is called weighted average cost of
25 capital which identifies the cost that a company

1 has when it raises capital for financial
2 expenditures of capital, whether it's bank loans
3 or issues stock, things of that nature.

4 Q. Now, the weighted average cost of capital was the
5 subject matter of your testimony in Panhandle
6 Pipeline?

7 A. That was discussed in Panhandle, correct.

8 Q. And that's something that requires very specific
9 data obtained from the company regarding the
10 capital nonexpenditures?

11 A. Yeah. We try to get as accurate and specific as
12 possible, so if we have the available financial
13 data from the company, we like to develop a
14 company-specific weighted average cost of
15 capital, but in lieu of that we look for what's a
16 reasonable, fair estimate of the cost of capital
17 and potential investment, and we frequently
18 choose the Federal Reserve Bank prime loan
19 lending rate as a reasonable estimate.
20 Frequently it's a little bit lower than the
21 weighted average cost of capital is for a
22 corporation.

23 Q. Now, Panhandle was a public corporation, publicly
24 held, wasn't it?

25 A. Correct.

1 Q. And I take it you were able to obtain and review
2 very detailed information?

3 A. Yes, we were.

4 Q. That type of information wasn't provided to you
5 here?

6 A. Not at this point.

7 Q. Were you asked as an alternative simply to do a
8 time value estimate of the avoidable expenditures
9 based upon the prevailing prime rates?

10 A. Yes, because I believe that gives a reasonable
11 estimate.

12 Q. And I think you also mentioned that it would
13 result in consequently a lower amount?

14 A. Frequently it's a conservative lower amount than
15 the weighted average cost of capital when you
16 calculate a company's specific what we call WACC,
17 weighted average cost of capital, W-A-C-C.

18 Q. What is the prime rate?

19 A. The Federal Reserve Board is a federally
20 regulated Board that sets a lending rate that the
21 lending market, the banks, frequently use to
22 provide capital or to loan money to some of their
23 best customers, their best financially sound
24 customers.

25 Q. So the major banks utilize the Federal Board's

1 discount rate and come up with a primary?

2 A. Right.

3 Q. Does it change from day to day sometimes, month
4 to month?

5 A. The data we use, it's a month-to-month analysis
6 of the prime lending rate.

7 Q. Can you explain basically what you did, your
8 assumptions and calculations, the information you
9 utilized and how you were able to come up with an
10 estimate?

11 A. Do you want to use this exhibit or --

12 Q. Yes, I do.

13 MR. DAVIS: I'd ask that this be
14 marked as Exhibit 20.

15 THE HEARING OFFICER: Mr. Woodward, do
16 you object to that?

17 MR. WOODWARD: I'm looking at it right
18 at the moment.

19 THE HEARING OFFICER: I'm sorry.

20 BY MR. DAVIS:

21 Q. As counsel looks at Exhibit 20, would you
22 explain, Gary, what it is.

23 A. This is an Excel spreadsheet analysis that I
24 developed as part of the Panhandle Pipeline case.
25 When cases are brought before the Pollution

1 Control Board or the court system, they want
2 the -- the EPA wants an analysis prepared by
3 professional business analysts, and this is how I
4 established a reasonable and accurate method of
5 identifying the economic benefit associated with
6 delayed or avoided capital expenditures. In this
7 case we're analyzing delayed capital
8 expenditures.

9 Q. Would it be fair to say this is a three-page
10 exhibit, the first page of which is essentially a
11 summary of your calculations?

12 A. Correct.

13 Q. And the second page which is also at the top
14 identified as Schedule B would be a -- well, what
15 would this be?

16 A. It's a schedule that -- using the plan cost
17 index, which is a reasonable estimate of
18 inflation. It's a table that we use to analyze
19 inflation during the noncompliance period to
20 bring in this case we had 2003 dollars, and we
21 want to deflate that back to October 16th of 1998
22 dollars, and we believe the plant cost index is a
23 reasonable method to use to do that.

24 Q. Okay. So page 2 of Exhibit 20 is the deflation
25 component of your calculation?

- 1 A. Correct.
- 2 Q. Taking the 2003 dollars, the figure of 1.183 and
3 then working backwards to presumably 1998?
- 4 A. Correct.
- 5 Q. Okay. The third page of Exhibit 20 would be
6 apparently just a tabulation of prevailing prime
7 rates?
- 8 A. Correct, and what we're doing in this table is --
9 well, reasonable estimate of prime rate to use
10 for analysis we use the median, or midpoint, of
11 that year to give a reasonable estimate of the
12 rate of, you know, the potential cost of capital,
13 so that's what that is. The bottom of those
14 tables those are the median rate, or the
15 midpoint, throughout that year of the prime rate.
- 16 Q. Okay. So to take a specific example for purpose
17 of illustration, 2001, the prime rate dropped
18 almost by half, didn't it?
- 19 A. Correct.
- 20 Q. From a little over 9 to a little over 4 1/2?
- 21 A. Correct.
- 22 Q. So the median number that you utilized in your
23 calculation?
- 24 A. Is at the bottom of that section there, 6.87,
25 which is the midpoint of that rate.

1 Q. And in contrast, the following year, 2002, the
2 prime rate held fairly steady before declining
3 toward the end of the year, and so you took the
4 most prevalent rate?

5 A. Again, it's not really the most prevalent rate.
6 It's just the midpoint of the rates. It's the
7 exact middle of the high versus the low.

8 Q. I have to admit that I was failing in statistics.

9 A. It's usually more accurate than taking the
10 average, more reasonable if we take the median,
11 midpoint.

12 Q. Let's get back to what you did then. Can you
13 walk us through the results that you obtained as
14 reflected on page 1 of Exhibit 20.

15 A. It's really a basic financial analysis. It's
16 very basic analysis, financial concepts that you
17 learn in college. Basically we're giving -- at
18 the bottom of Column F there, the 1,183,545, we
19 were given documentation from our Illinois EPA
20 attorneys that that was the delayed closure costs
21 associated with this particular case, so what we
22 did then is the first thing we do is we adjust
23 that figure for the impact of inflation over the
24 noncompliance period, so in Columns C, D, and E
25 there you can see we're calculating using the

1 plant cost index and annual inflation at E, and
2 we're deducting the annual inflation in Column E
3 there from the original 2003 dollar estimate of
4 1.183 million, and we're bringing it back to the
5 beginning of the noncompliance period. In other
6 words, in Column F there, 1,183,545 in 2003
7 dollars is worth \$1,163,216 in October 16th,
8 1998, dollars, and then we had used a -- then we
9 have to make an adjustment for the tax
10 implications of the delayed capital expenditures,
11 so in Column G there we're using 33 percent
12 corporate State and federal income tax rate. We
13 receive that figure as a reasonable estimate of
14 corporate taxes from a consultant I use, Dr. John
15 Nissori. He's a CPA, Ph.D. at U of I, and so we
16 adjust the initial capital investment in Column F
17 by the tax implications, so we deducted by
18 multiplying 33 percent times the initial capital
19 investment in Column F a deduction of \$383,861 in
20 tax savings, because according to the
21 environmental policy information that
22 expenditures for environmental capital outlays
23 are tax exempt, so that gives you in Column H at
24 the top there, Column 12H, a final capital
25 investment figure of \$779,354, so that figure is

1 adjusted not only for inflation but the tax
2 implications, so you start out with the initial
3 capital outlay of 1,183,545. You're adjusting it
4 for inflation using the plant cost index. You're
5 adjusting it for the tax savings, and you come up
6 with a final delayed capital expenditure back in
7 October of '98 of 779,354 in Column H. Now, at
8 that point then in Column I, again, we could use
9 the weighted average cost of capital if we have
10 enough financial data for the company. The
11 company's specific weighted average cost of
12 capital, or in this case we're using the prime
13 lending rate as set by the Federal Reserve Board
14 to basically evaluate what the economic benefit
15 associated with the delayed capital expenditure
16 is as far as the company was able to invest that
17 money and to earn income over time, and by using
18 the prime lending rate we then identified the
19 interest earnings or the investment earnings in
20 Column J every year of the noncompliance period.
21 It goes from -- Column 12 is -- I'm sorry, 13 is
22 \$11,043. That's a partial year. That's why
23 you'll see Column 14 is a full year, and it jumps
24 to 62,000 of interest earnings, and the total
25 noncompliance period of interest earnings on

1 delayed capital expenditures then is on the
2 bottom of Column J, \$284,283.

3 Q. And, Gary, does this total dollar amount then
4 reflect your conclusion as to the economic
5 benefit accrued by ESG Watts in delaying closure
6 of the landfill?

7 A. Yes.

8 Q. How is it a conservative -- In what respects is
9 it a conservative estimate?

10 A. Well, it's conservative as it relates to if we
11 did a company specific weighted average cost of
12 capital analysis. Usually there's not that many
13 companies that get prime lending rate when they
14 go to borrow money. In addition, depending on
15 the risk involved in a particular corporation, if
16 it's a higher risk type of corporation, the cost
17 of capital may go up, so it frequently is just a
18 couple to a few percentage points below the
19 weighted average cost of capital that we would
20 develop if we had the financial data.

21 Q. In your experience and speaking very generally,
22 would a company with current court judgment
23 deficiencies or delinquencies qualify for prime
24 lending?

25 A. Well, again, it all comes down to financial risk.

1 MR. WOODWARD: I would object to the
2 foundation. I don't think there's been any
3 foundation that he is somebody who lends money
4 and knows the criteria that banks or any other
5 person uses in lending and rating. There's been
6 no foundation for that.

7 MR. DAVIS: Well, and none was
8 attempted.

9 MR. WOODWARD: You asked for his
10 expert witness, so what's the foundation for --

11 MR. DAVIS: No. No. I'm laying a
12 foundation by asking if he has any general
13 conclusions, not a specific conclusion that ESG
14 Watts would not qualify for prime lending. This
15 is a matter of, I would submit, almost common
16 knowledge, but since this fellow is a certified
17 chief internal auditor with a master's in
18 business administration with many years in the
19 financial field, I think that he would be more
20 qualified to give us a general conclusion, so as
21 part of leading up to something specific, I'm
22 trying to provide foundation through general
23 conclusions.

24 MR. WOODWARD: Well, his experience
25 has all been working for the government. There's

1 been nothing here that indicates that he's had
2 any experience in lending money or in evaluating
3 persons for lending money, and, therefore, I
4 still say that he needs to lay a foundation for
5 him to answer that question.

6 MR. DAVIS: I'll back up then.

7 THE HEARING OFFICER: Okay.

8 BY MR. DAVIS:

9 Q. The experience that you've had, Gary, is within
10 the government, is it not?

11 A. Correct.

12 Q. When you analyze the economic benefit or perform
13 the audits that you do, do you also have recourse
14 to generally available financial knowledge?

15 A. Yes.

16 Q. In a matter of speaking, is it a matter of
17 conventional wisdom regarding the ability of any
18 applicant to get lending that the fact of their
19 financial background, their history, credit
20 history, if you will, is relevant?

21 A. I can't answer that in a short answer. The point
22 is that after doing economic benefit analysis
23 for -- since 1998 and internal auditing for
24 almost twenty years, a certified internal
25 auditor, I'm required to get at least 30 hours a

1 year in internal audit training which includes
2 economic and financial information. The CIA exam
3 goes into much detail on raising capital and
4 capital costs and capital expenditures. The
5 concept of business risk and raising capital is a
6 general financial principle that I'm involved
7 with frequently in these type of audits. I work
8 with Dr. John Nissori when we analyze the
9 weighted average cost of capital, and, again,
10 when a company raises capital, whether it's going
11 to a lending institution or issuing bonds or
12 issuing stock, it's based on business risk, which
13 is financial risk, the risk in general of the
14 industry, risk associated with potential
15 lawsuits, and the prime lending rate is
16 associated with companies that have -- the rates
17 are given to companies that have very low risk
18 when it comes to financial risk or operational
19 risk, so I have a lot of exposure to it, because
20 I read a lot of SEC filings, annual reports,
21 extensive financial information related to
22 corporations.

23 Q. Let me then rephrase my earlier inquiry. Would
24 a, quote unquote, best customer seeking prime
25 lending be an applicant with an unblemished or

1 low-risk credit history without recent court
2 judgment delinquencies?

3 A. Generally, yes, as far as what the lending
4 institution or the capital investors are looking
5 for is, you know, reasonable level of risk based
6 on the return they expect. If there's lower risk
7 because of good financial condition or lower risk
8 because of the type of industry they're in, then
9 the rate of return that they expect will be
10 lower, and it will approach the prime lending
11 rate for very low risk situations.

12 Q. And as a final question, were you asked to
13 consider those factors or issues in deriving this
14 calculation?

15 A. I don't understand the question.

16 Q. Okay. Isn't it true that you were not asked to
17 factor in those risk assessments in your economic
18 benefit audit of Watts? We didn't ask you to
19 look at those issues?

20 A. Well, you didn't ask me to look at those issues,
21 but when I'm performing economic benefit
22 analysis, I'm always looking at the factor of
23 business risk associated with the company in
24 general.

25 Q. So you utilized the prime rate as simply a

1 generally-applicable financial principle?

2 A. Yes, it's a conservative reasonable estimate, a
3 benchmark, let's say, of reasonable rate of
4 return or a cost of capital that a company
5 would -- that a cost associated with a company
6 raising capital -- that's a reasonable estimate
7 is the prime lending rate.

8 Q. And I should have said this is my final question.
9 This audit of yours only pertained to the closure
10 cost, and it didn't address any other compliance
11 issue?

12 A. Correct.

13 MR. DAVIS: Thank you, Gary. I have
14 no other direct exam. I would obviously move for
15 the admission of Exhibit 20.

16 THE HEARING OFFICER: Mr. Woodward,
17 are you objecting to that?

18 MR. WOODWARD: No.

19 THE HEARING OFFICER: Thank you.
20 Peoples' Exhibit 20 is the economic benefit
21 initial investment nondepreciable figures.
22 Mr. Woodward, you may cross-exam.

23 CROSS-EXAMINATION

24 BY MR. WOODWARD:

25 Q. If you would, would you look at Exhibit 20. If

1 on October 16th, 1998, the closure estimate was a
2 substantially different number, does that change
3 your analysis? I mean, during that period of
4 time there may have been several different
5 estimates of closure costs.

6 A. That's kind of a vague question. When we look at
7 the closure costs or the delayed costs, we're
8 looking to make sure that it's a reasonable
9 estimate as far as compared to what's going on in
10 that particular industry, what's going on with
11 the competitors, because the main goal here is to
12 level the playing field within that industry, so
13 we're after whatever is the most accurate,
14 reasonable estimate of delayed costs. Whatever
15 that number is, that's what we're after. If it's
16 not this number, then we'll be happy to find out
17 what number it is, because that's what we're here
18 for is to identify a reasonable estimate of the
19 delayed costs, whatever it is.

20 Q. Well, were you told the number 1,183,545 was
21 approved by the Illinois EPA or not approved as a
22 closure number?

23 A. No one had mentioned anything about approval, per
24 se.

25 Q. So we don't know whether 1,183,545 on May 31,

1 2003, is the cost of closure or not, do we, it's
2 just some number that was presented by ESG Watts
3 to the agency for approval?

4 A. What's the question?

5 Q. You don't know whether that's the true cost of
6 closure?

7 A. I would say I have been presented that this is a
8 reasonable estimate of the closure cost based on
9 numbers coming from ESG Watts. That's a
10 reasonable estimate.

11 Q. Okay. But you --

12 A. That's what I was provided as a reasonable
13 estimate.

14 Q. You were never provided any other estimates
15 during that -- from the period October 19 -- 16,
16 1998, to May 30th, 2003, that ESG had presented
17 to the Illinois EPA as closure cost estimates?

18 A. This is the only estimate that I was dealing
19 with.

20 Q. So my question to you again is: If the estimate
21 on October 16, 1998, was substantially different
22 than the 1,183,545, would that have changed your
23 analysis?

24 A. I'll answer it like this. If I'm provided with
25 documentation of closure costs, you know, that

1 support reasonable closure costs on October 16th,
2 1998, documented reasonable closure costs, and
3 it's a different figure than I was given of the
4 1,183,545, it's lower than that, then that would
5 have an effect on my calculation of economic
6 benefit.

7 Q. Now, the bank prime loan rate, Column I of
8 Exhibit 20, is there only one prime lending rate,
9 or is there a short-term prime lending rate, a
10 medium-term prime lending rate, and a long-term?
11 I think the short term is six months or less, the
12 medium term is one to three years, and anything
13 over three years is the long term?

14 A. I think there's some fluctuations in the lending
15 rates set by the reserve Board as far as whether
16 short-term or long-term rates.

17 Q. And which rate did you use? Do you know?

18 A. Well, basically we used the median for the whole
19 year.

20 Q. I know, but you did you use the short term or --

21 A. It's a monthly figure, but the way we took the
22 median, it's the estimate of the annual. It's a
23 one-year estimate.

24 Q. I know, but the estimate of annual is based upon
25 the median; right?

- 1 A. The median of the monthly --
- 2 Q. The monthly rates.
- 3 A. Right.
- 4 Q. And you get those rates from some sources;
- 5 correct?
- 6 A. Right. There's two web sites that I go to.
- 7 Q. And do those web sites report to you the
- 8 short-term rate, the medium rate, or the
- 9 long-term rate?
- 10 A. I don't believe it does. In this case it's
- 11 reporting a monthly rate.
- 12 Q. So the kind of capital that's involved in capital
- 13 expenditures that are involved in the closure
- 14 cost estimate presented to you, are those
- 15 short-term, medium-term, or long-term capital
- 16 expenditures?
- 17 A. I would say they're long-term capital
- 18 expenditures.
- 19 Q. Now, Column G you show one number, and I think
- 20 you said that's because it's your understanding
- 21 that environmental expenditures are -- you get
- 22 tax credit for; is that --
- 23 A. Correct.
- 24 Q. You said tax exempt, but --
- 25 A. Tax credit, that's more accurate.

1 Q. And if it's something that you get a tax credit
2 for, you don't get to take depreciation allowance
3 over time?

4 A. Right, your tax implications are taken all at
5 once at the beginning.

6 Q. Are all of those expenditures like that?

7 A. We treated them like that, because it was to the
8 benefit of the corporation to give them -- that
9 gives them the biggest tax break up front, so we
10 were again being conservative giving them the tax
11 break up front.

12 Q. All right. Now, the bank prime loan rate really
13 is the cost of capital to ESG Watts; right? It's
14 not the rate of return, it's what they -- it's
15 a -- what you're saying, a conservative estimate
16 of what they would have to pay to obtain the
17 capital to make this expenditure?

18 A. That's where you get into the final concept of
19 the capital asset pricing model. The implication
20 is that when a company raises capital, that the
21 return of the investment, an estimate of the
22 reasonable return on the investment, is going to
23 be at least at the cost of capital. In other
24 words, if a company goes and borrows money at
25 10 percent, the financial concept is that a

1 reasonable estimate of what the rate of return on
2 investing that money is again -- approaches
3 10 percent at a minimum, because the concept is
4 that managers of a corporation, they're trying to
5 run the company in such a way to minimize their
6 capital costs, to minimize their return on
7 capital investment, so this concept of
8 establishing basically an area of rate of return
9 is based on the cost of capital. It is a
10 reasonable estimate as a minimum rate of return
11 on investing those delayed costs. In other
12 words, if a company borrows money at 10 percent
13 and the rate of return is 6 percent, they're
14 going to go out of business, because it's costing
15 them more to borrow the money in their rate of
16 return on investment.

17 Q. Okay. I understand your answer.

18 A. That's why I interchanged the rate of return with
19 the capital costs.

20 Q. Now, on a closed landfill where there is no --
21 the assumption is because it's closed there is no
22 income coming in, can you tell me whether that
23 assumption would apply to a landfill capital
24 expenditure for closure?

25 A. Well, you're looking at the corporation. You're

1 looking at in general this corporation that
2 operates in various arenas in business. The
3 financial people for that business are
4 establishing methodology for raising capital.
5 They're investing their funds. They're earning
6 rates of returns for that company, so I mean, we
7 look at the company as a whole as a way to
8 estimate a reasonable cost of capital or rate of
9 return on delayed costs. We don't look at
10 site-specific cost of capital or rates of
11 returns. Companywide is what we look at.

12 Q. Okay. And if the landfill were the only asset
13 and you were to -- the landfill was closed,
14 therefore, no further revenue, does what you
15 described as your model for the weighted average
16 cost of capital still apply?

