ORIGINAL

THE ILLINOIS POLLUTION CONTROL BOARD

WARSAW/ITCO, Petitioner, vs. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 11-76

TRANSCRIPT FROM THE PROCEEDINGS taken before HEARING OFFICER CAROL WEBB, by LISA K. HAHN, CSR, RMR, a notary public within and for the County of Macon and State of Illinois, at the Illinois Pollution Control Board, 1021 North Grand Avenue East (North Entrance), Springfield, Illinois, on the 26th day of February 2013, A.D., at 10:30 a.m.

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
ALLAN GREEN	9	20	31/40	34
THOMAS HENNINGER	42	45	51	

E X H I B I T S

NUMBER/LETTER	MARKED	RECEIVED
Petitioner's Exhibit 1	17	19
Petitioner's Exhibit 2	18	19
Petitioner's Exhibit 3	20	20

HEARING OFFICER WEBB: All right. Good morning. My name is Carol Webb. This is a hearing for PCB 11-76 Warsaw/Itco versus IEPA. It is February 26th. We are beginning at 10:30 a.m.

For the record, although Petitioner is located in Tazewell County, there was no known public interest in this case. Thus, I granted the parties' request to hold the hearing in Springfield.

At issue in this case is Respondent's partial denial of Petitioner's amended corrective action plan budget. The decision deadline in this case is August 22nd.

The Pollution Control Board members will make the final decision in this case. My purpose is to conduct a hearing in a neutral and orderly manner so that we have a clear record of the proceedings.

This hearing was noticed pursuant to the Act and the Board's rules and will be conducted pursuant to Sections 101.600 through 101.632 of the Board's procedural rules.

At this time, I'll ask the parties to please make their appearances on the record.

MR. RIFFLE: Good morning. Robert Riffle on behalf of the Petitioner.

MS. JARVIS: Melanie Jarvis, Special Assistant Attorney General on behalf of the Agency.

HEARING OFFICER WEBB: Thank you. Are there any preliminary matters anyone wishes to discuss before we begin? Okay.

Would Petitioner like to make an opening statement?

MR. RIFFLE: Yes, briefly.

Good morning. I appreciate the opportunity to be here today. I think at the heart of this case is maybe a fairly simple misunderstanding and unfortunate scenario, and I don't think there are going to be a tremendous number of facts in dispute. It's really a question of how these facts relate to the right to reimbursement.

In 2002 with respect to this site, a plan was submitted and approved to put a ground water treatment system in place, essentially a system of trenches and pumps to remediate ground water. At that time back in 2002, the plan was approved, but the budget was not approved.

In a series of three subsequent addendums, the budget was approved to operate to first construct and then operate that system. My client went ahead and

proceeded in good faith to construct that system and operated that system and, again, in this series of planned budget amendments, those were approved.

At some point in 2005, a determination was made that the system really wasn't optimal; that although some progress was being made in this process of pumping and treating ground water, that the system could be enhanced through a series of horizontal piping and by remediation.

At that time, and I think this is the crucial fact in this case, at that time the enhancements to that pump and treat system were rejected. IEPA said, no, we are not going to approve your enhancements to the system. However, at no point in time, did the IEPA ever state that the existing system should be discontinued, and so that system continued to be operated. The enhancements were never made, but the pump and treat system that was already in place continued to be operated.

My client had an approved budget to have a permit for the error and for the water discharge. That money was paid. It's undisputed that those moneys were paid. They operated the system in good faith.

Now the EPA is coming back and saying, look, in 2005, we told you that we weren't going to let

you enhance that system, and inherent in that rejection of the enhancements, you should have figured out that we didn't want you to continue to operate the system that had already been approved, the budget had already been approved and had been operational for many years.

That is the crux of the issue here today is whether my client should bear the penalty for not discontinuing that system in a situation where they were never told that that is what they should have done, and I think that's what really this all comes down to here today.

I have Mr. Green here today to testify as to the history of the project and all of the details as to how we got here today, but in a nutshell, we believe that it's clear that Warsaw/Itco and Midwest Environmental operated appropriately under the approved plan to continue to operate this system, never having been told to discontinue it.

Thank you.

HEARING OFFICER WEBB: Would the Agency like to make an opening statement?

MS. JARVIS: Yes, just very briefly.

I guess that is the crux because, for us, it was very clear that their groundwater system was not

running, and in the 2005 letter, which we will show on page 79 of the record, it's clear that we say that it's difficult to ascertain whether or not this system was working and that they had to remediate the source of the contamination before running the system. So, for us, it was very clear that they were told not to run the system after 2005.

The amounts were rejected in the budget for complete use of the system, and they were told to do a haul and -- a dig and haul of the contaminated soil.

In fact, there's no proof in the record that the system has ever remediated the ground water at all.

So we believe that they were told that -- they were told twice. They never appealed the 2005 letter where they were told that they had to haul and dig first. They never gave us a list of sites where this project was working properly, and it was completely eliminated from the budget for them to go forward, and we believe that that's what the testimony in the record will show.

HEARING OFFICER WEBB: Okay.

Mr. Riffle, you may call your first witness.

MR. RIFFLE: Yes. Allan Green will be our

witness.

HEARING OFFICER WEBB: Mr. Green, would you like to have a seat up there? And Court Reporter, will you please swear the witness?

