

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

West Suburban Recycling and Energy)
Center ("WSREC"), L.P.)PCB 95-119
)
vs.)(Consolidated
) with
Illinois Environmental Protection) PCB 95-125)
Agency)

The following is the transcript of the TENTH DAY of hearing, a public hearing held in the above-entitled matter, at the Illinois Labor Relations Board, State of Illinois Building, 4th Floor Hearing Room, 160 North LaSalle Street, Chicago, Illinois, on the 6th of March, 1996 A.D., commencing at the hour of 9:30 o'clock a.m.

BEFORE:

MR. MICHAEL L. WALLACE, CHIEF HEARING OFFICER

APPEARANCES:

Ms. Percy Angelo,
Mr. Thomas W. Dimond,
Mr. Jonathan E. Singer and
Mr. John Z. Lee
Mayer, Brown & Platt
180 South LaSalle Street
Chicago, Illinois 60603
appeared on behalf of WSREC;

Mr. Daniel Merriman,
Mr. John J. Kim,
Ms. Laurel L. Kroack and
Ms. Christina L. Archer
Division of Legal Counsel
Illinois Environmental Protection Agency
Springfield, Illinois 62794-9276
appeared on behalf of IEPA;

Sally A. Guardado, C.S.R.
17369 Highwood Drive
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APPEARANCES (CONTINUED):

Ms. Ellen O'Laughlin and
Mr. George Cahill
State of Illinois
Office of the Attorney General
100 West Randolph Street
Chicago, IL 60601
appeared on behalf of the State.

ALSO PRESENT:

Mr. Thomas F. Kuslik
Mayer, Brown & Platt
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Members of the Public.

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HEARING OFFICER WALLACE: Pursuant to adjournment, I now call dockets PCB 95-119 and 95-125. This is West Suburban Recycling and Energy Center L.P. versus the Illinois Environmental Protection Agency.

Ms. Angelo are there any additional appearances?

MS. ANGELO: No, sir.

HEARING OFFICER WALLACE: Ms. Kroack?

MS. KROACK: No.

HEARING OFFICER WALLACE: Let the record reflect the same appearances as before.

Preliminarily, I have the motion on the Request for Admissions. And although there may or may not be a dispute on the dates, I don't think there's a dispute over the fact that there at least was a day or two delay in service.

Would you agree with that Mr. Kim?

MR. KIM: Yes.

HEARING OFFICER WALLACE: And, I think, based upon a couple of cases that have gone on at the Board the last couple of months, plus the Supreme Court case, Bright versus Dickie, which is 209 Illinois Decision 735, the

motion -- I'm not even sure. You have a motion to admit the request for admissions?

MS. ANGELO: We offered them as an exhibit. And we will make a motion to admit them as an exhibit.

HEARING OFFICER WALLACE: Did you hold on to the exhibit or did you give it to me?

MR. KUSLIK: You still have one up there.

HEARING OFFICER WALLACE: 12-?

MR. SINGER: 129.

HEARING OFFICER WALLACE: 129. Okay. Then, In terms of the Request to Admit, Exhibit 129 is granted. The Agency's counter-motion for an extension of time or leave to file responses, I believe has to be denied.

The Supreme Court case is fairly clear that the Request for Admission, while the Court or in my case, the Hearing Officer, would probably have the discretion to extend the time, if they are served late, they are served late.

MR. KIM: Could you give me the citation again? I'm sorry. 209 --

HEARING OFFICER WALLACE: Which one would you like? It's 209 Illinois Decision 735 or 652 N.E.2d 275.

The case basically goes onto say that the person requesting to file late has to show good cause for the late filing. And the burden does not shift to the other side to prove lack of prejudice.

So, in this instance, even though West Suburban may not have been prejudiced, it is not their burden to show lack thereof.

And then the service date. I checked the Board's procedural rules, and the service is when you put it into the mail. So, then we have the Mailbox Rule, which really doesn't apply, because the date of service is what you're representing it was served.

So if it was late, according to the Board rules, they would have been deemed admitted.

MR. KIM: I think on behalf of the Agency, we would generally reserve the right to raise the issue further to the Board.

HEARING OFFICER WALLACE: You're certainly welcome to do that.

The Board has considered this a couple of times in the past few months. In fact, in the two cases you have cited, Olive Street and People versus Wyman. And

I think that my ruling this morning is consistent with those cases and with the Supreme Court case.

So, Petitioner's Exhibit 129 is admitted.

I just want to check and make sure I have it up here.

Yes. Entitled Admissions by the Agency pursuant to Section 103.162 (c).

(Said document, heretofore marked Petitioner's Exhibit No. 129 for identification, was admitted into evidence, to wit, as follows:)

HEARING OFFICER WALLACE: All right. Then, any preliminary matters?

MS. ANGELO: I wanted to ask for just a minute to raise with you a point about the Grigoleit case which I missed yesterday in our discussion.

It was a result of, basically, getting too many notes too fast and I couldn't understand what I was being told.

The point being, this is the discussion we had about whether it would be appropriate for the Agency to call witnesses to address the factual matters in

the Mathur memorandum and to in some way contradict those facts as stated in the memorandum.

The Grigoleit case, which we mentioned yesterday, and we've provided a copy for the Hearing Officer and the Agency this morning, indicates that in the instance where materials have not been provided during discovery, and, in that case, what the petitioner asked for -- That was a permit appeal. The petitioner asked for the case to be dismissed, and the Board held that that was not appropriate in that case, but that the appropriate sanction, and I think I'm reading for it from page 11 of the draft providers. Of the opinion provided.

"The appropriate sanction is for the Board to disregard any evidence presented by the Agency on any matters pertaining to the type of information revealed in the withheld documents that may be favorable to the Agency."

And I wanted to provide a copy of the case, and make it clear that that's the principal in Grigoleit that we were relying on, because I know I did not express it well yesterday.

HEARING OFFICER WALLACE: Thank you.

Again, even with the Grigoleit case in front of me, I haven't read it for a while.

I, certainly, am not going to rule that the Agency's act was so egregious that in light of the representations that Mr. Kim made yesterday -- I mean, in light of his written response and his oral response, I'm not going to bar discussion of this memorandum, you know, except for in terms of what Mr. Kim mentioned.

So, as I understood it, the testimony is going to be, if any at all, is going to be very limited. And I have admitted the document, so, it seems to me that Grigoleit would say, probably not even let the information in at all.

Okay. Any other preliminary matters?

MS. ANGELO: There's one other issue. And that was the additional documents that the Agency provided to us that were kind of sandwiched. That memorandum, the fax cover sheets and so forth.

We had -- this was the -- I think there were four pages. There were two fax cover sheets and there was the unmarked copy of the memo without the fax

indications on it.

We have been anticipating that, with the Agency's Land witnesses, we would identify these documents and make the record complete on what surrounded this memorandum when it was sent from Mr. Mathur to Mr. Child and then from Mr. Child to the various individuals in Land.

In light of the fact that those individuals are not going to be called, we would ask that the Agency wouldn't agree to stipulate to the additional documents that accompanied that Mathur memorandum.

MR. KIM: I'm sorry -- I don't understand what we're being asked to stipulate to.

HEARING OFFICER WALLACE: You provided --

MR. KIM: I know what the documents are. I'm not sure. As to their authenticity? Relevance? I don't know --

HEARING OFFICER WALLACE: Would you stipulate to -- We can mark them as exhibits, but stipulate to the two cover sheets.

MR. KIM: I think we would stipulate that the cover sheets are accurate depictions of transmittal cover sheets

that were sent from the parties addressed -- from the parties identified to the parties address.

We certainly don't stipulate as to their relevance. And, in so far as those documents would be considered appended to the Mathur memorandum, we would certainly claim that those would fall within the privilege that was claimed, as well.

And, certainly, I think those same arguments would be raised as to the copy of the memorandum.

HEARING OFFICER WALLACE: All right.

MS. ANGELO: I would understand, certainly, the Agency's position with regard to the privilege issue. And I would assume your ruling on that would be the same.

I think, authenticity. We got them from the Agency days ago. I don't know that there is any question there.

And relevance. They're relevant to the same degree that the initial memorandum was relevant, and that had to do with the subjects it covered.

And, also, I think the importance of these additional documents as they demonstrate the path of

who were the recipients of this memorandum.

You'll recall that the testimony we had from Mr. Mathur is that we sent it to Mr. Child and that Mr. Child, then, faxed it on to someone in Land. And these documents make it clear how that transmission took place and who in Land received it.

The other, I think, thing -- And what we have done, by the way, is provide two exhibits and we can distribute those so you can see the way --

HEARING OFFICER WALLACE: And I'll put on the record that the cover sheet from Bill Child to Harry C., Ted D., and Ron Harmon is page one.

Page two is a page which has been withheld and I have previously ruled that that is not material to this case, and, therefore, there will be a gap. Page two will not appear. But that's what that page two is.

MR. DIMOND: Actually, Mr. Hearing Officer, we've marked them as three separate exhibits.

HEARING OFFICER WALLACE: All right.

MS. ANGELO: The other thing we understand is that the document that, if you'll see in front of you now, is

Petitioner's Exhibit 133, which is the memorandum itself. We understood as it was produced to us, that it was from Mr. Child's file?

MS. KROACK: No. The initial one -- I don't remember what file it came from, but it wasn't from Mr. Mathur's file. This was the one that we subsequently discovered in Mr. Mathur's incineration file.

HEARING OFFICER WALLACE: The non-faxed copy?

MS. KROACK: 133.

HEARING OFFICER WALLACE: 133.

MS. KROACK: Right.

HEARING OFFICER WALLACE: Was found in Mr. Mathur's incineration file.

MS. KROACK: Right.

MS. ANGELO: I guess, then I'm a little bit confused because as the initial one was produced to us, that was represented as having been found in Mr. Mathur's incineration file.

And so -- And I understood that we then asked the Agency if they would explain whether there were any others in the Land files. And then we were provided with a document that's labeled as 133.

So, I think we have the order of things backwards.

MS. KROACK: What we initially had was a copy that the Bureau of Land people had faxed. We did not know Mr. Mathur had a copy of this.

And we went back and looked for all the copies, and, apparently, his secretary had stuck a copy of this in one portion of that incineration file, but it wasn't with the initial folder.

That's what you asked us to do. So we went and searched again.

MR. MERRIMAN: Well, okay. I certainly had misunderstood that then, and the record will demonstrate what actually was said about it. But, I believe the explanation we were given for the earlier document, 120, was that it had been produced after having been found in Mr. Mathur's incineration file.

MR. KIM: Mr. Hearing Officer, the representation made was upon review of a deposition transcript in which a statement was made was that all documents in Mr. Mathur's files had been produced. The Agency went back, checked that file and found that this memorandum was, actually,

was in place, was in that memo -- or was in that file.

As we stated before, the memorandum that we produced, was the memorandum that we had held, which we did not realize was in Mr. Mathur's file.

When we discovered that we had a memorandum, or copy of that memorandum in the file, we produced the copy as, I believe, Exhibit 120. The request was then made, please produce all copies of that memorandum as they may exist within the Agency.

I don't believe it was limited to Land. It was all copies. We, therefore, asked all Land personnel and all Air personnel if they had any copies.

The copy which we produced, which has been marked as Exhibit 133, was the only other copy that was found by us during review.

Therefore, both copies have been produced. Copy number -- Petitioner's Exhibit 133 was the document which initially triggered our search and our concern that the statement in the deposition might have been incorrect.

We produced the first copy that we had which was the document we've been holding as part of our

privilege log. That was actually our privilege log and that's what we represented was disclosed.

When further request was made to provide all copies, this was the only other copy we had.

HEARING OFFICER WALLACE: Yes. That seems to summarize what I recall from the transcript, that the request was made to go and look for the fax cover sheets and any other copies.

MS. ANGELO: Well, then, I guess what we're asking the Agency to confirm for us -- and, I think I just have -- is that the document that's Petitioner's Exhibit 133 is from Mr. Mathur's file?

MR. KIM: That's correct.

MS. ANGELO: Is that correct?

HEARING OFFICER WALLACE: Then let's try to put it on the record. 133 is from Mr. Mathur's incineration file.

MR. KIM: Yes.

HEARING OFFICER WALLACE: Where did 120 come from?

MR. KIM: 120 was apparently the copy that made it's way from Mr. Mathur to Mr. Child to, as represented by Petitioner's Exhibit 131, representative of the Bureau of

Land.

HEARING OFFICER WALLACE: So 120, are you saying to the best of your knowledge, was in the Bureau of Land?

MR. KIM: That's right. And that is evidenced, I believe, by the fax transmission lines on the top of it. The memorandum.

HEARING OFFICER WALLACE: All right.

Okay. Petitioner's Exhibits 131, 132, and 133, having been stipulated to, are admitted into evidence.

MR. KIM: I'm sorry. I would just again note --

HEARING OFFICER WALLACE: With the Agency's reservations.

MR. KIM: Thank you.

MR. MERRIMAN: As to, both, privilege and relevance.

(Said document, heretofore marked
Petitioner's Exhibits Nos. 131, 132
and 133 for identification, were
admitted into evidence, to wit, as
follows:)

HEARING OFFICER WALLACE: Mr. Kim, did you have any preliminary matters?

MR. KIM: Yes, just one.

We informed -- As we stated at the close of the Hearing yesterday, we were going to review what points we needed to make in the remainder of our case in chief.

We had a discussion with Mr. Bill Child last evening. After our conversation with him, it was determined that his testimony was not necessary.

We then called John Singer. I apologize. I stated I would call Ms. Angelo and I didn't have her direct line at Mayer, Brown. I did have Mr. Singer's. So we called and left a message stating that Mr. Child would not be called.

On further review during the evening, we have now determined as to the Air witnesses which we had planned today. We have knocked two more of those people off our list.

So, we only have two witnesses planned for today. Those would be Mr. Romaine and Mr. Cobb.

And, as what I would hope to be one of the last accommodations that we would ask. Mr. Cobb is being called for a very limited series of questions on one

specific topic.

We don't think his Direct Examination on our part will last more than ten to fifteen minutes, at best. And Mr. Romaine's will take slightly longer.

So, we were hoping to be able to take Mr. Cobb first and allow him to leave and then pick up with Mr. Romaine.

MS. ANGELO: Could we have two minutes to switch around here?

We'd be happy to try to accommodate them. Could we have five minutes to try and shuffle documents?

HEARING OFFICER WALLACE: Sure.

Let's go off the record for five minutes.

(Whereupon, a discussion was held off the record.)

(Whereupon, Respondent's Exhibits Nos. 4 & 5 were marked for identification.)

HEARING OFFICER WALLACE: Miss Kroack?

MS. KROACK: I would like to call Mr. Cobb.

HEARING OFFICER WALLACE: Mr. Cobb, you're being recalled. You've previously sworn in this matter. Please

consider yourself still under oath.

You may proceed.

(The witness was previously sworn.)

JAMES D. COBB

called as a witness, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KROACK:

Q. Good morning, Mr. Cobb.

There is a Petitioner's Exhibit 39 that's in front of you. Could you look at that please?

A. Yes, I see the exhibit.

Q. Could you identify it?

A. Yes.

This is a document which I had prepared in preparation for a Technology Review Committee meeting. And it has some additional notes on it which are not mine.

Q. Okay. I believe you testified earlier that you couldn't remember when you created that document; is that correct?

A. That's correct.

Q. Can you now remember when that document was

created?

A. I now know when that document was created, yes.

Q. How do you know that?

A. When I produce a document on the word processor in my office, I encode the file name with the date in which that document is being initiated.

Q. Okay. Could you look at Respondent's Exhibit 6, please, and look on the back page of that?

A. Yes.

Q. On the last line you have something called "file." Could you describe that for me?

A. Yes.

When I was asked to determine the date that this document had been produced, I went back and obtained the original document from my computer. And at the bottom of that document I printed the file name for the document.

Q. Would you tell me what this file name means to you?

A. The file name is encoding of the date that the document was initiated and it bears my initials so that it could be identified.

The first digit in the file name indicates the year of the decade. The next three digits indicate the day of the year or Julian date. The next digit indicates the sequence in which a file was initiated. The next three characters are my initials. And then there's a period. And then there are three letters which designate the type of document that it is.

MR. DIMOND: Mr. Hearing Officer, at this point I'm going to object to any testimony or use of this document.

This was provided to us first time today. This is an unfair surprise. It is the same sort of thing that they did with the Mathur memorandum, except even more so.

And, under Grigoleit, they are not allowed to surprise people at hearing and then elicit self-serving testimony in that regard.

And I just think that this method of proceeding is unfair to the applicant. It's not what a permit hearing is supposed to be about, being on the record. And producing a document like this and surprising the applicant in this manner is unfair and it's effectively denying us our due process.

MR. KIM: In response, this document was prepared only to try and ascertain, as Mr. Cobb stated, the exact date when this -- Petitioner's Exhibit Number 39 was created.

As he stated, he was not able to remember, based just upon his recollection, when that document was created.

He was asked if there was any other way that he could find out the date of creation. It's my understanding -- and we can certainly elicit testimony from Mr. Cobb as to the exact date that this document was generated -- but, it was done, I believe, no more than two days ago. Three days ago. Something like that. And it's being provided for the sole purpose of trying to explain a gap in his memory that he had testified to earlier.

HEARING OFFICER WALLACE: Objection is noted and overruled.

Please continue.

BY MS. KROACK:

Q. Is this a true and correct copy of our computer file with respect to that document?

A. Yes, it is.

The only thing that doesn't exist in the computer file is the last entry, which lists the file name.

Q. Okay.

A. That was not imprinted on the file, but rather was just imprinted on this page.

Q. Okay. When did you prepare this particular document?

A. The file name indicates that the document was initiated in 1995, on the 166th day of that year.

Q. When I say this document, the document with the file encoded on the bottom.

When were you requested to produce this particular document?

HEARING OFFICER WALLACE: Have you identified this?

MS. KROACK: Yes.

HEARING OFFICER WALLACE: Then you might refer to it as the Respondent's Exhibit.

MS. KROACK: Respondent's Exhibit 4.

MR. KIM: 6.

MS. KROACK: 6.

THE WITNESS: Yes, I was asked to determine the date

of this document. And I did this on last Sunday.

BY MS. KROACK:

Q. Okay. Thank you. One last question.

Let me show you a copy of a calendar from 1995. Can you tell me what the 166th day of the year was?

A. That was June 15th of 1995.

Q. Thank you.

I have no further questions -- Wait. I'm sorry.

And was last Sunday, March 3rd, Mr. Cobb?

A. Yes, I believe it was.

MS. KROACK: Thank you. No further questions.

HEARING OFFICER WALLACE: Mr. Dimond?

MR. DIMOND: I think, Mr. Hearing Officer, we would like to renew our objection.

It's Ms. Angelo's recollection that during testimony by Mr. Harmon, he was asked if he could reproduce documents from his files.

MS. ANGELO: Perhaps I could address that.

In Mr. Harmon's deposition, you'll recall that Mr. Harmon had an undated review sheet. And Mr. Dragovich said that's not their practice. And if he

noticed that, he would have called it to Mr. Harmon's attention.

I believe I asked Mr. Harmon in his deposition if there was any way of recreating the date of his review sheet. And I was told there was not.

The document that Mr. Cobb has recreated here is a document. The attached second page to this memo is a document. Presumably, now that we know how it's done, there are many more documents in the Agency files like this that also should have been produced to us in the course of this discovery.

There are a number of points in this case where dates have been very important and have been left off one or another kind of Agency memo.

And to learn now, that, gee, when they want to find a date, they ask, but, otherwise, that we're not to be provided those dates, I think is unfair.

MR. KIM: In response.

I would certainly agree that in this case, dates are of particular importance and concern. And that is exactly why we have endeavored to try to clarify Mr. Cobb's testimony as to the date of the creation of

Petitioner's Exhibit 39.

As to Ms. Angelo's reference to a statement made by Mr. Harmon.

I point out, first of all, that was a statement made by Mr. Harmon and not by Mr. Cobb.

Second of all, I don't know, but it was certainly my -- Based upon just my casual observance, I know that computer systems set up within the Agency are set up differently.

Mr. Harmon, based upon his testimony, I would assume, does not have the ability to recreate the documents in the manner it existed. Mr. Cobb has stated that he does. Because one person within the Agency can perform certain tasks on his computer and another person does not. I can certainly speak from firsthand knowledge that they vary from one desk to the next. And that's not just to the capabilities of our computers and our systems.

