

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

2

3

4 PEOPLE OF THE STATE OF ILLINOIS,

5 Petitioner,

6 vs. No. PCB 94-373

7 WAYNE BERGER AND BERGER WASTE

8 MANAGEMENT, INC.,

9 Respondent.

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13 Proceedings held on August 19, 1998 at 9:07 a.m.,

14 at the Olney Public Library, 400 West Main Street,

15 Olney, Illinois, before the Honorable Kathleen M.

16 Crowley, Hearing Officer.

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1 A P P E A R A N C E S

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8 Illinois.

8

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11 On behalf of Respondent.

12 Also present:

13 Ms. Karen Kavanagh

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withdrawn on page 291.)

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

2 (August 19, 1998; 9:07 a.m.)

3 HEARING OFFICER CROWLEY: We will go back on the
4 record.

5 This is the second day of the hearing being
6 conducted by the Illinois Pollution Control Board in
7 our Docket Number PCB 94-373, an enforcement action
8 styled People of the State of Illinois versus Wayne
9 Berger and Berger Waste Management, Inc. My name is
10 Kathleen Crowley. I am the Hearing Officer in this
11 matter.

12 We have the same individuals here that we did
13 yesterday. I neglected to note for the record that
14 there were no members of the public in attendance
15 yesterday nor are there today. I should just comment
16 we have the same Counsel present. Mr. Berger is also
17 present. We don't have all of the witnesses in the
18 room that we heard from yesterday.

19 We are beginning at approximately 9:07 with
20 agreement of the parties. And we will be closing so
21 that we can have the room cleared by 2:00 today.

22 I will mention that at some point Ms. Kavanagh
23 will be leaving to return to Chicago for a meeting
24 with the Pollution Control Board tomorrow. So please
25 don't take that as any reflection on anything other

1 than her time constraints.

2 Is there anything else preliminary that we need to
3 deal with this morning?

4 MS. MENOTTI: I have one thing.

5 HEARING OFFICER CROWLEY: Yes.

6 MS. MENOTTI: Yesterday in our off-the-record
7 discussion we didn't put this on the record. The
8 Respondent withdrew their notice of party appearance
9 for Sheila Williams, Tom Edmundson, and Steve
10 Westbrook. I just wanted the record to reflect so.

11 HEARING OFFICER CROWLEY: Thank you. Is there
12 anything from you, Mr. Benoit?

13 MR. BENOIT: Not at this time.

14 HEARING OFFICER CROWLEY: Thank you. Do you want
15 to call your next witness?

16 MR. GUBKIN: The People for the State of Illinois
17 would like to call Wayne Berger to the stand

18 (Whereupon the witness was sworn by the Notary
19 Public.)

20 MR. GUBKIN: Ms. Hearing Officer, I would like to
21 qualify Mr. Berger as an adverse witness under Section
22 103 of the Board Rules.

23 HEARING OFFICER CROWLEY: Yes.

24 MR. GUBKIN: Thank you.

25

1 W A Y N E B E R G E R,
2 having been first duly sworn by the Notary Public,
3 saith as follows:

4 D I R E C T E X A M I N A T I O N

5 B Y M R. G U B K I N:

6 Q Would you please state your name for the
7 record.

8 A Wayne Berger.

9 Q And where do you live?

10 A In Noble. In between Noble and Olney.

11 Q Okay. Who is your current employer, Mr.
12 Berger?

13 A I am not working.

14 Q Okay. And prior to when you were working,
15 who did you work with?

16 A It was Berger Waste.

17 Q Okay. And what is the location of the
18 landfill?

19 A It is approximately four miles west of Olney,
20 one mile north, and then back another half mile. It
21 is on the north side of the road.

22 Q Okay. Who is the owner of the landfill?

23 A Wayne Berger or Berger Waste. Berger Waste.

24 Q Isn't it true, Mr. Berger, that you signed
25 the permit applications for the landfill?

1 A Yes.

2 Q Isn't it true that you are the only person
3 responsible for operating and maintenance of the
4 landfill?

5 A Yes.

6 Q Have others worked at the landfill?

7 A There were three of us that worked at the
8 landfill plus picking up the trash.

9 Q Did you oversee those who did work at the
10 landfill?

11 A Yes.

12 Q Isn't it true that you have always been in
13 charge of the landfill?

14 A Yes.

15 Q Mr. Berger, when did your landfill begin
16 accepting waste?

17 A 1979, I think it was. May the 1st.

18 Q Okay. And when did you stop accepting waste
19 at your landfill?

20 A September. I think it was either the 18th or
21 the 20th of 1993.

22 Q Isn't it true that at one time you had
23 financial assurance for your landfill?

24 A Yes.

25 Q Isn't it also true that you had a letter of

1 credit in the amount of \$38,398.00?

2 A Yes.

3 Q Isn't it true that that letter of credit

4 expired on October 31st of 1993?

5 A Yes.

6 Q After October 31st of 1993, isn't it true

7 that you no longer had financial assurance for your

8 landfill?

9 A Yes.

10 Q Mr. Berger, isn't it true that the financial

11 assurance requirements changed for your landfill when

12 you were issued a new permit, and that is 1991-401-SP,

13 which was issued on March 20th of 1992?

14 A Yes. Uh-huh, yes.

15 Q And isn't it true that your cost estimates

16 increased to \$241,950.00?

17 A Yes, from the \$38,000.00, yes.

18 Q Isn't it true that you did not increase the

19 amount of financial assurance for your landfill from

20 the \$38,398.00 to the \$241,950.00?

21 A Yes.

22 Q Isn't it true that you were required by your

23 permit, 1991-401-SP, to submit a revision of cost

24 estimates for your landfill on -- by December 12th of

25 1992?

1 A Yes.

2 Q You didn't do that, did you?

3 A No, and the reason I didn't --

4 Q Well, that's okay. I just need a yes or no
5 answer. Thank you. Isn't it true that your permit
6 required another revision of the cost estimate on
7 December 12th of 1994?

8 A Yes.

9 Q And you didn't do that, did you?

10 A No.

11 Q Then again you were required to make a cost
12 estimate on December 12th of 1996, correct?

13 A Yes.

14 Q And you didn't do that either?

15 A No.

16 Q Isn't it true, Mr. Berger, that your landfill
17 received waste after September 18th of 1992?

18 A Yes.

19 Q And isn't it true that the Illinois EPA sent
20 you a letter dated October 29th, 1992, requiring you
21 to submit a significant modification permit
22 application by March 1st of 1993?

23 A Yes, but --

24 Q That's fine. And did you ever submit a
25 significant modification permit?

1 A I don't think I did. I think that the people
2 that were interested in the landfill, they -- Terra
3 Tech. I think they did. They were interested in
4 buying it.

5 Q But you never yourself submitted --

6 A No.

7 Q -- a significant modification permit?

8 A No.

9 Q I am sorry. What was that?

10 A No.

11 Q I just wanted to make sure.

12 A Sorry.

13 Q That's fine. Isn't it true, Mr. Berger, that
14 you are not contesting that you had uncovered refuse
15 at your landfill at the end of an operating day?

16 A There was some.

17 Q Okay. Isn't it true that you are not
18 contesting that you had litter at your landfill at the
19 end of some operating day?

20 A Yes, I had a little litter.

21 Q Okay. Isn't it true that you are not
22 contesting that you didn't have at least six inches of
23 daily cover over the waste at the end of the day?

24 A Well, sometimes it is probably hard to tell
25 like six inches, but some of it.

1 Q I am sorry?

2 A I had some over it. I don't know whether it
3 was six inches or not.

4 Q Okay. Are you saying, then, that you did
5 always maintain six inches of cover, or are you saying
6 that you sometimes did not?

7 A Well, sometimes maybe the weather would
8 hinder having it covered.

9 Q Mr. Berger, isn't it true that you deposited
10 waste beyond the permitted boundary of your landfill?

11 A I am not for sure on that, because I believe
12 that -- I believe that the well is in the wrong place.

13 Q Do you remember giving a deposition on June
14 the 14th of 1998? I believe it was at Mr. Benoit's
15 office and you were there.

16 A I believe so.

17 Q Do you remember -- do you recall at that
18 deposition being asked this question:

19 "Do you recall ever getting an inspection report
20 or a letter from the EPA that said that you had gone
21 beyond the permitted limits of the landfill?"

22 A Yes, I got a letter stating that.

23 Q I want to show you Exhibit Number 9.

24 A Okay.

25 Q I will direct you to --

1 HEARING OFFICER CROWLEY: That is the deposition
2 you were referring to?

3 MR. GUBKIN: Yes, the deposition from June 14th,
4 1998. Line 24, do you remember seeing that question?

5 "Do you recall ever getting an inspection report
6 or letter from the EPA that said that you had gone --

7 MR. BENOIT: Objection. That has been asked and
8 answered. He already answered yes.

9 MR. GUBKIN: Well, he was answering the question
10 of getting the letter. I wanted to just make sure
11 that he remembers being asked that question.

12 THE WITNESS: I got the letter, yes.

13 Q (By Mr. Gubkin) Do you remember at your
14 deposition being asked that question?

15 A Yes.

16 Q And could you please read your answer
17 starting at line two?

18 A Okay. "Oh, yeah. I think one time I got a
19 report that I went like 30 feet beyond."

20 Q And then it goes on. Then Maria had the
21 question: "Okay."

22 Then you continued with your answer:

23 "What it is, see, there is 43 acres in that farm.

24 To me, 30 feet, like if you are talking a quarter of a

25 mile, and if you are over 30 feet, really that is very

1 little. I mean, it is pretty hard to go out there and

2 get exactly, you know what I mean."

3 Question: "Okay."

4 Answer: "I mean -- I mean, 30 feet, anybody could

5 have got 30 feet over."

6 Question: "Okay."

7 Answer: "I think -- I mean, even if it is an

8 engineer, he might -- he might have went over a

9 little, you know."

10 Question: "Okay."

11 Answer: "But I didn't mean to do it. I didn't

12 mean to go beyond."

13 Do you remember giving that testimony during the

14 deposition?

15 A Yes. Uh-huh, yes.

16 Q Okay. Thank you. Mr. Berger, isn't it true

17 that your landfill permit requires you to submit

18 quarterly groundwater reports?

19 A Yes.

20 Q Isn't it true that the last report you

21 submitted to the Illinois EPA was in September of

22 1994?

23 A Yes.

24 Q Mr. Berger, isn't it true that you formed a

25 trust July 1st of 1993?

1 A Yes.

2 Q And isn't it true that you put your house in
3 that trust?

4 A Yes.

5 Q And isn't it true you put your car in that
6 trust?

7 A No, no.

8 Q Again, directing your attention to Exhibit 9,
9 the deposition from 1998, page 54 -- I am sorry. I
10 will strike that.

11 Okay. On the Deposition Exhibit Number 9, page
12 54, would you please read from line 20 through to page
13 55, line 1?

14 A Okay. "Can you describe which assets of
15 yours are part of the trust?"

16 "I suppose it would be like you mean like car and
17 house and I guess the farm.