(Witness sworn.)

ALLAN GREEN, produced, sworn and examined on behalf of the Petitioner, testified as follows:

DIRECT EXAMINATION

BY MR. RIFFLE:

Q. Mr. Green, would you please identify yourself for record?

A. Allan Green. I'm the President of Midwest Environmental Consulting and Remediation Services in Tremont, Illinois.

Q. And what's the relationship between Midwest Environmental and Warsaw/Itco?

A. Warsaw/Itco is a client of ours regarding a leaking underground storage tank incident at their facility in Minier.

Q. And can you give just a very brief overview of the history of this project and Midwest's involvement in this remediation?

A. We got involved in the site during a tank

removal and replacement at the facility where, when the former tanks were removed, we had a free product situation on the site. Ground water -- we got involved in it at that point to basically undergo the IEPA corrective action investigation and corrective action activity to try to close the incident.

Q. And what were the initial actions you took in terms of remediation?

A. The former -- the leaking tanks were removed and ended up being replaced. The lines -- the entire systems basically were replaced. Any soil that was dug up during the tank removal was removed to a landfill. The ground water that had the free product on it was pumped out of the excavation to an extent. I mean, we had ground water just a couple feet below the surface, but what free product we could recover by pumping that water out of there, it was recovered and disposed of. Then the new tanks were installed.

At that point, the -- we did an investigation on the site, soil borings and wells; basically determined that a ground water interceptor trench would be appropriate at the site, based upon the water levels we had in the wells and the observations during the investigation and the early action activities.

So a request was made to the EPA to install basically a ground water recovery and treatment system on the site, mainly to keep any contamination from going off the property.

The EPA approved that, did not approve the budget, made some comments regarding the budget, so an amended budget for that plan was submitted. It was approved and modified. The system was installed. The ground water trench was installed. Any of the soil that was removed that was contaminated was taken off to the landfill during the remediation system install, and then the system was operated up to the point in 2004 where we started to evaluate the fact that even though we had ground water in the wells and in the excavations within a couple feet of the surface, the ground water trench was not recovering ground water that we thought it should, based upon the water levels that we had, and at that point requested -- did a little bit of study, investigated to determine if there was a way we could modify the ground water system to improve the collection on the site, and that was when we submitted that modification of the plan to the EPA, at which point that was denied. The modifications were denied.

Q. Can you give a little more detail as to what

this trench system consisted of and the hardware and work that was done to employ the system?

A. Yeah. The recovery trench consists of basically -- it's called a French drain -- and there was a trench excavated on two sides of the property, the down gradient sides of the property.

A recovery slotted PVC pipe basically was put in the bottom of the trench that led -- sloped back to a recovery sump in the corner of the property that -- then the trench was backfilled with pea gravel, permeable material, and then a -- basically an air stripper system was installed in a small building over the recovery sump to where the water that was recovered in the trench was pumped into this stripper assembly.

Basically we -- you know, you bubble the soil, aerate -- or aerate the water in this unit. The volatiles are stripped out of it and discharged into the atmosphere, and then the clean water was discharged into the sanitary sewer.

Q. Did you obtain permits for the air discharges and for the discharging into the sanitary sewer?

A. Yes.

Q. And did you pay for those?

A. Yes.

Q. From your perspective, did that -- would you call that a ground water treatment system?

A. Yes.

Q. And from your perspective, did that ground water treatment system accomplish anything in terms of protection of the environment?

A. It would have at least stopped any further contamination from my draining off the property.

Q. And it's your testimony that that is something that was accomplished by this system?

A. Yes.

Q. Okay. How long did that system remain operational?

A. It was in operation for around two and a half years. About that time that the EPA was reviewing our modification plan, there was a car accident, and the car basically ran into the treatment system building, put the unit out of operation for about four months while they were repairing the pump and resituating things back on, that the individual's insurance company paid for, and then the system was back in operation. So I'm going to say three years.

Q. And when was it back in operation approximately?

A. Basically 2005.

Q. And when did -- when, if ever, did it cease being operational?

A. It was down for about three months while it was being repaired. We had to take the stripper pump and things or the blower and things out of the unit and have it redone because it had been damaged in the car accident.

Q. And it was essentially recommissioned or restarted?

A. Right.

Q. And then how long did it operate after it was restarted?

A. It operated for about four months after that, at which time then we shut it down, based upon the fact that we were trying to determine whether, you know, there was a better way to close the incident rather than to continue to operate that system for an indefinite period of time.

Q. Okay. And the amounts that you're seeking in this case, what periods of time do those relate to and what system do those relate to?

A. It's basically the operation of the original ground water system.

Q. Okay. Is any part of what you're seeking related to the enhanced system that was rejected?

A. No. No enhancements were made to the unit.

Q. Were you ever told by anybody at IEPA or on behalf of IEPA to shut down the original system?

A. No.

Q. What is the current status of that site?

A. Following the rejection of the enhancements, we made a proposal to try to close the site through the TACO program, which originally the project manager originally rejected and that he said, well, that's changing our original plan of remediation, and that we could do that, but it would not be reimbursable.

I guess he talked to some people and decided that we could go ahead and send that proposal in, which we did. That did eventually get approved.