17 A. Yes, because again, you just pull the financial
18 statements of the company and find out how are
19 they raising capital or how are they investing
20 capital. Whatever their financial statements
21 indicate is what you go to.

22 Q. Wouldn't then the return that they could get on
23 their capital somewhere else be a better measure
24 of the net benefit?

25 A. Again, I had this problem before where you're

1 picking out little pieces of the puzzle, and I
2 want to look at the whole puzzle.

3 Q. I want you to answer my questions though.

4 A. Okay, well, then --

5 Q. My question I think was very specific. It's
6 called opportunity cost in economics. If I spend
7 the money here, I can't do it someplace else. If
8 I don't spend it here, I could get a rate of
9 return someplace else. Now, wouldn't the rate of
10 return that they could get someplace else be a
11 better measure?

12 A. No, I don't think that's the correct measure.
13 That's what I'm saying. It's the rate of return
14 companywide, corporatewide. They could be
15 investing in 20 different operations. You don't
16 pick and choose little pieces of it. I would
17 look at the entire corporate financial statements
18 and find out what was their cost of capital for
19 the entire corporation.

20 Q. Okay. And what corporation were you looking at
21 here?

22 A. ESG Watts is what I understand.

23 Q. And ESG Watts operates landfills, and this is a
24 landfill, and it's closed as of 1998, so there's
25 no revenue coming in from this landfill?

1 A. So what's your point? I don't understand your
2 point.

3 Q. I'm asking you, again, is your economic analysis
4 really applicable in that situation?

5 A. Clarify your situation again. Is my economic
6 benefit analysis applicable in what situation?

7 Q. On a company that operates landfills, its
8 landfill is closed, it's no longer receiving
9 revenue from that landfill, and the expenditures
10 that you're looking at are to close, the complete
11 closure, of the landfill.

12 A. Again, common benefit analysis doesn't focus on
13 parts of the company or little pieces of the
14 company. Again, I'm analyzing the corporation.
15 If I'm given the time to do a company-specific
16 weighted average cost of capital, I'm going to
17 examine how does ESG Watts go about raising
18 capital for all of its operations, whether
19 they're closed, these are open, these are in the
20 middle. It's the big picture, and that's why I'm
21 struggling with your scenario here. Because I
22 don't look at little pieces. I look at the
23 entire corporation as a whole. If one segment is
24 earning at a level and another segment is at this
25 level and another in the middle, you look at the

1 whole picture to get a rate of return on their
2 investment and what their capital costs are.

3 Q. Now, your analysis does not consider money that
4 was expended, efforts to have a different closure
5 estimate approved, does it, like engineering
6 costs, legal costs, things that were expended
7 before they ever got to this 1,183,545?

8 A. Well, if those costs should be -- If those costs
9 are legitimate costs associated with the closure
10 process, then they should be in there. If part
11 of the closure process includes engineering
12 studies, then those costs should be included in
13 there or added to it.

14 Q. But your analysis doesn't give room for any that
15 there might have been a reasonable difference of
16 opinion as to what it takes for closure and if
17 ESG presented one thing and the Illinois EPA
18 said, well, no, we don't like that and money was
19 expended to get the EPA to approve that, in the
20 end unsuccessfully, your analysis doesn't deduct
21 that, does it?

22 A. My analysis -- What my analysis is after is a
23 reasonable estimate of the delayed costs. If
24 there's additional documentation out there that
25 the company has that is provided to me that helps

1 me to focus in on a more accurate, a more
2 reasonable estimate of closure costs, I don't
3 work for the attorneys, I don't work for the
4 companies --

5 Q. I think you're missing my question.

6 A. I was not presented with any additional
7 documentation on any closure costs besides this,
8 so if I am presented with additional costs, yes,
9 I will take them into account.

10 Q. I think you missed my question. I have here in
11 Peoples' Exhibit 4, a closure estimate?

12 A. Correct.

13 Q. And that's dated 1-24-2003?

14 A. Right.

15 Q. And that has a specific number for closure. What
16 I'm saying is that -- These numbers have no
17 relationship to any reality. I'm not saying they
18 do. But say ESG spent \$500,000 in legal and
19 engineering fees to try to get the EPA to approve
20 a number that was only 600,000 for closure costs
21 but they were unsuccessful, and so they ended up
22 submitting a closure estimate of 1,183,545, your
23 analysis doesn't take into account that they
24 spend \$500,000, and they may have done that very
25 legitimately under a reasonable difference of

1 opinion. I think you said in your direct
2 testimony if they did it in error, it was not
3 purposeful. If they did it in error --

4 MR. DAVIS: Let me interrupt with an
5 objection. This is argumentative. It's calling
6 for conjecture. I understand the purpose of the
7 inquiry, but it is simply primarily
8 argumentative, and this witness is not going to
9 be able to give any answer other than conjecture.

10 MR. WOODWARD: I didn't ask him to
11 conject. I asked him whether his analysis ever
12 takes that into consideration. He can answer
13 that.

14 THE HEARING OFFICER: Okay. Just
15 answer that, and we'll end this particular line.
16 A. The type of costs that you're alluding to which
17 would inappropriate -- If you're alluding to
18 making any kinds of adjustments, rebates or
19 adjustments, to this economic benefit figure,
20 then I would say it would be inappropriate in
21 this analysis to -- Those certain costs are just
22 identified with the cost of doing business or the
23 risk of making perhaps purposely or not incorrect
24 decisions or poor decisions or not hiring the
25 right engineers or the right analysts. I mean,

1 there's a lot of costs associated with business
2 risk, and we are not -- it is inappropriate to
3 make rebates or adjustments to economic benefit
4 for the cost of doing business of a business risk
5 associated with perhaps the wrong decision at a
6 certain point in time, and so what you're saying
7 is correct, I would not make any kind of
8 adjustments to economic benefit for costs that
9 were potentially spent for whatever reason,
10 improper analysis, or wrong analysis that wasn't
11 accepted as allowing them to comply with
12 environmental laws.

13 Q. Okay. And you did indicate that the purpose of
14 this is to make companies have to pay back
15 benefits that they receive?

16 A. Financial benefits they receive from delayed
17 costs, correct.

18 Q. And if that's the purpose, would not an
19 adjustment for expenditures made on analysis and
20 presentation of a different avenue of compliance
21 be legitimate?

22 A. Most likely not.

23 Q. And explain to me why not.

24 A. I mean, what we're trying to do here is level the
25 playing field with competitors, so if you had a

1 competitor that hired the -- happened to spend
2 the money to hire the right consultants and
3 engineers that perform studies and looked at the
4 industry standards and happened to pick the
5 correct decision on what to implement to come in
6 compliance with the environmental laws, that's a
7 good thing, and that's what we wanted to
8 encourage, companies to take the time to spend
9 the money to make the right decisions. The
10 situations that you're alluding to which I've
11 come -- this has come up in the past where
12 companies for whatever reason do not make the
13 right decisions, install the wrong equipment, and
14 when you look towards the industry, you know, it
15 was not the right decision to make, that that's
16 correct, they do not get credits or rebates
17 towards the economic benefit for, unfortunately,
18 making the incorrect decisions or spending the
19 money in ways that didn't result in compliance.
20 We don't want to encourage companies to perhaps
21 cut back on the time they take to hire the
22 consultants and the specialists to make sure they
23 get it right the first time. We don't want to do
24 this trial by error type of approach where they
25 get rebates and they can try different things, so

1 that's where I'm coming from on that.

2 Q. So economic benefit analysis really may depend
3 upon accident, accidental selection of the right
4 consultant or the accidental selection of the
5 wrong consultant?

6 A. No, I totally disagree with that. This is the
7 scientific method. I also have a bachelor's in
8 science, environmental sciences and forestry, and
9 you hire the professionals, you hire the
10 consultants, you hire the engineers, and they're
11 there to make the right decision based on
12 industry standards, and if it's done right, if
13 they look at the industry, they talk to the
14 people that know what's working, they should get
15 it right the first time, and it shouldn't be
16 trial and error to any large extent.

17 Q. There's never any reasonable differences of
18 opinion as to methods of compliance?

19 A. Well, I mean, differences of opinion come down to
20 what's successful. It's not a reasonable opinion
21 to install equipment that doesn't work. If it
22 works, it's a reasonable approach, but I'm not
23 going to sit here and justify decisions to
24 install or to incorrectly come into compliance by
25 trial and error. As far as how that affects the

1 economic benefit, it doesn't, because that's the
2 assumption that it was done right the first time,
3 and there's many things in the industry, there's
4 many things that competitors are doing that you
5 can look towards to make sure that you don't make
6 mistakes, because it's already working there.
7 It's business risk. If you try something new and
8 different and it fails, that's called business
9 risk. That's the risk of unfortunately making a
10 wrong decision whether it's on purpose or not.
11 The intent doesn't matter.

12 Q. On page 2 of Exhibit 20?

13 A. Schedule B?

14 Q. Yes.

15 A. Yes.

16 Q. Can you tell me why you have your 86 through
17 97 --

18 A. This is just a general table we've been using in
19 internal audits to -- you can see we --

20 Q. So you just reproduced the whole table?

21 A. Yeah, but then we focus in on the noncompliance.
22 As you can see, it's kind of darkened there with
23 the arrow --

24 Q. Yeah, I was just wondering why. You testified on
25 direct exam that you allowed for 211 days to

1 complete closure; is that correct?

2 A. I believe that's correct.

3 Q. And I'm sorry I missed how you came up with that
4 number.

5 A. I was just told about that by the Illinois EPA
6 attorneys in reference to that's a stated time
7 period in some document as far as allowing a
8 reasonable amount of time to install closure type
9 of equipment.

10 Q. That would be probably the shortest period of
11 time, wouldn't it, if that's the time allowed by
12 the regulations?

13 A. I -- I do not know.

14 Q. So that number is entirely contingent upon
15 interpretation of law you didn't make but
16 somebody provided you?

17 A. Beginning of the noncompliance period?

18 Q. Not the beginning, the time period for completion
19 of closure.

20 A. I'm sorry. Are you talking about the --

21 Q. The 211 days.

22 A. Yes, that was just provided to me. I don't have
23 a lot of background on that number.

24 MR. WOODWARD: I think that's all I
25 have.

1 REDIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q. Gary, counsel questioned you about cost of doing
4 business. Would it be fair to say that a
5 landfill's business is waste disposal?

6 A. I mean, I'm sure that's one of their major
7 functions.

8 Q. And that after you're done accepting waste and
9 disposing of it, there are additional costs to be
10 incurred?

11 A. Correct.

12 Q. So you've got to look at the big picture?

13 A. Yes, and frequently those -- I mean, if a
14 business is run correctly, the closure costs
15 are -- costs at certain points in time are, you
16 know, calculated into the fees or the charges or
17 the sale of services in the price that's set for
18 that if properly done would, you know,
19 incorporate those types of costs in there.

20 Q. So you've got a large amount of revenue and then
21 after that stops still a large amount of costs
22 remaining to be expended?

23 A. Right, but in a prudent financial business, they
24 would identify those costs that are going to
25 occur after operation ceases and make sure that

1 those costs are factored into the price that's
2 charged to their customers.

3 Q. So during the time frame that revenue is coming
4 in the door, you've got daily operational costs,
5 for instance?

6 A. Correct.

7 Q. You've also got permitting, consulting,
8 engineering, legal fees as a cost of doing
9 business?

10 A. Correct, those are common costs that you see on
11 financial statements.

12 THE HEARING OFFICER: Mr. Styzens,
13 could you please speak this way.

14 THE WITNESS: Sure. Story about that.

15 BY MR. DAVIS:

16 Q. Just a few more questions, and I'll be
17 simplistic as well. If a company has to spend a
18 million dollars and doesn't, would it be
19 reasonable to assume that they -- one reason is
20 they don't have the money? I mean, that's one
21 option?

22 A. That's potentially an option.

23 Q. And if the company has to spend a million dollars
24 because they're required to do something that
25 costs a million dollars, is it also a reasonable

1 assumption that they should go out and borrow a
2 million dollars?

3 A. Well, the assumption would mean they need to go
4 out and raise capital. It could be through
5 borrowing, selling bonds.

6 Q. Right. I'm just being very simplistic here.

7 A. Right, they have to raise capital.

8 Q. And one common way to raise capital is obtaining
9 lending?

10 A. Yes. Correct.

11 Q. Would it be fair to say that one way of
12 approaching this, which is the money was not
13 spent, is to say ESG Watts should have obtained
14 the loan for the amount necessary and expended
15 that amount?

16 A. That's one method you could raise. They have
17 financial experts that will decide what the best
18 way to raise the capital is, and frequently one
19 method is by borrowing money.

20 Q. And one of the ways of approaching economic
21 benefit that has been accrued is they were
22 required to spend approximately a million, they
23 didn't spend approximately a million, they didn't
24 want -- obtain a loan for that amount, that the
25 cost of that loan is the economic benefit they've

1 avoided?

2 A. Yes, that goes back to the theory again that the
3 cost of capital -- in this case we're using
4 lending rate as our reasonable estimate, that
5 that would be a good estimate of what their rate
6 of return on investing that million dollars that
7 they didn't spend would be.

8 Q. And my view is a very simple approach to this.
9 It doesn't take into account all the actual money
10 that was expended for other purposes because
11 that's not relevant; isn't that true?

12 A. For the most part that's true.

13 Q. Now, another simplistic way of approaching this
14 is would it be fair to say if they never spent
15 the million dollars, that they've accrued the
16 economic benefit of at least a million dollars?

17 A. I don't totally understand the question. If they
18 should have spent a million at --

19 Q. At any point in time.

20 A. And what happens?

21 Q. They never do.

22 A. And what's the question?

23 Q. What is the economic benefit?

24 A. Well, again, if a financial analysis is that that
25 million is invested somewhere in the corporation

1 and they're earning income on that investment, so
2 as long as that million dollars is not properly
3 spent on pollution control or environmental
4 capital expenditures, then the company is using
5 that million to whether it's open up another
6 landfill, buy new equipment, marketing, I mean,
7 there's all kinds of ways to invest that million
8 in the company.

9 MR. DAVIS: Thank you very much. No
10 other questions.

11 THE HEARING OFFICER: Thank you.
12 Mr. Woodward, anything else?

13 MR. WOODWARD: Yes, I have one. I've
14 got to think.

15 RE-CROSS-EXAMINATION

16 BY MR. WOODWARD:

17 Q. If -- Does your analysis depend upon the ability
18 of any company to actually obtain capital? I
19 mean, say they have no ability at all, that
20 they're on the verge -- say they're on the verge
21 of bankruptcy.

22 A. I believe the analysis deals with, again, the
23 competitors in the industry associated with this
24 company as far as there's some financial basics
25 there that this company is being managed to make

1 a profit and that they're a going concern. The
2 picture is a long period over years that this
3 company was in operation or many years and, you
4 know, able to -- I mean, the fact that today
5 there may be some problems but five, six, seven,
6 eight years ago there may have been a situation
7 where they could have easily raised capital or at
8 least reasonably raised capital.

9 Q. So the answer is that your analysis really
10 doesn't depend upon the financial condition of
11 the company that you're testifying about, it's
12 making an assumption that it's a well-run company
13 and that it is like its competitors and that it
14 could obtain capital at this cost?

15 A. Yes, I believe that's correct.

16 Q. All right. Now, I think Mr. Davis asked you a
17 question that said that part of the assumption is
18 that the company when it was accepting waste had
19 to take and calculate in its rate of return the
20 cost that it was going to have in the future when
21 it didn't have any income coming in in order to
22 close the facility; is that correct?

23 A. I think agreed with that statement, yes.

24 Q. You also agree that in the course of a regulated
25 industry that -- such as landfills, that the

1 regulations change and pose different costs
2 during the cost of regulation?

3 A. I believe that's true in certain situations over
4 time.

5 Q. And depending upon the timing of that resolution
6 versus changes in regulations versus the closing
7 of your landfill, you might not be able to recoup
8 those costs; is that a correct statement?

9 A. Well, you would hope that there's somebody within
10 the organization that's monitoring, you know,
11 regulations and environmental issues that can
12 estimate that there's increasing costs over times
13 for compliance and then make adjustments in rates
14 based on that.

15 Q. But the simple answer, a yes or a no, is that you
16 may not be able to recoup it if the timing of the
17 change in the regulation is such that you don't
18 have a sufficient time between the change in the
19 regulation, the increase's cost to the date of
20 closure?

21 A. Well, again, the awkward part of this for me is
22 I'm looking at the corporation as a whole, and
23 there may be situations in a corporation when a
24 certain division or facility is not exceptionally
25 profitable and perhaps they need make adjustments

1 in other lines or other divisions or other work
2 products, they need make adjustments in what they
3 charge their customers to perhaps recover any
4 additional costs of doing business that they're
5 not able to adjust to at a particular site or --
6 I mean, again, I look at the company as a whole.
7 I mean, there's flexibility in a company to make
8 adjustments in work products from site to site,
9 from operation to operation, from division to
10 division. You may not be able to adjust prices
11 at a closed site, but I may be able to adjust
12 prices at other operations to try to recover some
13 of your costs of doing business.

14 Q. And if you have no other operations, ESG Watts
15 has no open landfills, if you make that
16 assumption?

17 A. Well, then the company is out of business,
18 they're not a going concern. If you're asking
19 me -- You know, I'm definitely using an
20 assumption that people are in business to run it
21 as a going concern and to make profits and to
22 invest wisely and to manage wisely. I mean, I'm
23 using those assumptions. It's difficult to deal
24 with a situation if it's not even a going
25 concern.

1 MR. WOODWARD: That's all.

2 MR. DAVIS: Nothing further.

3 THE HEARING OFFICER: Nothing further?

4 Everyone is finished with this witness? Okay.

5 Thank you very much, Mr. Styzens. You may step

6 down. Let's go off the record for a moment.

7 (A discussion was held off the

8 record.

9 THE HEARING OFFICER: We're going back

10 on the record. I'd like to note for the record

11 that we have just taken a ten-minute break, and

12 we are now resuming with the complainant's

13 witness, and what's his name again?

14 THE WITNESS: Joe Whitley.

15 THE HEARING OFFICER: Could you spell

16 that, please.

17 THE WITNESS: W-h-i-t-l-e-y.

18 THE HEARING OFFICER: Would the court

19 reporter please swear in Mr. Whitley.

20 THE WITNESS: Middle initial L.

21 JOE L. WHITLEY,

22 was called as a witness and, having first been

23 duly sworn to testify to the truth, the whole

24 truth, and nothing but the truth, was examined

25 and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q. Please state your name and spell your last name.

4 A. Name is Joe, middle initial L, Whitley, spelled
5 W-h-i-t-l-e-y.

6 Q. And, Mr. Whitley, where do you live?

7 A. At 8004 78th Avenue West in Milan, Illinois
8 61264-4117.

9 Q. Can you recall, Joe, when you and I first met?

10 A. It's been many years ago. I can't remember the
11 date, but I would say it was in excess of five,
12 eight years.

13 Q. Would it surprise you 1992 when you came down to
14 Springfield to testify?

15 A. Eleven years then.

16 Q. Okay. Did you also testify in a prior Pollution
17 Control Board proceeding against ESG Watts back
18 in October 1996?

19 A. Yes, I did.

20 Q. And I had sent you a copy in the mail of your
21 testimony recently. Did you get that?

22 A. Yes, I did.

23 MR. DAVIS: This is Exhibit 18,
24 Ms. Hearing officer, and as I indicated in my
25 opening statement, it's submitted into the record

1 to give the Board a context for Mr. Whitley's
2 testimony.

3 Q. And, Mr. Whitley, let me ask you at the outset a
4 fairly broad and general question, and that is
5 the problems that you testified to six and a half
6 years ago regarding runoff and odors from the
7 landfill, have those changed in any respect?

8 A. The only change would have been is they have
9 gotten worse.

10 MR. WOODWARD: Before he proceeds, as
11 to Exhibit 18, I don't object to its admission
12 for a limited purpose providing context, but if
13 it's to be admitted to prove the truth or
14 voracity of any current allegations, I would
15 object to that.

16 MR. DAVIS: Well, obviously it is not,
17 because the testimony was taken October 29, 1996,
18 so it relates to his observations and statements
19 and opinions up through that date. It's to
20 provide a factual context for the same types of
21 violations subsequent, so I hope the record is
22 clear on that.

23 THE HEARING OFFICER: Does that
24 address your concerns, Mr. Woodward?

25 MR. WOODWARD: Yes.

1 THE HEARING OFFICER: Then I will
2 admit the Peoples' Exhibit 18, the transcript of
3 the October 29th, 1996, hearing, the testimony of
4 Joe Whitley.