But I don't believe that anything that Mr. Cobb has said is inconsistent with what Mr. Harmon said. He's testified as to his abilities in producing this document.

Mr. Harmon stated he was not able to

produce something similar on his computer.

MS. ANGELO: But the point is that this attachment that they've given us is a document. And we asked for computer records and we were not provided any throughout the discovery that did exist.

HEARING OFFICER WALLACE: If I might.

Mr. Cobb, could you explain, for the record, how this, on Respondent's Exhibit 6, what appears between two thick black lines, maybe in a little more detail, what that is? Why it does not show up on all documents? If you know.

THE WITNESS: Okay. I was asked to determine the date.

What I did to do that, because of the manner in which I initialize documents that I produce, I went back, retrieved the computer record. And in order to show what the file name was, I added this particular line.

The computer processor has a function in it in which it will imprint onto the document the file name. And since that file name is an encryption of the date of initiation, I printed that date or that file name out.

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HEARING OFFICER WALLACE: All right. What type of system is this kept in?

THE WITNESS: This is WordPerfect 6.1.

THE WITNESS: And the files and numbers between the two black lines, that's the file name you gave it in the WordPerfect system -- the word processing system?

THE WITNESS: Yes.

HEARING OFFICER WALLACE: And that does not print-out on every document that you print out?

THE WITNESS: Not unless it's specifically requested, no.

HEARING OFFICER WALLACE: All right. Do you keep material on hard drive or floppy disk?

THE WITNESS: It's kept on the Agency's network.

HEARING OFFICER WALLACE: And is it kept under your file or is it --

THE WITNESS: It's kept under a file which is only accessible to myself and the network administrators.

HEARING OFFICER WALLACE: And this is -- What does the letters WPD mean?

THE WITNESS: That is letters which the word processor uses to identify the type of file it is.

HEARING OFFICER WALLACE: And do you know what those three letters mean?

THE WITNESS: It's just a document.

HEARING OFFICER WALLACE: Do you know if it stands for WordPerfect document? Or not?

THE WITNESS: I don't know precisely what it stands for.

MR. KIM: Mr. Wallace, I might add, obviously, the reason that Mr. Cobb is able to give the date, the 166th day of 1995, I believe is what he said, is, among other things, is because his system of naming the document is such that he would be able to determine that.

There is no reason to believe, certainly based upon his testimony, that Mr. Harmon would have identified documents to the extent that he even prepared these. He may not even -- I don't know whether Mr. Harmon does his own computer work, as apparently Mr. Cobb does. But there is no reason to believe that he would use the same system that Mr. Cobb does or that, for that matter, that was done on a network system or if it was done on a stand alone or what have you.

And as to the comment that this was not

produced in a timely manner as far as it being a computer file.

As Mr. Cobb stated, this was produced after February 27, 1995. And the Agency's production of documents did not include, I believe, many, if any documents, post-denial dates, simply because, again, we don't feel those are relevant here. And those were not requested in terms of --

MS. ANGELO: I guess if Mr. Kim's argument is that this was produced after February 27th, 1995, and, therefore, wasn't called for by our discovery, I don't see what relevance the document that's being provided here has for the record and the testimony that accompanies it.

HEARING OFFICER WALLACE: Well --

MS. ANGELO: I would remind you and the Agency, that the document we're talking about here was provided in their original filing of the record.

They provided this as part of the record. And they've now decided that they don't want it in the record, and they're going to try and take it out of the record by the methods that they're using.

But we've asked any number of people

about the dating of this document. No one was able to clarify that, as we've gone along.

We were told by Mr. Harmon -- and I can read you his testimony -- that he had no way, didn't know of a way to recreate the date of the document.

HEARING OFFICER WALLACE: That's sort of immaterial because it's not Mr. Harmon's document.

MS. ANGELO: But they're using the same Agency system.

MR. KIM: That's not been established.

HEARING OFFICER WALLACE: Yes.

MS. ANGELO: It seems to me that the burden on that point should not be ours.

The burden should be theirs to say, yes, we know there is a difference between what Mr. Harmon told us and what Mr. Cobb is telling us today.

They don't get to pick and choose the facts to fit the witness they happen to have up at the time. And this is what they're doing.

HEARING OFFICER WALLACE: Well --

MS. ANGELO: Suppose, for example, if they had a good faith belief that this was an appropriate way to do

this, don't you think someone should have told us about this before we went on the record this morning? With a witness who wasn't supposed to be on this morning?

I think that timing stinks.

HEARING OFFICER WALLACE: Well, Ms. Angelo, you're entitled to think that the timing stinks. However, I don't agree with that. And your renewed objection is, again, noted for the record and is overruled.

If you wish to Cross-examine Mr. Cobb on his testimony this morning, please begin.

CROSS-EXAMINATION

BY MR. DIMOND:

Q. Mr. Cobb, did you create what has been marked Respondent's Exhibit 6 at the request of attorneys for the Agency?

A. Yes, I did.

Q. And, if I understand your testimony right, you did that on Sunday?

A. This last Sunday, yes.

Q. Do you recall being asked about what's been identified as Petitioner's Exhibit 39 at your deposition?

A. I don't recall specifically if I was asked

about it, no.

Q. Do you recall being asked if you knew when that document, that the typewritten part of that document had been created?

MR. KIM: Objection. It's already been established that in previous testimony, Mr. Cobb had said he was not aware of the document's creation.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I believe that I had said, in the past, that I didn't know when the document was created.

BY MR. DIMOND:

Q. And when you said that, you said it under oath; is that correct?

A. That's correct.

Q. When you were shown Petitioner's Exhibit 39 during the deposition and you gave your testimony under oath that you did not know when the typewritten part had been created, did you give any indication that the document should not be in the record?

MR. KIM: Objection. Relevance.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No.

MR. DIMOND: Mr. Hearing Officer, the envelope for
Petitioner's Exhibit 8 doesn't seem to --

MS. KROACK: We put it on the table.

MR. DIMOND: Thank you.

BY MR. DIMOND:

Q. Mr. Cobb, I was to hand you what we have
previously marked as Petitioner's Exhibit 8, which is a
copy of the denial letter. In that package is the denial
letter dated February 27, 1995 by the Bureau of Air.

It's my recollection that you previously
testified that you drafted that document; is that correct?

A. Yes, I did.

MR. KIM: I'm sorry. Objection.

I think any questions directed towards
the February 27, 1995 denial letter are outside the scope
of Mr. Cobb's testimony.

HEARING OFFICER WALLACE: I assume you are going to
tie it up to the Direct?

MR. DIMOND: Most definitely.

HEARING OFFICER WALLACE: All right. Overruled at
this time.

BY MR. DIMOND:

Q. If you look at the second page of that document, does that second page have a line on the bottom with some encrypted -- "encrypted" may not be the right word. But with some initials and numbers?

A. Yes, it does.

Q. If we read that line from left to right, it reads: DES:JDC/0224952.DOC; is that correct?

A. Yes, it does.

Q. Don't the numerals on this document, 022495 indicate that you first created this document on February 24, 1995?

MR. KIM: Objection. Again, this is a question which is clearly outside the scope of Direct testimony.

Mr. Cobb has not made any representations whatsoever as to the encryption line or any other part of the February 27, 1995 denial letter.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes. That's correct. It does indicate the date which the document was initiated.

BY MR. DIMOND:

Q. And this method of inputting numerals into the document, is different than what you've testified about

with regard to Respondent's Exhibit 6; isn't it?

A. Yes, it is.

Q. Either/or both the documents, the typewritten part of Petitioner's Exhibit 39 and Respondent's Exhibit 6, summarize data from a report by U.S. EPA that was published in December 1994; isn't that correct?

A. That's correct.

MR. DIMOND: Okay. Mr. Hearing Officer, at this point in time, I'm going to ask leave to go outside the scope of what was asked on Direct, specifically, because at the time of Mr. Cobb's deposition, both days of his deposition, and at the time of his testimony in the case, we had not been provided -- Well, I guess maybe by that time we did have the privilege log. But we had not been provided a copy of what has been marked as Exhibit 120.

And I have a very few questions that relate to timing of events in the time frame of that memo that we would like to ask Mr. Cobb. And I would, again, I would just ask leave to go outside the scope because of our inability to ask those questions, given the non-existence of the document, or our not having the document either at his deposition or at the time of his

testimony.

MR. KIM: Objection.

First of all, again, as Mr. Dimond has acknowledged, that is certainly outside the scope of Direct testimony.

Second, the subject matter of what he seeks to elicit testimony on is exactly that, which, in repeated pleadings and very strenuous statements made at hearing on the record, the Respondent's have attempted to -- I'm sorry. The Petitioners have attempted to exclude that type of testimony.

They have stated that they feel that it is inappropriate for the Agency to elicit such testimony. They feel that it's inappropriate for that kind of information to be put into the record. And now they are seeking to do just that.

And, certainly, we would feel, just as we have agreed that we would not be eliciting that sort of testimony, that kind of concern that were at least, at one time, agreed by WSREC, should certainly go both ways.

And, if for some reason, the request is allowed, then, obviously, the Agency would have every

right to Cross-examine Mr. Cobb-- I'm sorry, to pose Redirect on exactly the subject matter that is going to be raised.

And I think that's exactly what we have been -- that's exactly the relief that has been sought by WSREC that we would be prevented against.

HEARING OFFICER WALLACE: All right.

MR. DIMOND: Mr. Hearing Officer, if I could just say two things.

One, Mr. Kim anticipates, I think incorrectly, about the questions we intend to ask.

I don't think -- In fact, I know that we do not intend to ask questions that will get into the area that I think Mr. Kim was describing, as best as I understand it.

Number, two, if we're not allowed to ask them now, we will, I think call Mr. Cobb as our first rebuttal witness this afternoon, and we'll go into it then. Albeit that it will only take five to fifteen minutes, I think.

HEARING OFFICER WALLACE: All right.

I was going to suggest this, that I would

overrule the objection, that you can go beyond the scope.

But I was going to anticipate that we would just turn around and call him as a rebuttal witness, as soon as your done with your Redirect, or we can just wait until this afternoon.

MR. MERRIMAN: It's now out of order with --

HEARING OFFICER WALLACE: I understand that. And that's only to accommodate his schedule. Otherwise, he can come back tomorrow as a rebuttal witness or this afternoon, if necessary.

MR. KIM: Again, because the Agency has attempted to abide by its previous statement that it would not seek to elicit any testimony on this subject, we have not discussed this in any kind of detail with Mr. Cobb and we feel it would be inappropriate to allow that kind of questioning to go on right now.

Certainly, if our case in chief wraps up early this afternoon and if they would like to call him as their first rebuttal witness this afternoon, that would be their right.

But, because, again, we feel the document is privileged, the contents are privileged and because we

have not discussed this matter with Mr. Cobb in the form of testimony that would be elicited, we feel -- we think it would be prejudice upon us to have that kind of testimony right now.

HEARING OFFICER WALLACE: Okay. But, in any event, Mr. Cobb is going to remain here today and tomorrow, if necessary.

I don't like getting out of order either.

So, he's -- You know, you're committing to keeping him around.

MR. KIM: That's exactly what we're doing.

MR. DIMOND: Mr. Hearing Officer, if I could just say.

Mr. Kim is anticipating ahead with what our questions are going to be.

I think that, essentially, the substance of his objection anticipates our questions incorrectly.

And, moreover, as Mr. Singer points out to me, the idea that they haven't talked to Mr. Cobb or, frankly, a number of their other witnesses about what has been marked as Exhibit 120, the Mathur memorandum, I think is not borne out by the fact that they have made a filing

with the Board which contains numerous affidavits, one of which, I believe, is Mr. Cobb's, indicating something in regard to the Mathur memorandum.

I find it hard to believe that they would have simply left this affidavit on Mr. Cobb's desk. Not explained anything about it to him. And just, sort of, with a note that said "sign this and send it back to us."

I've got to believe that there is some -- you know, there was some explanation there.

HEARING OFFICER WALLACE: You know, I agree that there -- I don't like getting out of order to a certain extent. It would be more efficient if we were to go ahead.

If you object, I will uphold the objection.

And you are not allowed to go beyond the scope of the Direct.

In other words, we can finish up with Mr. Cobb and, then, depending on his schedule, he's going to have to stay around here.

Or, else, if you want to withdraw your objection and let them go through this outside the scope,

now.

MR. KIM: Could I take a moment, right now?

(Whereupon, a discussion was
held between the Agency attorneys.)

MR. DIMOND: Mr. Hearing Officer, I didn't want to speak while the Agency attorneys were conferring and not have them be able to hear me.

In fact, we don't intend to ask any questions about the document itself.

What we do intend to ask about, is the timing of certain meetings that we understand Mr. Cobb may have been involved in on or about February 23, 1995.

We don't intend to -- I don't intend to have him identify the document. I don't intend to ask him any questions about the content of the document or anything that's written therein.

Just to clarify for the Agency in terms of the questions that we -- the general scope of the questions we intend to ask. That's it.

HEARING OFFICER WALLACE: Okay. And if you keep in mind that if you do bring out questions, we are going to get real confused on Redirect -- not confused, but that

will raise additional questions on Redirect, if you're prepared for that.

MR. DIMOND: I have no problem with that.

MR. KIM: Mr. Hearing Officer, I think that what Mr. Dimond has just elaborated on is definitely something that we have not discussed previously with Mr. Cobb.

If nothing else, could you allow a ten, fifteen minute recess, so that we could discuss this briefly with Mr. Cobb before this line of questioning takes place?

And, if that's the case, then we would be able to take him out of order and we would be able to conclude with Mr. Cobb this morning.

HEARING OFFICER WALLACE: Do you object to that?

MR. DIMOND: It's a little strange. But, that's okay.

HEARING OFFICER WALLACE: Your request to go beyond the scope is a little strange, too, for that matter.

MR. DIMOND: I guess under the circumstances, I don't think so.

MR. MERRIMAN: And under the circumstances, we don't think a request for recess is a little strange in itself.

HEARING OFFICER WALLACE: Like I said, we could do it normally and bring him back. So, I don't know which is more efficient.

MR. KIM: I appreciate your offer and, again, what, I guess, I'm trying to do is reach a compromise. So, if we take a small break now, we won't have to worry about Mr. Cobb being brought back this afternoon or tomorrow.

We would be able to allow the questions that WSREC would like to ask of him this morning.

If I could just ask for ten or fifteen minutes before them?

MR. DIMOND: That's acceptable to us.

HEARING OFFICER WALLACE: Let's take a ten minute break then.

(Whereupon, a short recess was had.)

HEARING OFFICER WALLACE: All right. Back on the record.

In the interest of trying to save some time, Mr. Dimond, you may go ahead and ask questions that are beyond the scope of the Direct in as much as Mr. Cobb could be re-called for rebuttal purposes.

MR. KIM: I'm sorry. I would just like to note, and I assume this has been overruled, but I would like to note for the record our objection, simply that this line of questioning we feel is outside the scope of our case in chief, and, therefore, will be irrelevant and objectionable.

HEARING OFFICER WALLACE: Your objection is noted. And, like I said, hopefully to try to shorten this up, it's overruled.

BY MR. DIMOND:

Q. Mr. Cobb, do you recall having a meeting --
Strike that.

Did you have a meeting involving representatives of the Bureau of Land on February 23, 1995, that involved discussion of the WSREC applications?

A. No.

Q. Did you ever give a different answer to that question?

A. No.

Q. Do you recall being deposed in the case?

A. Yes.

Q. And at one of those depositions, did you --

were these questions asked and did you give these answers -- and I'm at page I believe I'll start at 220, line number 8.

"QUESTION: What did you know about the Land permitting decision?

"ANSWER: I don't have a specific recollection. I know there was a meeting sometime prior to the February 27th denial, in which various issues were discussed between Air and Land of their considerations.

"QUESTION: Who was at that meeting?

"ANSWER: I can't recall specifically who attended that meeting.

"QUESTION: Can you recall generally who attended?

"ANSWER: You know, people that could have attended, I guess would be Ron Harmon, Ted Dragovich -- I'm not sure who else.

"QUESTION: Were you there?

"ANSWER: Yes.

"QUESTION: Was Mr. Romaine there?

"ANSWER: I believe he was, but I can't remember specifically.

"QUESTION: Was Mr. Desai there?

"ANSWER: I believe he was.

"QUESTION: Anyone else that might have been there that you recall?

"ANSWER: No.

"QUESTION: Do you know approximately when this meeting was held? You said it was before the February 27th denial?

"ANSWER: I believe it was February 23rd."

Were those questions and did you give those answers at your deposition?

A. I don't -- The meeting was prior to February 23rd.

HEARING OFFICER WALLACE: The pending question is did you -- were you asked and did you give those answers at your deposition?

THE WITNESS: I don't recall.

MR. DIMOND: No further questions.

HEARING OFFICER WALLACE: All right. Miss Kroack?

REDIRECT EXAMINATION

BY MS. KROACK:

Q. Mr. Cobb, could you look at Petitioner's Exhibit Number 8 for a moment?

HEARING OFFICER WALLACE: It might be helpful if you would do your Redirect of Mr. Cobb and, then, if you have any additional questions on -- go into that separately.

MS. KROACK: Okay. This is Redirect.

HEARING OFFICER WALLACE: All right.

BY MS. KROACK:

Q. Could you look at the last page of that document, the last line?

A. Which page?

MR. DIMOND: Which page?

BY MS. KROACK:

Q. Petitioner's Exhibit 8, the last page of the February 27th, 1995 denial. Below Don Sutton's signature block.

A. Yes.

Q. Can you explain to me why that file code is

different than the one that appears on Respondent's Exhibit 6?

A. These two documents were created at different periods of time.

Petitioner's Exhibit 8 was produced at a time when I was utilizing Microsoft WordPerfect -- I'm sorry. Microsoft Word. And I was utilizing a different means of naming files than what has been listed as Respondent's Exhibit 6.

BY MS. KROACK:

Q. Okay. Looking at this Petitioner's Exhibit 8, the numbers 022495 appear. Is that your effort to indicate the date this document was initialized?

A. Yes, it is.

Q. At the time you provided your earlier sworn testimony, testimony concerning Petitioner's Exhibit 39, and that's the one in the file folder in front of you, was it your belief at the time that you were unsure when that document was created?

MR. DIMOND: Objection. His testimony speaks for itself. It's also hearsay.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, I believe I initially testified I did not know when this document was created.

BY MS. KROACK:

Q. And are you now sure of the date you created that document?

A. Yes, I am.

Q. And that date is?

A. Is 166th day of 1995.

Q. Is that approximately June 15th, 1995?

A. Yes.

MS. KROACK: I'm done with Redirect.

MR. KIM: Mr. Wallace, if you might allow. I just have one or two questions to ask in response to the rebuttal testimony.

HEARING OFFICER WALLACE: All right.

REDIRECT EXAMINATION

BY MR. KIM:

Q. Mr. Cobb, during rebuttal testimony a portion of your deposition transcript was read to you, including the line -- and this is out of your transcript -- page 221, lines beginning on line 8:

"QUESTION: Do you know

approximately when this meeting was held?
You said it was before the February 27th
denial?

"ANSWER: I believe it was
February 23rd."

Was that your recollection at the time of
your deposition?

A. Yes, I believe it was.

Q. And is that your recollection now?

A No, it is not.

Q. What is your recollection now as to the date of
this meeting?

A. It was February 22nd.

MR. KIM: Thank you. Nothing further.

HEARING OFFICER WALLACE: Mr. Dimond?

MR. DIMOND: We don't have any further questions.

HEARING OFFICER WALLACE: Mr. Cobb, you can step
down.

(The witness was excused.)

MR. KIM: So that we are clear, Mr. Cobb is able to
return to Springfield?

HEARING OFFICER WALLACE: Ms. Angelo, do you have

any further need to call Mr. Cobb?

MR. DIMOND: Not that we know of.

MS. ANGELO: Not at this time.

MR. KIM: We are now going to send him back south.

MR. DIMOND: Happy trails.

MS. KROACK: Thank you.

HEARING OFFICER WALLACE: Next witness?

(The witness was previously sworn.)

HEARING OFFICER WALLACE: All right. Miss Kroack?

MS. KROACK: Mr. Romaine --

HEARING OFFICER WALLACE: I'm sorry.