We have done the TACO on the property, gotten the land use restrictions, gotten the ground water ordinance passed by the city and gotten any of the authority agreements that we've needed. So, basically, the site is ready to close. The incident should close, based upon what we've got done in the TACO rule.

Q. Now, you heard in counsel's opening argument that you were instructed to essentially do a source removal. Did that ever occur?

A. The source removal that we could do was done during the early action and during the trench install. In

order to do any further excavation on the property, we would have basically had to put the system or put the station out of operation, out of business, remove all the installed equipment, the new equipment, and taken -- you know, taken down the building.

When we did the early action activities, the tank removal installers had to drive sheet pile along the edge of the building to keep the building from coming into the hole, based upon the fact that we had water within a couple feet and it was all sloughing off into the hole, so we couldn't have excavated anything else without basically permanently putting the station out of business.

Q. And it's your testimony that you're able to close this incident without having to do this additional source removal; is that correct?

A. Yes.

MR. RIFFLE: Can I be off the record for just a moment?

HEARING OFFICER WEBB: We'll go off the record for a moment.

(There was then had an off-the-record discussion.)

Can we go back on the record?

MR. RIFFLE: Yes.

HEARING OFFICER WEBB: All right.

Q. Mr. Green, I'm showing you for the record a cover letter dated November 10, 2003. It looks like this is the middle of the priority cap budget amendment. Do you recognize that document, sir?

(Petitioner's Exhibit Number 1 was marked for identification.)

A. Yes.

Q. And can you explain for the record what that document is?

A. This was the addendum to the budget for the corrective action plan that was approved by the EPA in 2002, but the budget had been denied.

Q. So this is essentially the amended budget that was ultimately approved; is that correct?

A. Yes.

Q. And at page I-2 of that document, if you'd flip to that, please, can you explain what that page is?

A. This is the breakdown of the -- on the budget forms for other costs for expenditures that we would have of our out-of-pocket.

Q. And what do those expenditures include?

A. EPA air permitting fee, power, single-phase power for the system and the hook-up of the system to the

sanitary sewer.

Q. Okay. And it says there that the IEPA air permitting fee is a thousand dollars. Can you explain what, if anything, happened with respect to the permitting fee in this particular case?

A. The original air permitting fees were a thousand dollars, but when our former governor was elected, he changed the costs for the air and, you know, basically all the state EPA fees and they increased by in this case about 500 percent.

Q. Okay. And how much were the actual permit fees that were paid in connection with this?

A. I'd have to look at this for sure, but I think it was about $6,000.

Q. I'll show you now what's been marked as Exhibit 2. Would you explain what that document is and how it relates to Exhibit 1?

(Petitioner's Exhibit Number 2 was marked for identification.)

A. This is the EPA response letter to the November 10th budget amendment and basically had approved it with some modifications.

Q. And particularly with respect to the page that I had you identify a moment ago, page I-2, can you state for

the record what happened to those three particular expenditures that included that air permitting fee?

A. Without looking at the entire record, then, I'm saying that they were -- as far as the approvals go?

Q. Right, as far as the approval.

A. The approvals, they were approved as they were.

Q. So that $3,425 amount that appears on page I-2, if you look at the last page of Exhibit 2, does that depict that that amount was approved in full?

A. Yes. Yes.

Q. Okay.

MR. RIFFLE: I'd move for the admission of Exhibits 1 through 3, and I would note for the record these are not in the administrative record.

MS. JARVIS: And we have no objection.

HEARING OFFICER WEBB: Okay. All exhibits, 1, 2 and 3 are admitted.

MS. JARVIS: Well, what is Exhibit 3? We didn't go through that.

MR. RIFFLE: Oh, I'm sorry. I apologize.

MS. JARVIS: 1 and 2, I have no objection to. I have absolutely no objection to 1 and 2.

(Petitioner's Exhibit Numbers 1 and 2 were admitted into evidence.)

BY MR. RIFFLE:

Q. Mr. Green, I'm handing you Exhibit 3. Please identify those for the record?

(Petitioner's Exhibit Number 3 was marked for identification.)

A. This is just the printout of the IEPA database for the site, the status of the site from your system.

MS. JARVIS: Okay. I have no objection to that, either.

HEARING OFFICER WEBB: Okay.

MS. JARVIS: These are all documents within the course of the business.

HEARING OFFICER WEBB: All right. Those three exhibits are admitted.

(Petitioner's Exhibit Number 3 was admitted into evidence.)

MR. RIFFLE: No further questions.

HEARING OFFICER WEBB: Okay.

MS. JARVIS: Okay.

CROSS EXAMINATION

BY MS. JARVIS:

Q. I'm going to show you some documents, okay, and I like to stand when I talk, just so that you know. It comes from being a prosecutor. It's not --

A. I used to be a State Trooper so.

Q. I do that from prosecuting. I think better when I stand.

Okay. So we've had the documents that it was approved, and let's start with the permit fee, okay? Because I'm assuming that where we're going with that is that it was approved, but we paid the lower amount.

Did you get reimbursed for those?

A. Actually, no. What we've got here is, that was an annual fee. So basically what we had was when they increased the permit fees, we got the bill for the -- for that year's -- the new fee, which was considerably more. At that case, I contacted Mr. Ransdell, who was the project manager --

Q. Correct.

A. -- and I said, you know, is this -- before I write a check for this, is this a reimbursable expense. Originally, he says, well, I don't think we pay the permit fees, and I said, well, the previous was approved, and the other sites I've got, they've been paid.