5 MR. DAVIS: It was my understanding
6 that my exhibits have been admitted since they
7 were filed timely without objection, 1 through
8 18.

9 THE HEARING OFFICER: Oh, okay. I
10 didn't realize that he had already --

11 MR. DAVIS: Well, if as a preliminary
12 we can get that out of the way, I would move for
13 admission of 1 through 17 as well.

14 THE HEARING OFFICER: So there has not
15 been objections to any of those exhibits?

16 MR. WOODWARD: I do object to
17 Exhibit 13. It deals with a different landfill
18 entirely. I think that's the --

19 MR. DAVIS: The Viola.

20 MR. WOODWARD: The Viola. Yes, it has
21 no relevancy in this proceeding.

22 MR. DAVIS: It would be relevant under
23 42H at the least.

24 MR. WOODWARD: We've already admitted
25 that we've been in violation in Viola and

1 Sangamon Valley. It has no relevancy to this
2 proceeding as far as I can tell.

3 MR. DAVIS: Well, perhaps we can
4 address that in briefs or something, but I would
5 move its admission and certainly the same with
6 their exhibits. I've stipulated to their
7 admission. Some of it may not be relevant. But
8 just my presentation, Ms. Hearing officer, has
9 been obviously twopart, one, prefiled testimony
10 and written exhibits per your order timely to the
11 deadline, no response, and then here today live
12 testimony and further exhibits.

13 THE HEARING OFFICER: You're correct,
14 Mr. Davis. We'll go ahead and assume all of
15 these are admitted, and you can make any
16 arguments concerning these documents in your
17 briefs.

18 BY MR. DAVIS:

19 Q. Mr. Whitley, speaking of exhibits, did you bring
20 a stack of photographs with you today?

21 A. Yes, I did.

22 Q. And as a general matter were these taken on -- at
23 least on four or five different occasions?

24 A. Yes, they were.

25 MR. DAVIS: Would you prefer me,

1 Ms. Hearing officer, to have these as group
2 exhibits per date? Would that be helpful to the
3 Board?

4 THE HEARING OFFICER: I don't really
5 know what they are, so I'm not sure.

6 MR. DAVIS: They're separate
7 photographs, maybe a dozen or so. We can mark
8 them individually. That doesn't matter.

9 MR. WOODWARD: What he's saying is
10 some of them were taken like in January of '99,
11 some of them were taken May 24th of 2003,
12 May 29th, 2003.

13 THE HEARING OFFICER: Yeah, let's
14 group them by date. I think that would be the
15 easiest.

16 MR. DAVIS: Well, then let me have
17 marked as a group Exhibit No. 21 for the People
18 what I would represent to be five separate
19 photographs taken on December 1, 1999.

20 BY MR. DAVIS:

21 Q. And, Mr. Whitley, let me ask you how it is you
22 came to take these photographs or any photographs
23 of the land?

24 A. Well, at various times and various stages I'm in
25 presence of the landfill and of that area and the

1 facility, and I'm very interested in the
2 situation there as everything shows in the
3 photographs about what is happening in the
4 northwest corner of the landfill.

5 Q. And isn't it true that it's been your habit and
6 practice over many years to take photographs?

7 A. I have took many photographs, yes, sir.

8 Q. All of these photographs were taken from your
9 property?

10 A. Yes, they were.

11 Q. Let me go ahead and hand you Group Exhibit 21.
12 Are these five photographs that you took
13 December 1, 1999?

14 A. Yes, they are.

15 Q. And do these photographs truly and accurately
16 depict the various scenes within the photos?

17 A. Yes, they do.

18 Q. You mentioned the northwest corner of the
19 landfill. Would this be adjacent to your
20 property?

21 A. Yes, sir.

22 Q. What is there in the northwest corner on your
23 property and on the landfill property?

24 A. There's a -- Originally was a two-stream
25 situation that came down from the landfill

1 property to my property. This was back in its
2 original form. Then in the '80s I gave them
3 permission to knock the hill down in the center
4 of these two so they could put a berm and make a
5 permanent thing in the indentation or in the low
6 spot where I now have a retention pond, as they
7 have referred to it in numerous occasions. I
8 called it a siltation pit. But in that area just
9 below the landfill and one time at original state
10 my pond went to within 6 feet of the landfill
11 property.

12 Q. Let me interrupt you, Joe. When you say your
13 pond, what are you talking about?

14 A. I'm talking about the large pond. For the
15 record, I have two ponds. I have a large pond
16 which covers approximately an acre and a half of
17 surface water. I have a small pond that's
18 approximately 140, 50 feet long and 20 feet wide
19 from one point to -- the largest point -- 40 foot
20 wide from the largest point to the smallest point
21 of nothing that I had erected I think in the late
22 '80s, early '90s.

23 Q. And those are both on your property?

24 A. They're both on my property.

25 Q. And you talked about them at some length in your

1 prior testimony?

2 A. Yes, I did. It's all in the testimony there of
3 '96.

4 Q. And where is the retention pond in relation to
5 your ponds?

6 A. The retention pond is between my large pond and
7 the landfill property.

8 Q. Okay. So the retention pond is essentially that
9 second pond you just mentioned?

10 A. Yes, sir.

11 Q. Why don't we do this. If you have occasion to
12 talk about your pond, your larger pond, entirely
13 on your property, why don't you just call it your
14 pond, or my pond, and then as we focus your
15 testimony, my questions on this pond, let's call
16 it the retention pond.

17 A. Okay. But for the record, they are both on my
18 property.

19 Q. Right. As to the retention pond, are there
20 occasions where as depicted in these photographs
21 in Group Exhibit 21 the retention pond is
22 straddling the property line, that is, both on
23 your property and the landfill property? Let me
24 ask it --

25 A. At one time, yes. At one time there was a low

1 spot in the landfill. I think that it was
2 probably excavated out for the purpose of holding
3 water, and part of the water was on my property,
4 part of it was on their property with a fence
5 going through the middle.

6 Q. Does that fence represent your property line?

7 A. Yes, it did.

8 Q. Who put up the fence?

9 A. I put up three, and the last one was installed by
10 the Watts people.

11 Q. Does the photograph depicted in four of the
12 photographs in Exhibit 21 still exist?

13 A. No, it does not.

14 Q. Just very generally then, would you tell us what
15 happened -- what did you observe happen after the
16 photographs were taken December 1, 1999, to
17 change what's depicted there?

18 A. Could I refer to the photographs?

19 Q. Oh, certainly.

20 A. Okay. The photographs I'm holding in my hand
21 says it's Exhibit No. 11, and December 1, 1999,
22 and I was facing southwest, and this is a picture
23 of the retention pond, and in this pond it shows
24 the water on my side of the property, and it also
25 shows water on the Watts side of the property

1 with a fence partially still intact but
2 aboveground, and in later times when you asked if
3 the fence was -- they came in, and they put dirt
4 into that area to fill in the part of water that
5 was on their side of the property, and when they
6 did this work, they also exceeded the property
7 line and pushed the dirt, fill dirt, went over
8 the fence, and, of course, demolished the fence,
9 and it no longer exists.

10 Q. Let me now show what you I've marked as Group
11 Exhibit 22, a series of three photographs taken
12 on April 25, 2002, and first of all, do these
13 truly and accurately depict what you saw that
14 day?

15 A. Yes, they do.

16 Q. Does it show what you just talked about, that is,
17 the movement of earth to change what was
18 previously shown from December 1999?

19 A. Yes, they do.

20 Q. And tell us about what you see in those three
21 photographs.

22 A. In these three photographs is pictures that shows
23 when they were putting the fill in to fill up the
24 water pond or the ponding of water on their side
25 of the property, which I am supposing was built

1 up probably 3 to 4 feet. As the picture will
2 show, that the dirt was pushed completely over
3 the fence pushing the fence into the water, which
4 means that also the fill that they were putting
5 in was encroaching my property.

6 Q. The fence is still visibly in those photographs?

7 A. Yes, it is.

8 Q. Let me show you a group exhibit of two
9 photographs from May 21, '02, and ask if the
10 photos truly and accurately depict what you saw
11 that day?

12 A. Yes, they do.

13 Q. And what does it show pertaining to the fence?

14 A. You can see one fence post -- or maybe even two
15 fence posts at an angle of about 75 degrees.

16 Q. Does it appear that this dirt has been pushed on
17 your property?

18 A. Yes, it is.

19 Q. Did you give permission for that?

20 A. No, I did not.

21 Q. We have a single photo from June 21, '02, which
22 I'll mark as Exhibit 24 for the people and ask if
23 this truly and accurately depicts what you saw
24 that day?

25 A. Yes, it does.

1 Q. And what does it show?

2 A. It shows from the point that I was facing east
3 standing on the retention pond dike, and it shows
4 that the erosion, you can see the fence line in
5 the background, and you can see how much erosion
6 and dirt is also -- and in the inlet you can also
7 see how much erosion has come into the retention
8 pond.

9 Q. Just as a general matter, what disposal
10 activities had you observed in this area, that
11 is, the northwest corner, prior to the landfill
12 ceasing waste disposal operations?

13 A. In what time frame or what years are you
14 speaking?

15 Q. Well, prior to 1998. Essentially was waste
16 disposed of this in area?

17 A. There was originally, yes, sir.

18 Q. And moving forward to May 24, 2003, a group
19 exhibit labeled 25 consisting of two photographs,
20 other than what appears to be a processing glitch
21 on one of the photographs, do these photos truly
22 and accurately depict what you saw?

23 A. Yes, they do.

24 Q. And what sort of glitch do we have there?

25 A. Overexposure.

1 Q. Just on the left-hand corner of the --

2 A. Yes.

3 Q. And what does it show?

4 A. A picture that shows here facing east as the
5 other picture was there, and it shows how much
6 erosion has come into the sediment pond in the
7 matter of time between one photo was taken and
8 when this photo was taken.

9 Q. And the other photo being Exhibit 24 from June of
10 2002?

11 A. Right.

12 Q. Let me show you now the final exhibit of photos
13 consisting of nine taken on May 29, 2003, and,
14 again, do they truly and accurately depict what
15 you saw on that day?

16 MR. WOODWARD: What was the date?

17 MR. DAVIS: May 29, 2003.

18 A. Yes, they do.

19 Q. And what do they show generally?

20 A. The picture here I have a note on the back that
21 says see photo May 24 of 2003, because the May
22 photo of 2003 shows the erosion going into the
23 pond, and the May 29th of 2003 which is a
24 five-day period, shows that some of the erosion
25 has been drug back out of the pond area, the

1 retention pond, back to where all the fill dirt
2 was in and either spread around or hauled out.
3 I'm not sure of which, because nobody contacted
4 me they were going to do this work, and so when I
5 went back on May the 29th, I found that this work
6 had been done, but I have asked repeatedly if
7 they're going to do work in that area, they
8 contact me first.

9 Q. Now, on that issue, Joe, is it fair to say that
10 over the years -- I'm talking now back into the
11 '90s, even prior to the '96 Pollution Control
12 Board hearing -- that the landfill at your
13 request would dredge out this pond?

14 A. The retention pond or my pond?

15 Q. The retention pond.

16 A. Yes, sir.

17 Q. Prior to apparently what took place in May of
18 this year, when was the last time the landfill
19 had dredged out the retention pond?

20 A. Well, between May the 24th and May the 29th, they
21 removed some of the siltation that was in the
22 east end of the pond.

23 Q. Was this a partial dredging?

24 A. Sir, I have no idea. Nobody notified me that the
25 work was going to be done, and I have no idea how

1 much they took out or anything of that nature.

2 Q. And prior to that when was the last time that
3 they had dredged?

4 A. I'm not positive.

5 Q. Had it occurred since '99?

6 A. I believe so.

7 Q. Very good. This again is an issue that you
8 talked about in your prior testimony?

9 A. Yes, sir.

10 Q. Now, two of the photographs, Joe, from Exhibit 26
11 are intended apparently to serve a different
12 purpose. It you explain what they show and the
13 vantage point from which they were taken?

14 A. At every hearing and every testimony that I've
15 given I've always been asked one question, how
16 does your property sit or is it adjacent to or
17 how far is it from the landfill? In the two
18 photographs I stood on the dike of my large pond
19 and make a photograph facing north of my house on
20 my property, and from the same vantage point
21 turned my camera south, took a picture of my pond
22 and the landfill so anybody can see exactly what
23 the direct connection is between my property and
24 the ESG Watts Landfill.

25 Q. So for the Board's reference, these two photos

1 from the group of nine within Exhibit 26 are the
2 ones showing your buildings and your large pond?

3 A. Right, sir.

4 Q. And the photo depicting your large pond which is
5 not the retention pond; correct?

6 A. Right.

7 Q. Also shows a portion of the landfill in the
8 background?

9 A. Yes, sir. The retention pond, for the record, is
10 the left finger of the large pond, and for the
11 record, the ponding area originally when the dike
12 was extended in 1981, my pond went to within
13 6 feet of the landfill property. I had a fence
14 there, and I had an 8-foot tube to try to drain
15 the water there. At that time it was there. Now
16 it is 140 feet downstream from that from
17 siltation alone.

18 Q. And you talked about those impacts during your
19 prior testimony?

20 A. Yes, I did.

21 Q. In addition to essentially those previous
22 impacts, have you observed essentially continual
23 off-site impacts from erosion?

24 A. Yes, sir.

25 Q. That is, since the last time you testified?

1 A. Yes.

2 Q. And have you tried to show the Pollution Control
3 Board those conditions in the photographs that
4 you've presented here today?

5 A. Yes, sir.

6 Q. Now, the other problem, Joe, that you testified
7 during the last hearing was odors from landfill
8 gas emissions; isn't that true?

9 A. Yes, sir.

10 Q. The testimony that I've tendered in the form of
11 Exhibit 18 talks about all the odors that you
12 experienced up until October 1996; correct?

13 A. Yes, sir.

14 Q. Do you recall testifying at some length about the
15 odors resulting from the installation of the gas
16 and leachate collection wells?

17 A. I believe so, sir.

18 Q. And do you recall how many wells were installed?

19 A. My recollection it was 88.

20 Q. And do you recall from the testimony that you
21 witnessed during that hearing that much of that
22 activity in addition to your own observations, of
23 course, that much of the installation took place
24 during the summer and fall of 1996?

25 A. Yes, sir.

1 Q. Now, moving forward do you know from your own
2 personal knowledge that there is a flare
3 connected to some of the wells?

4 A. Yes, sir.

5 Q. And have you observed that flare?

6 A. Yes, sir.

7 Q. Let me focus these questions on two time periods
8 now, the big long general time period since the
9 last hearing up until the beginning of this year,
10 and then 2003. Okay? Generally what's been your
11 observation as to the landfill gas emissions
12 odors?

13 A. They are no better for sure, and at times they're
14 worse. They're not there all the time, but the
15 majority of the time when I'm in the area on my
16 property landfill, there's definitely odors, and
17 many, many times I have to go in the house and
18 shut the windows. I cannot stand the odors.

19 Q. During what I'm terming the long general time
20 period, you're aware that they stopped accepting
21 waste March of '98?

22 A. Yes, sir.

23 Q. Did the odors lessen just because waste was not
24 coming into the landfill?

25 A. No, sir.

1 Q. Now, directing your attention to this year, 2003,
2 did you become aware of a worsening of the odors
3 for any particular reason?

4 A. Since when?

5 Q. Just this year.

6 A. This -- Yes, they have been very prevalent.

7 Q. And what are you attributing it to?

8 A. Well, for one thing, I don't think the flare is
9 in operation anymore. I haven't seen it in the
10 last three months or so. I've gone through the
11 pasture and looked for it, but I haven't had a
12 visual -- it has not been visual to me.

13 Q. Now, I can represent that the evident admitted
14 includes a couple reports submitted by the Watts
15 Company, Exhibits for the People 7 and 8, and in
16 those reports, no. 7 is from April 2003, and
17 no. 8 is from February 2003, and there's a
18 statement that the flare is not operational.
19 Does this comport with your observations?

20 A. Yes, it does.

21 Q. Can you quantify -- And let's just focus on this
22 year 2003 -- how many times you've -- and just a
23 ballpark estimate, how many times you've noticed
24 that the odors were bad?

25 A. Probably three times a week at least.

1 Q. And would it be true that on some occasions
2 they're much worse and on other occasions they're
3 not so bad?

4 A. Yes, sir.

5 Q. How has it affected your life or interfered with
6 your enjoyment of your property and activities?

7 A. Well, there's lots of times I'd like to go sit on
8 the deck and kind of watch the birds and the
9 flowers, and sometimes it's completely
10 impossible.

11 Q. And where is your deck in relation to the
12 landfill?

13 A. It's on the east end of the house.

14 Q. So it's between the house and the landfill?

15 A. No, it's on the east end of the house.

16 Q. I'm sorry.

17 A. And other times that I would like to go out and
18 do things in the barn and around that area, and
19 the amazing thing with the odors as they are
20 emitted, sometimes it travels in such a narrow
21 range that you can smell it on one side of my
22 property and you can't on the other, and that is
23 according to, I'm sure, the atmosphere, the
24 humidity and the way odors rise or fall.

25 Q. Wind direction, so forth?

1 A. Right.

2 Q. Now, getting back to the effects on you, other
3 than not being able to sit on your deck or not
4 being able to go out to the horse pasture, are
5 there other activities that have been negatively
6 affected?

7 A. Certainly. I used to enjoy going up sitting by
8 the pond, which is much closer to the landfill
9 than my house, and that has become nonexistent in
10 the last two or three years.

11 Q. How about family visiting?

12 A. Family visiting, they'll come to see me if they
13 can come in the house and I'll turn on the air
14 conditioner on many occasions. Ordinarily --
15 Sometimes there's no odor. Sometimes there's
16 strong odors.

17 Q. Now, let's focus about the time that you're in
18 the house now. Are there occasions where you can
19 smell the odor from inside your own house?

20 A. Oh, if the windows are open, definitely.

21 Q. And is it your practice or preference to have the
22 windows open if the weather is good?

23 A. Absolutely.

24 Q. Have you been forced to run the air conditioning
25 even though it's not that hot out?

1 A. Yes, sir.

2 Q. On how many occasions say this year?

3 A. This year, honestly I haven't been home a lot
4 this year due to my wife dying in September with
5 lung problems. This year has been different.

6 Q. Okay. Then let's focus on the general longer
7 period just from the last hearing up through the
8 first of this year. Were there occasions where
9 you had to run the air conditioning even though
10 it wasn't that hot outside?

11 A. This year so far I've only run the air
12 conditioner twice, because the weather has -- I
13 don't know how it's been in Springfield, but it's
14 been very cool here.

15 Q. Maybe that's not a good example. Can you think
16 of other things that you've been forced to change
17 or other interferences?

18 A. Well, yes. I mean, like I said before, going
19 outside and enjoying the outside and visiting
20 with people outside the home, which I do have a
21 flower garden, and I loved going out and working
22 in those, and there's sometimes I can't.

23 MR. DAVIS: I have no other questions.

24 THE HEARING OFFICER: Do you have any
25 way of attaching these -- I think I need a recap

1 on the photos?

2 MR. DAVIS: I'll get some paper clips.
3 Would that help?

4 THE HEARING OFFICER: Yes.

5 MR. WOODWARD: Are we on break now?

6 THE HEARING OFFICER: Would you like
7 to -- Okay. We are going to break for lunch now,
8 and we will go off the record and reconvene at
9 2:30. Thank you.

10 (A lunch break was taken.)

11 THE HEARING OFFICER: I think we're
12 ready to go back on the record now. Before we
13 get to the cross-examination of Mr. Whitley, we
14 are going to clarify a couple of things about the
15 exhibits. I was reviewing a few things over
16 lunch, the People's exhibits, and it wasn't clear
17 to me that Mr. Woodward would not be able to make
18 objections to these exhibits at hearing, and so
19 I've decided to take another look at the People's
20 Exhibit No. 13, which was the only exhibit that
21 Mr. Woodward had indicated that he objected to.
22 I would like to just have a brief discussion as
23 to why the People are -- what the People are
24 attempting to show with this document and, again,
25 the reasons for Mr. Woodward's objection.