Mr. Romaine, having previously testified in this matter, please consider yourself still under oath.

THE WITNESS: I do. Thank you.

CHRISTOPHER P. ROMAINE

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KROACK:

Q. Can you state your name again for the record?

A. Christopher Pelton Romaine.

Q. What is your current job title at the Illinois

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EPA?

A. I'm the Manager of the New Source Review Unit in the Air Permit Section.

Q. And how long have you held that position?

A. Over twelve years.

MS. KROACK: Mr. Hearing Officer, at this time we would like to offer Mr. Romaine as an expert in the areas of New Source Review, including LAER, emission offsets, and BACT determinations, based on his previous testimony and our response to WSREC's interrogatories.

MS. ANGELO: May I ask some questions of Mr. Romaine on voir dire, before we proceed in that fashion?

HEARING OFFICER WALLACE: Yes, you may.

VOIR DIRE

BY MS. ANGELO:

Q. Mr. Romaine, we've met on several occasions prior to this matter for depositions and I want to refer you to the last day of deposition which encompassed your expert deposition.

Were you asked and did you tell us at that time, with respect to any opinions that you might have to offer with respect to the emission offsets issued,

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that you had not completed your review of that issue at that time?

A. I don't recall the specific question you're referring to.

Q. I believe you were asked what opinion you had formed regarding the documentation for emission offsets that were submitted by WSREC and I believe you responded that you hadn't completed your review?

MR. KIM: Mr. Hearing Officer, could we have a citation to the transcript.

MS. ANGELO: Well, I'm not trying to impeach him, I'm trying to refresh his recollection. Page 269.

MR. KIM: Thank you.

THE WITNESS: Yes, I do.

BY MS. ANGELO:

Q. And did you also tell me at that time that you did not have much recall for what was done prior to the February denial on that point?

A. Yes, I did.

Q. Were you also asked with respect to any opinions you might have formed with regard to BACT, and -- Strike that. Let me start again.

Did you also tell us, at that time, that with regard to any opinions that you might form with regard to BACT, that you had not finished forming your opinions at that time?

A. Yes, I had.

Q. Didn't you also tell us that in connection with forming those opinions you would like to review articles that might be -- might have been collected by Mr. -- excuse me, Dr. John Reed?

A. I don't specifically recall. It seems reasonable that I said that.

Q. And you indicated at that time that you hadn't completed reviewing those articles at that time?

A. That's correct.

Q. You also, I believe, indicated that, in connection with your review of that issue, you had or would be reviewing materials submitted by WSREC in May of 1995, did you not?

A. I believe so, yes.

Q. And didn't you also tell us that you weren't sure if you had reviewed those documents, articles, from Dr. John Reed as of February 27th, 1995?

A. I believe that's correct.

Q. And that, indeed, if you had reviewed them, you would have reviewed them quickly?

A. That's certainly correct.

Q. And didn't you also, in describing your views as to the BACT issues, make reference to certain articles that were contained in the May 1995 application?

A. I believe I did, yes.

Q. And with respect to the opinion that, or opinions that you might be forming with regard to LAER, were you not asked at your deposition about that matter -- about that issue and did you not reply that you were providing the information as to points that you'd identified so far to that point in time?

A. I believe so, yes.

Q. And didn't you also indicate that in forming your expert opinion, you were relying or would rely on the application that was filed by WSREC in May of 1995?

MR. KIM: As a matter of clarification, and I understand the purposes of your reading this, but is there another page citation you can give so as we can try to follow along with your questions, or are you skipping

around?

MS. ANGELO: I'm skipping around. Unless Mr. Romaine tells me that he doesn't remember anything, I'm afraid I have been skipping around, so I hadn't -- as you can imagine, these issues were dealt with over a number of pages.

MR. KIM: I understand.

BY MS. ANGELO:

Q. Do you remember my question?

A. No, I don't.

Q. With regard to your opinion with respect to LAER, did you not also indicate at that time, that you were relying on the WSREC application which had been submitted in May of 1995?

A. In forming an expert opinion as to what LAER might be, I think I've said that, yes.

MS. ANGELO: Thank you for the opportunity to conduct voir dire, Mr. Hearing Officer.

I think that we would argue that Mr. Romaine should not be allowed to testify as an expert for several reasons.

The first being that he had not formed

his opinions and was not prepared to provide his opinions at the time that he gave his expert deposition, which was at the very end of the discovery period in this case. And, therefore, we have not had any opportunity to learn his support of those opinions.

I would also suggest that to allow Mr. Romaine to appear and support his expert opinions by materials that have been barred from consideration, at the Agency's request in this record is, it seems to me, at the least, inconsistent with what's gone on so far in this proceeding.

I would also note that, it is troublesome, I believe, to provide an expert opinion from Mr. Romaine at this time relying on May 1995 data, articles he's read since, and so forth, when, at the time of the decision itself, those articles apparently were available and he hadn't read them and he was involved in the decision.

So, in essence, he's being asked to provide an expert opinion that, at the time, he did whatever he did in February of 1994, he was correct, even though he had not read the appropriate materials, reviewed

the articles that he believes are relevant.

I think that's an improper basis for an expert opinion.

So I would ask that he not be allowed to provide expert testimony in this case.

MR. KIM: In response, initially, I would note that, as I believe was borne out and, again, I wasn't able to follow, and I understand that Percy -- Ms. Angelo's was referring to the deposition transcript.

But, in my understanding, in most situations when Mr. Romaine during depositions was asked if he had an opinion, he stated that he had formed an opinion. It was just that he was continuing to review information.

I don't think that's at all inappropriate for someone in his position to do and, in fact, I think it would be unusual if a person would stop considering further information as part of his job responsibilities.

As far as any kind of reliance that Mr. Romaine may have upon documents that the Agency has taken the position would be inappropriate for direct consideration in reference to this case, we certainly

wouldn't change our position there. However, it's also our -- it's my understanding that as to a matter of guidance, Supreme Court Rule 703 -- I'm sorry, Federal Rule 703, Federal Rule 11 703, which has been adopted by the Illinois Supreme Court in the case of Wilson versus Clark, states that facts or data in the particular case upon which an expert basis an opinion or inference may be those received by or made known to the expert at or before the hearing.

So, the time frame that they seek to impose as being an inappropriate time at which he must have stopped his consideration of any materials, would not be applicable.

And that is not inconsistent with the Agency's past position that, for example, the May 1995, application is not relevant or germane to this case and should not be considered.

MS. ANGELO: I would just indicate that I don't think that the rule that you referred to is relevant here where the issue in the case is the propriety of the Agency's decision as of a particular date.

The situation we're faced with is that

Mr. Romaine had not completed review of the materials in the record as of that date.

He had not completed his review as of the date of the deposition, a year later, even though discovery had been filed indicating what Mr. Romaine's opinions were.

And I certainly object to the idea that people endeavor to keep reviewing these things all the way up to the time of trial. You either have formed an opinion and have reasons for it or you don't. But you don't continually speak to determine new support for your theory long after the fact. And, in this case, the fact was February 27th, 1995.

HEARING OFFICER WALLACE: All right. Thank you.

EXAMINATION

BY HEARING OFFICER WALLACE:

Q. Firstly, Mr. Romaine -- if you have stated this, I'm sorry -- what's your educational background?

A. I have a Bachelor of Science in Engineering and a Bachelor of Arts in Art from Brown University.

Q. Brown University?

A. Brown University.

I completed course work towards a Masters in Environmental Engineering at Southern Illinois University.

Q. And when were you degrees awarded?

A. 1973 and 1974.

Q. And you've been employed by the Environmental Protection Agency beginning when?

A. June of 1976.

Q. And, briefly, if you could run through your capacities at the Environmental Protection Agency?

A. I've always been employed by the Permit Section in the Bureau of Air.

I started off as a Junior Analyst. I did become Permit Analyst. I also got involved in Special Projects and proceeded to become a Senior Analyst over time.

Then I was designated as Manager of the New Source Review Unit and have been functioning in that position since, I believe, may of 1983.

As part of the New Source Review Unit, I sort of had a twofold job. The first involved to take programmatic responsibility for the various programs,

giving review of new and modified sources. And in the New Review making sure that we have the appropriate regulations and infrastructure in place. And then, also, to assist analysts in their review of individual permit applications.

I have also been involved in a number of special projects over the years for the Agency, including extensive involvement in Agency rulemakings -- Agency rulemakings before the Board.

Q. Do you have any publications under your authorship?

A. I have published one paper. Yes.

Q. Have you attended any, for a lack of better term, continuing education program since you became manager of New Source Review Unit?

A. I take advantage of those opportunities when they appear.

We have a connection to the U.S. EPA's training program. Periodically U.S. EPA office workshops. Yes.

Q. Do you attend professional or scientific meetings? Seminars?

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A. I attend meetings and seminars as my schedule allows that are organized by the Air and Waste Management Association in the general Illinois vicinity.

Q. Have you ever served on panels for such organizations?

A. I've successfully avoided that.

Q. And what's your experience with BACT, generally?

A. I've been involved in the reviewing or assisted in reviewing on a variety of PSD applications that have been received.

Q. PSD?

A. Prevention of Significant Deterioration Rules that have been received by the Agency. I've also been involved in the previous municipal waste combustion permits issued in Illinois.

By my recent count, we've processed about 50 PSD applications since I have been with the Agency.

Q. And all PSD applications involve BACT?

A. All PSD applications require determination of Best Available Control Technology.

Q. All right. And what's your involvement with

LAER?

A. Well, my involvement with LAER is much less because we have not been receiving major projects subject -- applications for major projects subject to Part 203. But in discussions with applicants about those requirements, I am required to be knowledgeable about the LAER requirements and to assist them in explaining what the Agency's expectations would be with regard to LAER or LAER determinations.

Q. How did you acquire your knowledge in BACT and LAER?

A. Primarily through on-the-job experience. Obviously, as part of my job I also have to refer to various documents, communications with U.S. EPA, communications with consultants, permit applications, and other Agency staff.

HEARING OFFICER WALLACE: Okay. Thank you.

MR. KIM: And I apologize, Mr. Hearing Officer. We would have asked the questions, you had, if you would -- I think we were attempting to save some time by avoiding those questions, but we certainly would have asked those questions, that you had gone through.

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HEARING OFFICER WALLACE: I understand that. That's okay.

I'm going to allow Mr. Romaine to testify as an expert witness. Although, I do believe that since Petitioner's Exhibit Number 8 defines the denial points and the date in time that the materials past February 27, 1995, his expertise must revolve around February 27, 1995.

MS. ANGELO: Mr. Hearing Officer, can we also ask that to the extent Mr. Romaine relies on arguments or material, that he was not prepared to provide for us at his deposition, that he confine his support for his opinions to the matters that we were able to explore at his deposition?

HEARING OFFICER WALLACE: Mr. Merriman?

MR. MERRIMAN: I guess I just I'd like to -- I think it's responsive to Ms. Angelo's concerns.

The Federal Rule of Evidence 703 changed the need to use hypothetical questions and cited all the basis for an expert opinion in advance and, in fact, it allows an expert to render an opinion based upon materials which may or may not be properly admissible themselves.

An expert can rely upon anything, as long

as it is something that is reasonably relied upon a person in that field.

And, I guess, in an area of inquiry permissible for cross-examination is, what it was that was relied upon and the reasonableness thereof.

And those are certainly under Federal Rule 705.

Federal Rule of Evidence 705 states that the expert may, in any event, be questioned about the underlying facts or data under which he relied on Cross-examination.

So, it's certainly a proper area of inquiry under Cross-examination if counsel for Petitioner believes that the formation of the opinion may or may not have relied upon things that were proper areas, or in the knowledge of the expert at the time of the February 27, 1995 denial. So I think --

MS. ANGELO: I think the point I was making was not so much the issue of admissibility of the underlying materials, as to litigation fairness and discovery fairness in our opportunity to learn of the matters on which he was relying.

So, I don't think the citation Mr. Merriman has given us dealings with that issue at all. And that's the concern I raised.

If a year after the fact, Mr. Romaine, who made and participated in the decision, still was not able to tell us what the bases were for the denial and his opinion that our application was insufficient, then I don't know that it's appropriate for him to be able to come up with reasons to support that opinion in the last couple of days before he goes on the stand.

HEARING OFFICER WALLACE: Mr. Merriman?

MR. MERRIMAN: In response to that, again, Federal Rule of Evidence 703, which was adopted by the Illinois Supreme Court in Illinois for civil cases in the Wilson versus Clark case -- I'm sorry, I don't have the citation at hand -- but that states that the facts or data in the particular case upon which an expert basis an opinion or inference may be those perceived by or made known by to the expert at or before the hearing.

It is perfectly proper for someone who has disclosed an individual pursuant to discovery as an expert, have the expert sitting here.

Mr. Pierce, could have been cited as an expert, for example, he could listen to Mr. Romaine's testimony today and formulate an opinion, and be asked that on rebuttal for his opinion. And he could rely upon things that Mr. Romaine says today.

It's a perfectly permissible use of expert witnesses so long as the other side has an opportunity to cross-examine the expert as to the basis and as to reasonableness of their reliance.

HEARING OFFICER WALLACE: In terms of -- I think we are just going to have to see what develops because I cannot tell if there are -- if there is anything that Mr. Romaine may have relied on now that he didn't rely on then, that he didn't disclose during his deposition or during discovery.

Short of -- It seems to me, kind of an odd situation in law where we are very limited by February 27, 1995. And if the material that Mr. Romaine is going to testify all was developed after 1995, then his expert opinion as to what occurred prior to February 27th, 1995, would be somewhat limited, if not useable at all by the Board. So, with that in mind, let's get started, I guess.

Ms. Kroack?

DIRECT EXAMINATION (Continued)

BY MS. KROACK:

Q. Good morning, Mr. Romaine.

In your opinion, what is the regulatory basis for requiring new municipal waste incinerators in Illinois to demonstrate BACT, or Best Available Control Technology for emissions of dioxin/furan and mercury?

MS. ANGELO: Objection. Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Section 9.4 of Illinois' Environmental Protection Act requires that new Municipal Waste Combustors that burn more than 25 tons of waste per day, have best available control technology for a number of different pollutants. Those pollutants include dioxin/furan and mercury.

BY MS. KROACK:

Q. Does WSREC's application indicate that the proposed facility will burn at least 25 tons per day of municipal waste?

A. Yes, it does.

Q. In your opinion, what is Best Available Control

Technology under Section 9.4 of the the Act.

MS. ANGELO: Objection. Ambiguous.

I don't know whether she's asking for a definition. If she's simply asking for what the Act says, conceivably, she's asking for a legal conclusion.

And, further, and an additional matter, and a reason for the ambiguity is, if she's asking for an application of BACT for a particular source, I don't think that's clear from the question.

So I think the question is ambiguous on several counts.

HEARING OFFICER WALLACE: Would you care to be more precise?

MS. KROACK: Sure.

BY MS. KROACK:

Q. What is your understanding of the definition of BACT under Section 9.4, without regard to any specific facilities?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: First of all, I'd clarify that BACT from Section 9.4, is, in fact, a term that is defined in

Section 9.4.

That definition states that BACT is the maximum -- in general terms, the maximum emission reduction for a pollutant, considering cost of environmental and energy impacts.

It's an emission limitation. That emission limitation is supposed to be set on a case by case basis during the permitting of a proposed project. Accordingly, it is an emission limitation that is going to be set by the Agency.

BY MS. KROACK:

Q. In your understanding, what is the difference, if any, between the definition of the BACT under Section 9.4 of the Illinois Environmental Protection Act and U.S. EPA's definition of the BACT for the Federal Program for Prevention of Significant Deterioration or PSD?

MS. ANGELO: Have you concluded?

MS. KROACK: Yes.

MS. ANGELO: Objection. Legal conclusion. I also would point out that I believe the last answer purported to ask for what the definition was provided in the statute.

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Mr. Romaine went far beyond that to give numerous interpretations. And I believe the answer should be stricken as non-responsive, as the question apparently was objectionable as being narrative. Calling for a narrative.

And I think it confirms my early objection that Miss Kroack was calling for a legal conclusion.

So I would also move to strike the prior answer.

HEARING OFFICER WALLACE: Objection is overruled.

And the answer will stand.

MS. KROACK: Do you remember the question?

HEARING OFFICER WALLACE: The objection to the pending question is overruled.

Mr. Romaine?

THE WITNESS: Well, the two definitions are, in fact, very similar.

The two major differences that I've noted in the terms are, first of all, the definition of BACT under Section 9.4 reflects emission limitation determination by the Agency. Where the PSD definition of

BACT refers to a determination made by U.S. EPA, in fact, the Administrator of the U.S. EPA.

The other difference is that the definition of BACT, under Section 9.4 of the Act, is narrowly focused toward Municipal Waste Combustors. Whereas, the definition of BACT under the PSD program is more generally developed in terms of any type of particular project.

MS. ANGELO: Mr. Hearing Officer, I'm going to also move at this point to strike Mr. Romaine's responses.

Mr. Romaine was offered as an expert in certain areas disclosed in the discovery responses.

He's being offered now as an expert, apparently, as to legal interpretations. That's an area in which he has not been offered and which I don't believe he's demonstrated, in answer to your questions, that he has any expertise.

And I think, this testimony is improper.

MR. KIM: I'm responding.

Again, Mr. Romaine has not provided any legal conclusions. Mr. Romaine has provided his understanding of the subject matter which has been

questioned by Miss Kroack.

Furthermore, he is simply testifying as to his day-to-day understanding and his application of the regulations, and that is entire within the context of his being called as an expert to testify in these areas.

MS. ANGELO: Mr. Hearing Officer, if I may just make an additional point.

I have the Agency's expert discovery response which gave the opinions on which Mr. Romaine would be testifying.

They have nothing of this kind in there. I mean, I can read it.

"Opinions and bases: As of February 27th, WSREC had not satisfied its obligations under 35 Illinois Administrative Code Part 203, specifically..." a long list of sections "...have not made an adequate showing..." --

HEARING OFFICER WALLACE: Well, Ms. Angelo. I'm going to interrupt here.

Your objection is overruled. The answer stands.

Please continue, Ms. Kroack.

BY MS. KROACK:

Q. Mr. Romaine, I believe in front of you, you have the document called the New Source Review Workshop Manual. And it's marked as Respondent's Exhibit 5; is that correct?

A. Yes, it is.

Q. Could you just identify that for us?

A. Well, this is, as you identified, the U.S. EPA's New Source Review Workshop Manual for the prevention of significant deterioration in non-attainment area permitting. It's dated October 1990. And it's indicated to be a draft document.

Q. Did you provide this document with your deposition materials?

MS. ANGELO: Objection. Ambiguous.

I don't know what deposition materials are.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I supplied this to the legal staff of the Agency and they, in fact, included it in the supplementary material filed at the time of my deposition.

BY MS. KROACK:

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Q. Thank you.

How do you use this document in your duties as Manager of the New Source Review Unit and as a member of the Bureau of Air Permit Section?

MS. ANGELO: Objection. Vague.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Well, I look at this document as the authoritative statement of U.S. EPA's guidance for New Source Review permitting.

And that's the first place I look if there is an issue that I have to address in permitting or if somebody looks for guidance on an issue.

I would look, first, here, to see if that topic has already been considered by U.S. EPA and have gotten their belief how it is appropriate to be addressed.

BY MS. KROACK:

Q. Do you follow any updates that might be issued by U.S. EPA on the matters that you just referred to?

MS. ANGELO: Objection. Ambiguous.

I don't know what "following" and "update" means. I don't know what an "update" means.

HEARING OFFICER WALLACE: Would you care to be more

precise?

BY MS. KROACK:

Q. Mr. Romaine, are you generally aware of and do you review any further additional guidance that U.S. EPA might issue, that impact the statements that they set forth in this New Source Review Workshop Manual?

A. As a general matter. Yes.

If there is further guidance or policy interpretation by U.S. EPA or some specific case where they are distributing the letter of decision that they had made, I would review it and try to follow it in my mind for general knowledge and put it away in a file folder for future reference, if, in fact, it constricted or supplemented that manual.

MS. ANGELO: Objection. And move to strike.

That answer had nothing to do with updates to this manual.

HEARING OFFICER WALLACE: Overruled.

The answer stands.

BY MS. KROACK:

Q. Mr. Romaine, in your understanding, is U.S. EPA's Top Down BACT process included in this document?

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MS. ANGELO: Objection. Ambiguous.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, it is. It's specifically described in this document.