So he looked into it, and he said, yes, as long as it's -- you know, you show proof of payment, whatever it is, reimbursable.

In that case, then we paid that permit fee to

operate the system.

Q. And what year was that? I mean, because this was 2003, and you started operating in 2005.

A. It was 2005.

Q. So I'm trying to figure out how many years, if this is an annual fee, did you pay the fee?

MR. RIFFLE: I think that misstated the prior testimony as to when the system started.

BY MS. JARVIS:

Q. Well, that is the 2003 submittal -- no, 2002 submittal -- and we started in 2003.

A. Right. We put the system in in 2003.

Q. So did you pay the fee in 2003?

A. Yes, the end of 2003.

Q. Okay. And it was reimbursed?

A. Yes.

Q. And you paid it in 2004.

A. That -- I mean, I would have to look at that because I don't think that even became an issue, so I'm assuming, yes, we did.

Q. Okay. And then in 2005, it was an increased amount then. Did you submit an amended budget at that time?

A. I think when we did that, we sent it in with the

corrective action plan to modify the system.

Q. Okay.

A. It was in there with that.

Q. Okay. So this would have been a 2005 submittal.

A. Right.

Q. Was it also included in 2010 submittal? I mean, did you now pay that fee from 2005 until 2009?

A. I mean, I don't want to veer off that question, but when we had the original meeting a few months ago, I think Tom had said, well, just look at the date that that fee was paid, and if it was before that denial letter for the system, then we don't even have a -- I mean, we don't even have an issue, and it was two months after that.

Q. I'm just trying to figure out for the Board how much it is, okay? Because we know it went up with Governor Blagojevich, and I'm not disputing that at all, okay?

A. Okay.

Q. I'm just trying to figure out what years you paid it and how much that amount would be and which budgets they were included in, so it's more of a factual --

A. I know it was also included in the 2010 because I just looked at it today.

Q. Okay.

A. And it was also in there, and I think it was $5,900, something like that, you know, rounded off.

Q. Okay.

A. But when I did look at the date that that was paid versus when the enhancements got rejected, it was about two months after that. So that's why we're basically --

Q. Why we're talking about this issue.

A. Right.

Q. Okay. I just wanted to clarify that so I knew if we were talking about just that one fee or if we're talking about all of them after.

A. No. It's just this one.

Q. Okay. We're going to switch gears, now that I've clarified that in my own mind.

Okay. The first document I'm going to show you is in the administrative record, so I'm not going to mark it as an exhibit, and it is the denial letter, okay?

A. Uh-huh.

Q. And specifically what I want you to look at is 1, 2, 3, 4, 5.

A. Uh-huh.

Q. Okay. And if you could read number 1 into the

record.

A. It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time. Soil exceedances still exist and are the source of contamination of ground water. You must eliminate the source of contamination before remediation of ground water can be implemented.

Q. Okay. And if you could read number 5.

A. Agency is requesting a list of sites which have had success with your proposed ground water treatment system.

Q. Okay. Now, after this letter came out, what was the next document -- the date of the next document that you submitted to the Agency? I mean, did you submit an amended budget or an amended plan after this?

A. I'm going to have to look. I mean, this has gone on for so long.

Q. If you need some documents --

HEARING OFFICER WEBB: Ms. Jarvis, what was date on that letter?

MS. JARVIS: The date on this letter is December 14, 2005, and it is from the Agency to Mr. Warsaw.

HEARING OFFICER WEBB: Okay.

MS. JARVIS: And it's page 79 of the record, if I didn't mention that already.

HEARING OFFICER WEBB: Okay.

THE WITNESS:

A. I'm going to say there was a corrective action plan submitted on 6-18 of 2010.

Q. So it was five years before the next document was submitted.

MR. RIFFLE: I'm going to object. Obviously, without having a full review of the documents, I don't want to hold him to that if, indeed, that's not accurate.

MS. JARVIS: And if it's changed, that would be fine.

MR. RIFFLE: And I think it's not because I'm just looking at the record here, I'm seeing January 25 of 2010 letter so --

MS. JARVIS: Well, the only point I'm trying to make is it was from 2005 to 2010.

MR. RIFFLE: I just want to make sure that this doesn't pertain to something that's not --

BY MS. JARVIS:

Q. Okay. So it was from 2005 to 2010. And during

that period of time, the system was running, and from 2003 to 2005, you were reimbursed for that.

A. Yes.

Q. Okay. Then I want you to look at a letter that's from you, okay? And in this, you answer some of the questions, okay, about whether or not the system is working. So you're answering the Agency's 2005 letter; correct?

A. Correct. I need to point out, too, that during this period of time, our client died.

Q. Oh, okay. Well, that makes it a different situation.

A. And basically what it came down to is there were two brothers who were arguing over who was taking this thing over, so we basically had to sit back for a while and let them determine who was going to take the responsibility for this before --

Q. So it was a little bit before you could answer the letter.

A. Right.

Q. And during that time, the system was running, except when it got hit by a car.

A. Uh-huh.

Q. And then it took some time.

HEARING OFFICER WEBB: And what page of the record?

MS. JARVIS: This is page 86 of the record.