18 Okay. Are the rental properties part of the
19 trust?

20 Yes, they are in the trust."

21 Q Okay. Thank you.

22 A But I found out later the car is not in the
23 trust.

24 Q Mr. Berger, you did say your rental
25 properties are in the trust; is that correct?

1 A No, they are not. They are not mine.

2 Q The rental property are not yours?

3 A They are not in my name.

4 Q Well, nothing in the trust is in your name,

5 is it?

6 A No.

7 Q The land which your house is on, that is in

8 the trust, isn't it?

9 A Yes, it is still in the trust.

10 Q Prior to forming the trust who owned your

11 house?

12 A Both of us.

13 Q You owned the land that your house was on

14 before you put it in the trust, correct?

15 A Yes.

16 MR. BENOIT: I am sorry. Could you read the

17 answer back to the question before that, when he said

18 that -- I couldn't understand what his answer was.

19 (Whereupon the requested portion of the record was

20 read back by the Reporter, page 223, line 11.)

21 MR. BENOIT: Okay. Thank you.

22 Q (By Mr. Gubkin) When you stated that the

23 house was owned by both of us, could you explain what

24 that means, who you were talking about?

25 A Wayne and Judy Berger.

1 Q Mr. Berger, who is the beneficiary of your
2 trust?

3 A My wife, Judy.

4 Q Isn't it correct that your wife is also the
5 executor of your trust?

6 A No, there is no -- she is not no executor,
7 no. There is not an executor.

8 Q I will direct you again to Exhibit Number 9,
9 your deposition of June 14th, 1998, at page 55, line
10 18 to line 20. If you could please read those.

11 A What was the numbers?

12 Q The question on 18 and then the answer given
13 on line 20.

14 A "Okay. What is the executor of the trust?
15 I believe my wife is the executor."

16 Q Thank you.

17 A But, see, I found --

18 Q That is fine.

19 MR. BENOIT: I would like the Hearing Officer to
20 take judicial notice that there is no executor of a
21 land trust.

22 MS. MENOTTI: Objection. We don't have the trust
23 before us, and if the defendant wants to offer that
24 into evidence that is fine. The Board can't take
25 judicial notice of something if it does not have

1 jurisdiction over --

2 MR. BENOIT: It is a legal -- there is no such
3 thing as an executor of a land trust.

4 HEARING OFFICER CROWLEY: I believe that we can
5 properly take judicial notice of the fact that in
6 Illinois there is no executor in a land trust.

7 MS. MENOTTI: Excuse me. For the record, it has
8 not been established that it was a land trust. The
9 defendant has said that he put his assets into a
10 trust.

11 HEARING OFFICER CROWLEY: That's correct. We have
12 spoken of trust. We have not identified what sort of
13 trust it might be.

14 Q (By Mr. Gubkin) Mr. Berger, your wife has
15 control of all of the assets which are in the trust,
16 does she not?

17 A Yes.

18 Q Mr. Berger, you created the corporation
19 Berger Waste Management, Incorporated, correct?

20 A Yes.

21 Q When did you incorporate that?

22 A July the 1st of 1993.

23 Q And you are the president of that
24 corporation, correct?

25 A Yes.

1 Q And there is no other officers for the
2 corporation, correct?

3 A No.

4 Q You are also the sole stockholder; isn't that
5 true?

6 A Yes.

7 Q I just wanted to clarify one other thing that
8 I asked. Is it correct to say that there are no other
9 officers in the trust -- excuse me -- no other
10 officers for the corporation?

11 A Yes.

12 Q You are the only officer of the corporation,
13 correct?

14 A Right.

15 Q Okay. Isn't it true that you don't hold
16 annual meetings for the corporation, do you?

17 A No.

18 Q And you don't keep records for the meetings?

19 A No.

20 Q And you don't keep corporation -- corporate
21 minutes?

22 A No.

23 Q You don't have bylaws for your corporation
24 either, do you?

25 A No.

1 Q Isn't it true, Mr. Berger, that you received
2 an enforcement letter from the Illinois EPA on June
3 1st of 1993?
4 A I don't recall getting it. I might have.
5 MR. GUBKIN: Okay. Are all the admitted pieces of
6 evidence up there? I would like to get a look at
7 R26A.
8 MR. BENOIT: That was never admitted. Maria
9 objected to it because it had a piece of magic marker
10 or something on it.
11 MR. GUBKIN: Maria said that it would be
12 stipulated if --
13 MS. MENOTTI: I stipulated that it had writing on
14 it that was not part of the exhibit.
15 MR. GUBKIN: Do you still have the one that was
16 marked up?
17 MR. BENOIT: Yes, but I was not ordered to produce
18 it so I am not going to give it to you. No, I am just
19 kidding. But this is the other one, and it doesn't
20 have --
21 MS. MENOTTI: I just want a clean one for the
22 record.
23 MR. BENOIT: Right. It does not have the yellow
24 sticker on it for the Hearing Officer.
25 HEARING OFFICER CROWLEY: I am having difficulty

1 locating --

2 MR. BENOIT: No, you don't have it.

3 HEARING OFFICER CROWLEY: Okay. Fine.

4 MR. BENOIT: Yesterday Maria agreed to have this
5 entered, but she --

6 HEARING OFFICER CROWLEY: That's correct. I
7 recall now. I know we had admitted it.

8 MR. BENOIT: So this could be your copy even
9 though it doesn't have the yellow exhibit sticker on
10 it.

11 HEARING OFFICER CROWLEY: That's fine. Thank
12 you.

13 MR. GUBKIN: Thank you.

14 Q (By Mr. Gubkin) Mr. Berger, I would like to
15 show you what has been marked as Exhibit R26A. Just
16 take a look at it.

17 A Okay. (Witness complied.)

18 Q Does that help to refresh your recollection?

19 A Yes.

20 Q Okay.

21 A But I still don't remember it, you know.

22 Q Okay. But you would acknowledge that you did
23 receive an environmental enforcement letter --

24 A Yes, now I do.

25 Q -- on June 1st of 1993? Okay. Isn't it

1 true, Mr. Berger, that on December 31st of 1997, you
2 received \$50,000.00 for the sale of your customer list
3 of contracts and containers to Olney Sanitary Systems?

4 A No, it wasn't to the Olney Sanitary Systems.
5 It would have been to me. They bought it from me,
6 yeah.

7 Q Right.

8 A Yes. Okay.

9 Q So isn't it true you received \$50,000.00 from
10 that sale?

11 A Yeah. Yes.

12 Q Isn't it also true that you received
13 \$55,000.00 pursuant to a related noncompetition
14 agreement?

15 A Yes.

16 MR. GUBKIN: Thank you. I have no further
17 questions.

18 HEARING OFFICER CROWLEY: Mr. Benoit?

19 MR. BENOIT: I have no cross at this time.

20 HEARING OFFICER CROWLEY: Okay.

21 MS. MENOTTI: The People ask that the Board take
22 official notice of the Environmental Protection Act,
23 35 Illinois Administrative Code, Subtitle A through H,
24 the Illinois Environmental Protection Act, 415 Ill.
25 CS, 5-1 et seq. and also Administrative Citation

1 88-26.

2 HEARING OFFICER CROWLEY: Administrative Citation

3 88-26, are you asking us to take notice of the

4 citation itself of the Board opinion and order, or

5 exactly what are you asking us to take notice of?

6 MS. MENOTTI: Of the Administrative Citation 88-26

7 and any subsequent ruling that the Board has made

8 therein.

9 HEARING OFFICER CROWLEY: We can take

10 administrative notice of that.

11 If I may ask, as Mr. Berger is somewhat

12 soft-spoken, and I may have missed this, is Judy

13 Berger your wife?

14 THE WITNESS: Yes.

15 HEARING OFFICER CROWLEY: Okay. Thank you.

16 MS. MENOTTI: Ms. Hearing Officer, the People

17 rest, but we reserve the right to call witnesses in

18 rebuttal if necessary.

19 HEARING OFFICER CROWLEY: Thank you.

20 MR. BENOIT: Can we go off the record for a

21 moment?

22 HEARING OFFICER CROWLEY: Certainly.

23 (Discussion off the record.)

24 HEARING OFFICER CROWLEY: Back on the record.

25 Let's start again at a quarter to 10:00.

1 (Whereupon a short recess was taken.)

2 HEARING OFFICER CROWLEY: We would like to go back
3 on the record. It is a couple minutes before 10:00.

4 Mr. Benoit?

5 MR. BENOIT: Yesterday the Hearing Officer barred
6 the Respondents from attempting to introduce any
7 evidence regarding the substance of any 31D meeting
8 held regarding this matter, or any settlement
9 discussions or offers made by the Respondents.

10 I just wanted to make clear for the record that
11 this ruling applies to all witnesses in this case that
12 the Respondents might call.

13 HEARING OFFICER CROWLEY: Thank you for seeking
14 that clarification. Yes, it does.

15 MR. BENOIT: Okay. Based on that --

16 HEARING OFFICER CROWLEY: Again, based on what I
17 said yesterday, Mr. Berger may testify as to what he
18 did.

19 MR. BENOIT: Does that include his offers?

20 HEARING OFFICER CROWLEY: No, that does not
21 include offers he may have made during the context of
22 Section 31D conferences. If he took actions, he may
23 testify as to what those actions were.

24 MR. BENOIT: Okay. Based on that ruling and that
25 clarification, I have noticed up John Taylor -- he is

1 an Agency employee -- as a witness. But I am not
2 going to call him as a witness. To make my record, as
3 far as an offer of proof, I believe his testimony, and
4 this would concern the financial assurance count, the
5 significant modification count, and the water
6 monitoring count, all of which Mr. Berger's or the
7 Respondent's defense is that they cannot afford --

8 MS. MENOTTI: Objection. I think he is arguing
9 his defense right now. Are you clarifying what --
10 trying to clarify what the Hearing Officer's ruling
11 is?

12 MR. BENOIT: No, I am trying to make my offer of
13 proof for the record, so that when the Board looks at
14 this --

15 MS. MENOTTI: She denied your -- Ms. Hearing
16 Officer, you denied the offer of proof.

17 MR. BENOIT: Okay. I --

18 HEARING OFFICER CROWLEY: Yes, I did.

19 MR. BENOIT: I have looked up the evidence in the
20 evidence handbook on this, and if the Hearing Officer
21 is hostile and won't even allow me to make the offer
22 of proof, you know, I don't have to do it and the
23 issue is preserved for the record.

24 I think the purpose of the offer of proof is to
25 show the reviewing -- in this case the Board or the

1 Appellate Court, what that evidence might have been.
2 If you are not even going to let me do that, you know,
3 there is nothing I can do about it. This is as far as
4 I can make my record.

5 HEARING OFFICER CROWLEY: First of all, the
6 Hearing Officer is not hostile. The Hearing Officer
7 is limiting the testimony to matters that are relevant
8 and probative. I ruled yesterday that the content of
9 the Section 31D conferences was -- the content was not
10 relevant and probative. I denied the Respondent's
11 ability to present testimony or an offer of proof as
12 to the content of those discussions.

13 MR. BENOIT: I want to qualify why I used the word
14 hostile. The Hearing Officer is not hostile toward
15 me. Actually, I mean just as far as this ruling is
16 hostile, and I am being, you know, prevented from
17 saying what the offer of proof was.