BY MS. KROACK:

Q. Do you rely on this New Source Review Workshop Manual in permitting for major new sources?

MS. ANGELO: Objection. Ambiguous. "Rely."

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, I do. As I said, if there are questions I need guidance on, this is one of the first places I would look to get matters resolved.

If I have forgotten or want to be refreshed on how U.S. EPA approaches a specific term, what the different steps of the Top-Down process, those sorts of issues, I would turn to this document.

BY MS. KROACK:

Q. In your understanding, is this document commonly relied upon by people who conduct permit reviews for BACT and LAER?

MS. ANGELO: Objection. This is, first of all, a foundation question, but Ms. Kroack, I believe, is leading

her expert. I don't think that's necessary here.

HEARING OFFICER WALLACE: Sustained as to leading questions.

BY MS. KROACK:

Q. Did you use this document in reviewing WSREC's permit application denied on February 27, 1995 by the Bureau of Air?

MS. ANGELO: Objection. ambiguous. "Use."

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I'm not sure whether I specifically used this document. I certainly have relied on this document and I previously looked at it in the review of WSREC's application.

MS. ANGELO: Mr. Hearing Officer, could I ask that that answer be read wack?

HEARING OFFICER WALLACE: Would you read the answer back, please?

(Whereupon, the record was read.)

HEARING OFFICER WALLACE: Next question, please?

BY MS. KROACK:

Q. In your understanding, what does the Top-Down BACT guidance provide?

A. The Top-Down BACT guidance establishes a procedure for going through a BACT evaluation. It sets forth a series of steps to assure that BACT evaluations are conducted in a standardized fashion. That they're done systematically and the goal of that process was to generally improve the consistency and quality of those determinations.

Q. Can you describe, briefly, what the steps are in the Top-Down BACT process?

MS. ANGELO: Calls for a narrative.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Well, the Top-Down process, like I said, was a systematic approach to making a BACT determination.

There are five steps in that process. The first step is identifying possible control alternatives for a particular project. And this is sort of like a test. Whatever is out there that can be conceivably applied to a particular project.

Step two, then, is to review those assembled control alternatives and to see if any of those can be limited because they're not technically feasible.

If one of those alternatives is not technically feasible, it doesn't have to be further evaluated.

Step 3 is then to rank the remaining control technologies with remaining alternatives as to their effectiveness.

Actually, first to determine their effectiveness and then to rank them in terms of their effectiveness. Putting the most effective technology at the top of the list, then the technology that has the lowest amount of emissions. And at the very bottom of the list you put the least effective technology, and that's the technology which allows the greatest level of emissions.

Step four is then to evaluate those technologies as necessary, and it's at that stage you consider the economic environmental and energy impacts of the projects.

And the approach that is used: You go to the top of the list. If the applicant is willing to accept that, then that is selected as BACT. Otherwise, you would proceed down that list until you come to a technology or alternative that you cannot eliminate and

that is what is established BACT.

And that is, in fact, the fifth stage, is selecting that technology that, in fact, cannot be eliminated.

BY MS. KROACK:

Q. In your understanding, does the use of this Top-Down process alter the determination of what constitutes BACT?

MS. ANGELO: Objection. Ambiguous.

But I also am not sure I understand the relevance of Mr. Romaine's discussion of a draft Federal Guidance document.

HEARING OFFICER WALLACE: This is their case, Ms. Angelo.

MS. ANGELO: I still -- Relevance is still a matter that applies to their case or my case.

This is a situation where they have several times told us that their case does -- their denial did not involve any federal issues.

They have moved to dismiss our appeal before the EAB because it did not involve any federal issues. And what we're getting now is the discussion of

federal guidance. Draft federal guidance.

HEARING OFFICER WALLACE: All right. Your objection is noted and overruled.

Please continue?

BY MS. KROACK:

Q. Do you remember the question, Mr. Romaine?

A. No.

Q. I will restate it.

In your understanding, does the Top-Down BACT process alter the determination of what constitutes BACT?

A. It doesn't substantively change what has to -- the determination of what is BACT.

As a technique or a procedure, it certainly improves the process by which BACT is determined. And by making that improvement to the process, I think it improves consistency and results in better BACT determinations, but it does not change the criteria for what is BACT in a particular situation.

Q. Mr. Romaine, do you know how widely used this New Source Review Workshop Manual is?

MS. ANGELO: Objection. "Widely used."

First of all, it's irrelevant. It's also ambiguous.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I believe this document is widely used. U.S. EPA certainly refers to it, when we ask questions. And they point to it, when they're asking questions of us. Consultants call me and ask questions about it. When I go to conferences, people make references to this document.

BY MS. KROACK:

Q. To your knowledge, does WSREC's application indicate that it would use U.S. EPA's Top-Down process to demonstrate what is BACT for a proposed facility?

MS. ANGELO: Objection.

Outside the scope of the testimony as disclosed interrogatories. Outside the scope of the testimony that was discussed by Mr. Romaine in his deposition.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes. The application does say that it's -- WSREC would be demonstrating what is BACT using the Top-Down process.

BY MS. KROACK:

Q. In your understanding, does U.S. EPA's Top-Down BACT process indicate that cost effectiveness should be used for comparison of the cost impact of different control alternatives?

MS. ANGELO: That's definitely vague.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Let me -- If you're looking at the Top-Down process, when you get to the step four of the process, when you are comparing different alternatives, U.S. EPA indicates that cost effectiveness is the way that different control alternatives should be compared.

BY MS. KROACK:

Q. What is your understanding of the phrase, cost effectiveness, as it is used in this Top-Down BACT Guidance?

A. Well, cost effectiveness is an economic measure of the performance of different control alternative. It relates the cost of that alternative, how much is about to be expended to apply it, to the amount of emission reductions that would be achieved.

The simplest way to explain it is by an

example.

If a certain control measure, for example, would take \$10,000 a year out-of-pocket to apply it, that control measure would result in 5 tons of emissions no longer being emitted to the atmosphere, then the control effectiveness of that particular measure would be quoted as \$2,000 per ton.

Q. In your understanding, would a BACT limitation be more stringent than an applicable Federal New Source Performance Standard?

MS. ANGELO: Objection. Foundation. Leading.
Legal conclusion.

HEARING OFFICER WALLACE: Sustained as to leading.

BY MS. KROACK:

Q. Mr. Romaine, in your understanding, which is more stringent, a BACT limitation or an applicable Federal New Source Performance Standard --

MS. ANGELO: Still leading.

I'm sorry.

BY MS. KROACK.

Q. -- or NSPS?

MS. ANGELO: It's still leading.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: A BACT limitation can be more stringent than an applicable New Source Performance Standard. It cannot be less stringent than a New Source Performance Standard.

BY MS. KROACK:

Q. Can you give my an example of a situation where a BACT is more stringent than an applicable NSPS or New Source Performance Standard.

MS. ANGELO: Objection. Relevance.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, I can.

The most obvious example for this particular situation, is the particulate matter emission limit that would be proposed to achieve by WSREC as compared to the applicable New Source Performances Standard.

I believe that the New Source Performance Standard that U.S. EPA adopted sets a particulate matter emission limit of .01 grains per standard cubic feet. Per BACT, WSREC proposed to comply with an emission limit of .007 grains per dry standard cubic feet.

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BY MS. KROACK:

Q. I would like you to look at Petitioner's Exhibit 8 for a moment. I believe it's on the table somewhere in front of you.

Did you assist in the drafting of Petitioner's Exhibit 8?

A. Yes, I did.

Q. What is your understanding of the Agency's February 27, 1995 denial point with respect to WSREC's demonstration of BACT for dioxin/furans and mercury?

MS. ANGELO: I'm going to object to that question because I'm not sure whether she's calling for Agency intent as to this point, as to which, I don't think testimony is appropriate. The document speaks for itself.

If she's asking for some kind of opinion, expert opinion of a point, I don't -- I think her question is unclear. And I have no idea what kind of answer she's eliciting.

So, I guess my question is -- my objection is either ambiguity or the fact that she's calling for an interpretation of the document and Agency intent in a situation where the document should speak for

itself.

MS. KROACK: I'm not asking for Mr. Romaine's expert opinion. I'm just asking what his understanding is of that denial point, as one of the drafters of that denial point.

MS. ANGELO: I'm not sure that's relevant.

If Mr. Romaine's intent or understanding were to differ from the point itself, that would not change what the denial point is.

And, I believe, -- Let me point out, that one of the requests for admission was that the permit denial sets forth each and every reason that the Air permit was denied by the Agency as required by the rule. That was request for admission number ten, which has now been admitted.

So eliciting further information of what Mr. Romaine believed he meant by something, I think, is not only irrelevant, but it's beyond the scope of what we ought to be considering now.

HEARING OFFICER WALLACE: Are you asking for his intent?

MS. KROACK: I'm just asking for him to describe the

denial point.

Really, their whole case has been that our denial points are faulty. I want him to describe it and I want to ask him some questions about it.

HEARING OFFICER WALLACE: All right. As redefined, please answer the question, Mr. Romaine?

THE WITNESS: Well, in terms of my understanding, I refer to the document itself to refresh my recollection exactly what our concerns for.

The first point of the denial, overall, the issue was that the application didn't include enough information to determine the compliance of the Act and the Regulations.

Then, with regard to Best Available Control Technology, expressed specific concerns that there wasn't enough information to determine what was Best Available Control Technology for the project as it was a Municipal Waste Combustor subject to Best Available Control Technology under Section 9.4 of the Act.

The two specific issues that we identified under that denial point were, the application didn't adequately evaluate other types of carbon

absorption technologies which might be more effective for purposes of control of dioxin, furans and mercury.

And the other denial point with regard to BACT was that the emission test data submitted from other Municipal Waste Combustors show levels of dioxin/furans that were below the proposed New Source Performance Standards, and we didn't believe that the application adequately addressed why those tests shouldn't be followed as the basis for BACT for dioxin and furans. It set a limit that was lower than the proposed NSPS.

BY MS. KROACK:

Q. Can you describe what an activated carbon control system is?

MS. ANGELO: Objection. That's not within the scope of the expertise that he described in his response to questioning.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes. I can.

Activated carbon is used in a lot of environmental control applications. In terms of this particular application, activated carbon is used to selectively remove a contaminant from the exhaust stream

by exposing the exhaust stream to an activated carbon or passing the exhaust stream to activate the carbon. Contaminants with some degree of effective, are then transferred to the carbon and removed from the gas stream, resulting in a cleaner gas stream than being discharged to the atmosphere.

BY MS. KROACK:

Q. When you say gas stream, is another term for that flue gas stream?

A. Another term is flue gas stream. Exhaust stream. We have a number of terms that we sort of try to use to describe emissions in a process that -- prior to discharge to the atmosphere and at various points in the control system.

Q. Are you aware of whether any fixed bed carbon systems are used in Europe to control the emissions of dioxin, furans, and mercury?

MS. ANGELO: Objection. Foundation.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes. The application indicates that fixed bed carbon systems are being used in Europe and Municipal Waste Combustors.

BY MS. KROACK:

Q. In your opinion, does the existence of these systems in Europe, to control the emissions of dioxin, furan and mercury, indicate that these systems are technically feasible, as that term is used in U.S. EPA's Top-Down BACT guidance?

MS. ANGELO: Objection. Foundation. Also, vague.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, it does. The most straight forward evidence of technical feasibility is whether a particular technology is being used in a particular type of source.

If fixed bed carbon systems are being used on Municipal Waste Combustors somewhere, they're used on a number of them over there, then they are technically feasible.

BY MS. KROACK:

Q. And in Europe, those systems are being used on Municipal Waste Combustors, specifically?

A. To my --

MR. MERRIMAN: Objection. Foundation.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Based on the information in the application, they are. Yes.

BY MS. KROACK:

Q. And to your knowledge, based on your review of WSREC's permit application, after identifying the existence of these fixed bed carbon systems, did WSREC continue its evaluation of fixed bed activated carbon systems and if they were technically feasible?

MS. ANGELO: Objection.

Apparently we're just being asked or Mr. Romaine is being asked to discuss the application itself and what was contained in the application.

That is in the document. It's for argument. I don't know that it's a matter of expert debate.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Can you please repeat the question, Miss Kroack?

MS. KROACK: Sure.

BY MS. KROACK:

Q. In your understanding of your review of WSREC's permit application, after identifying the existence of

these fixed bed carbon systems, did WSREC continue its evaluation of those systems as if they were technically feasible, as that term is used in U.S. EPA's Top-Down BACT guidance?

A. Yes, I believe they did.

In particular, they then obtained a quote for installation of a fixed bed carbon system on the WSREC facility.

The ability to obtain a quote for a particular type of control technology is a continuation of the Top-Down BACT procedure, as it is assembling information to allow comparison of different alternatives. It is also another indication that that technology is feasible.

MS. ANGELO: I'm going to object and move to strike as being an excellent example of an area where Mr. Romaine is going beyond the support for his opinions which he was able to offer at the deposition in this case.

HEARING OFFICER WALLACE: Overruled.

The answer stands.

BY MS. KROACK:

Q. After identifying technically feasible control

technologies, in your understanding, what is the next step in U.S. EPA's Top-Down BACT process?

A. The next step in U.S. EPA's Top-Down BACT process is to determine the effectiveness of those different feasible control alternatives and then to rank those alternatives in order of descending effectiveness.

Q. In your understanding of WSREC's permit application, did they take that next step to the Top-Down BACT process?

MS. ANGELO: Objection. The document is going to speak for itself and the Board is going to make the decision.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I don't believe they did. I think they skipped a step and simply went to the evaluation of cost impacts. And, even there, they didn't provide the cost effectiveness, they just gave data on the overall cost of applying the technology.

BY MS. KROACK:

Q. In your understanding of WSREC's permit application, did WSREC propose to meet the emission limitation for dioxin/furans in the proposed NSPS for

Municipal Waste Combustors?

A. Yes, it did.

Q. Why do you believe a lower dioxin and furan emission limitation might be achieved, than the one proposed by WSREC?

A Well, I don't know if I believe that first of all.

But, in terms of the issue that was before the Agency as of February 27th, we were trying to evaluate whether, in fact, what was the Best Available Control Technology for dioxin/furan emissions. And the application included a number of tests on dioxin and furan emissions. The application made -- And these tests showed emission levels that were well below the emission levels of the U.S. EPA's proposed NSPS.

One of the issues that we had to resolve or had to be resolved in this application was, should BACT be set at the level that U.S. EPA proposes or set at the level that is being achieved by these other facilities which is supposed -- much more lower -- much lower, based on the test data provided.

Q. When you refer to those facilities for which

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test data was included in WSREC's permit application, can you tell me which facilities you're referring to?

A. Yes, I can.

The facility of the most interest, just not necessarily how you relate it to back BACT, but in terms of what is the precedent for this facility, is SEMASS.

Energy Answers was also involved in SEMASS. It is also using Energy Answers' shred and burn technology. So we do look at this as the -- look at the SEMASS facility as the prototype or the starting point for what the WSREC facility was, certainly -- should be expected to achieve.

And data was provided for the SEMASS facility showing dioxin/furan emissions that were much lower than the U.S. EPA proposed NSPS.

There was also data for some other RDF facilities. Mid Connecticut facility shows much lower numbers.

There was data for the Greater Detroit facility that wasn't quite as good but, again, was lower than the NSPS. There's also data for facilities that are

using activated carbon systems which are, in fact, not used at SEMASS which also show very low levels of dioxin and furan emissions.

Q. Okay. With respect to the performance data for the SEMASS unit, can you recall what the average was of those test runs?

A. I'd prefer to refer to the application. The application speaks for itself in that regard.

My recollection, it's about .02 nanograms per cubic meter, toxic equivalence.

Q. If you would like to look at Petitioner's Exhibit 16, I believe it's the November 1994, amended supplement to the October 1994 application.

A. I have it before me.

Q. And can you find the data that you're referring to?

I believe it's on page 24, Bates stamp 026?

A. The data is actually on pages 24, 25, and 26, of the November submission. I'll take your word for Bates stamping.

Q. Okay. With respect to this performance data

for the SEMASS Unit Three for dioxin and furans, how would you describe the difference between that data and the proposed emission limit for dioxin and furans in WSREC's application?

MS. ANGELO: Objection. Vague. Ambiguous. May call for a narrative. I can't tell.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I guess, first of all, I do need to clarify which particular proposed limit in WSREC's application.

What WSREC proposed was the two-stage approach to compliance of dioxins/furan emission limitation, in which, for the first three years of initial operation, it would be a higher limit for dioxin/furan emissions. A lower limit would become effective in the fourth year of operation.

After the fourth year of operation, the number for comparison to these numbers would be .2 nanograms per cubic meter, toxic equivalence, the emission limit that WSREC was proposing. That's the background.

I remember the question was comparison. Well, the numbers speak for themselves.

.05 compared to .2. About an eighth.
.017 compared to .2. About a tenth.
.012 compared to .02, about a sixteenth,
or something.

Overall, they appear to be an order of magnitude generally less than .2 emission limit that WSREC proposed as BACT.

I think I'd also point out that as a result of my subsequent evaluation there is a numerical error on page 26.

The bottom of page 26, the total dioxin and furan represented should not be less than 0.095. I believe if you check your math, it should be less than 0.0095.

MS. ANGELO: Can I just suggest -- I was trying to follow Mr. Romaine as he read things.

I cannot find the numbers he was reading and comparing on these pages. At least what I thought I understood to be a .095 number.

HEARING OFFICER WALLACE: Mr. Romaine, would you go back through your numbers?

THE WITNESS: The last point I was making --

MS. ANGELO: It didn't have to do with your last point. It had to do with your earlier comparisons, I believe.

HEARING OFFICER WALLACE: You went through each of the three pages you had in your hand and read a number off them.

THE WITNESS: The numbers that I'm using for comparison are the numbers at the bottom of the page that are expressed as nanograms per dry standard cubic meter of 7 percent O-2.

In fact, the dioxin/furan limits that we're talking about that WSREC proposed is also at this correction, 7 percent O-2, so that's the number that's appropriate for comparison.

The NSPS number for dioxin/furan expressed in equivalency, not as total dioxin/furans, but as equivalent dioxin/furans, after three years of operation is .2 nanograms per cubic meter.

The emission data that's provided here in the application states that "This particular case at SEMASS was achieving total dioxin/furans in toxin equivalence at 7 percent O-2, the same units as the NSPS,

of less than 0.025.

Just using simple arithmetic, .025 is one eighth of .2.

BY MS. KROACK:

Q. And on the next page?

A. Similarly, on the next page, the number for comparison is 0.017. In rough terms that's a tenth of .2.

On the last page, the test of emission rate was 0.012. That's about a sixteenth of .2.

The other point I was making, was if you go up two numbers from that it states that the total was less than 0.095. That is a numerical error. That, they dropped out a zero and, in fact, should be less than 0.0095.

Q. Thank you.

In your opinion, are those differences in the emission rates significant?

MS. ANGELO: Objection.

MR. DIMOND: Objection.

MS. ANGELO: Vague. Foundation.

HEARING OFFICER WALLACE: You need to be more precise. "Different" from what, I believe.

BY MS. KROACK:

Q. In your opinion, is the difference between the test result of the SEMASS Unit Three, memorialized in page 24, the November 1994 application, page 25 of the November 1995 application, and page 26 of the 1995 application, expressed as nanograms per dry standard cubic meter at 7 percent O-2, in comparison to .2 nanograms per dry standard cubic meter at 7 percent O-2 proposed by WSREC, significant?

MS. ANGELO: Objection. That's beyond the scope of his expertise as offered or as described.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes. I believe it's significant. That sort of discrepancy between tested emission rates and the proposed limitation, definitely warrants further investigation to explain why the proposed emission rate should, in fact, be almost an order of magnitude higher than the test of emissions.

BY MS. KROACK:

Q. In your recollection, what did you recommend to WSREC in pre-application meetings with respect to inclusion of supporting information for its application?

MS. ANGELO: Vague. Foundation.

We've had discussions I believe, about various --

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. Mr. Romaine, did you have pre-application meetings with representatives of WSREC for its Bureau of Air permit application?

A. Yes. I had participated in a number of pre-application meetings. And, I guess, ongoing application meetings with WSREC with regard to this project.