1 Mr. Davis?

2 MR. DAVIS: Thank you. This is
3 admittedly a tangential issue. Peoples' Exhibit
4 13 is a May 3, 2000, letter from Watts to the
5 Illinois EPA regarding not this landfill but the
6 Viola Landfill. It is tendering a certification
7 of final cover in conjunction with a consent
8 order, which is Exhibit 12. Exhibit 12 required
9 Watts to remove and relocate some overfill at the
10 Viola Landfill, and Exhibit 13 indicates that
11 they've completed that project and that they've
12 complied with final permitted contours. This was
13 done without an additional permit. In this case,
14 Ms. Hearing Officer, the present proceeding, in
15 response to Count 1, the Respondent has contended
16 basically that the overfill could not be removed
17 until there was an additional permit issued by
18 the agency, and that's been the hang-up, so to
19 speak, so this was in rebuttal, if you will, to a
20 defense contention. It has relevance and
21 materiality only in that respect. Thank you.

22 THE HEARING OFFICER: Thank you,
23 Mr. Davis. Mr. Woodward, would you like to
24 restate your objection to this document?

25 MR. WOODWARD: Well, in our answer we

1 admit that we were held in violation of exceeding
2 permitted height at the Viola and Sangamon Valley
3 Landfill, so that's not a factual issue that's
4 present in this matter. In addition, I think
5 Mr. Davis misconstrued what our position was as
6 to Count 1. We specifically indicated that if we
7 proceeded to do things without modifying
8 already-issued permits, that we would be doing so
9 at our own risk in past actions we've been held
10 accountable for proceeding without obtaining new
11 permits, and the factual situation at Viola is
12 completely different than here. Therefore, I
13 don't think that that Viola letter and
14 certification has any relevancy to this
15 proceeding. The Viola case, it's an isolated
16 landfill, there was nobody who lived around it.
17 The agency specifically told us that they would
18 not object if we proceeded to move the overflow
19 waste without permit as long as we used the areas
20 where we were under height. Here there are a lot
21 of issues affecting what the final contours of
22 this landfill is going to be, and it's been one
23 of the major points of contention in getting
24 anything approved, and to proceed without the
25 Agency's stamp of approval puts us at great

1 economic risk, and it also puts us at risk that
2 they don't like what we do and they turn around
3 and prosecute us for doing something that's in
4 violation of a permit. So that was the issue
5 that we had that we were trying to raise in our
6 defense. I don't think that letter goes to that,
7 because Viola is completely different. The
8 Agency's position was different.

9 THE HEARING OFFICER: Mr. Davis, do
10 you have anything further you would like to add?

11 MR. DAVIS: Only to reiterate that
12 this was tendered because we felt that this was
13 tendered because the Respondent raised an issue
14 that we felt we needed to rebut.

15 THE HEARING OFFICER: Well, I
16 appreciate this expanded discussion on this
17 document. I'm going to go ahead and admit it
18 into the record for that specific limited purpose
19 regarding any possible argument you may want to
20 make for rebuttal. Having dealt with admitted
21 Exhibit 13, I'd like to go back and deal with the
22 photographs that Mr. Whitley testified to.

23 MR. DAVIS: Okay. Subject, of course,
24 to cross-examination, we would be tendering
25 Exhibits 21 through 26.

1 MR. WOODWARD: Can you tell me what
2 date Exhibit 23 is supposed to represent?

3 THE HEARING OFFICER: In fact, could
4 we do that for each of the exhibits?

5 MR. DAVIS: Certainly. Exhibit 21 is
6 a group of five photos taken December 1, 1999.
7 Exhibit 22 is a group of three photos taken
8 April 25, 2002.

9 THE HEARING OFFICER: And each
10 individual snapshot has the date on the back?

11 MR. DAVIS: Yes, it does.

12 THE HEARING OFFICER: Okay. Thank
13 you.

14 MR. DAVIS: And Mr. Whitley also
15 referred to some descriptives on each
16 observation. Exhibit 23 consisted of two photos
17 from May 21, 2002. Exhibit 24 is a single photo
18 from June 21, 2002; Exhibit 25, two photographs
19 from May 24, 2003; and then group Exhibit 26
20 consists of nine photographs, May 29, 2003, two
21 of which depict Mr. Whitley's property, so we
22 would tender these regarding the issue of the
23 runoff violations primarily.

24 MR. WOODWARD: I have no objection.

25 THE HEARING OFFICER: No objection?

1 Okay. Then Exhibits 22 through 20 -- 21 through
2 26 are admitted, and we will now resume with the
3 cross-examination of Mr. Joe Whitley.

4 CROSS-EXAMINATION

5 BY MR. WOODWARD:

6 Q. Mr. Whitley, if I understood your direct
7 testimony correctly, the property originally were
8 two naturally occurring streams; is that correct
9 or --

10 A. That is true.

11 Q. And you constructed what I would call a horse
12 pond? That would be what you were referring to
13 as the large pond?

14 A. No, sir.

15 Q. Did you have it constructed?

16 A. No, sir.

17 Q. How did it get there?

18 A. It was there when I moved in, sir.

19 Q. Okay. Was it naturally occurring, or had
20 somebody constructed it?

21 A. It had a dam, a dike.

22 Q. And before you did anything to it, it originally
23 extended to within 6 feet of the ESG Watts, Inc.,
24 property?

25 A. The two streams come directly out of the ESG

- 1 property.
- 2 Q. But I mean the border of the large pond?
- 3 A. The large pond backed up into the ESG Watts
4 landfill with two naturally-occurring streams
5 coming into that area.
- 6 Q. Well, I mean, you said -- I remember I wrote this
7 down, originally 6 feet from landfill?
- 8 A. Right.
- 9 Q. Is that the border of the pond or --
- 10 A. That was in later years, the 6 feet is from
11 before I put in the retention pond.
- 12 Q. Okay. But you had made changes to your horse
13 pond when it came to within 6 feet?
- 14 A. No, I didn't make the changes, sir. Watts
15 Landfill did.
- 16 Q. And if I understood you correctly, you said you
17 constructed the second sedimentation pond?
- 18 A. I hired it done, yes.
- 19 Q. And when you first constructed it, it didn't back
20 water onto -- standing water onto ESG's property?
- 21 A. No, sir.
- 22 Q. But subsequently it did?
- 23 A. No, sir, not until ESG Watts Landfill excavated
24 below the waterline. Your company has the
25 photos, the original -- when I put in the

1 retention pond, I put in a fence. Your company,
2 ESG Watts, has three photos showing the exact
3 location, how it was located, how it was built,
4 the whole thing.

5 Q. So if I understand you correctly, I'm showing you
6 a picture it's got a no. 11 on it. It's from
7 Exhibit 21, the pond that you had constructed
8 stopped at the fence line?

9 A. Yes, sir.

10 Q. And it never overflowed when it got water?

11 A. No, sir. I had it constructed on -- the water
12 came into the west side, went out on the east
13 side in the lower level. The dam and dike as you
14 can see the way it was constructed to a V point
15 out to 40 feet. The water came in at this point
16 originally and came out at this point.

17 Q. Would this picture show that point better,
18 no. 10?

19 A. Well, yes, to some extent. You still can't see
20 where the water actually overflows to the east.

21 Q. And as Mr. Davis kindly pointed out, you've been
22 involved with the hearings on this since 1992.
23 Do you understand that it would be a violation
24 for ESG Watts to have water standing on its
25 property?

1 A. That was my -- I have been told that, let's put
2 it there. I have not read the violation code as
3 such, no, sir.

4 Q. But that's your understanding?

5 A. Yes, sir.

6 Q. Did you ever tell Mr. Chenoweth that he could
7 take his time about replacing that fence?

8 A. Which time?

9 Q. Any time. My question was: Did you ever tell
10 Mr. Chenoweth that?

11 A. I told Mr. Chenoweth as long as the pond stayed
12 cleaned out, the fence was immaterial as long as
13 the landfill kept all of their sediment,
14 siltation, erosion up to the fence line and not
15 on my property. In other words, I told
16 Mr. Chenoweth two choices, either put it back to
17 its original state, make effective the silt to
18 stay on his property or else have some kind of a
19 contract and agreement of some type in regards to
20 the retention pond, because I do not feel anymore
21 that it's my -- you might say that I'm
22 responsible for catching the siltation that's not
23 supposed to be exiting the landfill.

24 Q. But you do admit that you had constructed which
25 required excavation of that area that was from

1 the originally 6 foot from the landfill to the
2 fence line? I mean, in order to create the pond,
3 you had to excavate that 6-foot area; correct?

4 A. No, sir. It was both put in -- The dike, the
5 east end where it overflows, is original, and
6 there was some excavation, yes, sir, between the
7 fence and the dike. It was excavated. That's
8 about the only way you can get a pond.

9 Q. And when you excavate, you didn't reinforce the
10 hillside that you created, right, the slope?

11 A. Reinforce the hillside that I created? What
12 hillside?

13 Q. Well, when you excavate, you create a slope.

14 A. No, sir. All the slope was in the east end, and
15 it's still there original as some of the pictures
16 there depict. You can still see the fence, you
17 can see the original fence, and you can see the
18 first 40 feet, four fence posts there. Original
19 40 feet. It's still there. It was put in back
20 in the '80s.

21 Q. This is Exhibit 22, and it's got no. 3 on it. In
22 the upper left-hand corner, is that the four
23 posts you're talking about?

24 A. No, sir. That's the east side.

25 Q. I thought that's the side you were saying.

1 A. No, sir. I'm talking the west side. That east
2 side there has nothing to do with the dike or the
3 retention pond. If you notice that east side
4 where those fence posts are are going up up the
5 hill to the east, which have no direct --

6 Q. No, I was talking about the four posts.

7 A. No, sir, those are on the east side. The four
8 posts that I'm talking about, sir, is on this
9 end, the west end of the landfill. If you'll
10 give me the photographs, I can probably show
11 them. If you don't, I've got them over there in
12 the bag.

13 Q. This is Exhibit 23, no. 2. There's a little
14 green hill there. Are those the posts you're
15 talking about?

16 A. Yes, sir. On the other side of that, over here
17 are the willow trees that you can't see, the
18 corner post sits back in that area right there,
19 and that other post as you see out there, the
20 last one you can see --

21 Q. Is that where the excavation occurred, right in
22 there?

23 A. My excavation?

24 Q. Yeah.

25 THE HEARING OFFICER: Mr. Whitley,

1 could you speak just a little more slowly and a
2 little louder. Thank you.

3 A. Yes, I can. Your question again, sir?

4 Q. I was asking: This area that was next to that
5 post that you were referring to, is that where
6 the excavation that you previously referred to
7 occurred?

8 A. This side that you're referring to, sir, is ESG
9 Watts property. This photograph was taken facing
10 west. The north side of this photo, the north
11 side of the fence in this photo is my property.
12 The south side of this photo as you're looking
13 west is ESG Watts property.

14 Q. Okay. I'm going to hand you what's been marked
15 as Exhibit 22, and I'm going to hand you a pen.
16 Can you on one of those photographs kind of put a
17 dotted line around the area where the excavation
18 that you had performed occurred?

19 A. I have very little excavation. Again, sir, what
20 is there right today as you looked at it when you
21 were there is approximately 4 to 8 foot higher
22 than the original property was, and when I built
23 this dike, I hauled all the dirt from the top of
24 the hill over there on my side of the property
25 with a scoop, a loader, and placed this dike

1 there, so there was very little excavation.
2 There was some excavation in there to make it
3 contour up to my dike, but on the landfill side
4 of the property, no. It all run down to an even
5 contour level. Your photographs, somewhere in
6 the files of Mr. Jones if somebody would go get
7 them --

8 Q. I'm asking you can you point out on those photos?

9 A. Point out what?

10 Q. Where this excavation even -- I don't care how
11 small it was. You said there's been some
12 excavation.

13 A. Why, certainly.

14 THE HEARING OFFICER: Could you read
15 what's on the back of that photo, just so the
16 Board is --

17 MR. WOODWARD: This is no. 23, and
18 it's Exhibit 24, Friday, June 21, 2002.

19 THE HEARING OFFICER: That is the
20 photo that Mr. Whitley has marked on.

21 MR. WOODWARD: Correct.

22 BY MR. WOODWARD:

23 Q. Isn't this the photo where you indicated that
24 the -- it showed that some sediment had been
25 pulled back? Is that that photo, or is this the

1 one where --

2 A. Let's see. This was June 21, 2002. You're
3 looking at the May photo --

4 Q. What date did I say?

5 A. June 22, 2002.

6 THE REPORTER: June 21.

7 Q. In this same photo that you marked on,
8 Exhibit 24, this dirt road that comes down,
9 that's on ESG property, is it not, this dirt road
10 here?

11 A. Yes, sir.

12 Q. You've marked an additional area on Exhibit
13 No. 22, no. 1. What is that that you marked?

14 A. You said you wanted to know where -- in this area
15 over here as you can see the dike running down in
16 this direction over here next to the dike, if you
17 want to call it excavation, I guess excavation is
18 whether you moved dirt in or out, but when you
19 put the dike in here, of course, we had to slope
20 it off on the interior, which is what I'm showing
21 you on that.

22 Q. So that also shows some excavation.

23 A. I would like to say one thing though.

24 Q. There's no question pending.

25 THE HEARING OFFICER: Mr. Whitley,

1 please hold off.

2 Q. Now, whether you think it was necessary or not,
3 the answer to my question was that when you did
4 excavate, you didn't reinforce the hillside with
5 pylons or anything like that, did you, to prevent
6 any caveback into the water?

7 A. No, sir.

8 Q. Now, I was a little confused about your answers
9 to Mr. Davis's questioning for the -- for your
10 description of the odors in 2003. Was your
11 testimony that in 2003 that you've been able to
12 detect odors three times per week?

13 A. It varies. I gave that, and I think if you'll
14 look at the transcript that says I gave that as
15 an average.

16 Q. But in 2003?

17 A. Yes, sir.

18 Q. Okay. But then later on you said you haven't
19 been home much during this year?

20 A. Yes, sir.

21 Q. And you also said you'd only run the air
22 conditioner probably two times in 2003?

23 A. Yes, sir.

24 Q. Is that because you haven't had the windows open?

25 A. It hasn't been warm enough to run the air

1 conditioner.

2 Q. So you didn't have to have the windows open?

3 A. I have closed my windows, yes, sir. The fact is
4 I closed my windows one day last week.

5 Q. Have you ever taken a picture where the area
6 looks good? Some people might say you pick days
7 that are shortly after rainfalls or something
8 like that. I'm just asking.

9 A. I probably have in excess of a thousand pictures,
10 and I'd be more than happy to look at all of
11 them, and if you can find me any that looks good,
12 then we will put them aside.

13 Q. Now, other than the fact that nobody notified you
14 of the removal of silt in the week of May 25th,
15 2003, was that your only complaint about that
16 activity. I mean, you really want the silt to be
17 removed, don't you?

18 A. Absolutely. Either that, or like I said, keep it
19 on your side of the property. I would prefer
20 that.

21 Q. And you would agree, would you not, that without
22 putting this fill up to the fence line on the ESG
23 side of the property, there would be little way
24 for them to get equipment in to desilt your side
25 of the -- your pond -- not your side, but your

1 pond?

2 A. Without what? I didn't follow the question.

3 Q. Okay. This picture shows an area that I think
4 you've testified to that they have put that fill
5 there?

6 A. Yes, sir.

7 Q. Would you agree that without putting that fill
8 there it would be almost physically impossible to
9 stay on their property and desilt your pond?

10 A. Yes, sir.

11 Q. So that fill is absolutely necessary in order for
12 them to accomplish that; is that not correct?

13 A. I have no idea, sir. I'm no engineer.

14 MR. WOODWARD: Went one question too
15 far.

16 Q. In the past I think you've testified, have you
17 not, that the odors were worse when it was warm?

18 A. Muggy, high humidity, wind from the south. I'm
19 the only person in the world that prays for a
20 north wind.

21 Q. And has it been muggy this spring, winter?

22 A. Oh, to some extent, but there is no different in
23 the smell in the summer or the winter.

24 MR. WOODWARD: That's all.

25

1

REDIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q. If I may, Joe, on the issue of the photographs
4 showing the conditions that, quote, look good,
5 would it be true that as a general matter that
6 photographs 21 through 26 show conditions quite a
7 bit different than the photographs that you
8 presented to the Board in '96?

9 A. No, sir, I think they're probably --

10 Q. What I'm getting at is the fact that the size of
11 this retention pond has decreased and it's
12 located now just on your property and not also on
13 the landfill property?

14 A. Yes.

15 Q. And that's due to in part the filling that
16 Mr. Woodward was just discussing with you?

17 A. Yes, sir.

18 Q. Okay. However, is there any barrier constructed
19 to prevent the storm water runoff from entering
20 your property and especially the retention pond?

21 A. No, sir.

22 Q. And do you still continue to be bothered, for
23 lack of a better word, by the runoff?

24 A. Yes, sir.

25 Q. How does it bother you?

1 A. Well, it keeps filling in my large pond. It
2 comes over the retention pond and along the
3 debris that is washing out of the landfill. Also
4 I am told -- this is probably -- you might want
5 to call it hearsay, but I have to treat my pond
6 at least three times a year due to the fact that
7 I have been told through the ponds, per se, that
8 fertilizer really grows algae, and so I imagine
9 that the fertilizer is coming out of the landfill
10 into the pond.

11 Q. Do you, in fact, have to treat your large pond
12 three times a year?

13 A. Yes, sir.

14 Q. And is this more than you used to have to treat
15 it?

16 A. Yes, sir.

17 Q. Did you ever have to treat it before?

18 A. In the early stages, no, sir.

19 Q. Getting back to the runoff problems, I had asked
20 you generally very early on in your direct
21 testimony whether these problems that you had
22 testified to back in '96 have essentially
23 continued, and you had answered yes, and just now
24 you said that you were still encountering waste
25 debris in the runoff?

1 A. Yes, sir.

2 MR. WOODWARD: When did he say that?

3 MR. DAVIS: Just a minute ago.

4 BY MR. DAVIS:

5 Q. Well, what, if anything, materials are you
6 encountering in the runoff in recent months and
7 years?

8 A. Exactly the same as I testified in there,
9 anything that will float.

10 Q. And can you describe some examples for us?

11 A. Wood, wood slats, wood chips, paper bags,
12 Styrofoam.

13 Q. I think back in '96 you mentioned plastic bags.
14 Have you seen those?

15 A. Yes, sir.

16 Q. Now, you were also questioned at some length,
17 Joe, regarding the construction of the berm which
18 created the retention pond. Is this also an
19 issue that you testified to previously?

20 A. I think it's the same thing that I testified to
21 in '96.

22 Q. Now, the question suggested at least to me that
23 the damage that you've talked about to your
24 property might have been partly your fault. Can
25 you respond to that?

- 1 A. The damage to my property could partially have
2 been my fault?
- 3 Q. By constructing the retention pond.
- 4 A. No, sir. I don't think I testified to that.
- 5 Q. No, I'm not saying you did, Joe. I'm saying the
6 questioning from Mr. Woodward seemed to suggest
7 that, and I'm asking you to respond to that?
- 8 A. The construction of the berm for the retention
9 pond, did it damage my property? Am I
10 understanding you right?
- 11 Q. Yes.
- 12 A. No, I think it probably helped my -- to keep the
13 sediment and all out of my large pond.
- 14 Q. And was that your primary motivation?
- 15 A. Yes, sir.
- 16 Q. And as you testified to back in '96, this was
17 constructed at your own cost?
- 18 A. Yes, sir.
- 19 Q. Now, one last issue. In discussing the odors
20 from the landfill gas emissions, Mr. Woodward
21 followed up on one of your statements on direct
22 that you're not home as much. Do you still
23 reside there?
- 24 A. Yes, sir.
- 25 Q. But since the death of your wife you spend less

1 time there?

2 A. Yes, sir.

3 Q. Okay. Are you there every day?

4 A. 95 percent of the time, yes, sir, at some point
5 of the day I'm home.

6 MR. DAVIS: No further questions.

7 MR. WOODWARD: I have nothing.

8 THE HEARING OFFICER: If both sides
9 are through with this witness, Mr. Whitley, you
10 may step down. Thank you.

11 THE WITNESS: Thank you.

12 MR. DAVIS: Thank you, Joe. We have
13 no other evidence to present in our case in
14 chief.

15 THE HEARING OFFICER: Thank you,
16 Mr. Davis. Before we begin with the Respondent's
17 case, I'd like to take this time to hear a brief
18 public comment from -- We have one member of the
19 public present who indicated that he would like
20 to make a brief statement. Mr. Bohnsack, would
21 you like to come forward?