HEARING OFFICER WEBB: Okay.

BY MS. JARVIS:

Q. I'm going to move on from that letter for just one second.

I'm going to go back and take a step back to your submittal on August 17, 2005, and that starts at page 5 of record, and it's a submittal by Midwest Environmental, and I'm going to go to page 17, okay? And I'd like you to read the part that's underlined, if you could.

A. Since installation of the ground water treatment system, no ground water has passed through the treatment system. Based upon ground water elevations taken from the monitoring wells near the trench, the trench should be generating water to be transferred to the ground water treatment system. However, due to hydrostatic pressure and the water bearing zone, ground water does not reach the elevation necessary to collect in the trench.

Q. So at that time in 2005, the system was not remediating the ground water.

A. Not to the point where we were discharging into

the sanitary sewer in any volume.

Q. Okay. And then I'm going to go on to your 2010 report, okay? And this starts on page 158 of the record, and I'm going to go to page 169, and if you could read -- you can read this whole thing down here -- but if you could read from where I started underlining until where I end.

A. Since installation of the ground water treatment system, ground water has passed through the treatment system only during years of above average rainfall. Ground water treatment system operated from 2003 until October of 2007, when the system was hit by a car and rendered inoperable. The system was repaired and restarted in 2009. System operated from March of 2009 until July of 2009 when the blower motor burnt out. The system is currently down while the blower motor is being rebuilt.

And I don't have my reading glasses.

MS. JARVIS: It says MECRS.

A. M-E-C-R-S presented alternatives to the IPEA to enhance the system in 2005. In 2010, IEPA has yet to approve of any of the plans.

Q. Okay. So the system wasn't working well, and it wasn't remediating, and we asked for you to do a dig and

haul, which then you come back in 2010 and say it's not possible to do the dig and haul.

MR. RIFFLE: I'm going to object to the characterization. I think that mischaracterizes the document. At least, we'd have you to lay a foundation as to this claim that the Agency asked for a dig and haul.

MS. JARVIS: Okay. No problem.

Q. We're going to go back to a portion that we already read, okay, and that's December 14, 2005. Read the last letter -- or the last sentence in number one: You must.

A. Oh. You just eliminate the source of contamination before remediation of ground water can be implemented.

Q. What would you take that to mean?

A. That they -- you wanted a -- I say you. But that they were making a request of further soil remediation prior to letting us enhance the system.

MS. JARVIS: Okay. I have no further questions.

HEARING OFFICER WEBB: Okay. Mr. Riffle?

MR. RIFFLE: Okay. Thank you.

REDIRECT EXAMINATION

BY MR. RIFFLE:

Q. Looking at this December 14, 2005 letter, the first sentence says: It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of the ground water at this time.

What did you understand that to be a reference to; the original ground water treatment system or the system proposed in the plan?

A. Well, it says the recovery well system, which is basically what we were proposing, was to enhance the recovery system.

Q. Okay. And did you interpret that in any way to impact the prior approval of the existing ground water treatment system?

A. No.

Q. And was that ground water treatment system in your view continuing to prevent off-site vibration?

A. In theory, yes, and based on the monitoring wells and that, that we had on the site, yes.

Q. So it would be unfair to characterize it as providing no benefit.

A. Right. It just wasn't optimal as to what we wanted the system or had the system operating or designed

to operate.

Q. Okay. In the listings that you must eliminate the source of contamination before remediation of ground water can be implemented, back in 2002, IEPA approved the ground water treatment system; correct?

A. Yes.

Q. And there was still contaminated soil at that time; correct?

A. Yes.

Q. And by this date, December 14 of 2005, what did you understand that they wanted you to do at that point?

A. If -- by my memory, when we proposed to enhance the system, we proposed to recycle the water from the -- from the treatment system and do like a soil washing reinjected back upstream of the site to basically push that water back through the contaminated soil and be recovered in the trench and basically create like an in situ soil remediation system at the same time.

MR. RIFFLE: Could I borrow the exhibits that you used?

MS. JARVIS: Sure. There's that one and that one. Here's the other one. Here's the part that I underlined.

BY MR. RIFFLE:

Q. You were shown earlier -- on the first page of the administrative record is referred to as P-157. This appears to be a transmittal that you provided November 16 of 2010 to the IEPA. Do you recognize that document?

A. Yes.

Q. Okay. And you were asked to look at page 169 of that document, and actually you read into the record that passage that gave the history of the installation and operation of the system. And if I understand correctly, installation occurred somewhere in October of '03; correct?

A. Yes.

Q. And then apart from the couple of times that the system was down, it ran through July of 2009; correct?

A. Yes.

Q. And this is a submittal that you provided to the IEPA in or about November of 2010; correct?

A. Yes.

Q. So they knew that you were still operating that system as of that timeframe in November of 2010, or at least --

A. I can't make that assumption based upon --

Q. But you were able to tell them that; right? In response to that submittal, did anybody call you or write

you and tell you that they didn't think you should be operating that system anymore?

A. No.

MR. RIFFLE: Okay. That's all I have.

MS. JARVIS: I just have a few follow-ups.

RECROSS EXAMINATION

BY MS. JARVIS:

Q. Did you call anyone at the Agency to ask about the status of the system, if you were confused about what the letter said?