18 HEARING OFFICER CROWLEY: Thank you.

19 MR. BENOIT: For the record, it is my
20 understanding that offers of proof may be made in
21 several different manners. One of them is by putting
22 the witness up on the stand. Another --

23 MS. MENOTTI: I am going to object. What is the
24 purpose of this dissertation? Is it a motion to
25 reconsider? Is there something that you are -- you

1 are not a witness. You are not allowed to testify on
2 the record. If you have a legal argument to make, I
3 would appreciate it if you would make it in the proper
4 form so that the Hearing Officer can rule or save the
5 issue for the Board to rule. If you have an argument
6 to make to the Board, the argument is properly made at
7 the time that the testimony is closed.

8 MR. BENOIT: Can I continue?

9 HEARING OFFICER CROWLEY: Yes. I am not sure
10 where we are going, but I am going to let you
11 continue.

12 MR. BENOIT: Okay. Well, my understanding is that
13 offers of proof can be made in -- well, the purpose is
14 to preserve the issue for, like I said, the Board or
15 the Appellate Court in this case, if this thing goes
16 that far. The reason the offer of proof is made, and
17 if it was a witness, a yes and no situation, where you
18 just have them testify as to what they would actually
19 say, is to save time and money in case, in this case,
20 you are ruling on the relevancy or the admissability
21 of -- it is really the relevancy of this testimony is
22 incorrect, then the hearing would not have to be
23 redone. In the second fashion, if you can't do that,
24 it is just for the attorney to say basically what he
25 believes would be said by the witness if they were

1 allowed to testify.

2 HEARING OFFICER CROWLEY: I agree that those are
3 the two methods in which offers of proof can be made,
4 and I --

5 MR. BENOIT: Okay. But you are not --

6 HEARING OFFICER CROWLEY: And stated that you
7 could not make your offer of proof.

8 MR. BENOIT: Okay. That's fine. I just wanted to
9 make the record.

10 HEARING OFFICER CROWLEY: Okay.

11 MR. BENOIT: All right. I would also like to,
12 just for the record, a second matter, just to bring to
13 the Board's attention, is that on the -- I noticed up
14 several IEPA employees and asked that they bring
15 Agency material, and I guess since the time that
16 discovery has been conducted, all that has been -- the
17 originals are apparently gone or destroyed and
18 everything is in microfiche. And, obviously,
19 microfiche is not going to do any good at a hearing.
20 That is all I have to say.

21 HEARING OFFICER CROWLEY: Okay. I don't believe
22 that the record has reflected that -- has fully
23 reflected that as the Complainant's presentation of
24 testimony by Mr. Berger took less time than we had
25 originally anticipated, Mr. Benoit has been attempting

1 to rearrange his witnesses, and has had some limited
2 ability to do so, but has not been as successful as he
3 might have hoped to be. Given the fact that none of
4 us were planning on testimony being as short as it
5 was, we will be taking a recess until Mr. Benoit's
6 witness is available to speak with us at 11:00; is
7 that correct?

8 MR. BENOIT: That is correct. He is scheduled to
9 be here at 11:00.

10 MS. MENOTTI: That's fine.

11 HEARING OFFICER CROWLEY: Thank you. We will go
12 off the record.

13 (Whereupon a recess was taken.)

14 HEARING OFFICER CROWLEY: We are back on the
15 record. Mr. Benoit?

16 MR. BENOIT: The Respondent's first witness will
17 be Gary Cantrell.

18 (Whereupon the witness was sworn by the Notary
19 Public.)

20 G A R Y C A N T R E L L,
21 having been first duly sworn by the Notary Public,
22 saith as follows:

23 DIRECT EXAMINATION

24 BY MR. BENOIT:

25 Q Could you state your name for the record,

1 please.

2 A Gary Cantrell.

3 Q And, Gary, where do you work?

4 A I am self-employed. I work at my house.

5 Q Okay. What is the address of your house and
6 place of employment?

7 A It is 2550 East Seven Hills Lane.

8 Q Okay. How long have you lived there?

9 A Ever since I was five years old.

10 Q And how old are you now?

11 A I am 23.

12 Q On the board here, and you may have to get up
13 to take a look at it, is a map marked Respondent's 49
14 (The witness approached the board to examine
15 the exhibit.)

16 MS. MENOTTI: Do you have a copy of the exhibit.

17 MR. BENOIT: I don't have a copy of the exhibit.

18 MS. MENOTTI: Can we request, Ms. Hearing Officer,
19 that the State be provided a copy of the exhibit,
20 because we will need it for the purposes of reprints.

21 MR. BENOIT: I don't have the ability to provide a
22 copy of something that large. I think yesterday the
23 State, you know, had large maps and things that I
24 didn't have. I mean, it is just not possible. I
25 think she can look at it now. It is a map.

1 MS. MENOTTI: Then I would request that it be
2 barred from admission into substantive evidence.

3 MR. BENOIT: I think if we lay the foundation it
4 could be admitted as substantive evidence.

5 HEARING OFFICER CROWLEY: Why don't you go ahead
6 and proceed. What we are looking at is a document
7 entitled, Richland County Wall Map, which was
8 presented by the --

9 MR. BENOIT: The Respondents.

10 HEARING OFFICER CROWLEY: -- Olney Trust Bank and
11 the Richland County Farm Bureau.

12 Please proceed.

13 Q (By Mr. Benoit) What does that map depict?

14 A I don't understand depict.

15 Q What is that a map of?

16 A Richland County.

17 Q Okay. And are you familiar with Richland
18 County?

19 A Yes.

20 Q And, in your opinion, does this map
21 accurately depict Richland County?

22 A Yeah.

23 Q Can you locate your house on that map?

24 A (Witness reviewing map.) It would be right
25 here (indicating).

1 MR. GUBKIN: Is it all right if I go up to the map
2 so I can see what he is pointing to so I can see
3 better?

4 HEARING OFFICER CROWLEY: Yes.

5 Q (By Mr. Benoit) Because several people are
6 going to be marking this map -- well, to answer my
7 question, were you able to identify where your house
8 is located on that map?

9 A Yes.

10 Q Okay. Several people are going to be marking
11 this map, so could you draw an arrow in blue ink that
12 ends right at your house and then initial on top of
13 that arrow to depict where you live on the map or show
14 where you live on the --

15 MS. MENOTTI: I object to the witness marking the
16 map prior to it being entered into evidence.

17 MR. BENOIT: My understanding of the discovery
18 rules is that they should mark it before it is
19 admitted and even after I lay the basis all the
20 witnesses should mark it and then it is admitted into
21 evidence.

22 HEARING OFFICER CROWLEY: Correct. Please mark
23 it.

24 MR. BENOIT: Go ahead and mark it.

25 THE WITNESS: Where my house is and initial it?

1 MR. BENOIT: Yes. Can I kind of show him how I
2 want him to do it so that things don't get --

3 HEARING OFFICER CROWLEY: Sure.

4 MR. BENOIT: Here is what I would like you to do.
5 Just kind of draw a line --

6 MS. MENOTTI: Is Mr. Benoit marking the map or is
7 the --

8 MR. BENOIT: No.

9 MS. MENOTTI: -- witness marking the map, for the
10 record? If he can initial it let him mark the map.

11 MR. BENOIT: I think we will recall yesterday that
12 when one of Maria's witnesses was having trouble
13 understanding what I was saying --

14 HEARING OFFICER CROWLEY: I had just told you that
15 you could assist him in marking the map so that we
16 have a uniform method of marking. If we have only one
17 map we can't afford to --

18 MR. BENOIT: Okay. Thank you.

19 (The witness marked on the map.)

20 MR. BENOIT: Let the record reflect that the
21 witness has marked the map in blue ink and has
22 initialed it.

23 MS. MENOTTI: Can we clarify the record? The
24 Respondent's attorney marked the map and the witness
25 initialed it.

1 MR. BENOIT: I did not mark the map.

2 HEARING OFFICER CROWLEY: I observed the witness
3 marking the map after counsel for the Respondent
4 indicated how he preferred to have it done in order to
5 make it uniform.

6 MS. MENOTTI: I am sorry. I saw him mark the map
7 and hand the pen to the witness for initialing.

8 HEARING OFFICER CROWLEY: As I have stated for the
9 record that I observed it. You have made your record.
10 Please proceed.

11 MS. MENOTTI: I just wanted to make my position
12 clear.

13 HEARING OFFICER CROWLEY: Excuse me?

14 MS. MENOTTI: I am sorry. I was trying to make my
15 position clear for the record. I was not trying to
16 contradict the Hearing Officer.

17 HEARING OFFICER CROWLEY: Please proceed.

18 Q (By Mr. Benoit) Do you see where the Berger
19 Landfill and, again, referring to the map, is located
20 in reference to your residence, which you just marked
21 its location on the map?

22 A It is right there (witness indicating on the
23 map.)

24 Q What does it say on the map right where you
25 have indicated?

1 A Wayne Berger.

2 Q Is there a number under that name?

3 A Yes, it is 43.

4 Q Okay. Thank you. Now, how far is your house
5 from the Berger Landfill?

6 A Oh, I would say around half a mile.

7 Q Okay. And are you familiar with the
8 landfill?

9 A Yes, a little bit.

10 Q Okay. Did you used to work for Wayne?

11 A Yeah.

12 Q At the landfill?

13 A Uh-huh.

14 Q Do you recall when that was?

15 A Let's see. It was around five years ago,
16 somewhere in there.

17 Q Okay.

18 MS. MENOTTI: The State is going to object to
19 further testimony by this witness regarding any of the
20 counts of the complaint, because this witness was not
21 properly disclosed. Interrogatory Number 29
22 propounded by the State says for each count of the
23 complaint identify any officer, agent, employee or
24 representative of the Respondent or any other person
25 acting for the Respondent having knowledge of the

1 facts alleged in such count.

2 The Respondent's answer was Harry Wayne Berger and
3 Harry Wayne Berger only. The document or the
4 interrogatory responses have not been updated,
5 supplemented, amended, or anything with regard to
6 Interrogatory 29 since Respondent's Counsel filed the
7 answer on June 11th, 1996. It is improper testimony.
8 The State is entitled to notice prior to testimony
9 under that interrogatory.

10 MR. BENOIT: I would say that discovery has been
11 updated somewhat. I think Maria is right on that
12 point, it hasn't. I would be willing to limit his
13 testimony as to his observations while not as an agent
14 of Wayne Berger.

15 HEARING OFFICER CROWLEY: Fine.

16 MR. BENOIT: I don't even know what my last
17 question was.

18 (Whereupon the requested portion of the record was
19 read back by the Reporter.)

20 Q (By Mr. Benoit) Can you -- just to refresh my
21 memory, how far away is your house from the landfill?

22 A About a half mile, somewhere in there.

23 Q Okay. What is between your house and the
24 landfill?

25 A Just farm ground.

1 Q Okay. Has there ever been any problems with
2 litter blowing off the landfill and going to your
3 house?

4 A No.

5 MS. MENOTTI: I am going to object unless there is
6 further clarification of what time period we are
7 talking about. We have not establish when Mr.
8 Cantrell worked for the landfill, and this may be
9 improper testimony for the Respondent's failure to
10 properly notify the State under the discovery rules.