22 MR. BOHNSACK: Sure.

23 THE HEARING OFFICER: Mr. Bohnsack
24 will be making a public comment that is not sworn
25 under oath and not subject to cross-exam?

1 MR. BOHNSACK: Unless they wanted to,
2 it's up to you. If you'd just as soon
3 cross-exam --

4 THE HEARING OFFICER: It's really your
5 choice. The difference would be the weight
6 accorded to your testimony by the Board. If it
7 is a sworn statement that is subject to
8 cross-examination, it would hold more weight.

9 MR. BOHNSACK: I'll take a sworn
10 statement.

11 JAMES BOHNSACK,
12 was called as a witness and, having first been
13 duly sworn to testify to the truth, the whole
14 truth, and nothing but the truth, was examined
15 and testified as follows:

16 THE HEARING OFFICER: Would you please
17 state your name and spell it.

18 THE WITNESS: Yes, it's James, and
19 it's spelled B, like in boy, o-h-n-s-a-c-k. My
20 address is 8429 88th Street West. That's Taylor
21 Ridge.

22 THE HEARING OFFICER: Who are you here
23 representing?

24 THE WITNESS: I have twofoldship. I
25 am a resident of Andalusia Township. I am about

1 a half a mile away. I have a farm half a mile
2 west of Watts Landfill. I'm also on the Rock
3 Island County Board, and that is my district that
4 I represent, and I'm also the Rock Island County
5 Board chairman.

6 THE HEARING OFFICER: Thank you.
7 Please make your statement.

8 THE WITNESS: I am just really
9 concerned why it's taken Watts Landfill this long
10 to correct what they should have corrected I
11 believe you said in 1998. I know they've done
12 Sangamon and Mercy County, and Rock Island County
13 is the Watts' family's home county, and why we
14 wouldn't get the privilege of getting that
15 corrected and go on with their lives and let them
16 go on with their business. I don't know why
17 that's happening, and I'd like to know why it's
18 taken so long. I'm really disappointed that we
19 have to -- and I have to look that. My farm, I
20 can look over and see that. I used to see that
21 blaze every day, and now I think it's since
22 February, I imagine, when it quit running, and I
23 just have a lot of questions why is that not
24 running anymore, why isn't it closed, why is it
25 as high as it is today. That's all I've got.

1 THE HEARING OFFICER: Okay. Well, the
2 parties aren't here to address your questions.
3 However, they may have some questions of you.
4 Mr. Davis?

5 MR. DAVIS: Okay. Thank you.

6 CROSS-EXAMINATION

7 BY MR. DAVIS:

8 Q. By the blaze, Jim, you mean the flare?

9 A. Yes.

10 Q. Have you smelled the odors yourself?

11 A. No.

12 Q. Okay.

13 A. I can't smell that well, so I can't -- I'm
14 telling you I can't --

15 Q. Okay. How long have you lived at your farm?

16 A. Since say about 38 years, I guess, I've lived
17 there.

18 Q. Was there a point in time that you could see the
19 landfill where you couldn't previously?

20 A. Yes.

21 Q. When did that point in time come?

22 A. Oh, boy, the years I don't know. The only
23 thing -- One comment I know, between my farm and
24 Watts Landfill there's another farm by -- Ron
25 Dalfox's (phonetic) farm is between my farm and

1 Watts Landfill, and their son-in-law, Daryl
2 Schmidt, used to have cattle, and he quit raising
3 cattle because of the black stuff coming down the
4 creek. It didn't affect mine, because my crick
5 doesn't run that way, but --

6 Q. Would you say that it's -- you've been able to
7 see the landfill from your farm for the past
8 several years?

9 A. Oh, yeah. I always say it's the highest point in
10 Rock Island County. I don't know if it is or
11 not. It's high.

12 Q. When you made your inquiry just now essentially
13 asking why things haven't happened, do you
14 realize that the State of Illinois has taken
15 repeated enforcement action?

16 A. Yes.

17 Q. Now, let me ask you a few questions with you
18 putting on your County Board hat. As the Board
19 member for your district have you received
20 complaints from other people regarding the
21 landfill?

22 A. Actually, not as bad as -- You know, I get some
23 comments why isn't it completely shut down, but
24 not a lot of complaints.

25 Q. Since it ceased operation?

1 A. Yes. Before that weekly.

2 Q. Has the County Board since you've been on it --
3 and how long have you been on it?

4 A. Ten years.

5 Q. Has the County Board during the past ten years
6 taken any official debate or action regarding
7 concerns that the County has about the landfill?

8 A. Yes, and I can't tell you the year, because this
9 is sort of a spur of the moment, but I know -- I
10 believe you asked to have that height stay the
11 same and not take it off, and I believe our Board
12 voted not to, to get it down to where it should
13 be.

14 Q. And this was some sort of informal --

15 A. It was a full Board meeting.

16 Q. Okay. But you're not referring to a signing
17 petition?

18 A. No. I'm saying that I think Watts had come to
19 the county asking for a variance to leave that
20 height to where it is, our zoning Board, and they
21 brought it to the full Board, and the full Board
22 voted no, they wanted it down to where it was
23 supposed to be.

24 Q. Has the County Board while you've been on it
25 expressed any concerns about having to expend

1 county funds to address problems caused by the
2 landfill?

3 A. Yes.

4 Q. Can you tell us about that?

5 A. Prior to that I was finance chairman, and as
6 county official we don't have any money, and it
7 does scare us if they would walk away, whose
8 responsibility is it then to take care of that,
9 and we do have big concerns as a county.

10 MR. DAVIS: Thank you, Jim. I have no
11 other questions.

12 THE HEARING OFFICER: Mr. Woodward?

13 CROSS-EXAMINATION

14 BY MR. WOODWARD:

15 Q. Are you sure Mr. Watts made a presentation to
16 the Rock Island County Board, or was it the waste
17 management?

18 A. Yes, waste management, but then they brought it
19 to the County Board with our procedures of zoning
20 and waste management. I think it went to zoning
21 though. I could try to dig those records up. I
22 was only a Board member at that time, and I know
23 we voted on it because it was in my district.

24 Q. And is it your position that the landfill's
25 higher today than it was ten years ago?

1 A. Oh, yeah.

2 Q. Five years ago?

3 A. Yeah, maybe five years ago. It's hard to judge,
4 because like I say, I'm probably a half a mile
5 away. I would say five years it was probably the
6 highest level. I don't know if any further
7 beyond there, but -- I don't know if it could be
8 any higher since 1998.

9 Q. Do you know what the permitted height for the
10 landfill is?

11 A. No, I don't. I can tell you a visual. I
12 couldn't tell you if it's 200 feet or 500 feet.

13 Q. So you don't know how much the height exceeds
14 whatever is permitted?

15 A. No. I'm sure we've got that on record as a
16 county.

17 Q. You think you could detect the difference in
18 9 feet?

19 A. No.

20 Q. From a half mile away?

21 A. No.

22 MR. WOODWARD: That's all.

23 MR. DAVIS: Nothing further.

24 THE HEARING OFFICER: Thank you, sir.

25 THE WITNESS: Thank you.

1 THE HEARING OFFICER: Okay. We are
2 now ready to proceed to Respondent's case.

3 MR. WOODWARD: Well, Respondent --
4 there are four counts to this complaint.
5 Respondent has indicated in its answer that it
6 had implemented the closure plan within the time
7 frame we were required to implement it in and
8 that subsequent thereto we have been in almost
9 constant negotiations with the Illinois EPA to
10 resolve what the final closure of this landfill
11 will look like. The EPA, Illinois EPA, the
12 agency, also made the resolution of that more
13 difficult by requiring an application for
14 significant modification permit when, in fact,
15 the regulations would not have required that,
16 that a closure plan was sufficient, and that is
17 now the tactic that the Respondent is pursuing is
18 to get approval of the closure, postclosure care
19 plan to close this landfill. I mean, that's what
20 everybody wants us to do, and we sure want to do
21 it, because to tell you the truth, we're just
22 tired of the state of Illinois. We would like to
23 be out of the business of landfills in the state
24 altogether, and we can't do that until we get
25 these matters resolved, and we've been working to

1 do it, and our position is that the Illinois EPA
2 has not been cooperative. They've made denials
3 where they've listed all kinds of violations
4 which I think are typically called wells letters
5 when I don't know that that's even applicable to
6 a closure situation. I mean, we don't have an
7 operating permit. We're not attempting to
8 operate a landfill. We're attempting to close
9 one, and it's that kind of behavior that has made
10 the resolution of this problem more difficult.

11 In addition, we will be submitting a quite
12 lengthy docket from the Bankruptcy Court,
13 Northern District of Illinois, for Resource
14 Technology Corporation. The Respondent executed
15 an agreement with Resource Technology Corporation
16 that gave Resource Technology Corporation the
17 exclusive right to mine landfill gas, and we have
18 been attempting through the bankruptcy court to
19 force Resource Technology Corporation to elect
20 whether it wishes to assume or reject that
21 executory contract, and the bankruptcy court has
22 continually granted them extensions of time in
23 which to make that election, and therefore, we do
24 not have the right to mine landfill gas on our
25 own landfill. And you cannot resolve the gas

1 problem without mining somehow the gas. You
2 either burn it away, or you use it to convert --
3 to converted energy or you somehow treat it as
4 leachate, let it bubble up and treat the
5 by-product in leachate that you collect, but we
6 do not deny that we have the ultimate
7 responsibility, but we're between the rock and
8 the hard place. The bankruptcy court won't give
9 us the right to do anything. We continually make
10 effort to do that, to get the bankruptcy court to
11 do it, and the Agency and the State, People of
12 the State of Illinois say we have to do
13 something. We believe that that constitutes a
14 defense, and it clearly would constitute a
15 mitigation of any penalty. As to the odor
16 violations, Mr. Whitley's testimony is the flare
17 doesn't do anything, but the flare does burn
18 methane gas away and does reduce the emission of
19 methane gas. In addition, we'll present
20 testimony that as landfills age, they produce
21 less and less methane gas and that, therefore, we
22 don't believe that the problem can be worse now
23 than it was in 1996. We would also point out
24 that as to Count 4, the overflow violations, that
25 the agency and the attorney general attempted to

1 amend its complaint in 96-107 to add an overfill
2 violation count before the conclusion of the
3 hearing, that that was denied by the Board as
4 undue surprise, but then the attorney general
5 pursued ESG Watts in court in 98-CH-20 and didn't
6 raise that allegation of overfill when it could
7 have, and that's the essence of res judicata,
8 that you're precluded from raising matters that
9 you could in a prior proceeding.

10 As to the runoff violations, again, we have
11 been in constant negotiation with the Agency
12 about what structures are needed to control
13 runoff, what slopes are to be which have a
14 correct effect on runoff and also what areas are
15 required to have additional final cover, and
16 until those matters are resolved with the agency,
17 there is little we can do to control the runoff
18 except what we've been doing, which is to make
19 some contours to divert water away from the
20 north, to remove sediment from the pond when it
21 occurs, and obviously having to fill the area
22 that's on our property where water was backing up
23 creates a problem in that that dirt, that fill,
24 then washes back in when Mr. Whitley's retention
25 pond, takes on more water than it normally does,

1 but these matters are in way of defense, and
2 they're in way of mitigation of any possible
3 penalties for any violations if an issue be found
4 to exist. We make no excuses for Count 5 -- is
5 that the reporting violation?

6 MR. DAVIS: Yeah.

7 MR. WOODWARD: Count 5, and we have
8 admitted that we violated those. So that is my
9 opening statement. I would call Joe Chenoweth.

10 JOSEPH CHENOWETH,
11 was called as a witness and, having first been
12 duly sworn to testify to the truth, the whole
13 truth, and nothing but the truth, was examined
14 and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WOODWARD:

17 Q. Mr. Chenoweth, would you state your name and
18 spell your last name, please.

19 A. My name is Joseph Paul Chenoweth, last name
20 C-h-e-n-o-w-e-t-h.

21 Q. Where are you employed?

22 A. I'm employed at ESG Watts Landfill.

23 Q. In what capacity?

24 A. I am the landfill operator.

25 Q. And are you certified to be a landfill operator

1 by the State of Illinois?

2 A. Yes, I am. I have been for six years.

3 Q. So you're basically responsible for the
4 day-to-day operation of the landfill?

5 A. That is correct.

6 Q. And when you say operation, that means any
7 maintenance responsibilities that occur there;
8 right?

9 A. That is correct.

10 Q. There is no operation in that we're not accepting
11 waste?

12 A. No, sir, we aren't.

13 Q. And are you familiar with the gas collection
14 system that's on that property?

15 A. Yes, I am.

16 Q. And who constructed that gas system?

17 A. RTC, the Resource Technology Corporation.

18 Q. And can you describe basically what that system
19 is?

20 A. They drilled several wells into the landfill to
21 extract the methane gas, and it's piped into an
22 area where it's flared.

23 Q. Okay. And is there a condensate tank?

24 A. There is a condensation tank that they installed,
25 yes.

- 1 Q. And do they empty that tank?
- 2 A. We do not empty that tank. That responsibility
3 relies upon RTC. I usually notify them when it's
4 full, because their people don't show up too
5 often, so I just take the responsibility myself,
6 because I know eventually it'll come down to us.
- 7 Q. Well, there's been some testimony that the flare
8 that burns off this methane gas has been
9 nonoperational since February. Is that a correct
10 statement?
- 11 A. No, sir, that's not correct.
- 12 Q. Okay. Can you tell us what is a correct
13 statement?
- 14 A. It has been nonoperational since January 27th.
- 15 Q. Of 2003?
- 16 A. Of 2003.
- 17 Q. And have you notified RTC about that?
- 18 A. I notified RTC the very day I found the flare
19 nonoperational.
- 20 Q. And have they done anything to your knowledge to
21 make that operational?
- 22 A. No, they have not.
- 23 Q. Have you notified them more than once?
- 24 A. Yes, I have.
- 25 Q. Do you know what's wrong with the flare?

1 A. Yes, I do.

2 Q. And what is wrong with it?

3 A. There's a 50-amp circuit breaker that blew,
4 because I investigated it myself, because once
5 again, I know RTC's history, and if it's going to
6 get done, I guess the only way to do it is
7 myself.

8 Q. When you say blown, you mean it exploded?

9 A. Not that it exploded. It's just not operational
10 anymore, and we had to -- As a matter of fact,
11 we, being ESG, purchased a new amp for it, and I
12 just received it in the mail.

13 Q. When you say just received, when did you receive
14 it?

15 A. Rough guess, I think it was last Thursday.

16 Q. Do we have anybody on payroll who's qualified to
17 install that amp?

18 A. Not to my knowledge. I don't know. I know out
19 there there is no one, and I'm looking for
20 someone qualified to install it.

21 Q. When did you find out about today's hearing?

22 A. Tom Jones, my supervisor, told me maybe yesterday
23 afternoon. I didn't know anything about it till
24 then.

25 Q. So your ordering this 50-amp circuit breaker and

1 receiving it last Thursday didn't have anything
2 to do with today's hearing?

3 A. I don't see how when I didn't know anything about
4 today's hearing until yesterday afternoon.

5 Q. I'm going to show you two pictures. One is
6 labeled Exhibit 25, People's Exhibit 25, and the
7 other one is a picture from people's Exhibit
8 No. 26, and it says on the back, deep erosion
9 ditches few feet from pond, see photo 8A. I'm
10 going to ask you to compare those two pictures.
11 First, do they accurately depict the -- are you
12 familiar with the area that --

13 A. Oh, very much so, yes.

14 Q. Depicted in the pictures?

15 A. Yes.

16 Q. Do they accurately depict the property on the
17 dates on the back displayed in the pictures?

18 A. I would say so, yes.

19 Q. Now, Mr. Davis asked Mr. Whitley to compare the
20 two pictures, or maybe it was Mr. Whitley that
21 brought up the comparison -- I don't know
22 which -- but there was a comparison made between
23 those two pictures, and the comparison was that
24 we had made some effort to remove sediment from
25 the pond between May 24th, 2003, and May 29th,

1 2003. Is that a correct statement, that we did
2 that?

3 A. Yes, we did.

4 Q. And at the time that you made the -- Were you the
5 one that did that?

6 A. Me and the people that are employed by me, yes.

7 Q. And at the time you did it, did you know about
8 the hearing today?

9 A. No, I didn't.

10 Q. So you weren't trying to improve the area just
11 because we had a hearing?

12 A. No. That wouldn't bother me anyway, because I
13 just do the job the best I can every day.

14 Q. Basically this is the time of year that you can
15 get out there and do it and you did it?

16 A. Without a doubt, because I know the spring rain
17 will bring it on, and when I think it's done,
18 then I'll go down and do something about it.

19 Q. Do you remember the last time you removed
20 sediment from the pond?

21 A. I can just take a rough estimate.

22 Q. Is it two years --

23 A. Oh, no. It was probably last fall, late summer.

24 Q. So this is something you do twice a year, once a
25 year?

1 A. Depending on Mother Nature, because I do site
2 inspections all the time, and when it needs it, I
3 do it.

4 Q. Okay. How long have you worked for ESG Watts?

5 A. This is my eleventh year.

6 Q. Have you always worked at the Taylor Ridge,
7 Andalusia landfill?

8 A. I've always been employed there. I have visited
9 and done work at other sites of his.

10 Q. But I mean, that's been your home base?

11 A. Yes.

12 Q. When you say you've done work at other sites,
13 that was on a temporary assignment?

14 A. That's correct.

15 Q. Do you have any opinion as to whether the height
16 of the landfill now is higher than it was in
17 1998?

18 A. I don't see how when we stopped taking in waste.

19 Q. Does it settle?

20 A. It has nowhere to go but down.

21 Q. So you believe it has reduced --

22 A. It's only common sense, yes.

23 Q. And was 1998 the apex of the landfill, or had it
24 been higher at any point?

25 A. It could not have been -- I don't know when the

1 final date was that they put the last lift on the
2 top of the hill. That would be the highest.

3 Q. But was the area you were working in in March of
4 1998 this top of the hill?

5 A. I don't recollect when we were on the top of the
6 hill.

7 Q. All right.

8 A. No, I do believe we finished our work up there
9 years before that.

10 Q. Are you present when Mr. Mehalick conducts his
11 on-site visits to the landfill?

12 A. Yes, I am.

13 Q. Do you accompany him?

14 A. Yes, I do. Lately not so much. 98 percent of
15 the time I do.

16 Q. Would January 8, 2003, have been his last
17 inspection?

18 A. Boy, I think he was there -- No, I think he's
19 been there since then. Yeah, he's been there
20 since then. I believe last month.

21 Q. Now, in his January 8, 2003, inspection report he
22 talks about a photograph showing gas bubbling up.

23 Do you recall that?

24 A. I recall him talking to me about that.

25 Q. What time of day does he normally inspect?

- 1 A. Normally before noon.
- 2 Q. Do you know what time it was on that date?
- 3 A. No, I do not.
- 4 Q. If his report said from 8:30 a.m. to 10:30 a.m.,
5 would that sound right?
- 6 A. It sounds good, yeah.
- 7 Q. His report also talks about a photograph that
8 shows a leachate seep observed at the southern
9 edge of the landfill area. Do you recall that?
- 10 A. Yes, I do.
- 11 Q. Now, how often do you make a walking inspection
12 of --
- 13 A. Daily.
- 14 Q. When he arrives at 8:30 in the morning, is that
15 before you would have had a chance to complete
16 your walking inspection?
- 17 A. No, it's done before he gets there.
- 18 Q. So when he pointed these out to you, you were
19 already aware --
- 20 A. Already aware of it. A lot of times he notes in
21 there that they're repairing it as he's writing
22 it down. That happens quite often too.
- 23 Q. Have you ever worked at any other landfill
24 besides the Watts landfill?
- 25 A. No, I have not.

- 1 Q. Now, what is a leachate seep?
- 2 A. Leachate is when water comes in contact with
3 refuge, and then it comes to the surface.
- 4 Q. From erosion or what?
- 5 A. It comes to the surface mostly because of the
6 methane gas that the landfill produces, and it
7 pushes it upward, or natural occurrence, gravity.
- 8 Q. Does trash from outside the landfill ever blow
9 onto the landfill?
- 10 A. Oh, yes.
- 11 Q. How often do you have to repair erosion, what I
12 would call erosion ruts? I think they're called
13 something else, aren't they?
- 14 A. Ongoing. During the summertime I will get caught
15 up after the rains, but it's ongoing.
- 16 Q. When you have a leachate seep or a gas bubbling
17 occurrence, what is your response?
- 18 A. It depends on the weather.
- 19 Q. Well, I believe January and December of this past
20 year were extremely dry months, so what was your
21 response back then?
- 22 A. Weather permitting, I'll excavate the area when
23 it's leachate, and then I'll put rock in it to
24 disperse it sometimes and then cap it off with
25 clay and compact it, and other times depending on

1 the weather I'll just cap it with clay.