Q. Did you discuss what kind of supporting information you wanted to see in that application with respect to BACT and LAER determinations?

A. I believe that topic did come up.

Q. Do you remember what you stated to WSREC with respect to that topic?

MS. ANGELO: That still doesn't answer the foundation problem.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. Can you tell me the date of the first meeting that you had with WSREC -- the pre-application meeting that you had with WSREC, the approximate date?

A. The only specific date I recall by memory would be something back in 1988. To identify other dates, in fact, I would refer to my handwritten memos. And one of the things that I can reproduce from those memos is dates of meetings.

Q. Okay. At the meeting back in 1988, do you remember who attended on behalf of WSREC?

A. I would want to refer to my memo to refresh my recollection.

I also believe that that was way before the particular meetings of interest with which Gary would have been present.

I guess the key participants in these meetings from my perspective would be myself, Jim Cobb and Gary.

HEARING OFFICER WALLACE: Uh-uh.

THE WITNESS: I apologize.

BY MS. KROACK:

Q. Were you present at the hearing last week when

Mr. Pierce stated that he believed testing of carbon duct injection systems at Camden County and Stanislaus County and Marion County showed emission returns beyond some rate of activated carbon injection?

MS. ANGELO: Misstates the testimony. I think it's also an unclear statement.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, I was.

BY MS. KROACK:

Q. To your knowledge, in reviewing the WSREC application, was this belief stated in those applications?

MS. ANGELO: Objection. The document is going to speak for itself. And Mr. Romaine's interpretation of that point, I think, is not helpful.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I don't believe that that representation or that testimony by Mr. Pierce was in fact reflected in the application that was submitted to the Agency that was before the Agency as of February 27, 1995.

There were references made to that testing. I checked that point after my testimony. But I did not find any identification of the point about

diminishing effectiveness.

MS. ANGELO: I'm going to move to strike now.

Apparently all we have gotten is a statement by Mr. Romaine that he went back and -- Not as a matter of expert testimony at all. He just went back and he didn't find something. And he's testifying to that.

That has nothing to do with whether a discussion was there or not.

HEARING OFFICER WALLACE: Overruled.

BY MS. KROACK:

Q. Based on your review of the WSREC permit application, were copies of those actual test results included in the November 1994 application?

A. No. They were not.

Q. Okay. With respect to the testing of activated carbon duct injection systems conducted at the Stanislaus County facility, what did WSREC's application, in your understanding, conclude or state?

MS. ANGELO: Same objection.

HEARING OFFICER WALLACE: Excuse me. We have to go off the record. I'll be right back.

(Whereupon, a discussion was held off

the record.)

HEARING OFFICER WALLACE: Miss Kroack?

MS. KROACK: I'm not sure. Did I get an answer to my last question?

HEARING OFFICER WALLACE: There was an objection.

Could you repeat your question?

MS. KROACK: Sure.

BY MS. KROACK:

Q. With respect to testing of activated carbon duct injection systems conducted at the Stanislaus County facility, in your understanding of WSREC's application, what did it conclude or state with respect to that testing?

MS. ANGELO: I think I made my objection. And the application speaks for itself.

HEARING OFFICER WALLACE: Okay. Objection is overruled.

Mr. Romaine?

THE WITNESS: The application included a number of points from that testing and then summarized the results of that testing, saying it appeared that this testing would suggest that activated carbon systems would be

effective in further reducing emissions of dioxins and furans and mercury from Municipal Waste Combustors.

BY MS. KROACK:

Q. Turning, for a moment, from the LAER requirements.

MS. ANGELO: Can I just object and move to strike.

I don't think that's a proper description of the document.

It illustrates the problem of having people testify as to what's clearly on paper. But I would object and move to strike.

HEARING OFFICER WALLACE: Objection overruled.

The answer stands.

BY MS. KROACK:

Q. In your understanding, do the Board's Rules at 35 Illinois Administrative Code Part 203 apply to emissions of NOx from the WSREC facility?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, they do.

The application clearly indicates that this will be a major source for NOx emissions. The site

of the proposed facility is in Northeastern Illinois. Northeastern Illinois is a severe Ozone Non-Attainment Area. We have a classic major non-attainment area project for NOx.

BY MS. KROACK:

Q. Mr. Romaine, what is your understanding of LAER, the Lowest Achieve Available Emission Rate?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Well, LAER is a requirement for a major new source for non-attainment area contaminants. In the circumstances such as WSREC, WSREC is subject to LAER for NOx.

LAER is an emission rate. It specifically described in the Board's regulations. I believe it's Section 203.301 (a), provides the description of what LAER is. As a general matter, the way I would describe it is a very stringent emission limitation.

But the Board's rule set up the framework that it's the choice of either of two limitations, whichever is more stringent.

The one limitation you look at is the

most stringent limitation that's in any State Implementation Plan, unless it can be demonstrated that even though there is such a limitation, the implementation plan is not achievable. So that's one basis to go for defining what is LAER.

The other bases, the other emission limitation to look at, is the most stringent limitation achieved in practice.

The other aspect of LAER is that it is set on a case-by-case basis during permitting of a project, such that it's a limitation that the Agency has to set in a permit.

BY MS. KROACK:

Q. When you say that one of the things that might be LAER is what is achieved in practice for a particular -- When you say "what is achieved in practice," is that achieved in practice by Municipal Waste Combustors or some other type of facility?

MS. ANGELO: Compound. Legal conclusion. Vague. Leading.

HEARING OFFICER WALLACE: Sustained as to leading and compound.

BY MS. KROACK:

Q. What is your understanding of what "achieved in practice" means for a LAER determination?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: My understanding of what is achieved in practice is, when we have a particular class for other similar types of units, what emission rates and what emission limitations are associated with those emissions limitations -- those emission rates, that have actually been achieved.

BY MS. KROACK:

Q. What class or source would you put the WSREC facility in?

MS. ANGELO: Objection. Outside of the scope of his expertise. Ambiguous

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Well, it's a fuel combustion source. A broad category. It's more narrowly a fuel combustion source burning municipal waste.

BY MS. KROACK:

Q. What is your understanding of the

February 27th, 1995, denial letter with respect to LAER?

MS. ANGELO: Same objections I made earlier as to the usefulness of testimony of any kind, expert or not, as to the text of the denial which must stand on its own.

MS. KROACK: I'm not asking his expert opinion, I just want him to describe it so that I can ask some questions.

HEARING OFFICER WALLACE: As amended. Overruled.

THE WITNESS: I refer to the document to refresh my specific recollection.

Again, as I already stated, we generally identified our concerns with the application. These are denials that have fair and adequate information to show compliance with the Act and Regulations.

We then have a specific denial point with regard to Lowest Achievable Emission Rate. We Stated that the application, the information in that application, doesn't demonstrate that Lowest Achievable Emission Rate has been supplied for NOx and that the application didn't provide sufficient explanation and reasons for elimination of Selective Catalytic Reduction technology which appears to be a more efficient technology.

BY MS. KROACK:

Q. And when you say that Selective Catalytic Reduction may be a more efficient technology, what do you mean?

MS. ANGELO: I think there's a disconnect there. I thought he was just describing the application. Now, he's being asked to tell us what he means by "more efficient."

I think that creates the assumption that he's now interpreting the language of this document and what was meant in the document. I don't think that's proper.

If Miss Kroack is asking Mr. Romaine, separately and apart from what he just read, you know, "look at the terms 'more efficient technology,' what do you mean by that?" I think that's a different question. But the suggestion that he's interpreting the document, now, I think is improper.

MS. KROACK: I'm not attempting to suggest that he interpret the document, and I will just rephrase the question.

HEARING OFFICER WALLACE: All right.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. Mr. Romaine, why do you believe WSREC needed to eliminate Selective Catalytic Reduction technology for the control of NOx for purposes of a LAER demonstration?

MS. ANGELO: I think it's the same objection.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Well, SCR is generally recognized as a more effective control technology for NOx, than SNCR.

The application included information confirming that general understanding as applied to Municipal Waste Combustors.

The key point, if you look at the applications, when they evaluated the application of SNCR -- SCR to the WSREC facility, they put forth as a quote that proposed an emission limit of 60 PPM for NOx. Whereas, they were only proposing to achieve an emission limit of 100 PPM with the SNCR technology.

BY MS. KROACK:

Q. When you say SNCR. You mean?

A. I mean Selective Non-Catalytic Reduction. SCR refers to Selective Catalytic Reduction.

Q. Thank you.

To your knowledge, does the November 1994

WSREC application include estimates of the cost of applying SCR to the proposed facility?

MS. ANGELO: Objection. The document speaks for itself.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, it did.

BY MS. KROACK:

Q. Are you familiar with these two cost estimates?

A. Yes, I am.

Q. Given that WSREC included two cost estimates in the November 1994 application, why do you believe that as of February 27th, 1995, WSREC had not made a LAER determination?

MS. ANGELO: Objection. This is leading.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. Do you believe WSREC had made a LAER determination as of February 27, 1995?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No, I don't.

As stated in the application, they hadn't

provided sufficient information, sufficient reasons for eliminating SCR as LAER.

BY MS. KROACK:

Q. And did you consider these two cost estimates in forming that opinion?

MS. ANGELO: Foundation.

First of all we didn't know what two cost estimates we are talking about. And that's also ambiguous. It's also outside the scope of what was disclosed in the discovery.

HEARING OFFICER WALLACE: Overruled.

Mr. Romaine?

THE WITNESS: I did not place great reliance on those cost estimates, no.

BY MS. KROACK:

Q. Why not?

A. The key question for a LAER determination is what is the most stringent emission limitation that is ever achieved in practice.

The information in the application clearly indicated that SCR was the most stringent control technology.

The information on economics is not normally considered in LAER determinations, and that's something that I would have referred to the U.S. EPA's New Source Review manual to confirm. And in the New Source Review Manual it indicates that economic considerations don't normally enter into LAER determinations. If it should be used somewhere, it should be used at the proposed facility.

However, the U.S. EPA goes on to provide, and I recall an exception to that, that says that if you can demonstrate that the economic impact of a particular control technology would preclude development of any facility, any new facility in that particular industry, that, in that case, economics can be relied upon to eliminate that control technology, so it doesn't have to be used as LAER.

MS. ANGELO: Objection. Move to strike.

The reliance on U.S. EPA's documentation with respect with respect to New Source Review and especially LAER, is irrelevant in this proceeding. This proceeding, as the Agency has told us several times, involves state law.

Sally A. Guardado, C.S.R. * (708) 479-6664

HEARING OFFICER WALLACE: Objection is overruled.

The answer stands.

BY MS. KROACK:

Q. I'm going to refer you to the November 1994 application, so you can refresh your recollection. I think it's pages 53 to 56 and Bates stamp 055 to 058. In particular page 55, Bates stamp 057.

Can you describe what's on page 55 for us briefly?

MS. ANGELO: Objection. That's vague. Overly broad. Obviously, the page speaks for itself.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. In Petitioner's Exhibit 16, the November 1994 application, at page 55, what does this page describe for you, Mr. Romaine?

MS. ANGELO: Objection. Same problem.

Now, we are asking about his personal impression, I guess.

I got the impression before that we were refreshing a recollection, but we didn't have any indication that there was a recollection that needed

refreshing.

I don't know what this is about, but I can't tell from the question and I don't know that the record will be able to tell from the question what this is showing.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. Looking at page 55, Mr. Romaine, is this what is referred to as the Mercer County Study for the estimated cost of applying SCR at a Municipal Waste Combustors facility?

A. Yes, it is.

Q. Okay. What emission level of NOx emissions was assumed to be achieved in this study?

A. It was assumed that the uncontrolled emissions would be 300 PPM and that the controlled emissions would be 60 PPM.

Q. How does this level of NOx emissions, with SCR control, compare to the NOx emission level proposed by WSREC with SNCR?

MS. ANGELO: Objection. Vague.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: WSREC, in its application, proposed a NOx emission limit for LAER of 100 PPM. This cost quote reflects achievement of an emission rate of 60 PPM. 60 PPM is 60 percent of 100 PPM.

BY MS. KROACK:

Q. If the WSREC project met an emission limit of 60 PPM for NOx, what effect would this have on total NOx expected to be emitted from the facility?

MS. ANGELO: Objection. Outside the scope of anything in this proceeding.

We've been told by the Agency itself that they were very concerned that this -- that the issues here do not slop over into other areas such as modeling, risk assessment, all kinds of other things, that were also involved with this permit application. And we have been very cautious in our case not to introduce those issues.

To ask Mr. Romaine, now, to talk about total emissions, I think is doing, on the Agency's part, exactly what they cautioned us that they would expect us not to do.

MS. KROACK: I just don't understand the basis of Ms. Angelo's objections. I'm asking Mr. Romaine to

compare the proposed -- the NOx emission rate achieved in this study versus what WSREC achieved and draw some conclusions from that, based on what they proposed in their application.

I'm not going past February 27, 1995. I'm merely asking him, what is his conclusion in comparing the two. The total of NOx emissions proposed to be admitted by the facility is one of the pieces of information included in this application.

HEARING OFFICER WALLACE: Overruled.

Mr. Romaine?

THE WITNESS: In terms of total emissions, at 100 PPM, WSREC indicated that they would have the potential to emit about 570 tons per year.

If you multiply 570 tons per year times 60 percent, you end up with about 340 tons per year of emissions.

Comparing 570 tons of 100 PPM versus 340 tons of 60 PPM, you are talking about a difference of 230 tons per year on the potential emissions from the facility.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. Would that reduction in total NOx emitted result in any kind of financial savings to WSREC in your understanding?

MS. ANGELO: Objection. Foundation. And, also, there is absolutely nothing in Mr. Romaine's experience or in the disclosures that were made to us that indicates that this is an area in which he's an expert or in which he was to provide testimony.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The thing that immediately comes to mind is what would be saved if WSREC didn't have to provide offsets for those 230 tons per year of emissions.

I don't know the details of it, but, apparently, WSREC is expending certain funds to obtain offsets so, conceivably they would have to spend 40 percent less money for those offsets.

BY MS. KROACK:

Q. Were you here when Mr. Pierce testified that the total price to be paid for NOx emissions from Commonwealth Edison -- emission offsets to be obtained from Commonwealth Edison in the event they were required, would be \$2.8 million?

MS. ANGELO: Objection. Misstates the testimony.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I recall Mr. Richardson mentioning a figure of \$2.8 million dollars, yes.

BY MS. KROACK:

Q. So, in your understanding, that cost figure could be reduced?

A. I don't --

MS. ANGELO: Objection. He's already said he doesn't have any further information. I think he was just about to say it again, there. So the question can only be leading and calling for speculation.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. What was the cost effectiveness of the SCR system evaluated by WSREC in your understanding?

MS. ANGELO: Objection. Ambiguous. Cost effectiveness.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: In this regard, the document does speak for itself. The cost estimate indicates for this particular option that's evaluated here, the cost

effectiveness would be \$6,162 per ton of NOx removed. There's another figure I can't immediately point to it, for the second version of this cost quote that would give a cost effectiveness for an SCR system, if the SCR system also included a fixed bed carbon filter.

BY MS. KROACK:

Q. Referring only to the Mercer County facility study for a moment on the November 1994, was the cost impact of the SCR system, evaluated by WSREC, also expressed in terms of the impact on the tipping fee?

A. Yes, it was.

Q. Okay. In your understanding of the application, did it specify the dollar amount of waste tipping fees in Northern Illinois?

MS. ANGELO: Objection. The document speaks for itself.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No, it did not.

BY MS. KROACK:

Q. Did the application specify a dollar amount of waste tipping fees in other areas of the United States?

MS. ANGELO: Foundation, as well. And I probably

should have made a foundation objection to the earlier question.

The question apparently assumes, and I don't know whether or not that's true, but apparently assumes that there is a dollar amount of tipping fees. I don't think there's any showing that such an animal exists.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No, it doesn't.

BY MS. KROACK:

Q. What concerns do you have about an economic evaluation of a control technology -- Let me rephrase that.

Do you have concerns about an economic evaluation of a control technology expressed in terms of tipping fees?

MS. ANGELO: Objection. Concerns.

HEARING OFFICER WALLACE: Overruled.

MS. ANGELO: Concerns are normally not relevant.

THE WITNESS: Yes, I do.

The way that control technologies are usually compared is by cost effectiveness values.

Effectiveness values are used to compare control technologies among -- with other control technologies to select among control technologies or to rank a conversion of costs into tipping fees, takes it into an area where I don't have expertise.

I don't know what goes into a tipping fee. I don't know if it's, in fact, the appropriate measure to be used for a Municipal Waste Combustor. I don't know if it accounts for other factors that should be considered in an economic analysis, such as electricity revenue and a cost for material recovery. It's an unknown to me.

BY MS. KROACK:

Q. In your opinion, is Selective Catalytic Reduction considered a technically feasible control technology alternative for NOx emissions for Municipal Waste Combustors?

MS. ANGELO: Objection. Legal conclusion.

MS. KROACK: I'm asking for his opinion.

HEARING OFFICER WALLACE: I'm sorry. Could you restate your question?

MS. KROACK: Sure.

BY MS. KROACK:

Q. In your opinion, Mr. Romaine, is SCR considered a technically feasible control technology for NOx emissions from a Municipal Waste Combustor?

HEARING OFFICER WALLACE: Objection is overruled.

THE WITNESS: Yes. Clearly based on the application. The application gave numerous references to locations where SCR systems were being used.

BY MS. KROACK:

Q. What is your understanding of what U.S. EPA's New Source Review manual indicates about technologies used outside of the United States in the Top-Down BACT process?

MS. ANGELO: Objection.

The document is going to speak for itself and say whatever it has to say. Interpretation of that is inappropriate.

Furthermore, again, it's a U.S. EPA draft guidance document. This is not a federal program that's being -- that is the subject of this particular part of the application.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The U.S. EPA does indicate it's

appropriate to consider control technologies in use outside the United States as part of the description of step one of the Top-Down process when collecting the entire realm of possible control options. It specifically states that if you're aware of something being used outside of the United States, just the fact that it's not being used outside the United States isn't basis to exclude it from the control technologies in consideration.

BY MS. KROACK:

Q. As you have been sitting through these proceedings, have you heard discussions about reengineering of SCR?

A. Yes, I have.

Q. And what is your understanding of what reengineering of SCR is?

A. Reengineering of SCR, as described in the testimony -- I'm not sure, in fact, I agree with that use of the terminology -- but, as used, it's the addition of features to a, I have to characterize it as a simple SCR system.

If the basic technique of SCR is introduction of a catalyst bed into a point and to make

the exhaust working at the correct temperature for the catalytic reductions to occur and inject ammonia or other appropriate reagent material for that, than that would be considered basic SCR.

As the term reengineered SCR has been used, it appears to be any additional features or alternative approaches that are applied to SCR to address technical concerns or obstacles to the use of SCR.

So, as described here, one of the things that have been characterized as reengineering, is taking that SCR catalyst bed from in front of the fabric filter and a particulate matter control device where the flue gas is normally in the appropriate temperature range for catalytic reductions to occur, and placing the SCR system after the particulate matter filter, to a point where we have to reheat the flue gas to appropriate temperature for the Selective Catalytic Reductions to occur.

Conceivably, another term that might be considered reengineering is the development of a more expensive catalyst or an alternative catalyst that operates at different temperatures and doesn't have problems with poisoning that might, in fact, be more

expensive. Introduction of a carbon bed filter to help protect a catalyst.

But reengineering as used in this thing, is the addition of -- in this proceeding, appears to be just the addition of additional features to a basic technology to make sure that that technology performed reliably and effectively.

MS. ANGELO: I'm going to move to strike. It's a long explanation that's purported to be a summary of our testimony. It was no where close. So I object on that grounds.

I also object on the grounds that Mr. Romaine is not an expert in these areas.

HEARING OFFICER WALLACE: Overruled.

Answer stands.

BY MS. KROACK:

Q. Using the term reengineered control technologies as been discussed in the testimony and as you've just described, in your understanding, does the U.S. EPA Top-Down BACT guidance address reengineering of control technology?

MS. ANGELO: Leading.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. In your understanding, what impact does reengineering of control technology have under U.S. EPA's Top-Down BACT guidance process?

MS. ANGELO: Vague.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The U.S. EPA's Top-Down guidance specifically addresses how to approach physical modifications to a particular technology to address technical obstacles or concerns to the application or to apply technology to a particular source.