11 MR. BENOIT: I think we established that he has
12 been living there since he was five years old.

13 HEARING OFFICER CROWLEY: Correct. Could you
14 limit your question to a time period consistent with
15 that in the complaint. You said was there ever.

16 MR. BENOIT: Okay. Can you tell me the date when
17 the first alleged violation is? I don't remember off
18 the top of my head.

19 MS. MENOTTI: You don't have a copy of the
20 complaint?

21 MR. BENOIT: I am trying to speed things along,
22 Maria. If you would like a date, I would use it.

23 HEARING OFFICER CROWLEY: I believe it is 1993.

24 MS. MENOTTI: With regard to the operational
25 violations.

1 HEARING OFFICER CROWLEY: Count 3, operational
2 violations.

3 MR. BENOIT: Okay.

4 Q (By Mr. Benoit) Since 1993 have you ever had
5 any problem with litter blowing off the landfill and
6 going across the field to your house?

7 A No, I never seen anything.

8 MS. MENOTTI: My objection was not -- was not only
9 to the lack of a year that we were talking about
10 litter, but we have not established at what point Mr.
11 Cantrell was an officer or an agent of the landfill.
12 And if he worked for the landfill during 1993 then
13 this testimony is improper because the Respondent was
14 required to disclose him to the State before he is
15 allowed to testify before the Board.

16 HEARING OFFICER CROWLEY: We are not accepting --
17 we have already limited testimony, so that testimony
18 is to his actions as an employee of the landfill is
19 not being admitted. What we are accepting is
20 testimony that he is a neighbor to the landfill for a
21 number of years, and he can give as to what he may
22 have observed.

23 So, Mr. Benoit, you may proceed.

24 MS. MENOTTI: If I misunderstood your ruling, I
25 apologize. My objection is only to -- I didn't

1 understand --

2 HEARING OFFICER CROWLEY: It stands --

3 MS. MENOTTI: -- that you were talking about the
4 neighbor. Thank you for the clarification.

5 Q (By Mr. Benoit) Since 1993, have you had
6 occasion to drive by the landfill on the road that
7 runs in front of Wayne Berger's home?

8 A The county road?

9 Q Yes, is that the road that runs by his home?

10 A Yeah.

11 Q Have you had occasions to drive down that
12 road?

13 A That's not the neighbor's road. It is just a
14 county road.

15 Q Okay.

16 A Yes, I drive it.

17 Q How often do you drive down that road?

18 A Maybe once a month.

19 Q Have you ever noticed --

20 HEARING OFFICER CROWLEY: Excuse me. Mr.
21 Cantrell, you are kind of talking into the map. It is
22 a little hard to hear this way. Thanks. Just
23 stepping back a little will help. You don't have to
24 sit, but just don't talk into the board.

25 Q (By Mr. Benoit) So about once a month you

1 have driven down that road since 1993?

2 A I would say approximately, yeah.

3 Q Have you ever noticed any problem on the road
4 with litter blowing out of the landfill and on to the
5 road?

6 A No.

7 Q Have you ever noticed mud or anything else
8 like mud drug on to the road due to operations of the
9 Berger Landfill since 1993?

10 MS. MENOTTI: I am going to object to the portion
11 of due to the operations of the Berger Landfill,
12 because it calls for a conclusion by the witness and
13 Mr. Benoit's question is also conclusory in that it
14 would just be the Berger Landfill. I would object to
15 asking what the witness saw when he was on the road as
16 a result of operations of the Berger Landfill. It is
17 conclusory. I object to the form of the question.

18 HEARING OFFICER CROWLEY: I will let you answer
19 the question if you can.

20 THE WITNESS: Do you want to run that by me
21 again?

22 Q (By Mr. Benoit) Since 1993, on what you
23 testified to be -- what you estimated to be your once
24 a month trip down the road that runs in front of Wayne
25 Berger's house, my question is, have you ever noticed

1 mud or anything else drug out on the road due to the
2 operations of the Berger Landfill?

3 A No.

4 Q As a neighbor to the landfill since 1993,
5 have you ever had any problem with the landfill?

6 A No.

7 Q Any complaints about the landfill?

8 A No.

9 Q From your observations, again, from being a
10 neighbor and driving down the road since 1993 that
11 runs in front of the Berger residence, do you feel
12 that the landfill was well kept from what you could
13 observe?

14 MS. MENOTTI: Objection. Calls for improper
15 opinion.

16 HEARING OFFICER CROWLEY: Would you try to
17 rephrase the question?

18 Q (By Mr. Benoit) During the time period in
19 question, from 1993, was the landfill well kept, in
20 your opinion?

21 MS. MENOTTI: Objection. It calls for an improper
22 opinion.

23 HEARING OFFICER CROWLEY: I asked for you to
24 rephrase it, not to repeat it.

25 MR. BENOIT: What's the objection?

1 HEARING OFFICER CROWLEY: Well --

2 MS. MENOTTI: The question calls for an improper
3 opinion.

4 MR. BENOIT: He is allowed to have an opinion on
5 this, his opinion as to well kept.

6 MS. MENOTTI: He has not qualified the witness as
7 being able to make that determination.

8 MR. BENOIT: This falls into the range of cases of
9 whether a lay witness can testify as to --

10 HEARING OFFICER CROWLEY: I don't understand what
11 well kept means. Could you please rephrase it? Can
12 you come up with another word than well kept.

13 Q (By Mr. Benoit) During the time -- instead of
14 well kept, I will change it to was the landfill taken
15 care of in such a manner that brush and trees were not
16 growing on the landfill?

17 A Yes, as far as I know of, pretty sure.

18 Q Again, in the same time period, 1993, did you
19 ever notice leachate escaping from the landfill?

20 MS. MENOTTI: Objection. Has not established that
21 the witness knows what leachate is. Improper
22 foundation.

23 HEARING OFFICER CROWLEY: You may answer the
24 question if you can.

25 THE WITNESS: No.

1 Q (By Mr. Benoit) You know Wayne Berger

2 personally; is that true?

3 A Yeah.

4 Q And you are not being paid to testify here

5 today on his behalf, are you?

6 A No.

7 Q Okay. What kind of person do you know Wayne

8 to be?

9 MS. MENOTTI: Objection. The Respondent's

10 character is not at issue.

11 HEARING OFFICER CROWLEY: I will allow him to

12 answer the question.

13 THE WITNESS: He is a good all around guy, as far

14 as I know. I have always got along with him.

15 Q (By Mr. Benoit) Since 1993, have you ever had

16 an occasion to drive down the landfill's road while

17 you were not an employee of Wayne Berger?

18 A No, I don't think I have.

19 MR. BENOIT: Okay. No further questions.

20 HEARING OFFICER CROWLEY: Thank you. You may sit,

21 if you --

22 MS. MENOTTI: Yes, please have a seat.

23 THE WITNESS: Okay.

24 HEARING OFFICER CROWLEY: Unless you need to point

25 at the map again. I am sorry about that.

1 CROSS EXAMINATION

2 BY MS. MENOTTI:

3 Q I just have a few questions. We have not met
4 before. My name is Maria Menotti, and I work for the
5 Attorney General of the State of Illinois.

6 Can you tell me what your relationship is with Mr.
7 Berger?

8 A Just a friend.

9 Q A friend. How long have you known him?

10 A About ever since I have lived there I knew
11 him.

12 Q So you knew him when you were child?

13 A Well, I always knew who he was. I wasn't
14 real close. He is a neighbor.

15 Q Do you socialize with Mr. Berger?

16 A Excuse me?

17 Q Do you socialize, do you go out with him?

18 A No.

19 Q Do you visit his house?

20 A I may -- I have stopped by there a few
21 times.

22 Q Okay.

23 A Not regular visits, no.

24 Q When did you work for him?

25 MR. BENOIT: Objection. This was already excluded

1 as far as --

2 HEARING OFFICER CROWLEY: That is what was
3 excluded.

4 MS. MENOTTI: I am sorry?

5 HEARING OFFICER CROWLEY: That was the area that
6 we excluded.

7 MR. BENOIT: You are beyond the scope of the
8 direct.

9 MS. MENOTTI: He has testified to the character.
10 I am trying to establish in what capacity he knows Mr.
11 Berger to make the statement that he is a pretty good
12 guy. And he has already testified that he worked for
13 him. I am trying to establish at what point to show
14 that the witness is bias.

15 HEARING OFFICER CROWLEY: You may answer the
16 question.

17 THE WITNESS: What was it?

18 Q (By Ms. Menotti) When did you work for him?

19 A I am not for sure. It was around 1993
20 probably.

21 Q How long did you work for him?

22 A Maybe six months, somewhere in there.

23 Q I am sorry?

24 A Maybe six months, somewhere in there.

25 MS. MENOTTI: I don't have anything further.

1 MR. BENOIT: No further questions.

2 HEARING OFFICER CROWLEY: I have just one
3 question. And, again, perhaps I didn't hear it. Mr.
4 Cantrell, you gave your address as 2550 East Seven
5 Hills Lane. Did you give a town?

6 THE WITNESS: It is Olney.

7 HEARING OFFICER CROWLEY: It is Olney. Thank
8 you.

9 Did you have anything else?

10 MR. BENOIT: No, no further questions.

11 HEARING OFFICER CROWLEY: Thank you very much. We
12 appreciate it.

13 (The witness left the stand.)

14 HEARING OFFICER CROWLEY: Off the record.

15 (Discussion off the record.)

16 HEARING OFFICER CROWLEY: Back on the record. It
17 is approximately 11:30. Earlier we had -- I had
18 agreed that Mr. Benoit could move up his witness until
19 noon. The witness is not here yet. So we will be
20 recessing until noon.

21 Again, I remind the people that we have to have
22 the room cleared at 2:00 and, again, for the record, I
23 am not sure that Ms. Menotti's request that we keep
24 things moving and avoid breaks where possible is on
25 the record. I think it should be. I am putting it on

1 the record. However, we will not resume until noon.

2 Thank you.

3 (Whereupon a recess was taken.)

4 HEARING OFFICER CROWLEY: All right. We are back

5 on the record.

6 (Ms. Karen Kavanagh was not present for the rest

7 of the hearing.)

8 MR. BENOIT: Okay. The Respondents are ready to

9 call their second witness.

10 (Whereupon the witness was sworn by the Notary

11 Public.)

12 BRUCE RUNYON,

13 having been first duly sworn by the Notary Public,

14 saith as follows:

15 DIRECT EXAMINATION

16 BY MR. BENOIT:

17 Q Bruce, could you state your name for the

18 record.

19 A Bruce Runyon.

20 Q And could you give us your educational

21 background?

22 MS. MENOTTI: I am sorry. Who is this?

23 MR. BENOIT: Bruce Runyon.

24 MS. MENOTTI: Thank you.

25 THE WITNESS: Educational background, I am a

1 life-long resident of Richland County. I attended the
2 West Richland Schools, one through grades twelve. I
3 then attended SIU in Carbondale, with a Bachelor's
4 Degree in finance.