2 Q. And is that dependent also upon the moisture
3 content of the soil?

4 A. Without a doubt.

5 Q. In order to do those things, do you require the
6 use of heavy equipment?

7 A. Yes.

8 Q. Because the landfill has slopes, the moisture
9 content affects your ability to use this heavy
10 equipment?

11 A. This is true.

12 Q. Now, this report indicates that paragraph -- not
13 paragraph, photograph 14 shows an unconnected gas
14 well and that there are many unconnected gas
15 wells. Are those unconnected gas wells the ones
16 that are not connected to the flare, or are
17 they -- are the unconnected -- are there some
18 unconnected ones that need to be --

19 A. All the ones that are connected to the flare I do
20 believe are not busted or anything -- I take that
21 back. There is a couple.

22 Q. Now, as to the ones that aren't connected to the
23 flare -- By the way, do you know how many are
24 connected to the flare or are supposed to be
25 connected?

1 A. I do not know.

2 Q. Of those that are not connected to the flare, is
3 there any way for you to cap them without
4 destroying equipment?

5 A. No.

6 Q. RTC equipment?

7 A. No.

8 Q. What efforts, if any, have you undertaken to
9 prevent the reoccurrence of silt from going into
10 Mr. Whitley's pond?

11 A. At the moment none. In the recent years past we
12 have redirected water to other locations so we
13 don't send so much volume of water to his area.

14 Q. So you've directed it away from his pond?

15 A. That is correct. I would say at least
16 50 percent.

17 Q. And what area would that water go, I mean, after
18 you redirected it?

19 A. We redirected it to the east to an area we call
20 outfall 1, 001 to be exact. Those pictures will
21 not show it, I don't think.

22 Q. Well, I'm going to show you no. 3 of People's
23 Exhibit 22. Now, does that picture show a road
24 coming down from the landfill to this pond from
25 the east?

1 A. It shows a road coming down to the pond that's on
2 the landfill, and the road is coming from the
3 east.

4 Q. Now, the water that falls onto the road would
5 still go into Mr. Whitley's pond; is that
6 correct?

7 A. That is correct.

8 Q. When you say you've redirected it, somehow
9 you've -- how have you redirected it to the east?

10 A. We have a terrace above this that gathers water
11 and runs it to the east, so we stop it before it
12 gets to here.

13 Q. I see.

14 A. But there is always some rainfall in this general
15 area that will come there.

16 Q. So any water that falls below the terrace is
17 going to still go to Mr. Whitley's --

18 A. That is correct.

19 Q. And the how big of an area is that? An acre,
20 2 acres, 3 acres? How big?

21 A. Acre maybe. I'm not a good judge when it comes
22 to acres.

23 Q. This picture doesn't show it, but is there
24 another road that slopes up to the west side?

25 A. From the retaining pond?

- 1 Q. Yeah. I mean --
- 2 A. Approximate.
- 3 Q. This one shows the road coming --
- 4 A. That is the only road to the retaining pond.
- 5 Q. Doesn't that road continue and go back up a hill
- 6 on the west side?
- 7 A. No, it does not.
- 8 Q. I see. How many men do you have working under
- 9 you currently?
- 10 A. Three.
- 11 Q. And besides yourself and those three men, are
- 12 your duties solely the maintenance of the
- 13 landfill?
- 14 A. Site inspections, right, maintenance of the
- 15 landfill, that's correct.
- 16 Q. The three men that work under you and you, you
- 17 don't repair vehicles --
- 18 A. On rainy days we do, maintenance of equipment,
- 19 stuff like this, yes.
- 20 Q. Now, you heard Mr. Whitley testify that he was
- 21 upset that you hadn't contacted him about your
- 22 latest removals of sediment from this
- 23 sedimentation pond. Have you made it a practice
- 24 to do that, or have you normally contacted him?
- 25 A. In the past other people would contact him. Now

- 1 that the job falls upon me, now it's my
2 responsibility, I'm assuming, that I should
3 contact him.
- 4 Q. Is there any way to prevent the fill that you put
5 in on the ESG side of the fence from falling into
6 the pond?
- 7 A. To the best of my knowledge there's only
8 temporary fixes for right now, soak fence. One
9 good rain fall would knock them down, but at
10 least it would be more of an effort, Riprap, slow
11 the water down, to stop siltation and stuff.
- 12 Q. Have you tried Riprap in the past?
- 13 A. Yes, I have.
- 14 Q. And didn't it all wash away?
- 15 A. Yes, and then sometimes the water changes route,
16 and I have to redo that to get it going the
17 direction I want it to go.
- 18 Q. Are you aware of any plans to create a permanent
19 structure there that would prevent --
- 20 A. I am not aware of any plans.
- 21 Q. Period, whether it's that or any other plans?
- 22 A. That is correct, period. I have no idea.
- 23 Q. That's not part of your responsibility?
- 24 A. No, it's not.
- 25 Q. The areas that the gas pipe that collects -- this

1 piping that collects the methane gas from these
2 wells, are the pipes aboveground or below ground?

3 A. They are aboveground.

4 Q. And has final cover been applied to those areas?

5 A. To my knowledge part of the landfill has a final
6 cover already that's been approved of, and other
7 parts are not.

8 Q. Is the gas piping on areas where there is not
9 approved final cover?

10 A. Once again, the question?

11 Q. Is this gas pipe, collection piping, -- I'm not
12 saying all of it, but is some of the gas piping
13 on areas where there's not approved final cover?

14 A. Yes.

15 Q. Are you familiar with the process that was used
16 at Viola to remove the overfill in the --

17 A. Very much so, yes.

18 Q. Were you involved in that operation?

19 A. Off and on I was, yes.

20 Q. And had you formed an opinion as to the
21 desirability of doing that same type of work at
22 the Taylor Ridge Landfill?

23 A. I'm confused on why they want to.

24 Q. Had you formed an opinion as to whether the
25 public health safety and welfare would be better

- 1 served or less better served?
- 2 A. Oh, there's no question in my mind. I don't
3 understand why we would remove the refuge from
4 over height, because that would create a stench
5 every day and hazards. There is an asbestos
6 field that would have to be removed, and that's a
7 very large hazard, and I don't understand -- I
8 really don't understand why not just permit the
9 height the way it is. Somebody dropped the ball
10 on it, fine and dandy, take the blame, but to go
11 through all of this work I don't understand why
12 to do that when we could leave it like it is and
13 pose less of a problem. It would not be healthy
14 to remove it, but that's beyond me.
- 15 Q. And that's from your experience working at Viola
16 and your 11 years as --
- 17 A. Without a doubt, yes.
- 18 Q. Were there any other hazards created in the
19 removal of the waste at Viola?
- 20 A. None that I can think of from Viola. Just
21 blowing debris all over the place, yeah, I never
22 thought about it. Wind factor would blow debris
23 from all over the place removing waste.
- 24 Q. Any dust?
- 25 A. Depends on the weather again.

1 Q. Is Viola an isolated area compared to the Taylor
2 Ridge Landfill?

3 A. Oh, without a doubt, yes, it is.

4 MR. WOODWARD: That's all the
5 questions I have of this witness.

6 THE HEARING OFFICER: Mr. Davis?

7 MR. DAVIS: Thank you.

8 CROSS-EXAMINATION

9 BY MR. DAVIS:

10 Q. Joe, after having diverted some of the storm
11 water, maybe even 50 percent of it, from the
12 northwest corner toward the east -- when was
13 that, first of all?

14 A. Finally did that before we were closed.

15 Q. In March of '98?

16 A. If that's when we were closed.

17 Q. Let's talk about the time period after that. You
18 mentioned silt fences. Had you put any silt
19 fences in down there?

20 A. Yes, I have.

21 Q. After March of '98?

22 A. Yes, I have.

23 Q. How long did they last?

24 A. Until the first heavy rainfall.

25 Q. And the Riprap, first of all, this is large

- 1 stones, or is it busted-up concrete?
- 2 A. It can be either one.
- 3 Q. Which did you use?
- 4 A. Both.
- 5 Q. How long did it last?
- 6 A. Maybe two to three months maybe. Rough guess.
- 7 Q. When was the last time either of those measures
- 8 were installed or tried?
- 9 A. It's been awhile. A good three years.
- 10 Q. Now, real briefly, on the gas wells, you
- 11 mentioned that the ones that aren't connected to
- 12 the flare are not capped; is that right?
- 13 A. They are -- They have a shutoff valve to them.
- 14 Q. Let me use People's Exhibit 17, which is what I
- 15 believe Mr. Woodward was referring to, the
- 16 January 2003 inspection, and I believe it was
- 17 photograph 14. Okay. Here it is. Is this one
- 18 of the wells that is not connected to the flare?
- 19 A. I have no idea. I don't know where the location
- 20 is on this.
- 21 Q. Okay. Does it show a white vertical pipe coming
- 22 up out of the ground and then a smaller black --
- 23 A. It looks like a pipe that would run to the main
- 24 line.
- 25 Q. Okay.

- 1 A. It looks like that, that's correct.
- 2 Q. And is it obvious that those pipes are not
3 connected?
- 4 A. Yes, it is, and it's shut off.
- 5 Q. Okay. This --
- 6 A. That's a shutoff valve.
- 7 Q. Okay. Toward the top of the white vertical pipe
8 there's a flange with a valve?
- 9 A. That is correct.
- 10 Q. Okay. So when we're talking about unconnected
11 wells, we're not talking about uncontrolled
12 wells? They're controlled by the shutoff valve?
- 13 A. You're correct in assuming that, yes.
- 14 Q. And the relocation of the overfill would from
15 what we understand from other testimony or
16 evidence involve about 34,000 cubic yards of
17 material; is this your understanding?
- 18 A. I have no idea when it comes to the volume.
- 19 Q. But as to the area, you know where the overfill
20 is located?
- 21 A. Yes, I do. I know approximately.
- 22 Q. And where within that area is the asbestos waste
23 disposal area?
- 24 A. Rough guess, just about dead center.
- 25 Q. And do you know how much quantity of asbestos

1 waste?

2 A. I do not know the volume.

3 Q. Are there signs posted there?

4 A. There are not signs, but I do have stakes that
5 mark the area approximately. They are normally
6 surveyed in.

7 MR. DAVIS: That's all I have. Thank
8 you.

9 MR. WOODWARD: Nothing further.

10 THE HEARING OFFICER: No further
11 questions? Okay. Thank you very much,
12 Mr. Chenoweth.

13 THE WITNESS: Thank you.

14 THE HEARING OFFICER: Do you need to
15 take a break? Let's go off the record and take a
16 ten-minute break.

17 (A break was taken.)

18 THE HEARING OFFICER: We'll go back on
19 the record. Let the record reflect we've just
20 taken a ten-minute break, and now we are
21 continuing with Respondent's case. Would you
22 please swear in the witness.

23 THOMAS ARTHUR JONES,
24 was called as a witness and, having first been
25 duly sworn to testify to the truth, the whole

1 truth, and nothing but the truth, was examined
2 and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WOODWARD:

5 Q. Would you state your full name, please.

6 A. Thomas Arthur Jones.

7 Q. Where are you employed?

8 A. ESG Watts.

9 Q. In what capacity?

10 A. As an engineer.

11 Q. Are you -- Do you have any professional licensure
12 or --

13 A. I'm a registered professional engineer in the
14 State of Illinois.

15 Q. And for how long have you held that designation?

16 A. Probably since '93 or '94.

17 Q. Did you graduate from a school of engineering?

18 A. Yes, I did.

19 Q. What school?

20 A. Michigan Technological University.

21 Q. Where is that located?

22 A. Houghton, Michigan.

23 Q. Prior to working for ESG Watts, Inc., did you
24 hold any other positions as a professional
25 engineer?

1 A. No, I haven't.

2 Q. Have you worked at any other landfills besides
3 ESG Watts?

4 A. Yes, I have.

5 Q. What landfills?

6 A. Wayne Disposal up in Bellevue, Michigan, and
7 Wayne Disposal, Oakland Disposal Facility in
8 Auburn Heights, Michigan.

9 Q. For how many years did you work at those two
10 locations?

11 A. Two and a half years.

12 Q. Do you hold an operator's license from the State
13 of Illinois also?

14 A. I have a certified operator's -- You take a test,
15 pass a test.

16 Q. And since your employment with ESG Watts -- By
17 the way, has it been continuing since 1993?

18 A. I was gone for one year.

19 Q. What year was that?

20 A. Actually I'd say '95 to '96 -- Actually, I've
21 been employed since 1990 era. '95 to '96 I took
22 a year off.

23 Q. Have you been the chief engineer for the Watts
24 Landfills during that period of time?

25 A. There was a one-year period or two-year period

1 there was another engineer that was my
2 supervisor. Probably back in '92, '93 or
3 '93, '94.

4 Q. Now, I'm going to show you what I've marked as
5 Respondent's Exhibit No. 1. Can you identify
6 that, please?

7 A. That's the significant modification application
8 prepared by CH2MHill in September 1994 for the
9 submittal at the Taylor Ridge Landfill to the
10 Illinois EPA.

11 Q. Did you hire CH2MHill?

12 A. On behalf of ESG Watts, yes.

13 Q. Did you supervise their work that they had to
14 turn in their bills to you for approval, that
15 kind of thing?

16 A. Yes, they did.

17 Q. And did you consult with them as to the
18 parameters of the application?

19 A. We reviewed their application with them. We went
20 up there, had numerous meetings at their offices
21 and at our offices at the landfill.

22 Q. Do you know what happened to that application?

23 A. Well, there's a several-step process. I think
24 originally after we submitted we received an
25 incompleteness letter. We addressed the items of

- 1 incompleteness. It was eventually deemed
2 complete, and then it was denied.
- 3 Q. I'm handing you what's been marked as
4 Respondent's Exhibit No. 2. Does that pertain to
5 that application?
- 6 A. Yes, it does.
- 7 Q. And is that the incompleteness letter?
- 8 A. This is the incompleteness letter.
- 9 Q. And could you identify Respondent's Exhibit
10 No. 3?
- 11 A. It's a letter from Ed Bakowski addressed to us.
12 That's from the Illinois EPA, and it's a letter
13 determining that the application is deemed
14 complete.
- 15 Q. And is Respondent's Exhibit No. 4 the denial
16 letter as to that particular application?
- 17 A. This is the denial letter for this application.
- 18 Q. Do you have any idea how much ESG Watts expended
19 on having that application prepared?
- 20 A. You know, I don't have the figures broken down,
21 but I do know that they probably spent -- between
22 this application and they did prepare a second
23 significant modification for us, and I think it
24 was about \$120,000.
- 25 Q. I'm handing you three volumes which have been

1 marked as Respondent's Exhibit No. 5. Can you
2 identify those, please.

3 A. These are the second application prepared by
4 CH2MHill to try to obtain a significant
5 modification at the Watts landfill in Taylor
6 Ridge, Illinois. There's two volumes, and the
7 third volume is an addendum to address the
8 deficiencies in the original application.

9 Q. And do you know what happened to that
10 application?

11 A. I think we received an incompleteness letter and
12 then a completeness letter and then finally a
13 denial letter.

14 Q. I have these out of order, but Respondent's
15 Exhibit No. 9, could you identify that, please?

16 A. This would be an incompleteness letter from the
17 Illinois EPA dated December 11th, 1996.

18 Q. And Respondent's Exhibit No. 6?

19 A. This would be a second incompleteness letter
20 dated February 14th, 1997.

21 Q. And identify Respondent Exhibit No. 7, if you
22 can.

23 A. This is a -- This letter serves two purposes.
24 One, it's a completeness letter, but it's also
25 referred to I think as a wells letter. It also

1 refers -- talks about that they're going to take
2 into consideration nontechnical aspects of the
3 facility in reviewing this application.

4 Q. And is Respondent's Exhibit No. 8 the denial
5 letter as to that application?

6 A. This is the denial letter for that application
7 dated August 5th, 1997.

8 Q. I'm handing you what's been marked as
9 Respondent's Exhibit No. 30. Can you identify
10 that, please.

11 A. This is a ledger from our computer system showing
12 what we paid CH2MHill over the years to work on
13 the significant modification.

14 Q. And the individual invoices are invoices that you
15 would have approved as part of your duties?

16 A. Yes.

17 Q. And the total for the expenditures to CH2MHill?

18 A. It says vendor total, 119,511.96.

19 Q. So your estimate of \$120,000 was fairly accurate?

20 A. Yes.

21 Q. Handing you what's been marked as Respondent's
22 Exhibit No. 10, can you identify that, please?

23 A. This is an application, a significant
24 modification application, to the Illinois EPA.
25 It's log no. 1997-323.

1 Q. The binder that it's in, it says CH2MHill. Are
2 they the ones that prepared that, or did you
3 prepare that?

4 A. Actually, I think it's something that we prepared
5 in-house. I think the cover on it is incorrect.

6 Q. And you know what happened to that application?

7 A. It was determined to be incomplete, and I think
8 we received a completeness letter, and then it
9 was eventually denied. It was eventually denied
10 on July 24th, 1998.

11 Q. I'm handing you what's been marked as
12 Respondent's Exhibit No. 11. Can you identify
13 that, please?

14 A. An incompleteness letter from the Illinois EPA
15 addressed to Watts. It's log no. 1997-323.

16 Q. So that's that application?

17 A. Yes, it is.

18 Q. That was identified as Respondent's Exhibit 10.

19 MR. DAVIS: I'd like to interrupt. We
20 have not objected to these 1 through 29, and they
21 have already been admitted was my understanding.

22 MR. WOODWARD: Except you observed the
23 right to object to relevancy.

24 MR. DAVIS: In briefs, but I'm not
25 objecting to the admissibility.

1 THE HEARING OFFICER: Okay. Well,
2 I -- I mean, I just received the motion to move
3 for the admission, and I don't believe that I
4 formally admitted them, so --

5 MR. DAVIS: So I'm suggesting that
6 since there is no objection, we needn't have the
7 witness identify. He can certainly ask him
8 whatever you want to ask him.

9 THE HEARING OFFICER: But do you have
10 a couple of exhibits that are not in this?

11 MR. WOODWARD: No. 30 wasn't.

12 THE HEARING OFFICER: So you also do
13 not object to no. 30?

14 MR. DAVIS: Right. That's correct.

15 BY MR. WOODWARD:

16 Q. So this one there was an incompleteness, a
17 completeness, and a denial?

18 A. That's correct.

19 Q. And that's --

20 A. Log no. 1997-323.

21 Q. So that would be 11 through 13A of the exhibits
22 if they're identified as log no. 1997-323?

23 A. That's correct.

24 Q. Are you familiar with Environmental Solutions?

25 A. Yes, I am.

1 Q. And who are they?

2 A. They're a consulting firm that we hired back in
3 the late '90s to try to obtain a significant
4 modification for us.

5 Q. Was it a significant modification, or was it
6 called response --

7 A. Well, I think originally we looked at hiring them
8 to prepare a significant modification for us, but
9 another course of action was decided that we
10 would take a different course of action, that we
11 would prepare a response action plan at the
12 suggestion of the director of that company, a
13 Devon Moose.

14 Q. And was the response action plan really designed
15 to leave any overfill in place and allow a
16 continuation of accepting of waste to recontour
17 the sides?

18 A. That was the whole purpose of the response action
19 plan.

20 Q. And how long -- Do you recall how long the
21 negotiations with the Illinois EPA took
22 concerning the response action plan?

23 A. I would probably say a couple years, probably two
24 years.

25 Q. So if the response action plan, revised grading

1 plan, was in August 1999, do you recall when
2 Andrews Engineering was hired?

3 A. Andrews Engineering was hired probably within
4 several months of that route not being accepted.
5 I don't think it was an official denial on it,
6 but I think we were told by the Illinois EPA that
7 they would not accept this application in this
8 form, they would not accept anything other than a
9 significant modification application.

10 Q. And do you know how much -- Well, were you the
11 one responsible for reviewing their invoices and
12 submitting them for payment?

13 A. Yes.

14 Q. Did you prepare a report for -- or have prepared
15 a report for business records about the payments
16 to them?

17 A. Yes, I have.

18 Q. Do you know how much approximately was paid?

19 A. I would have to review the document.

20 Q. Handing you what's been marked as Respondent's
21 Exhibit 31, is that the report you had prepared
22 concerning the payments to Envirogen?

