

THE ILLINOIS POLLUTION CONTROL BOARD

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

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

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

9 At issue in this case is Respondent's
10 partial denial of Petitioner's amended corrective action
11 plan budget. The decision deadline in this case is August
12 22nd.

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

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

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

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

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

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

6 Would Petitioner like to make an opening
7 statement?

8 MR. RIFFLE: Yes, briefly.

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

16 In 2002 with respect to this site, a plan
17 was submitted and approved to put a ground water treatment
18 system in place, essentially a system of trenches and
19 pumps to remediate ground water. At that time back in
20 2002, the plan was approved, but the budget was not
21 approved.

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

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

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

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

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

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

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

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

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

19 Thank you.

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

22 MS. JARVIS: Yes, just very briefly.

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

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

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

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

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

21 HEARING OFFICER WEBB: Okay.

22 Mr. Riffle, you may call your first
23 witness.

24 MR. RIFFLE: Yes. Allan Green will be our

1 witness.

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

5 (Witness sworn.)

6
7 ALLAN GREEN, produced, sworn and examined on
8 behalf of the Petitioner, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. RIFFLE:

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

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

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

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

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

24 A. We got involved in the site during a tank

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

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

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

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

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

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

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

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

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

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

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

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

22 A. Yes.

23 Q. And did you pay for those?

24 A. Yes.

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

3 A. Yes.

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

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

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

11 A. Yes.

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

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

23 Q. And when was it back in operation approximately?

24 A. Basically 2005.

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

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

7 Q. And it was essentially recommissioned or
8 restarted?

9 A. Right.

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

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

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

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

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

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

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

3 A. No.

4 Q. What is the current status of that site?

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

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

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

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

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

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

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

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

16 A. Yes.

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

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

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

23 Can we go back on the record?

24 MR. RIFFLE: Yes.

1 HEARING OFFICER WEBB: All right.

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

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

8 A. Yes.

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

11 A. This was the addendum to the budget for the
12 corrective action plan that was approved by the EPA in
13 2002, but the budget had been denied.

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

16 A. Yes.

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

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

22 Q. And what do those expenditures include?

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

1 sanitary sewer.

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

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

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

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

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

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

20 A. This is the EPA response letter to the November
21 10th budget amendment and basically had approved it with
22 some modifications.

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

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

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

5 Q. Right, as far as the approval.

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

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

10 A. Yes. Yes.

11 Q. Okay.

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

15 MS. JARVIS: And we have no objection.

16 HEARING OFFICER WEBB: Okay. All exhibits,
17 1, 2 and 3 are admitted.

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

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

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

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

1 BY MR. RIFFLE:

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

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

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

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

10 HEARING OFFICER WEBB: Okay.

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

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

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

17 MR. RIFFLE: No further questions.

18 HEARING OFFICER WEBB: Okay.

19 MS. JARVIS: Okay.

20 CROSS EXAMINATION

21 BY MS. JARVIS:

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

1 A. I used to be a State Trooper so.

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

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

8 Did you get reimbursed for those?

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

15 Q. Correct.

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

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

24 In that case, then we paid that permit fee to

1 operate the system.

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

4 A. It was 2005.

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

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

9 BY MS. JARVIS:

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

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

13 Q. So did you pay the fee in 2003?

14 A. Yes, the end of 2003.

15 Q. Okay. And it was reimbursed?

16 A. Yes.

17 Q. And you paid it in 2004.

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

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

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

1 corrective action plan to modify the system.

2 Q. Okay.

3 A. It was in there with that.

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

5 A. Right.

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

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

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

18 A. Okay.

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

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

1 Q. Okay.

2 A. And it was also in there, and I think it was
3 \$5,900, something like that, you know, rounded off.

4 Q. Okay.

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

9 Q. Why we're talking about this issue.

10 A. Right.

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

14 A. No. It's just this one.

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

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

20 A. Uh-huh.

21 Q. And specifically what I want you to look at is
22 1, 2, 3, 4, 5.

23 A. Uh-huh.

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

1 record.

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

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

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

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

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

19 Q. If you need some documents --

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

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

1 HEARING OFFICER WEBB: Okay.

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

4 HEARING OFFICER WEBB: Okay.

5 THE WITNESS:

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

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

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

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

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

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

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

23 BY MS. JARVIS:

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

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

3 A. Yes.

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

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

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

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

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

20 A. Right.

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

23 A. Uh-huh.

24 Q. And then it took some time.

1 HEARING OFFICER WEBB: And what page of the
2 record?

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

4 HEARING OFFICER WEBB: Okay.

5 BY MS. JARVIS:

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

8 I'm going to go back and take a step back to
9 your submittal on August 17, 2005, and that starts at page
10 5 of record, and it's a submittal by Midwest
11 Environmental, and I'm going to go to page 17, okay? And
12 I'd like you to read the part that's underlined, if you
13 could.

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

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

24 A. Not to the point where we were discharging into

1 the sanitary sewer in any volume.

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

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

18 And I don't have my reading glasses.

19 MS. JARVIS: It says MECRS.

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

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

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

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

7 MS. JARVIS: Okay. No problem.

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

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

15 Q. What would you take that to mean?

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

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

21 HEARING OFFICER WEBB: Okay. Mr. Riffle?

22 MR. RIFFLE: Okay. Thank you.

23

24

REDIRECT EXAMINATION

1
2 BY MR. RIFFLE:

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

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

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

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

16 A. No.

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

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

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

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

1 to operate.