5 After graduating from college, I started to work
6 at the Olney Trust Bank, my current job. And there I
7 have had a series of continuing educational programs.

8 Q Okay. You stated that you have been employed
9 by Olney Trust Bank. What is your current position
10 there?

11 A President and CEO.

12 Q Okay. In the past, has Wayne Berger
13 requested that your bank issue letters of credit so he
14 can satisfy financial assurance requirements for the
15 Berger Landfill?

16 A Yes, we have had that request.

17 Q I am going to show you what has previously
18 been admitted as Respondent's 18.

19 MS. MENOTTI: Excuse me. For the record, what
20 exactly -- can we identify what exactly it is that Mr.
21 Runyon has in front of him and that he is referring
22 to? He has a big file and some papers and stuff in
23 front of him and --

24 MR. BENOIT: Okay. Let's do that.

25 Q (By Mr. Benoit) Mr. Runyon, we noticed that

1 you have a file in front of you. Can you generally
2 describe the contents of that file?
3 A This is a file which I pulled out of our dead
4 file area. It is a loan related file. Wayne Berger
5 has a long time history as a customer of Olney Trust
6 Bank, both as a deposit customer and a loan customer.
7 As part of our loan documentation, we maintain loan
8 related documents including financial statements, past
9 loan history, commentary.

10 And that's the file that I have in front of me.
11 There is not an active file. We consider it a dead
12 file, because Wayne and Judy are not currently active
13 borrowers with our bank.

14 MS. MENOTTI: And what about the piece of paper?

15 THE WITNESS: This piece of paper is information
16 compiled out of the file. Do you want me to review
17 this?

18 MR. BENOIT: Well, I was intending on introducing
19 it. But it is basically his notes and compilations to
20 refresh his memory or whatever.

21 MS. MENOTTI: Well, I would prefer, then, if he is
22 going to use it to refresh his memory, that if he is
23 going to use it in that capacity, that he should not
24 be reading from it during his direct testimony.

25 MR. BENOIT: I think that throughout this hearing

1 the inspectors and everybody has had their reports and
2 notes before them.

3 MR. GUBKIN: We did admit those into evidence
4 before they used the reports and whatnot to review.

5 MS. MENOTTI: And it was information that would
6 have already been before the Board.

7 MR. BENOIT: The calculations are fairly complex
8 and the witness is going to need to look at his notes
9 to answer my questions.

10 HEARING OFFICER CROWLEY: I will allow him to use
11 his notes in the interest of moving this along.

12 Q (By Mr. Benoit) Again, I was going to show
13 you what has been previously admitted as Respondent's
14 18. Do you recognize that document?

15 A Yes, I do.

16 Q Is that a letter of credit issued by --

17 MS. MENOTTI: Objection. Leading.

18 MR. BENOIT: Can I have a little latitude to try
19 to move things along?

20 HEARING OFFICER CROWLEY: Yes.

21 MR. BENOIT: There is no reason for these
22 objections other than to delay things.

23 MS. MENOTTI: I am entitled to make objections for
24 the record. That is my job.

25 Q (By Mr. Benoit) Is that a letter of credit

1 issued by your bank in favor of the Illinois EPA?

2 A Yes, it is.

3 Q What is the date of that document?

4 A December 2nd, 1988.

5 Q And for what amount is it?

6 A \$38,398.00.

7 Q And what is the expiration date on this

8 letter of credit?

9 A The effective date of the letter was October

10 31, 1988 and with an expiration date of October 31,

11 1993.

12 Q Does the letter of credit contain the

13 language allowing the IEPA to exercise an option to

14 extend the expiration date?

15 A Yes, it does.

16 Q Did the IEPA, in fact, extend the expiration

17 date?

18 MS. MENOTTI: I am going to object to the

19 characterization that the Illinois EPA is somehow in

20 charge of this letter of credit. This letter of

21 credit was issued in the Respondent's name, not in the

22 Illinois EPA's name.

23 HEARING OFFICER CROWLEY: Would you -- this

24 document is in the record, but could you please, one

25 or the other of you, read the language that you are

1 referring to.

2 Q (By Mr. Benoit) I will ask the witness to
3 read the portion of the document granting the IEPA an
4 option to extend the expiration period.

5 A I will read that paragraph. This letter of
6 credit is effective as of October 31, 1988, and shall
7 expire on October 31, 1993. But such expiration date
8 shall be automatically extended for one period of 12
9 months, starting with the expiration date if the
10 operator fails to substitute alternate financial
11 assurance prior to the expiration of this letter of
12 credit, and to notify us of such failure within 30
13 days after the above expiration date.

14 Q Did the IEPA exercise its option to extend
15 the expiration period?

16 MS. MENOTTI: I am going to object to the form of
17 the question. That is not what the language says.

18 The language says that the operator can --

19 HEARING OFFICER CROWLEY: May I see the --

20 MS. MENOTTI: A letter of credit is issued in the
21 name of Harry Wayne Berger.

22 HEARING OFFICER CROWLEY: Let me see the
23 document.

24 MS. MENOTTI: The irrevocable standby letter of
25 credit is sent to the Director of the Illinois

1 Environmental Protection Agency, that's the
2 letterhead, and then it says, dear sir or madam. It
3 is issued in Harry Wayne Berger's name.

4 HEARING OFFICER CROWLEY: The letter directed to
5 the Director of the Environmental Protection Agency
6 does state, as the witness read, that you, the
7 addressee -- that if the operator fails to substitute
8 alternate financial assurance you, which I would read
9 as the addressee, may notify and it can be extended.
10 So I see nothing wrong with the testimony. Go ahead.

11 MR. BENOIT: I am going to show the witness what
12 has been marked as R30. It is a letter from Bill
13 Remensky (spelled phonetically), Manager of Planning &
14 Reporting Section, Bureau of Land, and it is directed
15 to the Olney Trust Bank and it is dated November 1st,
16 1993.

17 Q (By Mr. Benoit) Do you recognize this
18 document?

19 A I am not directly familiar with it, but it is
20 a document to the bank of November 1, 1993.

21 Q What does that document request the bank to
22 do?

23 A Would you like me to read it, the contents
24 here in the last paragraph?

25 Q That would be fine.

1 A We hereby notify you that the operator failed
2 to substitute alternate financial assurance prior to
3 the expiration date of irrevocable standby letter of
4 credit Number 37. Therefore, under the provisions of
5 this letter you must automatically extend the letter
6 of credit for one period of 12 months starting with
7 the expiration date of October 31, 1993. If you have
8 any questions please contact John Taylor.

9 Q So what did Olney Trust Bank do upon receipt
10 of that letter that we have just referred to, R30?

11 A I honestly have not researched this. I would
12 need to go back and check our file to see what action
13 was taken at that time.

14 MR. BENOIT: Okay. I am going to show the witness
15 what has been marked as R47. It is captioned personal
16 financial statement, and it is dated March 25th,
17 1992.

18 Q (By Mr. Benoit) Do you recognize this
19 document?

20 A Yes, this was a personal financial statement
21 submitted to the bank March 24th, 1992.

22 Q Is that a record that the bank would keep in
23 the regular course of its business?

24 A Yes, it is a record that was still maintained
25 in our dead loan file.

1 MR. BENOIT: I would ask that R47 be admitted.

2 MS. MENOTTI: Can I have one second, please?

3 HEARING OFFICER CROWLEY: Yes.

4 MS. MENOTTI: Joel, did you move to admit it as a
5 business record?

6 MR. BENOIT: Yes.

7 MS. MENOTTI: Okay. The State does not object on
8 the grounds of a business record. I do object because
9 this was not provided to the State prior to just right
10 this very minute. Interrogatory 19 of the State's
11 discovery requests asks that the foregoing -- that the
12 Respondents attach copies of each paper document or
13 other tangible thing that shows any legal or
14 beneficial interest in, and I am paraphrasing, bank
15 accounts, stocks, bonds, certificates of deposit, any
16 corporate, governmental, security, negotiable,
17 nonnegotiable instruments, annuities, notes, or other
18 agreements evidencing an obligation by you, the
19 partnership or anything --

20 MR. BENOIT: This doesn't fall under that.

21 MS. MENOTTI: -- with regards to the lawsuit. And
22 they didn't disclose this. The State has not seen
23 this before.

24 HEARING OFFICER CROWLEY: It does --

25 MS. MENOTTI: We are objecting to it being entered

1 as substantive evidence, because of the breaches of
2 the discovery rules.

3 HEARING OFFICER CROWLEY: It does not sound to me
4 as if it was covered by that interrogatory. It is a
5 business record. Respondent's Exhibit Number 47 is
6 admitted.

7 (Whereupon said document was admitted into
8 evidence as Respondent's Exhibit 47 as of this
9 date.)

10 Q (By Mr. Benoit) What is Respondent's Exhibit
11 Number 47?

12 A It is a personal financial statement of March
13 24th.

14 Q Now, are you aware --

15 HEARING OFFICER CROWLEY: That is the one that you
16 had intended to move, correct?

17 MR. BENOIT: Yes.

18 HEARING OFFICER CROWLEY: Okay. Thank you.

19 Q (By Mr. Benoit) Now, are you aware of the
20 Bergers' average adjusted gross income for the years
21 1991 through 1995?

22 A I have access to that information which was
23 pulled from their federal income tax forms.

24 MS. MENOTTI: I am sorry. I couldn't hear your
25 answer.

1 THE WITNESS: Yes, I have access to that
2 information as pulled from their federal income tax
3 forms.

4 Q (By Mr. Benoit) Okay. And what was the
5 average -- the Bergers' average adjusted gross income
6 for the years 1991 through 1995?

7 A The five year average income, \$41,697.00.
8 That ranged from a low of \$14,454.00 in the year 1994
9 and a high in 1993 of \$75,485.00.

10 Q Now, I have called you here today to testify
11 as to whether or not, based on Exhibit R47 and the
12 Bergers' average adjusted gross income for the years
13 1991 through 1995, the Olney Trust Bank would have
14 been -- or would have issued a letter of credit in the
15 amount of \$250,000.00?

16 MS. MENOTTI: I am going to object to this line of
17 questioning for two reasons.

18 First of all, this witness was not identified as
19 having any knowledge of any counts of the complaint.
20 We have already been through that with Interrogatory
21 Number 29. The only witness identified is Harry Wayne
22 Berger.

23 Secondly, further testimony -- this document was
24 not identified -- I am sorry -- I had the wrong
25 interrogatory number. Interrogatory Number 28 says

1 identify any financial statements that were prepared
2 by or for the Respondents for the purpose of acquiring
3 loans, for reporting purposes, reports on financial
4 conditions, balance sheets, and income statements,
5 changes in equity of capital funding, from 1986 to the
6 present.

7 The response only -- in response the Respondents
8 only gave a personal financial statement from the
9 Olney Trust Bank that they used in order to obtain a
10 \$10,500.00 loan. This is clearly a document that
11 would be involved in that category. It was not
12 provided to the State. It is unfair surprise. It is
13 abuse of discovery. It should be stricken from the
14 record, along with the rest of the witness' testimony.