23 A. Yes.

24 Q. And when did says Envirogen, is there any mention
25 of Environmental Solutions there also?

1 A. You know, I don't see it, but they did change
2 their name in the middle of us working with them.

3 Q. And I mean, the report speaks for itself, but how
4 much did we pay Envirogen?

5 A. \$108,170.74.

6 Q. And after paying them that much money, were we in
7 the same position we were in when we finished
8 with CH2MHill?

9 A. That's correct, we still did not have a
10 significant modification or closure plan
11 approved.

12 Q. Now, were both Envirogen and CH2MHill respected
13 engineers in the field of landfills in the state
14 of Illinois?

15 A. I would say that they were very respected.

16 Q. Their reputations were that they got results?

17 A. Both companies had obtained approval for
18 significant modifications within the State of
19 Illinois. I think Envirogen had probably -- You
20 know, I can't think of the exact number, but I
21 think from what I recall, it was maybe a dozen or
22 something. I think CH2MHill had maybe two or
23 three. I think Envirogen even represented to us
24 that they had the first sig mod approved, if I
25 recall correctly.

1 Q. Now, were you involved with an attempt by ESG
2 Watts, Inc., to have the Rock Island County Solid
3 Waste Agency or Rock Island County approve
4 leaving any overfill in place?

5 A. Yes, I was.

6 Q. And are you -- I'm handing you what's been
7 labeling as Respondent's Group 15. Are those the
8 documents that were involved in that activity?

9 A. Yes, they are.

10 Q. Were you present at a meeting of the Rock Island
11 County Solid Waste Management Governing Board on
12 April 17th, 2001?

13 A. You know, I can't remember the exact dates, but I
14 was present at several meetings. I think I was
15 present at every meeting that I'm aware of that
16 involved Watts employees.

17 Q. Were you present at the meeting where they made a
18 final determination as to what that Agency was
19 going to do?

20 A. Yes, I was.

21 Q. Do you recall what that action was?

22 A. That they pass a resolution saying -- actually, I
23 think saying that we had to move waste. Are you
24 talking about the last meeting we went to?

25 Q. I'm talking about the one on April 17, 2001, in

1 which we made a -- in which ESG Watts made a
2 presentation to the Rock Island County Solid
3 Waste Agency Governing Board?

4 A. Can I see those again? I was involved in several
5 meetings, and I can't remember the names of the
6 organizations, but originally there was a motion
7 passed supporting our actions, and if I recall
8 correctly, you were directed to write an opinion
9 on that for the Rock Island County Commission as
10 a whole to vote on.

11 Q. And it was -- Okay. That's all. Do you know
12 what the outcome eventually of that was, that
13 effort?

14 A. The County Board voted no, not to support our
15 efforts.

16 Q. Was it the County Board or the Rock Island County
17 State's Attorney?

18 A. I don't remember.

19 Q. Respondent's Group Exhibit 16, are you familiar
20 with that?

21 A. Yes, I am.

22 Q. Is that a significant mod application for Taylor
23 Ridge?

24 A. For Taylor Ridge prepared by Andrews Engineering.

25 Q. So is that the fourth sig mod application since

1 1993?

2 A. That's correct.

3 Q. And do you know what happened to that one?

4 A. It was denied.

5 Q. Subsequent to Andrews Environmental, Inc.,

6 preparing an application for significant

7 modification, did they also prepare a subsequent

8 submission, but not a sig mod application?

9 A. They prepared a groundwater assessment monitoring

10 hydro, and the hydrogeological assessment were

11 concurrent but for two separate reasons. One was

12 the groundwater assessment, and the other was

13 support of documentation to file this

14 application, the significant modification.

15 Q. Okay. Did they then drop the sig mod ap and

16 change course and submit a different entire

17 document?

18 A. They submitted a closure plan.

19 Q. And do you know what the status of that is?

20 A. I think it's currently pending. They've

21 requested additional information which was

22 supplied to them. I think the additional

23 information is currently under review.

24 Q. Now, this sig mod application, did it propose

25 leaving overfill in place?

1 A. No, it did not.

2 Q. So that would have been the first document that
3 did not make that as a proposal?

4 A. I think that's correct.

5 Q. Do you know how much money ESG Watts is expended
6 with Andrews Engineering?

7 A. I think approximately \$360,000, plus another
8 \$60,000 with the drilling company who performed
9 the hydrogeological and the groundwater
10 assessment work, fieldwork, so approximately
11 \$420,000.

12 MR. WOODWARD: I'm sorry. Am I up to
13 32?

14 THE HEARING OFFICER: Yes, you are.

15 BY MR. WOODWARD:

16 Q. Handing you what's been marked as Respondent's
17 Exhibit No. 32.

18 A. There's notes on back of these, so are you going
19 to keep these copies.

20 Q. Yeah, that's mine. Can you identify that,
21 please?

22 A. They're money that we had paid Andrews
23 Engineering, money that we owed Andrews
24 Engineering, and money that we have paid AEX
25 Operation Corporation (phonetic), which was a

1 company owned by Andrews that did the drilling
2 work at the Taylor Ridge facility for the
3 hydrogeologic study.

4 Q. Now, are those prepared from invoices that you
5 approve as part of your duties?

6 A. Yes.

7 Q. Are those records kept in the normal course of
8 business?

9 A. Yes, they are.

10 Q. And did you ask that that report be prepared for
11 you?

12 A. Yes, I did.

13 Q. After the expenditure of that \$360,000 or
14 \$420,000, however you look at it, are we still in
15 the same position as we were in in 1993 when we
16 hired CH2MHill?

17 A. Yes, we are.

18 Q. We have not --

19 A. We have not obtained a significant modification.

20 Q. And is Andrews Engineering a firm that has a
21 reputation in the state of Illinois for being
22 able to get things accomplished in the
23 environmental area?

24 A. Yeah, I think that they have a pretty good track
25 record of getting significant modifications

1 approved in the state of Illinois.

2 Q. Was that one of the considerations you used in
3 selecting them?

4 A. Yes, it was. We actually went through a process
5 of interviewing several consulting firms before
6 we hired them in looking for proposals.

7 Q. Who is the lead person for Andrews Engineering,
8 by the way, on our project?

9 A. Ken Liss.

10 Q. L-i-s-s. Handing you what's been marked as
11 Respondent's Exhibit No. Group 21, is that a
12 subsequent report prepared by Andrews Engineering
13 for ESG Watts and submittal to the Illinois EPA?

14 A. Yes, it is.

15 Q. Have you already identified that as one of the
16 things they prepared?

17 A. I identified it as assessment monitoring plan.
18 It's officially titled Assessment Monitoring Plan
19 in Groundwater Classification Investigation, log
20 no. 2000-077.

21 Q. Do you know what that is?

22 A. This has been approved.

23 Q. Is there a permit on the back of that? That's
24 supposed to be part of it.

25 A. Okay.

- 1 Q. Attached to group 20 -- no. 21 is a document. Is
2 that the permit?
- 3 A. This is the permanent issued by the Illinois EPA
4 for log no. 2000-077.
- 5 Q. And with the issuance of that permit we were
6 authorized to do groundwater assessment
7 monitoring; is that correct?
- 8 A. That's correct.
- 9 Q. And we did groundwater assessment monitoring for
10 a period of time; is that correct?
- 11 A. That's correct.
- 12 Q. Did we stop doing that?
- 13 A. Yes, we stopped doing it.
- 14 Q. We stopped gathering the samples or just doing
15 the reporting?
- 16 A. We stopped gathering the samples.
- 17 Q. And what was the reason for that?
- 18 A. Nonpayment to analytical firm that did the -- we
19 had performing the analytical services for us.
- 20 Q. And what analytical firm was that?
- 21 A. Test America.
- 22 Q. Are you familiar -- Have they told you what it
23 would take to get them to recommence?
- 24 A. Payment in advance.
- 25 Q. Do you know whether we've paid them or not?

- 1 A. I know we started a payment plan with them. I
2 don't know if we've completed that at this time
3 or not.
- 4 Q. You heard Mr. Chenoweth testify that there was an
5 area of asbestos in the landfill that would
6 require removal if we're required to remove the
7 overheight; is that correct?
- 8 A. That's correct.
- 9 Q. And he said that it was marked by some stakes.
10 Do you know how it's marked?
- 11 A. Well, we have it surveyed in. It's required by
12 the asbestos regulations to document the location
13 and placement of all asbestos-containing material
14 we've taken to the landfill.
- 15 Q. And is that asbestos in the area that the
16 Illinois EPA says would have to be removed in
17 order to comply with the maximum permitted
18 height?
- 19 A. I would say yes. There may be due to settlement
20 over the years that that general location may
21 actually be below our permitted elevations. I
22 would have to review the data to see, but it
23 would -- there's a good chance it does fall
24 within areas that need to be removed.
- 25 Q. Now, when you were involved in the activities

1 described in Respondent's Group 15, was that
2 because you had formed a professional opinion
3 about removal of overheight?

4 A. There are two reasons why we try to pursue that
5 avenue. One is that it was my opinion and then
6 several other peoples' opinion that moving waste
7 isn't always in the best interest of the
8 environment, and second of all, there was a
9 precedence set in another county where they
10 requested the exact same thing that we were
11 doing, and the County Board did grant approval,
12 and the Illinois EPA from my understanding
13 acquiesced to their judgment.

14 Q. And it was your understanding of the county -- at
15 least the Solid Waste Management Committee was
16 willing to recommend that the waste remain in
17 place?

18 A. They made that recommendation to the County Board
19 as a whole.

20 Q. And that recommendation did not win today. Do
21 you know why?

22 A. The State's attorney here and the -- for Rock
23 Island County wrote a letter to the County Board,
24 and it's my recollection saying that he would not
25 support such an action based upon information he

1 had received from the Attorney General's Office.

2 Q. In making the presentation that ESG made to the
3 county, it was clear, was it not, that if the
4 county did not, that was never an issue?

5 A. Oh, yeah, we told them right up front that if
6 they were not interested in supporting this, that
7 was fine, it's a simple yes or no answer for us.
8 If they were interested in supporting, then, you
9 know, it was our intention to move waste.

10 Actually, I was instructed by the owner of the
11 company, James Watts, not to pursue that course
12 of action. He just didn't think that there would
13 be support for it, and he told me just move
14 waste.

15 Q. Are you familiar with contracts that ESG has with
16 RTC Corporation?

17 A. Yes, I do.

18 Q. And what do the contracts allow RTC to do?

19 A. To extract the landfill gas from the landfill.

20 Q. Does it give them an exclusive right?

21 A. It gives them the exclusive right.

22 Q. And has RTC moved to construct an energy --
23 landfill gas to energy conversion plan at the
24 Taylor Ridge, Andalusia landfill?

25 A. No, they have not.

1 Q. Do you know what the status of that company is?

2 A. It's my understanding that they're a debtor in
3 service, which is a form of bankruptcy.

4 Q. They retain possession of their assets?

5 A. Yes, they have.

6 Q. Well, they're in a reorganization; is that what
7 you're referring to?

8 A. Yes.

9 Q. And has ESG Watts employed legal counsel to
10 represent them in that bankruptcy proceeding?

11 A. Yes, we have.

12 Q. And do you know who that is?

13 A. Hinshaw Culbertson.

14 Q. And have they -- Do you know whether they have
15 been successful in terminating what I call RTC,
16 Resource Technology Corporation's rights?

17 A. No, they have not been successful.

18 Q. Are there things that you believe ESG Watts could
19 do to alleviate the inactivity of RTC?

20 A. I feel if we were able to terminate the contract,
21 we would be able to hire another developer to
22 come in and finish the project.

23 Q. You believe that this particular landfill that's
24 in question today is one that would produce a
25 profit for a landfill gas to energy conversion

- 1 plan?
- 2 A. I think it's economically viable.
- 3 Q. But short of terminating their rights, are there
- 4 any temporary measures we could undertake?
- 5 A. Fix the flare.
- 6 Q. What about this picture that shows where the
- 7 piping is not connected?
- 8 A. You know, I haven't seen that picture.
- 9 Q. It's Exhibit 17, Picture Photograph 14.
- 10 A. It looks like it's a well head that the valves
- 11 are shut off and that it's not connected to the
- 12 lateral. I think one of the problems with the
- 13 way that RTC set this system up, if that was
- 14 connected, what would eventually happen is the
- 15 condensate from the gas as it comes out of the
- 16 ground, the gas is warm, and as high moisture
- 17 content, it hits the cold air. The gas
- 18 temperatures down at the landfill are about
- 19 120 degrees. As the gas comes out, if it's a
- 20 cold morning or winter or whatever, the moisture
- 21 would condense, and this lateral goes up the
- 22 hill, and the moisture would collect in this
- 23 elbow right here and basically plug the well and
- 24 make it ineffective.
- 25 Q. So I think there was some testimony or some

- 1 statement earlier that only 30 wells were
2 connected to the --
- 3 A. 30, 35, somewhere in there.
- 4 Q. -- to the flare that is in existence. Is that
5 because those are the ones that can be without
6 having this condensate problem?
- 7 A. Yeah, they're -- the lines are -- They have
8 enough fall on them where they're able to collect
9 the condensate through a low point and drain it
10 out of the system. This one it would not be
11 easily accomplished.
- 12 Q. That picture shows two exposed pipe ends though;
13 correct?
- 14 A. That's correct.
- 15 Q. Now, I think there's a shutoff valve, so if the
16 shut off valve is in the off position, that well
17 is not releasing methane into the atmosphere, is
18 it?
- 19 A. That's correct.
- 20 Q. I may have inartfully asked Mr. Chenoweth this
21 question, because I thought the condensate was
22 the same thing as leachate collection. Does the
23 Taylor Ridge Andalusia Landfill engage in
24 leachate collection?
- 25 A. We extract leachate from the landfill.

1 Q. And how do we do that?

2 A. We have an air compressor down in the shop that
3 compresses area that we have a series of air
4 lines that go up to the top of the landfill, and
5 we have two pneumatic pumps which operate by air
6 pressure within the last fill, and they force the
7 leachate up and out of the landfill which is
8 carried to a central collection tank down in the
9 shop, and when that tank is full, we haul it to
10 the Milan Wastewater Treatment Plant.

11 Q. Now, is leachate collection one of the activities
12 that we were supposed to engage in to implement
13 closure?

14 A. Yes, it is.

15 Q. And this gas burnoff with the flare, is that one
16 of the other activities?

17 A. Yes, it is.

18 Q. And the groundwater monitoring that was initially
19 implemented, was that one of the activities?

20 A. Yes, it was.

21 Q. The other activities, is there something
22 preventing us from implementing them?

23 A. I feel the issuance of a permit is required to
24 properly close the landfill, to move the waste,
25 to improve design which will include a storm

1 water management plan, gas collection system,
2 leachate extraction system will all be tied
3 together in a final closure document which we
4 have not been able to obtain.

5 Q. Is there some issue as to the number of
6 groundwater monitoring wells that are going to be
7 required?

8 A. Our groundwater monitoring plan has been called
9 into question.

10 Q. And when you dig wells, do you disturb the cover?

11 A. Gas wells or --

12 Q. Groundwater monitoring wells?

13 A. No, groundwater monitoring wells have no effect
14 on the core --

15 Q. They're outside the waste area?

16 A. They're outside the waste area.

17 Q. Is there some issue as to what areas are going to
18 be required to have final -- new or additional
19 final cover?

20 A. It's my understanding that Andrews Engineering is
21 making a case to delineate certain areas in the
22 landfill from having to have additional final
23 cover.

24 Q. And why is that? What's the basis for that?

25 A. That the final cover and vegetation was in place

1 before a certain date, and I want to say it was
2 in the early '90s.

3 Q. And does that issue affect your ability to build
4 storm water retention structures and what the
5 final contour and cover is going to be?

6 A. As long as that issue is outstanding, yeah, it
7 affects your ability to have an acceptable final
8 cover with, you know, final -- final contours,
9 final cover, well placement, leachate extraction
10 placement.

11 Q. Now, were these issues present at the Viola
12 Landfill?

13 A. No, they were not.

14 Q. And why was that?

15 A. The agency made it very clear to us that what our
16 cover requirements were, where we could and could
17 not place waste. You know, it was pretty cut and
18 dry. There was no ambiguity.

19 Q. And you're not saying the agency is taking the
20 position that we cannot remove this waste, are
21 you, and move it to other places at the
22 landfill --

23 A. No.

24 Q. -- without additional permits?

25 A. No.

1 Q. It's that we may have to do everything all over
2 again?

3 A. If it's not acceptable to them, the work we
4 perform is not acceptable, then they could make
5 us redo the work.

6 Q. And the work is kind of expensive, is it not?

7 A. It's kind of pricy.

8 Q. I mean, that work forms some of the basis for
9 this \$1,183,000 final closure estimate, does it
10 not?

11 A. Yes, it does. I would say it's probably the
12 basis for most of it.

13 Q. And so basically you don't want to put ESG Watts
14 at risk for expending \$1,100,000 with the
15 possibility to have to do it all over again?

16 A. That's correct.

17 Q. Are you familiar with a permit 1996-087-SP?

18 A. Is that the permit that was issued for the
19 installation of the gas collection system?

20 Q. Well, it's People's Exhibit No. 2.

21 A. Yes, I am.

22 Q. Now, when is the requirement for a gas collection
23 system triggered?

24 A. The gas monitoring probes within the waste
25 boundary described in application log

1 no. 1996-087, which is the application of the
2 permit I'm reading from, shall be installed and
3 put into service within 90 days after final cover
4 has been applied to the various areas where they
5 are located.

6 Q. Okay. And do you know what the subsequent
7 permits read?

8 A. I think all the subsequent permits read all the
9 exact same thing.

10 Q. I'm going to show you what's been marked as
11 People's Exhibit No. 3, a supplemental permit
12 1996-136-SP, and the 1996 is a misprint. It's
13 actually a 1999 permit. Direct your attention to
14 numbered paragraph 14 in that?

15 A. The postclosure care period if any of the
16 following conditions occur, the operator shall
17 within 90 days of the occurrence propose
18 additional landfill gas management in the form of
19 an application for permit modification. Do you
20 want me to read all of the --

21 Q. Are we in the postclosure care period?

22 A. No, we are not.

23 Q. Were you present for the prosecution of ESG Watts
24 and PCB in 96-107?

25 A. Yes, I was.

- 1 Q. That also involved Taylor Ridge, did it not?
- 2 A. Yes, it did.
- 3 Q. Were you present at the hearing?
- 4 A. Yes, I was.
- 5 Q. At the whole hearing? Were you the company
6 representative at that whole hearing?
- 7 A. I was probably there the whole time. I can't say
8 for sure I was there 100 percent, but --
- 9 Q. Was there an attempt to amend the complaint at
10 the hearing?
- 11 A. Yes, there was.
- 12 Q. And by whom was that done?
- 13 A. I don't know if it was Mr. Davis or Amy
14 Simmons-Jackson.
- 15 Q. Somebody from the people of the State of
16 Illinois?
- 17 A. Yeah, from the AG's office.
- 18 Q. And what was the purpose of the amendment to the
19 complaint?
- 20 A. To show that we were over height. I think there
21 were two issues that they amended, but I just
22 remember specifically the over-height issue.
- 23 Q. And when was that hearing held?
- 24 A. 1990 -- You know, I can't remember the exact --
25 the date.

1 MR. DAVIS: December 12, 1996.

2 MR. WOODWARD: I was going to say
3 October. That's how bad my memory was.

4 A. December 12th, 1996.

5 Q. Do you know what the outcome of that attempt to
6 amend the complaint was?

7 A. The hearing officer, if I recall correctly,
8 denied their amended complaint, the submittal of
9 it, but I think they submitted it to show cause.
10 Is that the correct legal term?

11 Q. I mean, are you talking about the --

12 A. The line of testimony was allowed to show cause,
13 I think is the term that they used.

14 MR. DAVIS: Oh, offer of proof.

15 THE WITNESS: Offer of proof.

16 BY MR. WOODWARD:

17 Q. But as far as you know, the hearing officer
18 denied it. Do you know whether the full Board
19 did or not?

20 A. I don't recall. I -- From my recollection, they
21 did not -- it was not addressed in the final
22 outcome, so I guess --

23 Q. So the decision of the Pollution Control Board
24 did not --

25 A. -- address that issue.

1 Q. Now, subsequent to the hearing in PCB 96-107, are
2 you aware of any activity by the attorney general
3 of the State of Illinois to prosecute ESG Watts
4 either in Rock Island County Circuit Court or
5 some other court in the state of Illinois about
6 Taylor Ridge Landfill?