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

6 A. Yes.

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

9 A. Yes.

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

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

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

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

24 BY MR. RIFFLE:

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

5 A. Yes.

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

12 A. Yes.

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

15 A. Yes.

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

18 A. Yes.

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

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

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

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

3 A. No.

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

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

6 RE CROSS EXAMINATION

7 BY MS. JARVIS:

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

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

12 Q. Okay.

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

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

19 A. The one in 2010 was, yes.

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

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

23 Q. Right.

24 A. -- and continued operation of that enhanced

1 system for a period of a year.

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

10 Q. So you plan the budget from the beginning of the
11 system and you had your cost listed. Were you paid for
12 the full amount of the costs that you had listed in the
13 2002 budget?

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

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

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

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

23 THE WITNESS: There were three cap
24 addendums.

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

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

6 MR. RIFFLE: We've got the 19th on the
7 database, but I'm assuming that's -- it was mailed on
8 3-18.

9 MS. JARVIS: Okay.

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

12 BY MS. JARVIS:

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

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

18 Q. Minus deductions?

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

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

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

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

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

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

16 MS. JARVIS: No, I think it's very, very
17 relevant if that -- if that budget was paid in full by
18 2005, that he had no budget at all for the continuing
19 years that he's saying he was concerned or was
20 questionable about whether or not he knew that he could
21 continue to use the system.

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

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

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

5 HEARING OFFICER WEBB: Yeah.

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

8 MS. JARVIS: Same objections.

9 HEARING OFFICER WEBB: Go ahead.

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

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

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

18 Q. Okay.

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

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

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

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

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

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

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

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

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

23 Q. And then were you paying the town?

24 A. No.

1 Q. Okay.

2 A. No.

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

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

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

10 REDIRECT EXAMINATION

11 BY MR. RIFFLE:

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

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

17 Q. If you were to look at the last page of Exhibit
18 2, which is the cumulative budget that was approved as of
19 March of 2004 and then compare that to that page from
20 Exhibit 3, could you determine whether you had additional
21 amounts still in the budget for the operation of the
22 original water treatment system?

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

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

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

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

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

13 HEARING OFFICER WEBB: Okay.

14 BY MR. RIFFLE:

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

23 A. Yes.

24 Q. Okay.

1 MR. RIFFLE: No further questions.

2 MS. JARVIS: I have nothing further.

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

5 Mr. Riffle, do you have anything further?

6 MR. RIFFLE: I have no further witnesses.

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

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

11 (A brief recess was taken.)

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

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

17 (Witness sworn.)

18

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

22 DIRECT EXAMINATION

23 BY MS. JARVIS:

24 Q. Please state your name.

1 A. It's Thomas A. Henninger.

2 Q. And you work for the Illinois EPA?

3 A. Yes.

4 Q. And what are your job duties?

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

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

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

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

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

16 Q. Okay. So you supervised?

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

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

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

24 HEARING OFFICER WEBB: I'm sorry.

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

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

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

8 MR. RIFFLE: Sure.

9 BY MS. JARVIS:

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

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

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

24 MS. JARVIS: Okay. I have no further

1 questions.

2 HEARING OFFICER WEBB: Okay.

3 CROSS EXAMINATION

4 BY MR. RIFFLE:

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

7 A. Okay.

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

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

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

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

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

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

23 Q. Isn't that this?

24 A. Yes.

1 Q. And where does it say that?

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

4 Q. Could you read that into the record?

5 A. The entire paragraph?

6 Q. Any portion that you think --

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

14 Q. And as of the time that you sent the December
15 14, 2005 letter, there was an approved plan for an
16 existing water treatment system; is that correct?

17 A. Yes. We approved one in 2002.

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

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

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

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

6 A. The existing system.

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

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

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

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

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

18 A. Yes.

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

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

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

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

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

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

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

9 A. We denied a plan in the budget, I believe, in
10 2010.

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

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

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

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

22 Q. Didn't approve it.

23 A. Right.

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

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

4 A. Can you ask that question again, please?

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

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

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

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

20 A. Yes, in item 1 --

21 Q. Okay.

22 A. -- of that letter.

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

1 off site?

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

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

11 A. No. No.

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

14 A. Yes.

15 Q. -- with respect to this particular property?

16 A. No. None were provided.

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

22 A. It wasn't recovering any ground water.

23 Q. The proposed system or --

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

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

5 Which system are you referring to there?

6 A. The system that's at the site.

7 Q. The existing system, or the proposed system?

8 A. Either.

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

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

13 REDIRECT EXAMINATION

14 BY MS. JARVIS:

15 Q. When does the Agency write letters to people?

16 A. When we receive a plan or a budget.

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

18 A. No.

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

21 MR. RIFFLE: Can I have just one minute?

22 HEARING OFFICER WEBB: Sure.

23 MR. RIFFLE: I have nothing further.

24 HEARING OFFICER WEBB: Okay. Thank you,

1 Mr. Henninger.

2 Ms. Jarvis, do you have anything further?

3 MS. JARVIS: I have nothing further.

4 HEARING OFFICER WEBB: Okay.

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

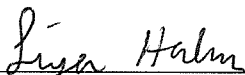
13 So there's no one here who wishes to make
14 any public comment. If no one has anything further, we'll
15 conclude these proceedings. We stand adjourned. Thank
16 you very much.

17 (Whereupon, the above-entitled
18 proceedings were concluded at 11:36
19 a.m., February 26, 2013.)
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23
24

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

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

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