15 MR. BENOIT: I can't recall off the top of my head
16 which financial forms that we did provide to the
17 State. I know there was more than one.

18 MS. MENOTTI: We have not seen this before.

19 MR. BENOIT: If I can finish, I know that there
20 was more than one that we provided. And as far as the
21 dates, the exact dates, because there were numerous
22 loans, I cannot say right off the top of my head. I
23 know she is wrong. There is more than one. If we
24 want to go off the record and dig through all of this
25 discovery, then --

1 MS. MENOTTI: My point is not that there was more
2 than one. I don't care that there was more than one.
3 I care that I have never seen this before. And the
4 fact that I have never seen this before makes it abuse
5 of discovery and unfair surprise, and the Board should
6 not be considering it, because the State is entitled
7 to notice of what they are going to use from the
8 interrogatories. That is the purpose of discovery.
9 It is clearly an abuse of discovery.

10 The exhibit should be stricken from the record as
11 well as the witness' testimony regarding the exhibit
12 or the financial conditions of the Respondent based on
13 Interrogatory Number 28 and 29.

14 HEARING OFFICER CROWLEY: Mr. Benoit, did I
15 understand you correctly that you believe this was
16 presented to the State?

17 MR. BENOIT: I would have to dig through the
18 discovery material to find out. I know that Maria is
19 wrong when she states that one and only one was
20 given.

21 MS. MENOTTI: I am sorry. I was not stating
22 that. I was reading the answer of your -- in the
23 interrogatory.

24 MR. BENOIT: I think we would have to go back
25 through the discovery responses, 201k letters that

1 went back and forth, you know, what was said, whether
2 she filed a motion to compel, which I know that was
3 not done.

4 MS. MENOTTI: That still does not excuse them. I
5 didn't even know this existed. So how am I supposed
6 to move them to compel a document that I don't know
7 exists. My lack of a motion to compel does not
8 relieve the defendants of the obligation of disclosing
9 the information requested by the State pursuant to
10 discovery. Under the case law, which I don't have in
11 front of me, but I would be willing to get, and it is
12 apparent from the previous Hearing Officer's order,
13 that if the stuff was not disclosed by the State we
14 would be barred from using it at the trial. I presume
15 that the same law applies to the Respondents. If they
16 don't disclose upon the State's request, they are
17 barred from using it at trial.

18 HEARING OFFICER CROWLEY: The interrogatory that
19 she read, that document would certainly be
20 responsive. If you can demonstrate that it was
21 provided, then it is properly admitted into the
22 record. If you can't demonstrate that it was
23 provided, then --

24 MR. BENOIT: Okay. I think what I would like to
25 do, just to save time, I would like to have the

1 Hearing Officer reserve ruling on the admission of
2 this particular --

3 MS. MENOTTI: Objection. A waste of time. We
4 have been subject to countless delays.

5 HEARING OFFICER CROWLEY: Could you finish,
6 please.

7 MR. BENOIT: Yes. And then what I will do is I
8 will have Wayne Berger testify as to his assets and
9 liabilities on March 25th, 1992, and I will have Mr.
10 Runyon base his opinion on the testimony to be tied up
11 earlier. So in that fashion, if I can't find that it
12 was actually disclosed to her, you know, it won't get
13 admitted.

14 HEARING OFFICER CROWLEY: Fine. We will proceed
15 on that basis.

16 MS. MENOTTI: Further, for the record, during the
17 201k process the State asked for a more responsive
18 response to Interrogatory Number 28. From a letter
19 from Mr. Benoit dated October 31st, 1996, in response
20 to Number 28, he states that the Respondents have
21 responded to Interrogatory Number 28, thus providing
22 the latest financial statement prepared. Any
23 financial statements which have been prepared prior to
24 that date are irrelevant to the Respondent's current
25 financial condition.

1 If he can show that he has disclosed it -- I have
2 never seen this before. I am going to continue to
3 object to anything -- to any testimony regarding
4 anything to do with the letter of credit and anything
5 to do with financial statements that were not
6 disclosed.

7 HEARING OFFICER CROWLEY: I understand that.

8 MS. MENOTTI: Okay.

9 HEARING OFFICER CROWLEY: Your record is clear,
10 and --

11 MR. BENOIT: And I would also like to offer this
12 evidence, and I will just have Mr. Runyon read through
13 the assets and say based on these assets,
14 hypothetically, which the witness can offer testimony
15 on that, too.

16 HEARING OFFICER CROWLEY: Okay.

17 MR. BENOIT: So if I can't tie it up with Wayne --

18 HEARING OFFICER CROWLEY: I said you could
19 proceed, so let's --

20 MR. BENOIT: Okay.

21 Q (By Mr. Benoit) Based on the assets and
22 liabilities listed in R47, if you could quickly read
23 through what they are for the record.

24 A Okay. This is from a personal financial
25 statement dated March 24, 1992. Itemization of

1 assets: Cash, \$8,000.00. Marketable securities,
2 \$72,000.00. Real estate owned, \$300,000.00
3 Automobiles, \$19,000.00. Other personal property,
4 \$17,500.00. Five trucks, \$50,300.00. A 1987 55 John
5 Deere bulldozer, \$30,000.00. A tractor, blade, and
6 rotary mower, \$2,400.00. Tools, tool boxes, air
7 compressor, lawn mower, \$2,000.00. Dumpsters,
8 \$18,000.00. For total assets of \$519,200.00.

9 MS. MENOTTI: I am going to object. This is
10 duplicative. Right now this is in evidence. This is
11 duplicative testimony.

12 HEARING OFFICER CROWLEY: Your objection stands.

13 It is a continuing objection.

14 Please proceed.

15 Q (By Mr. Benoit) Okay. Have you --

16 A Then the liabilities on that date were notes
17 payable to banks, \$64,000.00. And Ed Berger escrow,
18 \$6,000.00. The total liabilities, \$70,000.00. The
19 total assets minus the total liabilities is the net
20 worth on that date given at \$449,200.00.

21 Q Okay. Now, based on those figures and,
22 again, based on the average adjusted gross income that
23 we discussed earlier, which was \$41,697.00, would the
24 Olney Trust Bank have been able to issue a letter of
25 credit --

1 MS. MENOTTI: Objection. Calls for speculation.

2 HEARING OFFICER CROWLEY: This is within his area
3 of expertise.

4 Please continue.

5 Q (By Mr. Benoit) (continuing) -- to Wayne
6 Berger in the range of \$250,000.00?

7 A The primary consideration in issuing a letter
8 of credit is that in the event of a request that the
9 credit is drawn upon that the borrower will be able to
10 repay the debt. And under the circumstances given, a
11 \$250,000.00 request for a letter of credit would need
12 to be supported by a corresponding \$250,000.00 loan.
13 The mechanics of this are the loan sets in the
14 background, and it is not an active loan until the
15 letter of credit is drawn upon, then an advance is
16 made on this loan.

17 Then the process that we look at in any loan
18 request is -- the primary factor is the ability to
19 repay. And the secondary factor is the collateral
20 position in event of default, if the individual is
21 unable to repay the loan.

22 I did do some figures, and that's the worksheets
23 that I have in front of me. On a \$250,000.00 loan
24 request --

25 MS. MENOTTI: Is this still in response to his

1 question about the -- whether or not in 1992 or is
2 this testimony going to the present financial
3 condition?

4 MR. BENOIT: 1992.

5 HEARING OFFICER CROWLEY: Okay. Please proceed.

6 THE WITNESS: With the request for a \$250,000.00
7 loan, and I am assuming a pay back of a 15 year
8 maturity at an interest rate of 9.5 percent, a monthly
9 payment would have been, in 1992, of \$2,610.56 per
10 month. When we looked at a recommended ratio for a
11 loan approval, we look at the debt repayment on a real
12 estate loan and it should not exceed 28 percent of
13 total available net income.

14 As I worked through that calculation, the borrower
15 would not qualify. It would have been denied based on
16 insufficient ability to repay. Just as a ballpark
17 figure, what we look at, the total debt service of
18 principle and interest, along with taxes and
19 insurance, and when I did a very conservative
20 estimate, it totalled \$2,835.56. That would be the
21 monthly payment required to service this loan.

22 If we use our 28 percent guideline for income
23 qualification, the borrower would have to have an
24 income of approximately \$10,000.00 per month. At 28
25 percent it is \$2,800.00 per month. His actual income

1 was \$41,000.00, when we looked at an average. So,
2 clearly, the loan would not pass the test for the
3 ability to repay based on income.

4 Q (By Mr. Benoit) The actual financial
5 assurance that the Agency was requesting was, I
6 believe, more in the range of \$241,000.00. Now --

7 MS. MENOTTI: Objection. It assumes facts not in
8 evidence. This witness has not testified that he has
9 personal knowledge of anything requested by the
10 Illinois EPA.

11 MR. BENOIT: This is --

12 HEARING OFFICER CROWLEY: I believe that this
13 evidence is already in the record.

14 So please continue.

15 Q (By Mr. Benoit) Based on your calculations,
16 could they have gotten a letter of credit for
17 \$241,000.00 in 1992?

18 A No.

19 Q Now, you mentioned that income, ability to
20 generate income to service the debt is the primary
21 consideration; is that correct?

22 A Yes.

23 Q But there are also collateral issues, and it
24 looks like they --

25 MS. MENOTTI: Objection. Leading.

1 HEARING OFFICER CROWLEY: It is a clarification of
2 earlier testimony.

3 Please continue.

4 Q (By Mr. Benoit) There are also, you know,
5 assets that are listed on R47, which you just -- that
6 you read into the record. Couldn't the bank issue the
7 letter of credit just based on assets?

8 A As I stated earlier, the loan -- the decision
9 process is twofold. The primary consideration is the
10 ability to repay based on current income. The
11 secondary consideration is the availability of
12 collateral in the event of a default of the
13 repayment. It is plan B. We hope to never get
14 there. We hope that all of our lending decisions are
15 based on documented ability to repay the loan.

16 Because the loan would fail the first test, it
17 should never be made. As far as a collateral
18 question, that's a hypothetical consideration. If we
19 were looking at the availability of the collateral
20 with real estate, generally we can loan up to 85
21 percent of current value, but that would come only as
22 the second part of this test.

23 Q Okay. I am going to show you what has been
24 marked as R48. Can you tell me what that is?

25 A This is a personal financial statement dated

1 August 17, 1998, again, listing all assets and

2 liabilities.

3 MS. MENOTTI: I am sorry, but this is clearly -- I

4 renew the objection to my -- I object to Respondent's

5 48, first off, on the same basis as I have objected to

6 Respondent's 47.

7 But based on the fact that this was just

8 generated, and this has just been produced for this

9 date, it has not been previously disclosed to the

10 State although it was prepared a couple days ago,

11 apparently, and it constitutes not only unfair

12 surprise, but this is not admissable if it was only

13 generated for the purpose of using it at trial.

14 And if you look at the back of the exhibit, it

15 says completed for Pollution Control Board hearing.