A. I wasn't confused about what the letter said.

Q. Okay.

A. Basically, we proposed enhancements. The enhancements were denied, so we said we're not -- we're not going to do that.

Q. But now the entire budget was rejected; correct? So is the budget for everything, including the continuation of the operation of the system?

A. The one in 2010 was, yes.

Q. So was the one in 2005 -- or 2005?

A. Well, it was for our proposed -- basically, our proposed enhancements to the system --

Q. Right.

A. -- and continued operation of that enhanced

system for a period of a year.

We don't ever say going into, you know, infinitum. It's basically, this was just to install the enhancements, make the system operational, monitor the system to make sure it was operating the way, you know, we wanted it to, and then basically the way we operate is after a year, we'll plan the budget for a year. After that year, then it's going to be -- well, then we go on to address that from that point on.

Q. So you plan the budget from the beginning of the system and you had your cost listed. Were you paid for the full amount of the costs that you had listed in the 2002 budget?

A. Well, we have deductions, you know, based upon -- you know, they call it unreasonable personnel time or whatever. There were deductions. But, you know, we basically just lived with them. We didn't appeal them.

Q. If you didn't have the original --

MS. JARVIS: This would be the original approved budget?

MR. RIFFLE: That actually would be -- what's the date of that?

THE WITNESS: There were three cap addendums.

MR. RIFFLE: Here's what happened. There were three different modified approved budgets, and that would have been -- I'm sorry, again, the date of that?

MS. JARVIS: This is March 18, 2004 is when it was approved.

MR. RIFFLE: We've got the 19th on the database, but I'm assuming that's -- it was mailed on 3-18.

MS. JARVIS: Okay.

MR. RIFFLE: So that would have been the third of those approved modifications.

BY MS. JARVIS:

Q. So in the total of this budget, okay, which because there's a whole bunch of numbers, I can't give you an exact total, but we could do it during the break, were you paid in full for this budget?

A. Was I paid in full? I mean, no.

Q. Minus deductions?

A. Minus deductions. I mean, what we reimbursed for. We did not use the entire budget. I mean, we only bill for what we spend on the project, so when those reimbursements are sent in, there were some deductions in that, I'm sure, but nothing that we, you know, went to appeal on or changed, so --

Q. Now, if you continued to operate the system, would it exceed that original budget?

After 2005, when you came in with the modification, if you continued to operate the system after that date, would it have exceeded the cost approved in your budget?

MR. RIFFLE: I'm going to object to the question because I think it's an incomplete hypothetical.

MS. JARVIS: I don't think it's a hypothetical at all. All I'm going to be showing in the records as to what has been paid and what hasn't been paid.

MR. RIFFLE: But my point is, if they ran it for 50 years, maybe the answer would be different than if they ran it for five years.

MS. JARVIS: No, I think it's very, very relevant if that -- if that budget was paid in full by 2005, that he had no budget at all for the continuing years that he's saying he was concerned or was questionable about whether or not he knew that he could continue to use the system.

So if he was paid in full and had no budget from 2005 on, that was an approved amount, I think that's a very relevant question.

HEARING OFFICER WEBB: I'll allow it. You can redirect, but I'll allow it.

MR. RIFFLE: Could we have the question back, please?

HEARING OFFICER WEBB: Yeah.

(The court reporter read back the previous question into the record.)

MS. JARVIS: Same objections.

HEARING OFFICER WEBB: Go ahead.

A. I mean, I can't say because it depends on electricity usage, it depends on maintenance costs, you know, permit costs, whatever.

Q. Is it safe to say that that budget would not have covered the entire time from 2003 to 2009 for running of the system? I mean, you went out there monthly; correct?

A. No. The city went out there monthly. I mean --

Q. Okay.

A. -- we had very minimal expenditures on the system, you know, operating over time.

I mean, basically, I can't say without looking at what the total reimbursements were compared to what -- you know, what was approved versus what we had. I'm sure over ten years, it probably would have exceeded that. Our

plan was not to continue operating the system indefinitely the way it was. That's not what we wanted to do.

Q. Okay. I just want to point you to page 17, and I want you to look at this first part up here because this is a document that you submitted to the Agency, and it is dated August 17, 2005. The document starts on page 5 of the record, and I'm pointing to page 17.

If you could just read that first line, that's not --

A. Site visits have been conducted on a monthly basis for the purpose of monitoring the system, progress, conduct routine operation and maintenance, take influent and effluent samples, if applicable.

Q. So now you're saying that you didn't go to the site on a monthly basis?

A. I'm saying somebody did; we did not. We didn't have to go out monthly because the city was doing it, the town was doing it.

In the -- back when the system was installed, you had to be a certified waste water treatment operator to monitor these systems, which the town was; we were not. The town was doing it for us.

Q. And then were you paying the town?

A. No.

Q. Okay.

A. No.

Q. And where in this document does it say that the town was doing this for you?

A. It probably doesn't say that in there anywhere. It just says that the system was being checked on monthly, and it was.

MS. JARVIS: Okay. I have no further questions.

REDIRECT EXAMINATION

BY MR. RIFFLE:

Q. Mr. Green, this is one of the three pages of Exhibit 3. Can you identify that for the record?

A. It's a printout of the EPA database records for the site, and reimbursement; reimbursement part of the site.

Q. If you were to look at the last page of Exhibit 2, which is the cumulative budget that was approved as of March of 2004 and then compare that to that page from Exhibit 3, could you determine whether you had additional amounts still in the budget for the operation of the original water treatment system?