What the Top-Down guidance indicates is that the presence or the need to make those types of physical modification or do that reengineering should not be considered a basis to deem a particular control technology infeasible.

Those additional features of reengineering, however, can be and should be considered when an evaluation is performed at the cost of that technology. The cost impact of that technology.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. In your opinion, does the Top-Down BACT process apply to LAER determinations?

MS. ANGELO: Objection. Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: It doesn't strictly apply. However, the Top-Down policy resolves a number of issues for how control technology determinations should be determined.

Certainly, the LAER guidance builds on all those points that U.S. EPA expounds at much greater length in the Top-Down analysis.

The point where I would say that the LAER evaluation deviates from the Top-Down analysis is that the LAER evaluation focuses on the most stringent options out there. So, it isn't necessary to go through, as I say, as complete a listing of control options as this broad universe of what is conceivably achieved. And, then, starting from that point, a much more condensed evaluation can be performed, focusing on, in fact, what are the most effective technologies in this case.

The two technologies that would have to be resolved are SCR versus SNCR.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. In your opinion, which is the more stringent emission limitation, BACT or LAER?

MS. ANGELO: Legal conclusion.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: LAER is clearly the more stringent limitation in a general sense.

If you look at the definition of LAER, it says the most stringent of what is being achieved or limitations in a particular limitation plan that's being applied in a non-attainment area. So, LAER has to be equal to or more stringent than Best Available Control Technology.

Q. In your understanding of the Board's Rules that appear in Part 203, as they mention cost effectiveness or cost impact, would that criteria be considered in a LAER determination?

MS. ANGELO: Objection. Legal conclusion.

She's asking him to read the rules. The Board apparently knows them better than all the rest of us.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. In your understanding, what does U.S. EPA's guidance in the New Source Review Manual provide with respect to the role of economic impact in a LAER determination?

MS. ANGELO: I think we've had this before. Asked and answered.

HEARING OFFICER WALLACE: Didn't we have this before?

MS. KROACK: He answered part of it, but not quite all of it, earlier.

HEARING OFFICER WALLACE: Overruled. Just answer the part you didn't answer.

THE WITNESS: I'm afraid -- I'm afraid I will repeat what I said before.

HEARING OFFICER WALLACE: All right. Then let's skip to the next question, then.

BY MS. KROACK:

Q. Does the U.S. EPA's guidance in the New Source Review Manual, with respect to the economic impact of the LAER determination, set forth its standards in economic factors that may be considered in a LAER determination?

MS. ANGELO: Objection. Leading.

MS. KROACK: I'm asking if it does.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I think you could look at it as a standard. It, basically, says that you can't normally consider economic impacts, but if you can demonstrate, you can meet a standard, I guess, that the economic impacts of a particular technology would prevent development of a particular type of source in the industry as a whole, then it is acceptable to consider economic impacts.

MS. ANGELO: I'm going to object, Mr. Hearing Officer and move to strike.

I had understood, I guess, perhaps incorrectly, that when Miss Kroack was referring, when she was talking about U.S. EPA guidance to the document she had marked at the beginning of this discussion.

That clearly is not the case with respect to the question she just asked.

MS. KROACK: That's isn't true.

MS. ANGELO: Which must mean, in my mind, that we have been referring all along to a document that hasn't been identified for us.

MS. KROACK: That's not true Ms. Angelo. You have

to look at G 4 in here. And the guidance that -- individual guidance that you brought up before in your Direct Examination, actually appears in this document, as well. Look at Section G. Specifically, G 4.

HEARING OFFICER WALLACE: What did you pull out?

MS. KROACK: I'm looking at Respondent's Exhibit 5.

HEARING OFFICER WALLACE: The objection is overruled.

BY MS. KROACK:

Q. In your opinion, did WSREC's application and the information contained therein meet the standard for economic viability of SCR to Municipal Waste Combustors as described in the New Source Review Workshop Manual?

MS. ANGELO: I don't know what meeting the standard for economic viability to SCR, or of SCR, I can't remember what Miss Kroack's just said. I can't tell what that means and, therefore, I don't know what kind of a narrative is being solicited by that question. And, I also believe I have a legal objection. A legal conclusion objection. But, again, I can't tell from the question.

MS. KROACK: I can rephrase the question slightly, but I'm asking for a yes-or-no answer. And I'm asking

based on a standard he just described -- I will just rephrase it.

BY MS. KROACK:

Q. Mr. Romaine, in your opinion, based on the standard for when economic factors may be considered in a LAER determination, did WSREC's application and the information contained therein, meet that standard with respect to Selective Catalytic Reduction application to Municipal Waste Combustors?

MS. ANGELO: Legal conclusion and leading.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No, it did not.

MS. KROACK: I have no further questions for Mr. Romaine.

Although, at this time, I'd like to move to admit Respondent's Exhibit 5, and, from yesterday, I believe we had Respondent's Exhibit 4, which is just the Top-Down BACT guidance that also appears in this document, that that's what Mr. Pierce was questioned about, specifically.

MS. ANGELO: I would like to object to both documents. They were not provided by the original record

in this case. They were included in one of the much subsequent piles of documents that we received.

We have already heard an explanation of how matters were or items or documents were kept in Mr. Romaine's office. I think it's pretty clear they were never part of a record here until the Agency began accumulating documents in response to the litigation, and it was decided that this document would be added to the pile as being supportive, or arguably supportive of the decision that was reached.

I don't think there was any showing that it was ever part of the record as considered by the Agency in a decision that was issued in February of '95.

MS. KROACK: Mr. Romaine has testified that he knew of this guidance before this decision date. He uses that guidance in his role as Manager of the New Source Review Unit. That he applied this guidance with respect to the WSREC application in particular.

When the initial record was filed, we included only the things that the Board requires.

When required to expand that, we included all the supporting documents that were identified by our

Permit Analysts. We provided this to Ms. Angelo at Mr. Romaine's first deposition early in January. And it's been part of the Agency -- was then submitted to the Board as part of the Agency's supplemental record. It has been in the record the entire time.

I fail to see any of Ms. Angelo's arguments on this point.

HEARING OFFICER WALLACE: All right. Thank you.

Respondent's Exhibit 4 and 5 are admitted into evidence.

(Said document, heretofore marked Respondent's Exhibits Nos. 4 & 5 for identification, was admitted into evidence, to wit, as follows:)

HEARING OFFICER WALLACE: Let's break for lunch.

MS. KROACK: Are we coming back?

MR. KIM: We are coming back.

HEARING OFFICER WALLACE: Let's take about forty-five minutes.

THE WITNESS: I will refrain from discussing my testimony with my attorneys.

(Whereupon, the hearing was continued

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pursuant to lunch recess to March 6,
1996 at the hour of 1:50 p.m.)

Sally A. Guardado, C.S.R. * (708) 479-6664

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

West Suburban Recycling and Energy)
Center ("WSREC"), L.P.) PCB 95-119
)
v.) (Consolidated
) with
Illinois Environmental Protection) PCB 95-125)
Agency)

March 6, 1996, A.D.
1:50 O'clock p.m.

Illinois Labor Relations Board
State of Illinois Building
4th Floor Hearing Room
160 North LaSalle Street
Chicago, Illinois

BEFORE:

MR. MICHAEL L. WALLACE, CHIEF HEARING OFFICER

APPEARANCES:

Ms. Percy Angelo,
Mr. Thomas W. Dimond,
Mr. Jonathan E. Singer and
Mr. John Z. Lee
Mayer, Brown & Platt
appeared on behalf of WSREC;

Mr. Daniel Merriman,
Ms. Laurel L. Kroack,
Mr. John J. Kim and
Ms. Christina L. Archer
Division of Legal Counsel
Illinois Environmental Protection Agency
appeared on behalf of IEPA;

Ms. Ellen O'Laughlin and
Mr. George Cahill
Office of the Attorney General
appeared on behalf of the State.

Also Present:

Members of the Public.

Sally A. Guardado, C.S.R. * (708) 479-6664

HEARING OFFICER WALLACE: Back on the record. Let's reconvene for the afternoon. Mr. Romaine is in this chair.

Are there any preliminary matters to take up before we begin?

(No response.)

HEARING OFFICER WALLACE: All right.

Cross-examination?

MS. ANGELO: Thank you.

CROSS-EXAMINATION

BY MS. ANGELO:

Q. Good afternoon, Mr. Romaine.

You were asked some questions this morning about, I believe, comparing BACT to NSPS and LAER to BACT. Isn't it true that BACT can be the same as the standards set by NSPS?

A. Yes.

Q. And isn't it also true that BACT can be the same as LAER for any particular pollutants?

A. Yes.

Q. Indeed, isn't it also true that -- Respondent's Exhibit 5 is entitled New Source Review Manual. It says in the upper right-hand corner that it is a draft dated

October 1990.

Is it your understanding that this, indeed, is a draft document by U.S. EPA?

A No, it is not.

Q. That's not your understanding?

A. I don't consider it a draft document, no.

Q. Has U.S. EPA issued a final version of that document?

A. No, they have not.

Q. Has U.S. EPA taken any steps to adopt this document as regulation?

A. I don't know if they have or not.

Q. In your understanding, is this document required to be followed in New Source Review determinations?

A. As a whole, I couldn't -- I would say it is not required to be followed, but there are certain elements in it that are required to be followed.

Q. Could you look at page 274, Bates 274, of the document? And I want to refer you to the second sentence on that page which states that the document is not intended -- that's "not" intended to be an official

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statement of policies and standards and does not establish binding regulatory requirements.

Do you see that language?

A. Yes, I do.

Q. Do you disagree with that language?

A. No.

Q. Since the document's issuance as a draft in October 1990, has there been any action by the Agency to -- I'm reminded I should say U.S. EPA. Has there been any action by the U.S. EPA to implement this document in final form?

MR. KIM: Objection. I believe this question has been asked.

MS. ANGELO: It's a slightly different question.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I don't know.

BY MS. ANGELO:

Q. But you're not aware of any?

A. No, I'm not.

Q. When you were testifying about how you used this document, you made references, I believe, if my notes are correct, to updates -- Well, let me start begin.

I think the question that was presented to you was with regard to updates. And you gave an answer that had to do with trying to follow letter decisions, letters -- Trying to follow letters. Trying to follow decisions. Implementing the document. I guess, I'm going to need to have you, if you recall your testimony on this point, state it again so that I can understand what you were referring?

A. Okay. What I was indicating was that if I received copies of U.S. EPA's policies or correspondence that they distribute that touches on their guidance and policies, I would take those into consideration as well.

And the U.S. EPA does issue policy memorandums. It also distributes correspondence on decisions it's made or findings it's made in other cases and makes those available to State permitting agencies to assist them in carrying out permitting.

Q. Okay. Are those memoranda, are those adopted in any way by U.S. EPA?

A. Certainly. They're signed by U.S. EPA.

Q. So, as far as you know, what they have that makes them effective is just the signature on the

document?

MR. KIM: Objection. Characterization of the document being "effective." It's unclear what that means.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I have not -- I think it's -- investigated the issue of what authority is behind those documents. I was asked the question of whether they were adopted. And certainly they were adopted. They certainly aren't rules either.

BY MS. ANGELO:

Q. Are any of those updates provided in this Respondent's Exhibit 5 that's been offered by the Agency?

A. No, they're not. This reflects a document as of October 1990.

Q. You were asked some questions with regard to cost effectiveness in making BACT, I believe it was, determinations. And you defined cost effectiveness in response to a question, and I believe you eventually came down to defining it as cost per dollars -- cost per ton of pollutants involved.

Isn't it true, Mr. Romaine, that cost effectiveness does not relate to directly to the economic

viability of any particular control technology?

A. That's correct.

Q. Going back to the U.S. EPA draft guidance which you provided as Respondent's Exhibit 5, and your indication that you relied on guidance, letters, memoranda, policy memoranda. Do you also rely on U.S. EPA publications?

A. In certain circumstances I would rely on U.S. EPA publications.

Q. We've given you a copy of Petitioner's Exhibit 126, Mr. Romaine. Do you recognize this document?

A. Yes, I do.

Q. Isn't this document a U.S. EPA publication?

A. Yes --

Q. With regard to NOx control technologies for Municipal Waste Combustors?

A. Yes, it is.

Q. You were asked a question about, I believe, concerns that you had with regard to the use of tipping fees in making your analysis.

Are you aware that tipping fees are discussed in the New Source Performance Standards for

Municipal Waste Combustors?

A. I don't specifically recall that.

Q. Have you read the New Source Performance Standards for Municipal Waste Combustors?

A. I have looked through it several times, but I have not read it in the sense of reading it straight through.

Q. Have you looked at the proposed New Source Performance Standards for Municipal Waste Combustors, the one that was published I believe in the Fall of 1994?

A. Yes.

Q. Do you recall that that proposal had any kind of discussion of tipping fees and the effect of the technology proposed on tipping fees?

A. I don't specifically recall that.

Q. Isn't it true, Mr. Romaine, that the New Source Review Workshop Manual that you indicated that you use and rely on, indicates that technologies in application outside the United States are considered to the extent that they've been successfully demonstrated in practice on full scale operations?

A. Are you referring to a specific page?

Q. Is it your -- You don't have an independent recollection of that?

A. I don't remember the specific qualification as demonstrated on full scale facilities.

I also don't remember the context in which that statement was made and whether that was a statement with respect to the consideration of those technologies, or was that linking together the first -- the inclusion of step one in the Top-Down analysis and then step two of the Top-Down analysis to evaluate whether those technologies were, in fact, technically feasible.

Q. Is it your understanding, then, that technologies should be considered even though they are not used in practice on full scale operations?

A. Under the step one of the Top-Down analysis, it would certainly be appropriate to include those technologies for evaluation. And, then, as part of step two of the Top-Down analysis, to determine whether, in fact, those technologies should be considered feasible or not.

Q. Would you also disagree that technologies which have not yet been applied to or permitted for full scale

operations need not be considered available?

A. I don't think I can agree with that statement, as it doesn't explain what basis is being used for the demonstration.

The other fact to consider is, in fact, technology transfer.

If the narrow distinction was being drawn between a particular technology not having been applied on exactly that type of unit, certainly I would not allow that conclusion to be drawn.

Q. I guess I'm not sure, I believe, I have an answer.

Do you disagree with that statement?

A. I think I have to.

Q. You think you have to.

Mr. Romaine, you didn't take any chemistry as an undergrad, did you?

A. No, I did not.

Q. And you're not a chemist?

A. No, I'm not.

Q. How many people do you supervise in your New Source Review Unit?

A. None, directly.

Q. The unit is just yourself?

A. That's correct.

Q. You gave us some comments about emission levels that you had observed in the application of SEMASS and certain other combustors, I think you also mentioned Greater Detroit and Mid Connecticut?

A. That's correct.

Q. Isn't it true, Mr. Romaine, that emission levels have to be -- emission levels set as standards have to be complied with a hundred percent of the time?

MR. KIM: Objection. That calls for a legal conclusion.

HEARING OFFICER WALLACE: First of I didn't quite catch all your question. The emission?

MS. ANGELO: The emission levels set as standards.

MR. KIM: It's also a vague question in that there is no foundation as to what emission levels she's referring to as applied to what type of facility or what operation.

MS. ANGELO: Any kind of emission level.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: No. As a practical matter they don't have to be.

BY MS. ANGELO:

Q. If they were to be set in a permit as a permit condition, wouldn't they have to be complied with a hundred percent of the time?

A. As a practical matter, no.

As a regulatory matter, if they were not complied with a hundred percent of the time, a source would be subject to enforcement for those periods of time in which they were in compliance.

Q. So to avoid regulatory enforcement, the source has to be in compliance?

MR. KIM: Again, objection. These are all legal questions.

HEARING OFFICER WALLACE: Overruled.

BY MS. ANGELO:

Q. A source has to be in compliance --

MR. KIM: I'm sorry.

BY MS. ANGELO:

Q. -- all the time, is that not correct, Mr. Romaine?

THE WITNESS: What was the question?

MR. KIM: I apologize for interrupting you, Ms. Angelo.

BY MS. ANGELO:

Q. In order to avoid regulatory enforcement, a source has to be in compliance with its applicable limitations all the time, does it not?

A. If it's not in compliance 100 percent of the time, it certainly experiences the risk of regulatory enforcement.

Q. And isn't it true that in setting emission limits for a source, that it's appropriate to set that limit at a level higher than the emission rate that might have been achieved over a limited period of time?

MR. KIM: Objection. It's unclear what type of emission limits she's talking about, in what context as far as what regulatory basis or what period of time.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: It may be. It may not be.

BY MS. ANGELO:

Q. Did you give me a different answer in your deposition?

A. I think I gave you a much longer answer in my deposition.

Q. Well, do you recall being deposed?

A. Yes. The answer I gave in my deposition, as I recall it, is you have to account for variability.

If in fact you don't have confidence that that short-term test is indicative of long-term performance, then you have to account for long-term performance.

Q. And indeed when you were asked a question -- And I'm at page 227, line 23.

"Is the emission limit normally higher than the emission rate that might have been achieved over a limited period of time?"

Your answer at that time was "yes," was it not?

A. Yes. I would agree with that previous answer.

Q. Mr. Romaine, we've handed you, I hope, a copy of Petitioner's Exhibit 37, which was the fax to Mr. Jim Cobb from Gary Pierce on December 19, 1994.

Do you see that document in front of you?

A. Yes, I do.

Mr. KIM: Objection. This document was never discussed during the course of Direct.

MS. ANGELO: It's directly relevant to the discussion Mr. Romaine had on his Direct testimony about how you set emission limits and what emission limit was appropriate in light of the test results that were achieved.

HEARING OFFICER WALLACE: Continue.

BY MS. ANGELO:

Q. You would agree, would you not, Mr. Romaine, that this document, in particular the discussion in this document that begins at page Bates 21, is relevant to the question of the emission limit that should be set for dioxin, furans and mercury for the WSREC facility?

A. No, I would not.

Q. Did you give me a different answer at your deposition, Mr. Romaine?

A. I hope not.

Q. I'm referring to page 233, at line 3. And at the time of the deposition, I believe this document was Exhibit 41.

At that time, Mr. Romaine, were you asked and did you give the following answer to this question at the time of your deposition:

"I would like you to look again, just a little bit, at Exhibit 41. And I'm going to point you in particular to pages 21 through 23."

And I think if you will look at pages 21 through 23 of Exhibit 37, that's in front of you, you'll see that those are the same pages.

"If you recall it was the fax from Mr. Pierce to Mr. Cobb on December 19th. If you could just read through that quickly and tell me if what is in that fax responds to or provides information that is relevant to the issue of the meaningfulness of the emissions test data that is below the emissions limits -- that is below the emissions limits that was being proposed by WSREC?"

Pause. Witness perusing document.

"THE WITNESS: I would agree that

the material is certainly relevant to the issue."

Were you asked that question and did you give that answer --

A. Yes, I did.

Q. -- on the occasion of your deposition?

A. That was a discussion that was with regard to the dioxin/furan limits.

Q. And did I ask you about mercury, is that the --

A. Yes, you did.

Q. I'm sorry if I was overbroad in my question.

A. Uh-hum.

Q. So you would agree that this material is relevant to the issue of dioxin/furan limits?

A. Yes, I would.

Q. And it's correct, is it not, Mr. Romaine, that you can't recall whether or not you considered the information in this Petitioner's Exhibit 37 on or prior to February 27th?

A. I think what I indicated in the previous statement was that I cannot specifically recall whether I re-reviewed it in the time frame of February 27th.

I do recall having looked at it in the time period of December when it was submitted to us.

Q. Is that the answer that you gave to us at your deposition?

A. I don't believe so.

Q. So at that time of your deposition you told us that you had not -- couldn't recall whether you had considered this information on or prior to February 27th, did you not?

A. In the context of that deposition, answering that question, yes.

Q Did you, during any of your conversations with the people from WSREC, or did anyone else with the Agency during any of the meetings which you attended, tell the people from WSREC that they should get cost quotes to make their application a stronger application?

MR. KIM: Objection. Lack of foundation. There is no dates. No parties from either side. It's unclear when these meetings would have taken place.

MS. ANGELO: It doesn't matter when they took place. And I'm asking if he set it at any time and I then I'll be happy to pin down the time and the individuals present.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I don't recall.