16 We don't even need to go any further on this.

17 HEARING OFFICER CROWLEY: Response?

18 MR. BENOIT: This R48 was provided to Mr. Runyon

19 to make calculations as to -- and offer an opinion as

20 to whether or not the Respondents would be able to

21 obtain financial assurance based on their current

22 assets, and it is -- I agree with Maria that it

23 shouldn't be admitted. It is used for his reference

24 here, and then I am going to tie it up later in Mr.

25 Berger's case in chief as to, you know, his testimony

1 to say, yes, these are the assets.

2 Again, it is -- I want to offer it as a
3 hypothetical to an opinion witness based on his
4 educational background and position with the bank,
5 would the bank be able or willing to issue a letter of
6 credit currently.

7 HEARING OFFICER CROWLEY: I will allow its use as
8 the basis of a hypothetical question of would a person
9 with assets of whatever they are listed on the sheet,
10 be issued a letter of credit by the bank, given all of
11 the considerations of which you have previously
12 testified.

13 MR. BENOIT: Maria, you had objected to me having
14 him read it off the last time. Do you want -- well, I
15 think I will have him read it.

16 Q (By Mr. Benoit) Could you just go ahead and
17 read the assets that are listed on --

18 MS. MENOTTI: I am going to object. You just said
19 that he had to ask it in a hypothetical form in order
20 for it to be allowable in the record.

21 MR. BENOIT: Okay. Let's do it that way.

22 Q (By Mr. Benoit) Hypothetically, if Wayne
23 Berger had \$20,000.00 in cash, \$193,000.00 in real
24 estate, \$4,000.00 of value in a car, a vested interest
25 in deferred compensation or profit sharing plans of

1 \$130,000.00, a tractor and mower valued at \$15,000.00,
2 and amounts payable to others for \$2,000.00, resulting
3 in a net worth of \$360,000.00, and he had --

4 MS. MENOTTI: Excuse me. Can the witness not look
5 at Respondent's Exhibit Number 48 if it is a
6 hypothetical.

7 HEARING OFFICER CROWLEY: I think it will foster
8 his ability to answer the question. He may continue
9 to refer to the document.

10 Q (By Mr. Benoit) And if that person had a
11 projected future income in the amount of \$15,000.00,
12 and if all of these factors were to be occurring
13 today, and the application was submitted to your bank
14 for the purposes of the applicant requesting you to
15 issue a letter of credit in the amount of \$241,000.00,
16 would the bank issue the letter of credit?

17 A The answer to that, again, is based primarily
18 on the debt repayment ability of the borrower. It is
19 my understanding that the current income is estimated
20 at \$15,000.00 per year. That is \$1,250.00 per month.
21 Clearly, it would not meet the income test with an
22 annual payment required of approximately \$2,800.00 --
23 for the monthly payment of \$2,800.000, when the total
24 monthly income is \$1,250.00 per month. So, no, a
25 request for \$250,000.00 would not be granted.

1 Q Would a request for \$241,000.00 be granted?

2 A No.

3 Q On the board here is Exhibit R49. On this
4 exhibit marked in blue is the residence, as has
5 previously been testified, the residence of Gary
6 Cantrell. The testimony was that approximately a half
7 mile south of Gary Cantrell's home is the Wayne Berger
8 Landfill. Are you familiar, in your position with the
9 bank, of land values in that area of Richland County?

10 A Generally, yes.

11 Q Okay. And are you aware that Wayne Berger
12 owns farmland, or the trust does, in the location that
13 I have described earlier, approximately 100 acres?

14 A Yes, I am.

15 Q In your opinion what would be the value of
16 that farmland per acre?

17 MS. MENOTTI: I am going to object. He has not
18 established that this witness is an expert in land
19 values. He said he was somewhat familiar with land
20 values in the area. And this is not proper foundation
21 for this question, unless they establish that he is
22 some kind of land assessor or has some other expertise
23 outside of his financial background or outside his
24 capacity as the president of a bank.

25 MR. BENOIT: I think he has testified that he has

1 been at the bank for numerous years and he has
2 obviously made loans on farmland, and he is qualified
3 to offer an opinion.

4 HEARING OFFICER CROWLEY: We will allow the
5 opinion. The Board can give it whatever weight it
6 deems necessary based on the information provided
7 about the witness' background.

8 Q (By Mr. Benoit) Again, would you be familiar
9 or have an opinion as to the estimated value per acre
10 of the farmland held in the trust?

11 A Admittedly, I have not done a complete
12 assessment of soil productivity and a study of
13 comparable sales that you would have and an official
14 written appraisal, but in my opinion I am familiar
15 with the property. I know it to be Wayne's parents
16 homeplace, their farm. I am familiar with the general
17 area.

18 This farm is not prime farmland. It is very
19 rolling, subject to erosion, and it would not be -- it
20 would not fall into the category of a high
21 productivity rating, in my opinion. Just based on
22 that general overview, my estimate is it would be
23 approximately \$800.00 per acre.

24 Q Are you familiar with -- I think you stated
25 that you are -- the Bergers' residence?

1 A Yes, I am.

2 Q Are you familiar with the values of
3 residences in Richland County, in that area?

4 A Generally, yes.

5 Q Would you have an opinion as to the value of
6 the Bergers' residence?

7 A Again, just a general statement, a modest
8 ranch home, located on the property adjoining the
9 landfill, perhaps in the \$65,000.00 range.

10 Q I meant to ask you this question earlier when
11 you were discussing whether or not the bank would be
12 willing to issue a letter of credit, and you discussed
13 the income test that was failed, and then why you
14 wouldn't just rely on the assets.

15 Do you know of any other financial institution or
16 insurance company that would have provided financial
17 assurance in the range of \$241,000.00 based on the
18 information that we previously discussed in 1992 or
19 currently?

20 A I do not see how any institution would have
21 based on these numbers, so no.

22 Q Yesterday Kevin Bryant, who is an employee of
23 the IEPA, with some financial background, testified
24 that the Respondents received an estimated financial
25 benefit in the amount of \$27,500.00 by not obtaining

1 \$241,000.00 in financial assurance.

2 MS. MENOTTI: I am going to object. I think that
3 is a mischaracterization of Mr. Bryant's testimony.

4 HEARING OFFICER CROWLEY: I recall that that is an
5 accurate characterization.

6 You may continue.

7 Q (By Mr. Benoit) In your opinion, does someone
8 who is unable to qualify for a letter of credit obtain
9 a financial benefit by not obtaining that letter of
10 credit?

11 MS. MENOTTI: I am going to object. The question
12 is unclear, and it is also calling for a legal
13 conclusion, and it assumes that the witness is aware
14 of facts and is well versed in the Environmental
15 Protection Act. And I think that there needs to be
16 more foundation in order for the witness to answer the
17 question that Mr. Benoit just asked.

18 MR. BENOIT: It is a straight-forward question.
19 It is just a financial --

20 HEARING OFFICER CROWLEY: I believe the facts are
21 sufficient.

22 You may answer if you can.

23 THE WITNESS: For the Bergers to have received a
24 direct financial benefit, in my opinion as a banker,
25 or if we are looking at it in the context of a loan

1 application, the only financial benefit that gets put
2 on a financial statement or that gets reported is
3 actual income. So, in my opinion, only if Wayne and
4 his family would have received income that is a
5 financial benefit. And if I understand properly
6 that's not the case here.

7 Q (By Mr. Benoit) The testimony kind of -- the
8 earlier testimony kind of confused me. I think what
9 they are saying is -- I think the earlier testimony
10 had to do with their not gaining income, but they are
11 avoiding an expense.

12 I guess my question to you is, in your opinion, if
13 you can't obtain a letter of credit in the amount of
14 \$241,000.00, are you, in fact, avoiding an expense?

15 A From a banker's perspective?

16 Q Yes.

17 A In a real world scenario, we clearly would
18 not allow an asset to be listed as an expense
19 avoidance, if that's the -- if I understand your
20 explanation here. I don't know of any accountant who
21 would allow that to appear on a personal financial
22 statement. I do not see how that would be an asset or
23 a benefit.

24 MR. BENOIT: No further questions.

25 MS. MENOTTI: Before I do my cross-examination, I

1 would like to clear up the discovery issue of this
2 witness prior to my cross-examination regarding
3 everything to do with that financial statement, and if
4 it is, in fact, going to be stricken from the record
5 because it was not produced.

6 HEARING OFFICER CROWLEY: I am sorry. I missed
7 something there.

8 MS. MENOTTI: I can re-explain. I would like to
9 clear up the discovery issues and have a determination
10 as to whether this was not properly -- Respondent's 47
11 was not properly given to the State in discovery.

12 HEARING OFFICER CROWLEY: It was my understanding
13 that --

14 MS. MENOTTI: To determine whether or not the
15 testimony will or will not be stricken. Because I
16 don't think we need to waste anymore time. I don't
17 want to waste my time cross-examining the witness.

18 HEARING OFFICER CROWLEY: Is my understanding
19 correct, that you were going to continue providing the
20 basis for that with a later witness?

21 MR. BENOIT: Yes. I will have Wayne testify as to
22 the assets and liabilities listed on 47 and 48. But I
23 think our --

24 HEARING OFFICER CROWLEY: Thank you. I believe
25 that is what --

1 MR. BENOIT: No, I think --

2 HEARING OFFICER CROWLEY: Go ahead.

3 MR. BENOIT: I think there was a back up
4 position.

5 HEARING OFFICER CROWLEY: Okay.

6 MR. BENOIT: If not, I want to offer this
7 testimony based on hypothetically.

8 MS. MENOTTI: That's not what happened. That is
9 not what my objection is. That is not what I am
10 asking the Hearing Officer to decide. I am asking if
11 we can clear up the discovery issue as to whether or
12 not this document was actually provided to the State.
13 And whether Mr. Runyon's testimony is proper prior to
14 my cross-examination.

15 There is no need for me to go through a
16 cross-examination on issues that are to be stricken
17 from the record under an abuse of discovery and
18 improper notice or no notice to the State with regard
19 to these. If Mr. Benoit wants to call his client and
20 then have his client give some facts or wants to call
21 Mr. Runyon as an opinion witness to testify to facts
22 that are actually in evidence that is something
23 different.

24 I don't think he can postdate it and come back and
25 say, well, my client said this after the fact, and so

1 now I am going to offer Mr. Runyon's testimony. He
2 can't do that because the witness would not be subject
3 to cross-examination.

4 MR. BENOIT: It is very common to tie things up,
5 connect up evidence with later witnesses. It is done
6 all of the time. Again, I think that as to R47 and
7 R48, and I don't know how I can state this again, but
8 he is an opinion witness. He can take that
9 information as a hypothetical and give his opinions,
10 and that is what he has done.

11 MS. MENOTTI: Madam Hearing Officer, I am sorry,
12 but that does not excuse -- Mr. Runyon is an opinion
13 witness. I recognize that he is a very well versed
14 man in financial statements. That does not excuse the
15 Respondents, number one, for not disclosing what they
16 were required to disclose during discovery.

17 Number two, it does not excuse them for not
18 disclosing Mr. Runyon as a witness who had knowledge
19 of facts in the complaint. My objection is the fact
20 that they did not comply with discovery and,
21 therefore, this should be stricken from the record.
22 There is 18 million reasons why they may be wanting to
23 call him to testify.