MS. JARVIS: I'm going to object to that because the letter from the Agency does not have a total

on it, so unless we actually sat down and totaled the amounts from each line item, it would be impossible, unless he can do it in his head, to determine how much is in that budget and how much has been paid.

MR. RIFFLE: Well, there are seven subtotals within that cumulative total which could be totaled easily. It's just a simple matter of math and -- I guess that's a question we could just address in briefing. It's just a mathematical calculation.

MS. JARVIS: It's a matter of the record, so the Board can determine that.

THE WITNESS: I can't do it in my head.

HEARING OFFICER WEBB: Okay.

BY MR. RIFFLE:

Q. Let me ask, just for the record, would that be indicative, that calculation -- am I correct that comparing Exhibit 2 as to what your total budget was and comparing that to your submittals, we can determine whether or not there were still amounts left in the budget from your originally approved budget for the water treatment system that was approved, whether there was still money left in that budget.

A. Yes.

Q. Okay.

MR. RIFFLE: No further questions.

MS. JARVIS: I have nothing further.

HEARING OFFICER WEBB: Okay. Thank you, Mr. Green.

Mr. Riffle, do you have anything further?

MR. RIFFLE: I have no further witnesses.

MS. JARVIS: Could I ask for just about like a five-minute break to consult with my witness?

HEARING OFFICER WEBB: Sure. We'll go off the record.

(A brief recess was taken.)

HEARING OFFICER WEBB: Are we ready to go back on the record? Okay.

Ms. Jarvis, we will pick up with your presentation of your case; and would the court reporter please swear in the witness.

(Witness sworn.)

THOMAS HENNINGER, produced, sworn and examined on behalf of the Petitioner, testified and deposed as follows:

DIRECT EXAMINATION

BY MS. JARVIS:

Q. Please state your name.

A. It's Thomas A. Henninger.

Q. And you work for the Illinois EPA?

A. Yes.

Q. And what are your job duties?

A. I'm a unit manager in the Leaking Underground Storage Tank section.

Q. And you signed -- I'm going to show you a letter dated March 18, 2011, which is the letter under appeal, and if you could look at that, it's on page 257 of the record. Did you sign that document?

A. Actually, Michael Lowder, another unit manager, signed it for me, but I had the letter prepared, but I was out the day the letter went out.

Q. And it mentions Jim Ransdell. Who is he?

A. He is a project manager that reports to me.

Q. Okay. So you supervised?

A. Yes. And I saw the letter but helped Jim draft it, actually.

Q. Okay. In this letter, the Agency denies the use of the system, okay, and denies the budget from 2005 forward for the ground water system.

MR. RIFFLE: I'm going to object to the characterization of the letter.

HEARING OFFICER WEBB: I'm sorry.

MS. JARVIS: You're going to object that it denies your budget and plan?

MR. RIFFLE: The document speaks for itself, so --

MS. JARVIS: Well, I just want him to explain what the document says and why the Agency issued it.

MR. RIFFLE: Sure.

BY MS. JARVIS:

Q. So if you want to go ahead and explain the document and why the agency issued it, that would be terrific.

A. Yes. This document was a denial of the cost affiliated with the ground water remediation system, and there was also some cost for Bureau of Air and Water Permitting. We did approve a portion of the budget that -- Midwest wanted to use TACO to exclude all the pathways, so the site could obtain closure.

The reason we denied the remediation system, the use of it anymore, is the same as in 2005 when we denied it because we didn't think it was effective, and there was still a source effective to remediate ground water, and there was still a source of contamination on the property.

MS. JARVIS: Okay. I have no further

questions.

HEARING OFFICER WEBB: Okay.

CROSS EXAMINATION

BY MR. RIFFLE:

Q. I'm showing you the December 14, 2005 letter that's been referred to before.

A. Okay.

Q. Is that the letter you were referring to as the denial letter?

A. This was the denial letter rejecting the plan in the budget, yes, dated December 14, 2005.

Q. Okay. And is that the letter upon which you base your claim that the original system was supposed to be put out of use?

A. That was the letter that we sent as a result of a corrective action plan that Midwest sent in that asked to enhance their remediation system, and we denied it.

Q. Great. And are you aware of any written document where you told Midwest to discontinue the existing water treatment system?

A. Yes. It's the December 14, 2005 letter that was signed by me.

Q. Isn't that this?

A. Yes.

Q. And where does it say that?

A. In item number 1, the last sentence, paragraph number one.

Q. Could you read that into the record?

A. The entire paragraph?

Q. Any portion that you think --

A. I'll read it all. It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time. Soil exceedances still exist and are the source of contamination in the ground water. You must eliminate the source of contamination before remediation on the ground water can be implemented.

Q. And as of the time that you sent the December 14, 2005 letter, there was an approved plan for an existing water treatment system; is that correct?

A. Yes. We approved one in 2002.

Q. And that system, as far as you knew, was up and running as of December 14 of 2005?

A. Prior to that, actually. We received an amended corrective action plan in August of 2005 from Midwest saying that it was -- it had been running and it wasn't effective, but they wanted to enhance it. We made a final decision in December.