BY MS. ANGELO:

Q. Do you recall having a meeting with the people from WSREC in November of 1994?

A. I don't specifically recall that meeting, no.

Q. Do you generally recall that meeting? I don't know what your term "specifically" means.

MR. KIM: Objection. I think he just answered the question.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The practice that had been established is when we sent an NOI to WSREC, Gary would come and talk about it. So, I believe there was a meeting in that time frame.

BY MS. ANGELO:

Q. Do you have any recollection of talking to WSREC in that meeting about the desirability in the view of the Agency of obtaining cost quotes of the equipment that was being discussed?

A. I don't --

MR. KIM: Objection. He stated he didn't have any

recollection of the meeting itself, much less any content that was discussed during the meeting.

MS. ANGELO: He testified, I believe, that he recalls that there was a meeting during that time frame.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I don't recall.

BY MS. ANGELO:

Q. You testified with regard to test data for certain sources including, for example, test data for sources controlling dioxin/furan emissions.

Were you, in that testimony, relying on information that was supplied in the application?

A. Yes, I was.

Q. Were you relying on anything else beyond the application?

A. No.

Q. You also, I think, testified about fixed carbon beds being used in Europe. Was your information about that, also, from the application?

A. In terms of my statements, it was based on the application. I have not bothered to remember whether there were other independent evidence confirming that

fixed carbon beds were also being used there.

Q. But your statement here relied on the application?

A. That's correct.

Q. You also, I believe, talked about activated carbon duct injection being used on Municipal Waste Combustor facilities in the United States.

Isn't it true that all of those facilities are mass burn facilities?

A. In terms about the data that I was referring to, that is correct.

Q. You also testified that the application stated, I think this was with regard to SCR, that it was generally recognized as more effective and that the application confirmed that for MWCs.

Do you know where in the application that's stated?

A. I can't point to a specific sentence in the application that makes that statement. But, in terms of the variety of data presented for Municipal Waste Combustors in the application, that's the conclusion that appears to be presented by that data.

Q. That's the conclusion that you drew?

A. That's the conclusion I drew, yes.

Q. Can you tell me which -- I don't want to have you spend a lot of time going through papers here, but can you tell me which document of the application you were referring to in making that statement?

A. It would have been the specific discussions with regard to whether SCR or SNCR is appropriate to be used for LAER.

It was addressed very generally in the October submission. There was a much more detailed response to our Notice of Incompleteness in the November submission.

Q. So you were relying primarily on the October and November submissions?

A. Yes.

Q. But primarily on the November submission?

A. That's correct.

Q. And you would agree that that language does not appear in the document in that form, but that's just the conclusion you drew?

MR. KIM: Objection. He answered that question

three questions ago.

HEARING OFFICER WALLACE: Sustained.

BY MS. ANGELO:

Q. You also referred to, I believe, the Mercer County data estimated annual costs in the November application and, I believe, indicated that you had determined that the Mercer County facility would be meeting a limit of 60 parts per million?

A. I believe that's correct.

Q. The 60 parts per million was an assumed number for purposes of that cost quote, was it not?

MR. KIM: Objection. To borrow an objection from earlier this morning, the document speaks for itself.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The 60 PPM was the assumption for the emission level reflected by that cost quote.

I don't have basis to say whether it was assumption or not. But certainly, I'm assuming that it was the emission limit.

BY MS. ANGELO:

Q. You are not aware of any vendor guarantee of any kind that backs up the 60 part per million number for

that installation of SCR at that facility?

A. No, I'm not.

Q. Indeed, isn't it true that Mercer County uses SNCR?

A. I don't know.

Q. So you don't know actually what the limit that a -- what limit is in place in Mercer County, do you?

A. That's correct.

Q. With respect to BACT and the New Source Performance Standards, isn't it true that in the Robbins Air permit issued by the Agency, the Agency set a dioxin/furan limitation at the same level as was proposed in the proposed NSPS?

MR. KIM: Objection. The Robbins permit was never discussed during the Direct Examination. It's outside the scope.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, it is.

BY MS. ANGELO:

Q. Isn't it true, Mr. Romaine, that you no longer review most construction permits that come into the Air Bureau?

MR. KIM: Objection. Relevance.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: I never reviewed most of them.

I'm no longer involved in the supervisory review of most construction permits prior to issuance.

BY MS. ANGELO:

Q. I should have used the term "supervised." Exercised a supervisory role in connection with most construction permits.

If I had rephrased the question, that way, would I have been more correct?

A. Yes.

HEARING OFFICER WALLACE: I'm sorry. Just so it's clear, why don't you say it again.

MS. ANGELO: Say it again that way?

BY MS. ANGELO:

Q. Isn't it true, Mr. Romaine, that you no longer exercise a supervisory function with respect to most construction permits that come into the Air Bureau?

A. That's right. I don't get involved in the majority of the construction permit applications.

Q. And isn't it true that the reason that you no

longer provide that role, is that you didn't have the time to do that?

MR. KIM: Again, objection. This is outside the scope and I don't see how this is relevant.

MS. ANGELO: It has to do with his qualifications.

HEARING OFFICER WALLACE: Yes. You've offered him up as an expert and I think this can get into that.

So the objection is overruled.

THE WITNESS: That's corrects.

My time is too valuable. It should be concentrated on the more significant applications.

BY MS. ANGELO:

Q. And isn't it also true that your review was delaying the expeditious return of information to the analyst?

MR. KIM: Objection. That's a characterization on the part of Ms. Angelo.

BY MS. ANGELO:

Q. I'm afraid it's not.

HEARING OFFICER WALLACE: I'm sorry. I was trying to think. Overruled.

Go ahead and answer the question.

THE WITNESS: That's correct. For routine matters, my review was not contributing anything to the process.

BY MS. ANGELO:

Q. And, indeed, was delaying the expeditious return of information to the analyst, was it not?

A. That would happen at times, yes.

HEARING OFFICER WALLACE: What?

THE WITNESS: That did happen. I agree.

HEARING OFFICER WALLACE: I'm sorry. I missed something. Did you say on this project or did you just say on projects?

MS. ANGELO: On projects.

HEARING OFFICER WALLACE: On projects.

MS. ANGELO: I have no further questions.

MS. KROACK: I just have a few.

HEARING OFFICER WALLACE: Redirect?

MS. KROACK: Just a few.

REDIRECT EXAMINATION

BY MS. KROACK:

Q. Mr. Romaine, you were asked about updates that effect Respondent's Exhibit 5. Are you aware of any updates that, as that term has been used, in copies of

U.S. EPA policies, correspondence of policies or findings on other cases that would change what's stated in that document?

A. Yes, I am.

MS. ANGELO: Objection. Overbroad. Ambiguous.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: Yes, I am.

BY MS. KROACK:

Q. And can you describe those?

A. Well, the one that specifically comes to mind in this circumstance is the U.S. EPA's further guidance on federal enforceability for exhaustives.

Q. Anything else that you can think of?

A. None that are relevant to this matter.

Q. When you were asked whether the cost effectiveness relates to economic viability of any control technology, you responded that you agreed with that statement.

What did you mean?

MS. ANGELO: Objection. Ambiguous.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: That in the permitting of air

pollution control sources I did not consider the economic viability of the project as a whole.

The economic viability of projects isn't something that the Agency is charged to protect. The goal of the Agency is to evaluate projects against the applicable Air Pollution Control Regulations where, with respect to those projects, some projects are viable and some aren't.

BY MS. KROACK:

Q. With respect to Petitioner's Exhibit 126. I think you have that in front of you, correct?

A. To your knowledge, did you receive that document on or before February 27th, 1995?

A. Not to my knowledge.

Q. Okay. With respect to -- There's a publication date of December 1994.

Based on your understanding of how these types of documents generally come to the Agency, when do you -- what is the normal process for how this document comes into the Agency?

MS. ANGELO: Foundation. And I think it assumes a lot of facts that we haven't had any discussion on.

Sally A. Guardado, C.S.R. * (708) 479-6664

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. You were asked whether emission levels set at standards must be complied with a hundred percent of the time.

My question is, how does a permittee demonstrate whether they're complying with an emission limit in their permit?

MS. ANGELO: Objection. Compound and calls for a narrative. Also beyond the scope.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: In compliance with an emission limitation, the permit may be determined by a number of means, depending on what that emission limitation is, in the first place. What the technology is.

The most authoritative determination of a compliance with an emission limit is, in fact, by emissions testing. Actually going in and measuring the concentration of the pollutants and the exhaust gases from the facility. For certain pollutants, continuous emission monitoring can also be used to form that evaluation on a continuous basis.

There also may be inferences with regard to making compliance based on how equipment is being operated. So that if equipment is not properly -- not being operated in a proper manner consistent with normal practice, it may be assumed that a source is out of compliance.

So, to maintain equipment and operating it within normal parameters, is also a means that a source uses to demonstrate compliance or non-compliance.

MS. ANGELO: May I just interrupt? I missed a word. I don't know whether it was an important one or not. But you said -- if I may, the witness said something, there may also be, and there was a blank on my paper, based on how the equipment was operated.

HEARING OFFICER WALLACE: Mr. Romaine, do you remember?

THE WITNESS: I believe I said inference. Inference and indication. It's not a definitive statement of whether a source is in compliance or not, but as a piece of information that could be relied upon.

MS. ANGELO: "Inference" is what you're saying?

THE WITNESS: Correct.

MS. ANGELO: Thank you.

BY MS. KROACK:

Q. You were asked about activated carbon duct injection used in the U.S. and you responded those were all mass burn facilities.

In your understanding, opinion, would you expect similar or better emission rates for dioxin and furan with respect to RDF facilities with the use --

MS. ANGELO: Objection.

BY MS. KROACK:

Q. -- with the use of activated carbon injection?

MS. ANGELO: Objection. Outside the scope. It's outside the scope of the Direct, even. It's also outside his expertise.

MS. KROACK: It may be outside the scope of the Direct, but Ms. Angelo asked on Cross about activated carbon duct use in the U.S., and wasn't that all on mass burn facilities. And I'm just exploring that.

MS. ANGELO: No. My question related simply to the kinds of facilities on which it was used.

HEARING OFFICER WALLACE: You tailed off.

MS. ANGELO: It was directed solely to the kinds of

facilities on which it was used as to which Mr. Romaine had testified.

HEARING OFFICER WALLACE: Sustained.

BY MS. KROACK:

Q. Mr. Romaine, does the fact that a facility is a mass burn facility, affect or impact the effectiveness of removal for a particular pollutant, when using activated carbon duct injection?

MS. ANGELO: Objection to his area of expertise.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: It might have an effect. Yes.

BY MS. KROACK:

Q. Would you describe that effect?

MS. ANGELO: Same objection.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The effectiveness of a technology or not, on control technology, depends on the amount of pollutants entering that device. Accordingly, the type of technology generating emissions does have a role in what will be measured as the effectiveness of the control technology. That means that if you are going in with a low concentration of it in the middle, may in fact be into

the inlet of a device, you may not show as high an efficiency in terms of percent removal. You may still show a reduction across the control device.

So, it will have an impact on what the measured efficiency of the control device is. It doesn't necessarily show that the addition of that technology would not act to control emissions.

BY MS. KROACK:

Q. Would it affect the emission rate?

A. Yes, it would.

Q. And can you describe that?

MS. ANGELO: Same objection as to expertise.

HEARING OFFICER WALLACE: Overruled.

THE WITNESS: The function of activated carbon is to collect and remove a contaminant from the Air stream. And the addition of activated carbon would function to collect and remove dioxin, furan, mercury from the air stream. The extent of that removal might vary, but the general principal would be the same. You might get very little. You might get a lot. But it would be acting as a further control measure.

BY MS. KROACK:

Sally A. Guardado, C.S.R. * (708) 479-6664

Q. With respect to the Robbins permit for the Robbins Resource Recovery facility, do you know when the Agency issued its permit?

A. In June of 1990.

Q. And with respect to your review of permits, do you participate in the review of most construction permits that include PSD New Source Review or NSPS issues.

A. I participate in the review of most projects that involve PSD issues.

I certainly get involved in the more significant New Source Review applications.

Most NSPS projects, at this point, are considered routine and I do not get involved.

(Whereupon, a discussion was held off the record.)

HEARING OFFICER WALLACE: Back on the record.

MS. KROACK: I have no further questions.

HEARING OFFICER WALLACE: Recross?

(Pause.)

HEARING OFFICER WALLACE: Are you still discussing whether you have any Recross?

MS. ANGELO: I think I have one. Maybe one small

question.

REXCROSS-EXAMINATION

BY MS. ANGELO:

Q. I had asked you a question, Mr. Romaine, about cost effectiveness, and whether it wasn't true that cost effectiveness had no relationship to economic viability, and you agreed with that.

Miss Kroack came back, asked you to explain that answer, and you said that you had given that answer, because, I believe -- I don't want to misstate -- that economic viability is not to be considered in the determinations that you were making.

I want to go back to my original question, however.

Irrespective of whether or not you believe whether or not economic viability is a consideration, isn't it true that cost effectiveness of the technology, in and of itself, does not relate directly to the economic viability of a particular facility?

A. That's correct.

MS. ANGELO: Thank you.

HEARING OFFICER WALLACE: Mr. Romaine, before you

leave, if you could, just for the Hearing Officer, give us on -- try to explain the relationship or the overlap between BACT or LAER? I mean, you said something about BACT can be LAER. Didn't you?

THE WITNESS: Yes.

MR. MERRIMAN: Just a simple question.

Ms. ANGELO: Very metaphysical.

MR. KIM: Gary's running for cover.

HEARING OFFICER WALLACE: Is it, apparently, not a very short answer?

THE WITNESS: Yes.

Nobody can object to your questions.

I will give you sort of a general --

HEARING OFFICER WALLACE: Well, actually my question is, why did you say BACT is LAER or BACT can be LAER?

THE WITNESS: Both of these are case -- You know, BACT is a case-by-case determination. LAER is a case-by-case determination.

You may come up with a circumstance where BACT and LAER case-by-case determinations result in the same conclusion. In that case, LAER would be the same as BACT. BACT would be the same as LAER.

There may be circumstances where LAER results in something more stringent, than what is determined to be BACT.

HEARING OFFICER WALLACE: Okay. That was simple enough.

Thank you.

You may step down.

THE WITNESS: Thank you.

(The witness was excused.)

HEARING OFFICER WALLACE: Mr. Kim?

MR. KIM: Mr. Hearing Officer, I believe that is the last of the witnesses we would call on Direct on our case in chief.

Before we would rest, we did have some things, housekeeping matters, that we do want to raise. And you can take them up now, I suppose, or at the conclusion of the hearing. But we wanted to make sure we raised the issues.

And we would also, like, I guess, get some kind of idea as to who and how many -- I guess who would be called tomorrow as a rebuttal witness, and I don't know, if it's at all possible, an expectation as to

the time that that might take so we could possibly coordinate some schedules.

HEARING OFFICER WALLACE: First things first. What matters did you want to bring up?

MR. KIM: Well, there's a -- I'll tell you. I will go through my laundry list and some of these, are, obviously what we would discuss at the close of rebuttal.

But we had some concerns as to briefing. Obviously, a briefing schedule will have to be worked out.

We have some considerations we wanted to raise as to the time of the Agency's preparation of the brief.

We feel it would be appropriate to allow slightly longer time for the Agency's reply -- or response brief, insofar as WSREC -- well, Petitioner in this case -- the Petitioner in permit appeals has an opportunity to file two pleadings. We have just the one. So we would like to make sure we have as much time as possible to get our one bite of the apple in.

Along those lines, as to briefing, when you do set the briefing schedule, we would ask that the mailbox rule not be applicable and that briefs be due on

the date that the briefing schedule sets. And, furthermore, that as far as delivery of those briefs, one copy be provided both to the Attorney General's office here in Chicago and also to the Agency's offices in Springfield.

There are, I believe, two protective orders that are still in effect.

We would certainly ask that those remain in effect until the Board have an opportunity to -- had an opportunity to consider them and make a ultimate ruling. Certainly as to the document that's been identified as the Mathur memorandum, and also to the permit appeal -- I'm sorry, the permit manuals and the administrative manual for the Bureau of Land.

Also, along the lines of a Protective Order, we would ask that an order be entered such that neither party would be allowed to initiate or propound discovery during the period of briefing, discovery in the second set of appeals, 96-155 and 156, such that the parties would be allowed to focus primarily upon the briefing of this case.

The Agency is still working under the

time deadline for the filing of whether there's a second case anyway, so we already have that obligation. But, we would ask that both parties be -- essentially a moratorium be set in place until after the briefing schedule is run, before any discovery could be propounded.

Let's see.

I believe that the only other requests that we wanted to bring to your attention would be resolution of any pending matters as to pending motions that would be before the Hearing Officer and exhibits that have -- where the ruling for admittance of those exhibits has been deferred.

And I wanted to make sure we've raised these before we rest our case. You can address them now or, I suppose, tomorrow at the end of rebuttal. I just wanted to make sure we got these out.

HEARING OFFICER WALLACE: Thank you.

Do you wish to say anything right now?

MS. ANGELO: I prefer to -- I mean, as to some of the matters, I have to look at a calendar anyway to figure out what's going on and it seems better to wait until tomorrow to deal with them.

HEARING OFFICER WALLACE: All right.

In terms of rebuttal, we are going to break today. Unless you want to put someone on today?

MS. ANGELO: No. We do have to break.

HEARING OFFICER WALLACE: All right. And are you -- Will you be ready to proceed tomorrow?

MS. ANGELO: Yes. What I anticipate tomorrow is that we'll put Mr. Pierce on.

We need to go back and talk to Mr. Richardson about his schedule, so I can't -- I'm not in a position to say today, yet, when we would be able to put him in or if we need to.

As far as how long Mr. Pierce will be tomorrow, we can't imagine that it would take more than an hour, hour and a half.

HEARING OFFICER WALLACE: For your Direct?

MS. ANGELO: For our Direct.

HEARING OFFICER WALLACE: All right. In terms of -- Maybe we should deal with some of this right now since we actually have spare time.

Petitioner's Exhibit 30, I have reserved ruling on. And the Agency's objection was that this was

unsigned; is that correct?

MR. KIM: That's correct.

And, I guess, to go through it, we believe certainly it was unsigned. We believe it was never sent. And we don't believe it's relevant to the case at hand.

MS. ANGELO: This was covered in the Request to Admit Number 7.

HEARING OFFICER WALLACE: Okay. Petitioner's Exhibit 30 is admitted

(Said document, heretofore marked
Petitioner's Exhibit No. 30 for
identification, was admitted into
evidence, to wit, as follows:)

HEARING OFFICER WALLACE: The next one I show is 32. February 1st memo from Mr. Desai to Mr. Cobb. "The final draft permit must be errorless," et cetera.

MR. KIM: I'm sorry. I believe the Agency's objection on that document was that it was irrelevant. I don't believe there is any testimony that's been provided as to this.

MS. ANGELO: I'm sorry. I didn't hear.

MR. KIM: I stated, I'm sorry, I wasn't aware of any testimony that has been elicited since the time you reserved your ruling that would have changed -- that would have added any additional relevance.

HEARING OFFICER WALLACE: Okay. Petitioner's Exhibit 32 is admitted.

(Said document, heretofore marked
Petitioner's Exhibit No. 32 for
identification, was admitted into
evidence, to wit, as follows:)

HEARING OFFICER WALLACE: The next one I show is 35, a memo from Rich Hodges to Jim Cobb.

MR. KIM: There again, the Agency's position was there was no relevance to this document. There was no testimony as to the contents of the document.

MS. ANGELO: Well, it went to Cobb, the permit reviewer. It demonstrates, I think, consistent with all the rest of the testimony in the case, that all the way up until February 22nd, the Agency was on track to issue these Air permits. February 22nd and beyond. February 23rd, seems to be the day everything fell apart.

MS. KROACK: Mr. Hodges isn't a permit analyst.

He's merely an AQPS Section and reviewed the permit with respect to whether they complied with that portion. We haven't raised that in our denial. We're not alleging that they didn't comply with the Air Quality Modeling Requirements.

HEARING OFFICER WALLACE: This just goes to modeling?

MS. ANGELO: Mr. Singer reminds me that this is one of the very few things that was included in the original record filed by the Agency.

HEARING OFFICER WALLACE: All right.

MS. KROACK: It is in the record. We agree.

HEARING OFFICER WALLACE: In that event, it's in there anyway, so I would admit it as an exhibit.