7 A. For that issue or for any issue?

8 Q. For any issue.

9 A. Yes.

10 Q. Subsequent to the hearing in 96-107?

11 A. That's correct.

12 Q. And would that have been in 98-CH-20 in Rock
13 Island County Circuit Court?

14 A. Yes.

15 Q. So at the time that was filed, the Attorney
16 General's Office clearly knew that there was an
17 over-height issue?

18 MR. DAVIS: Objection. That calls for
19 speculation.

20 THE HEARING OFFICER: Sustained.

21 MR. WOODWARD: They made an attempt to
22 amend their complaint in December of 1996 to
23 include the over-height allegations, and they
24 were unsuccessful in doing that. Now, how could
25 they attempt to amend their complaint if they did

1 not have a factual basis for doing so? They had
2 to have some knowledge in December of 1996, so
3 that doesn't require any speculation. He was
4 present when they made the motion.

5 THE HEARING OFFICER: But it was the
6 way you worded your question. Would you like to
7 reword the question, please. If in his opinion,
8 perhaps.

9 BY MR. WOODWARD:

10 Q. In 1998 the People of the State of Illinois
11 versus ESG Watts, Inc., was filed in Rock Island
12 Circuit Court. Did you have any personal
13 knowledge as to any person in the Illinois
14 Attorney General's Office knowing of an
15 over-height situation at the Rock Island County
16 landfill?

17 A. Yes, I think everybody was well aware that it was
18 over height. There was no attempt on our part to
19 hide it.

20 Q. And do you know whether 98-CH-20, the case that
21 was identified as being filed in the Circuit
22 Court of Rock Island County, addressed the
23 over-height situation?

24 A. Not that I recall.

25 Q. Do you know whether this People's Exhibit

- 1 No. 4 -- whether that was the closure,
2 postclosure cost estimate for Taylor Ridge in
3 1998?
- 4 A. Are you saying is it exact number, or is it in
5 that range?
- 6 Q. Is it in that range?
- 7 A. I would say it was probably within that range.
- 8 Q. Did you prepare closure, postclosure care plans
9 for the Watts landfill in Rock Island County,
10 what I call the Taylor Ridge Andalusia?
- 11 A. I think I prepared probably the last three, four,
12 five of them. I don't know.
- 13 Q. Except for the ones that Andrews just prepared?
- 14 A. I probably supplied them with the data.
- 15 Q. And do you remember a number for closure,
16 postclosure care in the range of \$2,231,000 for
17 Taylor Ridge --
- 18 A. For closure and postclosure care, yes.
- 19 Q. And this was 1,183,000 just for closure; right?
- 20 A. That's correct.
- 21 Q. Your prior one didn't include waste relocation,
22 your prior estimates that you prepared didn't
23 include waste relocation?
- 24 A. No, they did not.
- 25 Q. And that number is 102,000 of it right there, is

1 it not?

2 A. I would have to read it. Waste relocation,
3 \$102,000.

4 Q. And does it include for putting additional final
5 cover that your prior estimates didn't include?

6 A. Yes, it does.

7 Q. And how much cost is associated with that?

8 A. About \$765,000.

9 Q. So about 800,000 of that 1,183,000 wasn't covered
10 by your prior estimates?

11 A. No, it was not.

12 Q. And is that because you had a professional
13 opinion about the removal of the waste?

14 A. No, because the prior closure cost estimates were
15 based upon a different set of regulations.

16 Q. Okay. 807 versus 814 and 811?

17 A. That's correct.

18 Q. Would you take a minute to just look at all these
19 pictures that -- It's Exhibit 21 through 26, is
20 it? The border where this fence bisects at times
21 the retention pond?

22 A. Uh-huh.

23 Q. That's reflected in several photographs. Is
24 there any temporary measure that could be done
25 that you think would be effective to prevent the

1 fill that's placed on our side to keep standing
2 water from standing on our landfill from sliding
3 into Mr. Whitley's retention pond?

4 A. I guess I'm confused by the question. You've
5 asked if there's anything I could do to prevent
6 standing water from going --

7 Q. Not standing water, the fill that's placed to
8 prevent the standing water on our side.

9 A. No.

10 Q. Couldn't put pound plastic pipe in or anything
11 just to --

12 A. There's nothing we could do on our side. There's
13 nothing we could do on our property. We could
14 pump the water up onto the landfill, use it to
15 water the vegetation.

16 Q. I'm not talking about water. I'm talking about
17 the fill. Mr. Whitley was complaining that
18 the -- we'd put fill in, and it was right up
19 against the fence and then the fill would fall
20 into the pond, his retention pond, and resedimate
21 (phonetic) -- is that a word?

22 A. Construct a concrete wall.

23 Q. But that's not a temporary measure, is it?

24 A. No.

25 Q. I mean, there are plans for this area, is there

1 not, in the storm water retention --

2 A. I think that the storm water management plan
3 tries to address the entire site.

4 Q. And Mr. Liss in his testimony will be able to
5 address any calculations Andrews Engineering has
6 performed for that?

7 A. That's correct.

8 Q. But -- So my point is: Is there something in the
9 interim on a temporary basis that you think would
10 be effective? I mean, Mr. Chenoweth testified
11 that he put Riprap there, that wasn't effective?

12 A. It's temporary, you know, for a few storms.

13 Q. You heard Mr. Whitley testify that he's lost
14 about 140 feet on that retention pond?

15 A. That's correct.

16 Q. As an engineer do you believe that from those
17 photos?

18 A. You know, it's -- 140 feet seems a long ways.
19 You know, I think he testified that that pond was
20 about 40 feet wide and the berm was another
21 10 feet wide, and I think the pond is pretty
22 close past that berm right there.

23 Q. You're talking about his big pond?

24 A. Yeah. Yeah, the big pond is relatively close to
25 that berm that separates the pond from the

1 retention base, so there's, you know, 50 feet. I
2 don't think the pond is another 100 feet away
3 from that berm.

4 Q. Do we know how long the berm is?

5 A. How wide it is?

6 Q. (Attorney nods head yes.) That's correct. I'm
7 shaking my head.

8 A. I don't know. 10, 15 feet.

9 Q. I'm talking about the length of the berm.

10 A. The length of the berm?

11 Q. Uh-huh.

12 A. Well, you said he said the fence posts are about
13 10 feet apart. I'd say it's about 100, 120 feet.

14 Q. And he still has plenty of that, right, I mean,
15 the last photo that's identified as Exhibit

16 No. 26?

17 A. Has a lot of what?

18 Q. A lot of water. It's not filled in with
19 sediment?

20 A. No. Yeah, there's still a lot of water there. I
21 see Riprap placed, and I see a silt fence in
22 place in there too.

23 Q. I think that's all I have from those photos.

24 Does ESG have any operating landfills at the
25 current time?

1 A. No, we do not.

2 Q. Does it have any source of revenue?

3 A. No, it does not -- Well, --

4 Q. Other than --

5 A. The \$3,000 check that we're supposed to get every
6 month from RTC, no.

7 Q. Is that the only source?

8 A. That's the only source, but, you know, I don't
9 think we've received a check in probably six
10 months.

11 Q. So any additional revenues are obtained from how?

12 A. We lease some land out. I think that we get a
13 couple thousand every six months or something, so
14 there's no -- no revenue there really that I can
15 think of.

16 Q. And how long has that been going on? I mean,
17 when was the last time ESG Watts had an operating
18 landfill?

19 A. Was it March of 1998, was it?

20 Q. So this was the last landfill that was open?

21 A. Yes.

22 MR. WOODWARD: That's all I have.

23 THE HEARING OFFICER: Mr. Davis,
24 before you begin, you do not have any objection
25 to Respondent's Exhibits 30 through 32?

1 MR. DAVIS: That's correct.

2 THE HEARING OFFICER: Okay. Then
3 they'll be admitted. Thank you. Continue.

4 CROSS-EXAMINATION

5 BY MR. DAVIS:

6 Q. I only have one area of inquiry, Tom. This
7 pertains to the overfill. If I understand your
8 testimony, you were present during the -- I think
9 it would have been the third and final day of
10 hearing in the previous case, PCB 96-107?

11 A. Okay.

12 Q. And that was December 12, 1996. Now, this was
13 the session held in Springfield?

14 A. That's correct.

15 Q. Okay. And I believe it was the contractor ESG
16 Watts had hired to do soil borings that was
17 testifying?

18 A. That's correct.

19 Q. What was his name?

20 A. Steven Brao.

21 Q. That's right. B-r-a --

22 A. B-r-a-o.

23 Q. Now, did Mr. Brao -- what did he say on the
24 over-height issue?

25 A. I don't know he was there to address the

1 over-height issue. I don't --

2 Q. How did this issue come up during the hearing?

3 A. It's my recollection that Mr. Brao was obtained
4 to document the cover thickness on the landfill.
5 He had prepared a drawing with a grid on it every
6 100, if I recall correctly, showing the cover
7 thickness at each discrete location, and that map
8 he used was generated in the routine business
9 practices of a landfill. We had attained an
10 aerial survey. He had used that aerial survey to
11 place his grid location points, it was a 100 grid
12 on, and that map at the time showed the elevation
13 of the landfill at that time.

14 Q. Okay. Now, Tom, that map showing the elevation
15 pertained to an area of the landfill that had
16 previously received final cover?

17 A. Yes.

18 Q. Okay. And do you know when that final cover had
19 been applied?

20 A. There was various years. You know, I think some
21 of it had been applied prior to my employment and
22 some of it applied, you know, after I started
23 working there.

24 Q. Now, was this the first time that you learned
25 that there may have been an exceedence (phonetic)

1 of the vertical elevation?

2 A. I don't -- I don't think so.

3 Q. So you were aware of it prior to December '96?

4 A. Yes, I was. I also -- If I recall correctly,
5 that that aerial survey was not an accurate
6 representation of the landfill at the time he did
7 his cover thickness investigation.

8 Q. So he was using an outdated aerial?

9 A. He was using an older aerial -- I couldn't tell
10 you whether it was -- When the aerial was taken,
11 we were excavating a future area to place waste
12 in. All that dirt that we excavated out of there
13 we placed on top of the landfill. That dirt was
14 on top of the landfill when the aerial was taken.
15 That dirt has since been removed. We used it as
16 a stockpile location.

17 Q. This was during the construction of the, for lack
18 of a better term, so-called hole in the northeast
19 corner?

20 A. That would be correct, yes.

21 Q. Do you recall reading the Pollution Control
22 Board's February '98 order in 96-107?

23 A. I have read it.

24 Q. And it addresses this offer of proof that you
25 testified about a few minutes ago?

1 A. Yes.

2 Q. Do you recall the Board ruling, "given the
3 character of testimony regarding the overage,
4 adequate evidence of this potential violation is
5 lacking?"

6 A. I don't remember that specifically, but if that's
7 what it says, then that's what it says.

8 Q. Well, in addition to the outdated topographical
9 or aerial, were there other concerns whether,
10 and, if so, how much over height may have been
11 there. Now, I'm talking about prior to the
12 landfill ceasing waste acceptance in March of
13 '98. Was there still some uncertainty on this
14 issue?

15 A. Yes, there was -- Well, I don't think -- It was
16 not uncertain. Everybody knew that we were over
17 height. There was no -- I don't think anybody
18 denied that fact. I think the documents speak
19 for themselves.

20 Q. Okay. Now, the documents would be what, the sig
21 mod aps?

22 A. That, the response action plan prepared by
23 Envirogen. I think, you know, that document
24 itself specifically addresses that we were over
25 height.

1 Q. When was it, Tom, if you know, that the
2 quantification of the overfill was made?

3 A. I think Beeling prepared some calculations at our
4 direction, but I couldn't tell you when it was
5 done.

6 Q. Okay. Now, I'm talking in particular about the
7 34,100 cubic yards.

8 A. Uh-huh.

9 Q. You don't know when that number was communicated
10 to the Illinois EPA?

11 A. I would have to review a document.

12 MR. DAVIS: I have no other
13 cross-examination.

14 THE HEARING OFFICER: Thank you.
15 Mr. Woodward?

16 REDIRECT EXAMINATION

17 BY MR. WOODWARD:

18 Q. In Respondent's Group No. 15 I'm directing you
19 to a document that's included in there that's
20 prepared by Bryant Johnsrud of Andrews --
21 Environmental Engineering?

22 A. Uh-huh.

23 Q. There is a calculation of 34,000 cubic yards in
24 that, is there not?

25 A. Yes, there is.

- 1 Q. Okay. And that's dated when?
- 2 A. January 29th, 2001.
- 3 Q. So when he prepared that memo for the County
4 Board and Solid Waste Commission, do you know
5 whether it had already been communicated to the
6 Illinois EPA?
- 7 A. That number?
- 8 Q. Yes.
- 9 A. Yes, I think it had been previously submitted to
10 them. I don't know if Andrews had done it, but I
11 think the number is very close to what Envirogen
12 submitted in their response action plan.
- 13 Q. And Envirogen, did they rely upon information
14 prepared by Beeling?
- 15 A. I think they relied upon the survey data
16 collected by Beeling.
- 17 Q. And Beeling, we're talking about Beeling
18 Engineering now known as Raymonds Consulting --
19 Consultants or Consultants, Inc., or something
20 like that?
- 21 A. Yes, and I don't even know if they survey
22 anymore.
- 23 Q. So the date that appears on Envirogen's --
24 A. Response action plan is --
- 25 Q. I think that is this document right here?

- 1 A. No, that's Andrews.
- 2 Q. Oh, here it is.
- 3 A. August 10th, 1999.
- 4 Q. So we know it was done before that; right?
- 5 A. Yes. The existing grades are based upon a
6 topographical map which was flown on April 24th,
7 1998.
- 8 Q. Was that done by Beeling Engineering, that
9 topographical map, or is that some other map that
10 they're referring to?
- 11 A. Beeling supplied what we would call the ground
12 control. The aerial survey was performed by a
13 firm that specializes in aerial surveys.
- 14 Q. Was Beeling's report based on an aerial, or was
15 it based on a land survey -- a ground survey?
- 16 A. It was based upon the data obtained from the
17 aerial survey. Beeling did a ground survey to
18 supply control points as reference points to the
19 aerial survey.
- 20 Q. And in that ground survey did they make any
21 determination as to any overfill?
- 22 A. Not that I can recall.
- 23 Q. But the fact that there hadn't been an exact
24 calculation of how much overfill there was, you
25 believe everybody knew prior to that date, in

1 fact, back on December 1996 that we were over
2 height?

3 A. I think if you were to look at Rob Mehalick's
4 inspection of reports, IEPA inspector reports,
5 that would probably be so.

6 Q. When we talk about over height in this situation,
7 hasn't Illinois EPA, the Illinois Attorney
8 General's Office, and ESG Watts come to agreement
9 that when we say over height we're talking about
10 those areas that exceed the maximum mean
11 elevation of the placement of waste?

12 A. It would be hard for me to speculate.

13 Q. Well, I mean, haven't they communicated that's
14 what we have to remove, anything over the maximum
15 mean elevation, permitted mean elevation of 752?

16 A. I've heard that, yes.

17 Q. And there are documents prior to January -- I
18 mean December 12, 1996, that talk about a maximum
19 mean elevation of greater than 752, are there
20 not?

21 A. Yes, there are.

22 Q. And they were filed with the Illinois EPA?

23 A. That's correct.

24 MR. WOODWARD: That's all.

25

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REXCROSS-EXAMINATION

2 BY MR. DAVIS:

3 Q. Tom, has there been only one aerial survey?

4 A. No, there's probably -- I would think there's
5 been three, maybe four. I think -- I think
6 we've -- may have done an aerial survey. I know
7 we did one for this application originally. I
8 think we did an aerial survey for the response
9 action plan, and I think we did an aerial survey
10 for the Andrews application too.

11 Q. So Mr. Brao relied upon the 1994 sig mod aerial
12 survey?

13 A. I would have to see which one.

14 Q. And then subsequent to his testimony in '96 the
15 response action plan preparation had another
16 aerial survey?

17 A. Yes.

18 Q. And then it was on that basis that somebody else
19 did some ground survey work or in conjunction
20 with that second aerial that somebody else, as
21 you just testified, did some ground survey?

22 A. That's correct.

23 Q. And that second aerial with the ground survey
24 work for the response action plan to your mind
25 confirmed the existence of the over height but

1 didn't quantify it? I'm just trying to summarize
2 your testimony.

3 A. I think we had a number prior to that before the
4 response action plan that was applied by Beeling,
5 because I think we looked at previous, you know,
6 how much waste we would have to remove.

7 Q. But the current number, the 34,100, has come from
8 the third and final aerial survey for the most
9 recent sig mod?

10 A. That's my understanding, my recollection.

11 MR. DAVIS: Okay. Thank you. Sir.

12 MR. WOODWARD: I have nothing further.

13 THE HEARING OFFICER: Great. Thank
14 you very much, Mr. Jones. I think we are
15 finished with you.

16 (A discussion was held off the
17 record.)

18 THE HEARING OFFICER: We've gone off
19 the record for a moment to discuss the fact that
20 the Respondent has a third witness for whom he
21 would like to submit written testimony; is that
22 correct?

23 MR. WOODWARD: Ken Liss, L-i-s-s.

24 THE HEARING OFFICER: And the people
25 do not object?

1 MR. DAVIS: That's right. We have
2 been apprised of the nature of that testimony,
3 and we are confident that there will be no need
4 for cross-examination. In order to expedite the
5 conclusion of this hearing rather than carry over
6 until tomorrow, we're willing to let the
7 Respondent have adequate time for Mr. Liss to
8 prepare his written testimony. We certainly
9 reserve the right to argue in our brief that --
10 what Mr. Liss will testify to may or may not be
11 relevant to the alleged violations.

12 THE HEARING OFFICER: Okay. So we
13 will expect written testimony from Mr. Liss by
14 Friday, June 13th, and that will be filed in the
15 clerk's office for the Pollution Control Board
16 clerk in Chicago. Okay. Before we hear closing
17 arguments, I'd again like to go off the record to
18 discuss the transcript availability and a
19 briefing schedule which will then set on the
20 record, so we'll go off again for a minute.

21 (A discussion was held off the
22 record.)

23 THE HEARING OFFICER: All right.
24 We'll go back on the record. We've just had an
25 off-the-record discussion regarding posthearing

1 briefs. The parties have agreed to a briefing
2 schedule as follows. The transcript of these
3 proceedings will be available from the court
4 reporter by June 13th and will appear on the
5 Board's web site shortly thereafter. Public
6 comment must be filed in accordance with
7 Section 101.628 of the Board's procedural rules,
8 and we will allow public comment to be filed also
9 through June 13th, 2003, of course. The Peoples'
10 brief will be due by July 11th, 2003, and
11 Respondent's response brief will be due by
12 August 8th, 2003. The reply brief, if any, will
13 be due by August 29th, and since this is not a
14 decision deadline case, I will allow the mailbox
15 rule to apply for the briefs and the public
16 comment. At this time I will ask the People if
17 they have any closing statements they would like
18 to make.

19 MR. DAVIS: We will summarize our
20 arguments in the written brief.

21 THE HEARING OFFICER: Thank you. Does
22 the Respondent have any closing statement?

23 MR. WOODWARD: No. We'll reserve it
24 for the brief.

25 THE HEARING OFFICER: Okay. I will

1 now proceed to make a statement as to the
2 credibility of witnesses's testifying during this
3 hearing. Based on my judgment and experience, I
4 find all of the witnesses testifying to be
5 credible. At this time I will conclude the
6 proceedings. It is Tuesday, June 3rd, at
7 approximately 6:00 p.m., and we stand adjourned.
8 Thank you all very much for coming.

9 (The hearing was concluded at 6 p.m.)

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CERTIFICATE OF REPORTER

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4

5 The undersigned, a Certified Shorthand Reporter
of the State of Iowa, do hereby certify:

6

7 That she acted as reporter in the cause
mentioned on the title page of this transcript and
took down in machine shorthand the testimony offered
8 and proceedings had on said hearing.

9

10 That the foregoing pages of typewritten matter
is a full, true, and complete transcript of
proceedings had in this cause and that said
transcript contains all of the testimony offered and
11 proceedings had at the times herein shown.

12

DATED this _____ day of June, 2003.

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Heidi L. Weston
Certified Shorthand Reporter

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