Q. And it says: It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time.

Were you referring to the existing system or the proposed system at that time?

A. The existing system.

Q. And does it say the existing system at any place in the December 14, 2005 letter?

A. Yes, it does, to me, in paragraph 1.

Q. And could you point out where in paragraph 1 it says existing system?

A. You must eliminate the source of contamination before remediation of ground water can be implemented, and there's already a ground water remediation system there.

Q. And so it's your testimony that Midwest and Warsaw/Itco should have perceived from paragraph 1 that they were to discontinue the existing system.

A. Yes.

Q. Other than this December 14, 2005 letter, are you aware of any communication to either Warsaw/Itco or Midwest instructing them to discontinue the system?

A. Other than this December 14th letter, no.

Q. Were you aware that the system continued to be operated after December 14 of 2005?

A. Not until we received the amended corrective action plan in 2010.

Q. And at that point did you tell Midwest or Warsaw/Itco to discontinue the existing water treatment system?

A. At that time, yes, I believe we did. I would have to look at the record.

Q. You think there's a document that says that?

A. We denied a plan in the budget, I believe, in 2010.

Q. But my question, I think, is more narrow than that. Did you ever tell Midwest or Warsaw/Itco to discontinue operation of that water treatment system?

A. Yes, I believe I did in the December 14, 2005 letter.

Q. Okay. And other than your perception that that December 14, 2005 letter accomplished that task, can you think of any other time where any notification was provided to you?

A. Well, I believe our 2010 denial plan and budget did not approve the operation of that system.

Q. Didn't approve it.

A. Right.

Q. What would have happened -- in your mind, what

would the process of discontinuing a system such as was implemented here consist of? What exactly would someone do?

A. Can you ask that question again, please?

Q. Sure. If someone were to discontinue -- strike that. If in 2005 upon receipt of the December 14, 2005 letter, Mr. Warsaw or Midwest had discontinued the system, what exactly in your mind would have happened?

A. That they not operate it anymore, do any O&M or continue to try to pump and treat any ground water.

They certainly could operate it, but we had said we didn't think it would be effective to continue to operate it and we didn't approve a budget, so the cost wouldn't be paid. If they wanted to operate it, it wasn't going to be approved by the Agency or the costs weren't going to be paid as pointed out in the December 2005 letter.

Q. And again, can you tell me where you pointed that out to them?

A. Yes, in item 1 --

Q. Okay.

A. -- of that letter.

Q. And do you know whether or not that system was accomplishing the prevention of migration of ground water

off site?

A. In my professional opinion, no, it wasn't. I don't know what that would be based off of that it did. It actually, based on the August 2005 cap that was submitted by Midwest, it said that no ground water had been remediated because the ground water table was too low so, in my opinion, it wasn't doing anything.

Q. Could it have been at least preventing the migration, even if it wasn't recovering any significant quantity?

A. No. No.

Q. Have you done any calculations or seen any calculations in that regard --

A. Yes.

Q. -- with respect to this particular property?

A. No. None were provided.

Q. That letter says it is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time. On what did you base your conclusion it was difficult to ascertain if the proposed system was appropriate?

A. It wasn't recovering any ground water.

Q. The proposed system or --

A. Oh, the proposed? I'm sorry.

Q. Well, I'm just reading what I understand this to be. It says: It is difficult to ascertain a recovery well system proposed in the plan is appropriate for the remediation of ground water at this time.

Which system are you referring to there?

A. The system that's at the site.

Q. The existing system, or the proposed system?

A. Either.

MR. RIFFLE: I think I have no further questions.

MS. JARVIS: I just have a couple follow-up.

REDIRECT EXAMINATION

BY MS. JARVIS:

Q. When does the Agency write letters to people?

A. When we receive a plan or a budget.

Q. Do we ever on our own write letters to people?

A. No.

MS. JARVIS: Okay. I have no other questions.

MR. RIFFLE: Can I have just one minute?

HEARING OFFICER WEBB: Sure.

MR. RIFFLE: I have nothing further.

HEARING OFFICER WEBB: Okay. Thank you,

Mr. Henninger.

Ms. Jarvis, do you have anything further?

MS. JARVIS: I have nothing further.

HEARING OFFICER WEBB: Okay.

We should receive the transcript of these proceedings on March 8th, and it will be posted on the Board's website. The public comment deadline is March 12th. Public comment must be filed in accordance with Section 101.628 of the Board's procedural rules. Petitioner's brief is due April 8th and Respondent's brief is due by May 8th and Petitioner's reply, if any, is due by May 22nd.

So there's no one here who wishes to make any public comment. If no one has anything further, we'll conclude these proceedings. We stand adjourned. Thank you very much.

(Whereupon, the above-entitled proceedings were concluded at 11:36 a.m., February 26, 2013.)

STATE OF ILLINOIS)
) SS
COUNTY OF MACON)

I, LISA K. HAHN, CSR, RMR, do hereby state that I am a court reporter doing business in the City of Decatur, County of Macon, and State of Illinois; that I reported by means of machine shorthand the proceedings held in the foregoing cause, and that the foregoing is a true and correct transcript of my shorthand notes so taken as aforesaid.

Lisa Hahn
Lisa K. Hahn, CSR, RMR
Notary Public, Macon County, Illinois
CSR #84-2149