Petitioner's Exhibit 35 is admitted.

(Said document, heretofore marked
Petitioner's Exhibit No. 35 for
identification, was admitted into
evidence, to wit, as follows:)

HEARING OFFICER WALLACE: The next one I show is 39?

MS. KROACK: That's the discussion we had this morning and I believe testimony has established that the

creation date was June 15th, 1995, four months --

HEARING OFFICER WALLACE: The Agency objected to this; is that correct?

MS. KROACK: We objected to it because we didn't believe it was created before February 27, 1995, and that's what Mr. Cobb was testifying to this morning.

HEARING OFFICER WALLACE: Okay.

MS. ANGELO: Mr. Hearing Officer, as you can tell from our discussion this morning, the testimony of Mr. Cobb was inconsistent with what he had told us before about this.

We do think it's curious that we suddenly have a way of identifying a date on this document even though when we were asking about dates earlier we were told there was no way to do it.

It's clear that the document summarizes material that was available as of the time of the permit application in December '94 and should have been considered by the Agency, whether or not it was.

And Mr. Dimond can provide for you the comments that were made by Dr. Reed on this document who indicated that it was something that he had considered in

this review.

MR. DIMOND: Looking at --

HEARING OFFICER WALLACE: That's --

MS. KROACK: Can I respond?

HEARING OFFICER WALLACE: You're looking at his deposition, right?

MS. ANGELO: That's right.

HEARING OFFICER WALLACE: That's outside the record.

MS. ANGELO: If we need to, we will call him and have him say the same thing.

HEARING OFFICER WALLACE: I don't want Mr. Dimond reading the deposition into the record at this point.

MS. KROACK: Could we just respond very quickly?

HEARING OFFICER WALLACE: Yes.

MS. KROACK: We object to that document because we now can establish when it was created and, additionally, the handwritten notes on it are Hank Nauer's who was not called to testify with respect to those handwritten notes.

Secondly, the document that it summarizes is Petitioner's Exhibit 126, which you've previously admitted into the record, and that document if you apply Ms. Angelo's with Best Evidence Rule, is the document that

they need in the record, if they feel that they need it.

HEARING OFFICER WALLACE: I'm going to admit the exhibit to the extent that it goes to Mr. Cobb's credibility.

MS. KROACK: I don't believe Mr. Cobb ever testified he couldn't establish when that document was dated. He said he did not recall. It was Mr. Harmon who said he couldn't date his documents.

HEARING OFFICER WALLACE: Without arguing what's back three or four hearing dates ago, or even what Mr. Cobb said, today, I think that it's been properly established as going to that credibility in the hearing.

MR. KIM: So, as a matter of clarification, you are admitting this, not as to the substance of the document itself, but rather as to, again, like you said, the question as to Mr. Cobb's testimony as to date of preparation?

HEARING OFFICER WALLACE: Well, I'm admitting the document. And if --

MR. KIM: I thought you were doing it for a limited purpose. That's why I was trying to flush that out.

HEARING OFFICER WALLACE: It certainly is

admissible, I think, as a document that he acknowledges preparing. Whether the information is valid, based upon the other document, that's a different story.

But, I think, it's certainly admissible.

MR. KIM: One last question then, before we conclude, about that.

Does the admission -- Are we to take the admission of that document as a finding on the part of the Hearing Officer as to the credibility of Mr. Cobb's testimony?

HEARING OFFICER WALLACE: Not at this time, no.

MR. KIM: Thank you.

(Said document, heretofore marked
Petitioner's Exhibit No. 39 for
identification, was admitted into
evidence, to wit, as follows:)

HEARING OFFICER WALLACE: Petitioner's Exhibit 57
and 58 are these manuals.

I'm going to admit both of those. I
guess I would renew -- I haven't changed it, so the
Protective Order concerning those two is still in effect.

MS. ANGELO: I think there was only a Protective

Order on the one. Am I wrong on that?

MR. KIM: I believe we have always taken the position that both documents need to be protected.

HEARING OFFICER WALLACE: That was my understanding.

MS. ANGELO: I think --

MR. SINGER: That's right.

HEARING OFFICER WALLACE: I caution the Agency, once we drop these into the record, they are public documents and there is no, you know, --

MR. KIM: I think we appreciate and recognize the limits of the Protective Order.

HEARING OFFICER WALLACE: Okay. So 57 and 58 are admitted.

(Said document, heretofore marked Petitioner's Exhibit No. 57 & 58 for identification, was admitted into evidence, to wit, as follows:)

HEARING OFFICER WALLACE: Petitioner's Exhibit 73 is "How does the waste-to-energy stack up."

MS. ANGELO: This was, I believe, provided by the Agency in one of its supplements to the record.

Some of us seem to remember it's from Mr. Romaine's office.

HEARING OFFICER WALLACE: The piles.

MS. KROACK: Actually, I believe that one was part of Mr. Cobb's.

MR. ROMAINE: I gave it to him.

MS. KROACK: There you go.

MS. ANGELO: So, if it was provided by Mr. Cobb, then, it clearly, as far as we know, came from what was viewed as the record from the very beginning of the process.

MS. KROACK: I don't think there has been any testimony to that and no one testified as to the contents of the article, but we did include it in our discovery, and, then, subsequently, put all this stuff in discovery into the record.

HEARING OFFICER WALLACE: All right. Do you still object to the admission of Petitioner's Exhibit 73?

MS. KROACK: Yes.

MR. KIM: Relevance.

MS. KROACK: Relevance.

HEARING OFFICER WALLACE: Okay.

MS. ANGELO: If you would like me to address the relevance, I can.

HEARING OFFICER WALLACE: No. That's all right.

I'm going to admit it for whatever it might be worth.

(Said document, heretofore marked Petitioner's Exhibit No. 73 for identification, was admitted into evidence, to wit, as follows:)

HEARING OFFICER WALLACE: I show the next one as being Petitioner's Exhibit 112.

MR. KIM: The Agency's position on that document, I believe, that it was an unsigned document and we don't feel -- it's, as such and by the content, not relevant to the case.

MS. ANGELO: I'm sorry. "Unsigned" I heard, but what was the rest?

MR. KIM: Unsigned document, and because of that and

the contents of the document, we do not feel it is relevant to the case.

MS. ANGELO: Well, the contents, I think, are right on relevance.

This accompanied the letter that went to -- This was sent at the same time as the letter which went to U.S. EPA which said this was a complete application and it meets all standards and we'd love U.S. EPA's comment on it.

It's certainly relevant.

As far as the Agency's view about whether it was signed or not signed, I don't think that has anything to do with the text. The fact it was prepared by Don Sutton who said these things about the application.

MR. KIM: Mr. Sutton, I believe, testified that he did not actually prepare that document. And, furthermore, again, because it is an unsigned document, I believe, actually, Ms. Angelo's statement that it was sent at all is incorrect.

MS. ANGELO: I'm sorry. I'm told that Mr. Cobb prepared it for Mr. Sutton, so it's what Mr. Cobb is saying, at this point in time.

MR. KIM: I don't believe there has been any testimony established that that document was ever sent from the identified originator to identified recipient.

MS. ANGELO: It doesn't matter whether it was sent or not.

MR. KIM: I'm just responding to the statement that you made that it was sent at the same time of a different document.

MS. ANGELO: If I said that, I was misspeaking.

I don't know that it's clear it was not sent. But the fact that's important, I think, is that this was prepared at this time for this purpose to notify people of the sending of a document to U.S. EPA. And it shows, just as we've said on other points, everyone on the Agency was on track for issuing this permit up until February 23rd.

HEARING OFFICER WALLACE: I'm going to admit it, although, again, I don't think that it says what you are arguing, Ms. Angelo. But I will admit it into the record.

(Said document, heretofore marked
Petitioner's Exhibit No. 112 for
identification, was admitted into

evidence, to wit, as follows:)

HEARING OFFICER WALLACE: All right. The Agency had one other.

MR. KIM: Is that the --

HEARING OFFICER WALLACE: I showed the ordinance. I was reserving ruling on the ordinance.

MR. KIM: I'm sorry. I was going to say along with our arguments as to why that document should be admitted into evidence. It also represents a formal action taken by an elected body and, certainly, the Board, at the very least, would be able to take administrative or judicial notice at this time.

MS. ANGELO: Is this the ordinance we are talking about now?

MR. KIM: Yes. Respondent's Exhibit 3.

MS. ANGELO: I don't think the problem with the ordinance is relevance, because its clearly siting related and this is not a siting based denial.

I guess I would also add that if the Agency intends to use this, and I don't know how they intend to use it, but if they intend to use it in their briefing to discuss siting, adequacy of siting and so

forth, then, I think that use would be improper. And I don't know how to protect myself from that, without trying to figure out how to address whatever imaginary issues that there may be in there.

So, it certainly puts us in a difficult spot to know what to do with an admitted document that has nothing, apparently, to do with the denial. The scope of the denial in this case.

Would it be premature to ask how the Agency intends to use this?

MR. KIM: Well, I think it probably would.

HEARING OFFICER WALLACE: Okay. Mr. Kim, this ordinance at least the document you submitted, is the Village's approval of the siting application?

MR. KIM: That's correct

HEARING OFFICER WALLACE: And, therefore, this confers jurisdiction on the Agency to proceed per the jurisdiction on the Board. Are you going to argue that this ordinance is now inapplicable?

MR. KIM: No. No, again. And I understand that we have had this discussion before.

The Agency's position is, it's not that

the siting which was granted by the Villages of Summit or McCook is deficient. What we are saying is that the siting that those bodies granted is not sufficient when or for the purposes that are being offered by WSREC, vis-a-vis their permit applications.

The siting approvals are fine. What we question is, basically, what WSREC is doing with those siting applications.

And, obviously, the ordinance -- I agree I don't think we are questioning the jurisdiction of the Village of Summit to enter that ordinance. As a matter of fact, we are saying that that was certainly -- we have no problem with that.

We would like to, basically, use that document as evidence of what the Village of Summit did do, which would be, in fact, grant the local siting requested.

MS. ANGELO: What I'm hearing is that they intend to use it to argue the scope of siting at this site, which is not an issue that's been addressed at all in this proceeding so far, and which, you know, if that goes in, I don't know -- We have to respond to it.

I don't know what we would do to respond

to it now, but it seems to me that we have -- we cannot leave that sitting there.

MR. KIM: Well, again --

HEARING OFFICER WALLACE: I'm curious. How does the Agency proceed with any permit application in a 172 case without this to begin with?

MR. KIM: We don't. As a matter of fact, the McCook ordinance, the corresponding ordinance is in the Land permit application, so we don't need to worry about trying to get that in, because that document has already been admitted into evidence.

If, for some reason, that, the Summit ordinance, had been included with the Bureau of Land application, we wouldn't need -- we obviously, wouldn't need to make that request either.

They are generally considered to be part of the application. Talking to you right now, I don't know why that particular ordinance was not included in the permit application. But, certainly the Village of Mc Cook's was, appropriately so.

And the siting ordinance granted by the Village of Summit provides the proof that we would, I

agree, feel is necessary for us to consider the application as one that had gone through local siting.

What I'm saying, again, is -- And perhaps it's a fine line that's not appreciable. But what I'm saying again is that our concern is not that the Village of Summit did not grant -- did not follow the appropriate steps as to their grant of local siting. That's not the Agency's domain. It hasn't been for a long time. And we don't want it to go there.

What we are saying is, WSREC's use of that siting ordinance, the grant of local siting, is at question in our mind and we do feel that that is not consistent with what has been represented in the permit application. And we would like to be able to use the ordinance to reflect what the local body, the local unit of government did.

HEARING OFFICER WALLACE: Okay.

MR. KIM: Essentially, using that as the baseline.

HEARING OFFICER WALLACE: Well --

MR. KIM: And again, I know, it is --

HEARING OFFICER WALLACE: I think that that's not an issue that is even before the Board and I'm not sure that

it's an issue that can be placed before the Board.

Because this ordinance shows that siting was done and, therefore, you're going to argue something completely different in the context -- not in the context of a denial point and something that is essential being raised now at the Board level. I don't --

MR. KIM: We are not trying to shoehorn that application or that ordinance into our denial points.

We agree, acknowledge and certainly feel restrained to the relevant case law that states that the Agency's denial points are framed by the denial letter.

HEARING OFFICER WALLACE: All right.

MR. KIM: What we are saying is, there are other issues outside of the denial letter which we feel are of a special concern and raise, in our minds, jurisdictional matters that must be placed before the Board in the event that the Board asks the Agency to take some action on permitting.

This is exactly what happened in Grigoleit. What we are trying to do is to forestall that kind of thing by trying to raise the issue as soon as possible, so we don't end up in a situation where this

kind of issue comes up in what is, probably, an untimely manner.

MS. ANGELO: This is a permit appeal, and it's subject to the scope set for permit appeals in the statute. And what I'm hearing is that some way the Agency believes it's appropriate to raise non-permit appeal issues in a permit appeal.

I don't know that I've ever seen that done before, but, it's inconsistent with the record that it was before the Agency. It's inconsistent with the record to be provided to the Board.

I think the practicalities of what it does to our situation demonstrate why it can't be the right approach.

It means that there is this document now floating around in the record that the Agency is apparently going to argue from, that, I don't know, I'm left to try and respond to, even though it was not part of the denial, even though it was not part of the record, but somehow it's going to -- the Agency feels it's going to bar the Board from granting the relief to which we believe we're entitled.

I'm just not aware of any basis in law, for saying, this is a permit appeal, and we know this is not a denial point, but we want the Board to consider it anyway. And it seems to me that if they want to do that, it's not appropriate to say, Mr. Hearing Officer, make this part of the record so we can do it.

If they want to try and do that, and I think it's totally inappropriate for them to do it, they just ought to make their argument and try to deal with it that way.

But don't force me to try and deal with it because it's part of the record before the Board of a permit appeal.

HEARING OFFICER WALLACE: I think that the -- I guess it can go either way -- or can't go both ways.

So, I don't see that that's a proper issue before the Board in this permit appeal, and, therefore, if that's the reason you want Respondent's Exhibit 3 admitted into evidence, it is not admitted.

MR. KIM: Could I then, request, that --

HEARING OFFICER WALLACE: It will be included in these boxes.

MR. KIM: And similar to what was previously denied by -- as to Respondent's Exhibit 1 and 2, I think those were basically denied and the Agency asked that those be considered as part of an offer of proof.

Would you include that Respondent's Exhibit Number 3 in that group as well? I'm asking that you would.

It would then be incumbent upon the Agency, if it decided to make that argument, to make that offer of proof before the Board.

HEARING OFFICER WALLACE: I don't think it's necessary. I think you can, if you wish to argue that it should have been admitted and, therefore, you can make an argument from it, I think you can do that just as a motion to the Board -- you know, preserve that in your brief. Bring that up. This doesn't need to be in an offer of proof.

MR. KIM: But your decision today does not restrict us from so raising the issue in the manner you've described, in briefing before the Board?

HEARING OFFICER WALLACE: Well, if I could I would.

MR. KIM: So it's understood.

HEARING OFFICER WALLACE: Because I certainly feel, as a Hearing Officer, that's not an issue in this case. And to the extent that that's a ruling of mine, you can take exception to the Board, obviously.

MR. KIM: Well, again, I --

HEARING OFFICER WALLACE: So, I mean, insofar as Respondent's Exhibit 1, 2, and 3, deal with this issue of the potential, as you phrase it, siting jurisdiction, you know, they have not been admitted into evidence in this record. And you can argue that they were wrongly denied admission, I guess, if you want.

MR. KIM: Thank you.

I believe then, the last document that is pending would be Respondent's Exhibit Number 6.

HEARING OFFICER WALLACE: Okay.

MR. KIM: Which is the document that Mr. Cobb testified to this morning.

We have not intended to offer to admit this into evidence, but given your ruling on Petitioner's Exhibit 39, we ask that it be admitted, as well?

HEARING OFFICER WALLACE: It is admitted.

(Said document, heretofore marked

Respondent's Exhibit No. 6 for
identification, was admitted into
evidence, to wit, as follows:)

HEARING OFFICER WALLACE: All right.

Did I miss any exhibits that you know of?

MS. KROACK: I can't find it.

MR. KIM: You've got our six.

MS. KROACK: We have a lot of exhibits.

MS. ANGELO: I'm told that we're, at least, not
clear in our records as to whether 124 was admitted.

HEARING OFFICER WALLACE: You're right.

MR. KIM: What's 124?

MS. ANGELO: It was the NOx Trading Program Design.

I guess I would suggest that when this
initially came up there was an objection to it.

We've since had the Solid Waste Report,
which, when it came up, the Agency recognized that it,
being a publication of the Agency, that it was appropriate
that -- without conceding relevance, that it was
appropriately something that the Agency had available and
could have considered.

I would suggest that the similar handling

is appropriate for this document.

HEARING OFFICER WALLACE: 124 is the Draft Proposal Designs for NOx Trading System.

MS. KROACK: Right.

Our objection is that was a draft proposal that never went forward. It wasn't relied upon by anyone. There was no testimony to that effect. And we asked for disclosure of the documents they intended to introduce and that document wasn't included in their list of exhibits.

HEARING OFFICER WALLACE: Petitioner's Exhibit 124 is not admitted.

MS. ANGELO: Mr. Hearing Officer, I don't understand the objection to it, being a draft, since it was distributed to the public and it has as much status as a draft as the EPA document that they provided earlier for us today, that they indicated Mr. Romaine uses frequently.

MS. KROACK: But it doesn't have the same status because it for a program that never went for forward.

It was the beginning of a design of a program, Agency Regulatory Program that the Agency felt it may need to implement and it was determined that we

didn't. We never moved forward with the proposal.

MS. ANGELO: And that wasn't the reason why the document was provided.

The document was used as indicating that the Agency and WSREC have all the information that is necessary to indicate that availability of NOx offsets of the type that WSREC proposed to use here. Specifically, those from Commonwealth Edison.

The Agency's suggestion that no one really knew whether Commonwealth Edison had offsets available is contradicted by the inventory that's attached to the back of this document.

MS. KROACK: No Agency person said that we didn't know whether Commonwealth Edison had NOx offsets available.

The question was the specificity of those offsets with respect to the WSREC project, and whether we were comfortable with Commonwealth Edison's commitment to move forward with those offsets in the event they had to go -- they had to actually provide them.

That's a different question than the one Ms. Angelo just posed.

HEARING OFFICER WALLACE: I'm not going to admit
124.

MS. ANGELO: We apparently also have some question
about 11 and 12? Or 12 and 13?

12 and 13 were the original June
applications. I don't know what your records show.

HEARING OFFICER WALLACE: I thought they were
admitted.

MS. ANGELO: Okay. That's fine with us, obviously.

MS. KROACK: We have 11 as Procedures for a
Coordinated Permit Review.

MS. ANGELO: I think I got the numbers wrong. I
meant 12 and 13.

MS. KROACK: We have them as admitted.

HEARING OFFICER WALLACE: Okay. If they're not, 12
and 13 are admitted. They're the June '94 Air
applications, Volume 1 and 2.

Now you scare me. There wasn't an
Exhibit 11, was there?

MR. SINGER: No. We never used that number.

Should we provide a list?

HEARING OFFICER WALLACE: No. I think we have them

all.

MR. SINGER: We skipped a couple numbers in there and they might appear in the files.

HEARING OFFICER WALLACE: I didn't think I missed any.

All right.

Briefing schedule we will reserve until we have calendars.

Well, I guess we could handle that one.

Do you have any objection to Mr. Kim's request on 155 and 156? I don't think there is any ongoing discovery right now anyway, is there?

MS. ANGELO: There isn't, but I would like to look at a calendar and find out what our deadlines are before I agree to it and have no discovery until the end of the briefing period.

HEARING OFFICER WALLACE: Did you waive that out until August or something?

MS. ANGELO: We did until --

Mr. SINGER: August 10th or thereabouts.

MS. ANGELO: So I would just prefer to check the dates to make sure that whatever kind of time bonds we are

putting ourselves in, we understand, before we do that.

HEARING OFFICER WALLACE: Does that wrap everything up today?

(No response.)

HEARING OFFICER WALLACE: Thank you.

We will reconvene here tomorrow morning for rebuttal.

(Whereupon, the hearing was continued until March 7, 1996 at the hour of 9:30 o'clock a.m.)