24 I am saying that the State had a right to know.

25 We asked. They didn't tell us. It is improper

1 testimony. It should be barred from the record.

2 Before I do a cross-examination I would like a

3 determination on the abuse of discovery so that I

4 don't waste anymore time.

5 MR. BENOIT: Mr. Runyon is not a witness that has

6 knowledge of facts, you know, based on the allegations

7 in the complaint.

8 HEARING OFFICER CROWLEY: We have accepted Mr.

9 Runyon's opinion testimony based on hypothetical facts

10 which were read into the record by Mr. Benoit.

11 Respondent's 47 has not been entered into the record.

12 You may cross-examine on the basis of the hypothetical

13 facts that were presented and --

14 MS. MENOTTI: Excuse me, just for a clarification,

15 Respondent's 47 has been entered into the record.

16 Respondent's 48 was the hypothetical.

17 HEARING OFFICER CROWLEY: I am sorry. I am sorry.

18 MS. MENOTTI: Respondent 47 is what I am

19 challenging.

20 MR. BENOIT: And I agreed on the record that if I

21 can, by tomorrow morning, find out what the discovery

22 was --

23 MS. MENOTTI: Why is --

24 MR. BENOIT: Which I am not going to agree with

25 her that we did not give this to her previously, but

1 then I think his testimony as to R47 should come in as
2 a hypothetical.

3 MS. MENOTTI: Madam Hearing Officer, what is the
4 reason for the delay? Why can't we figure out if this
5 has been disclosed right now, instead of going through
6 useless -- not useless -- unnecessary
7 cross-examination. It is almost 1:00. We have an
8 hour left. We have taken various breaks and wasted
9 enough time as it is. I am just trying to get things
10 done in the most expeditious manner possible.

11 HEARING OFFICER CROWLEY: I would like to ask, are
12 the documents physically present in this room?

13 MR. BENOIT: No, they are not.

14 MS. MENOTTI: I have the discovery documents that
15 I received.

16 MR. BENOIT: Here is what I am willing to do. If
17 she will take it as just both based on hypotheticals,
18 he is an opinion witness, the way I will connect it up
19 later, and the way the Board will see it is that Wayne
20 will later testify to it, and if the numbers match up,
21 so be it, and they can draw whatever conclusion they
22 want. So I am willing to go that route.

23 MS. MENOTTI: But the testimony was not a
24 hypothetical. The testimony is not offered as a
25 hypothetical, and it --

1 MR. BENOIT: I will go back, if Maria would like,
2 and we can do --

3 MS. MENOTTI: Can I finish, please? I think I was
4 still talking.

5 This was not -- Exhibit 47 was not offered as a
6 hypothetical exhibit. Exhibit 47 and the testimony
7 regarding Exhibit 47 was not offered in a hypothetical
8 manner. And unless he wants to go back through and
9 somehow do that by recalling Mr. Runyon, that's fine.

10 Right now I am dealing with actual substantive
11 testimony on Exhibit Number 47, and a substantive
12 exhibit, Exhibit Number 47 for the Respondents and my
13 request is that we figure out whether or not the
14 Hearing Officer will strike the testimony and the
15 exhibit from the record prior to me doing my
16 cross-examination of this witness.

17 MR. BENOIT: Could I suggest that in the interest
18 of efficiency that Maria could just accept it. I am
19 just going to ask the same questions as to R47, as if
20 every question was asked in the hypothetical and that
21 the record reflects that that is everybody's
22 understanding, the answers are going to be the same.
23 There is no reason to go through it again. And then
24 she can get on with her cross.

25 MS. MENOTTI: I am sorry. I can't stipulate until

1 I hear what the questions are going to be.

2 HEARING OFFICER CROWLEY: I am sorry. Would --

3 MR. BENOIT: You have already heard them.

4 HEARING OFFICER CROWLEY: I am sorry. Will you --

5 MS. MENOTTI: I have not heard a hypothetical

6 question.

7 HEARING OFFICER CROWLEY: Would you proceed to ask

8 the questions.

9 MR. BENOIT: Do it again?

10 HEARING OFFICER CROWLEY: Yes.

11 MR. BENOIT: Okay.

12 MS. MENOTTI: I am still going to request that we

13 clear up the thing regarding Number 47, unless they

14 are willing to strike this as an exhibit, and strike

15 the testimony prior to me doing my cross-examination.

16 HEARING OFFICER CROWLEY: And if I understand

17 correctly, you are not willing to do so?

18 MR. BENOIT: I will agree to that.

19 MS. MENOTTI: So --

20 HEARING OFFICER CROWLEY: You are agreeing to

21 striking --

22 MR. BENOIT: Striking his testimony regarding R47.

23 MS. MENOTTI: And this as an exhibit?

24 HEARING OFFICER CROWLEY: And R47 is no longer in

25 the record?

1 MR. BENOIT: Right.

2 (Respondent's Exhibit 47 was withdrawn from the
3 record.)

4 Q (By Mr. Benoit) Mr. Runyon, do you still have
5 a copy of R47 in front of you?

6 A Yes, I do.

7 Q On March 25th, 1992, Wayne Berger had assets
8 consisting of cash of \$8,000.00, U.S. Government
9 marketable securities of \$72,000.00, real estate of
10 \$300,000.00, automobile \$19,000.00, other personal
11 property, \$17,500.00, five trucks valued at
12 \$50,300.00, a 1987 55 John Deere bulldozer at
13 \$30,000.00, a tractor, blade and rotary mower were
14 \$2,400.00, miscellaneous tools valued at \$2,000.00,
15 dumpsters at \$18,000.00, for total assets of
16 \$519,200.00, and had outstanding liabilities
17 consisting of notes payable \$64,000.00, and Ed Berger
18 escrow, \$6,000.00. Total liabilities \$70,000.00, for
19 a net worth of \$449,200.00.

20 If Wayne Berger's average adjusted gross income of
21 \$41,697.00 was used as the income consideration and
22 the projected income, would the Olney Trust Bank have
23 been able to issue him a letter of credit for
24 financial -- for a financial assurance fund?

25 A No.

1 Q And because I am not sure how much of the
2 testimony was stricken, how would the Olney Trust Bank
3 make that determination?

4 A The determination for a \$250,000.00 letter of
5 credit would be predicated upon the borrower
6 successfully applying for and documenting the fact
7 that he had sufficient income to repay the debt.
8 Should I recount all of the numbers?

9 Q I am afraid you are going to have to.

10 A In a hypothetical loan request for the amount
11 of \$250,000.00 to support a letter of credit, I did a
12 calculation to estimate the monthly repayment required
13 for that loan. I am assuming a 15 year maturity,
14 which would require that a loan be secured by real
15 estate. And at an interest rate of 9.5 percent, the
16 monthly repayment of principle and interest would be
17 \$2,610.00. I am estimating the monthly taxes for that
18 real estate of \$175.00 with estimated monthly
19 insurance of \$50.00. The total estimated principle,
20 interest, tax and insurance --

21 MS. MENOTTI: Excuse me. The testimony --

22 THE WITNESS: Excuse me. I have an appointment I
23 will have to leave for very shortly. I apologize for
24 that, but it is the real world.

25 HEARING OFFICER CROWLEY: Could you complete your

1 objection?

2 MS. MENOTTI: My objection is that the last
3 portion of the calculation is not based on the
4 hypothetical, and I think it is an improper response.

5 MR. BENOIT: I asked him what factors he would
6 consider. Obviously, taxes and insurance when making
7 a real estate loan are considered, and I ask that he
8 be allowed to go on.

9 HEARING OFFICER CROWLEY: I will allow him to go
10 on.

11 THE WITNESS: I am giving testimony based on if a
12 loan application were made to our bank what we would
13 look at in determining the repayment, the total
14 estimated repayment on the loan, and then we look at
15 the income that is required. This is the calculation
16 that we go through. It is the same testimony that I
17 gave before your earlier objection.

18 If I may continue, the total estimated payment for
19 this hypothetical loan request would be \$2,835.56. To
20 qualify for a loan repayment of that amount would
21 require income of \$10,000.00 per month at our
22 guideline of 28 percent, which is a simple calculation
23 of \$2,800.00, the documented actual average income for
24 the time period from 1991 through 1995 is \$41,697.80.

25 HEARING OFFICER CROWLEY: We will strike the

1 portion of the testimony about the documented actual
2 income.

3 MR. BENOIT: Right. It is just based on the
4 hypothetical.

5 THE WITNESS: The average monthly income,
6 hypothetically, would have been \$3,474.00. Therefore,
7 this loan request would be denied based on
8 insufficient income to service the debt.

9 Q (By Mr. Benoit) Based on those same factors
10 that I just gave you, hypothetically, talking about
11 the 1992 figures, are you aware of any other financial
12 institution that would have offered a letter of credit
13 or financial assurance in the amount of \$250,000.00?

14 A No, I am not.

15 Q Would your answer be any different if we --
16 if the request was for a letter of credit for
17 \$241,000.00?

18 A No, it would not be.

19 MR. BENOIT: Okay. No further questions.

20 HEARING OFFICER CROWLEY: Thank you. Does the
21 Complainant have cross-examination?

22 MS. MENOTTI: I absolutely have some
23 cross-examination. Can I take a couple minutes to
24 confer with co-counsel off the record?

25 HEARING OFFICER CROWLEY: Off the record.

1 (Discussion off the record.)

2 HEARING OFFICER CROWLEY: Okay. We are back on
3 the record.

4 CROSS EXAMINATION

5 BY MR. GUBKIN:

6 Q Mr. Runyon, did Mr. Berger ever request a
7 letter of credit?

8 A Yes, he did.

9 Q Are you referring to the letter of credit
10 which expired in 1993?

11 A Yes.

12 Q Since that time has Mr. Berger requested a
13 letter of credit?

14 A Not to my recollection.

15 Q Are you -- have you made a determination of
16 the value of Mr. Berger's assets as of this date?

17 A I have.

18 MR. BENOIT: Objection. The testimony was based
19 on hypotheticals.

20 HEARING OFFICER CROWLEY: Yes, it was.

21 MR. GUBKIN: Yes, the testimony was based upon
22 hypotheticals, but I am -- what Mr. Runyon testified
23 to was hypothetically if Mr. Berger had this would he
24 have done it. I am trying to get whether he has any
25 knowledge of, in the real world, whether he would have

1 or would not have, based upon the work that he has
2 done.

3 MR. BENOIT: That's beyond the scope.

4 HEARING OFFICER CROWLEY: It is beyond the scope.

5 MR. BENOIT: He testified as to, to my
6 recollection, his value opinions as to the house and
7 100 acres of the farm only.

8 MR. GUBKIN: He did testify as to the value of the
9 house and the farm?

10 MR. BENOIT: I think so.

11 MS. MENOTTI: The witness did testify as to a
12 hypothetical issue that was brought before --

13 HEARING OFFICER CROWLEY: I am sorry. Yes, he did
14 testify as to the actual value of the house and farm.

15 MS. MENOTTI: The point being that if he doesn't
16 have any actual personal knowledge, the hypothetical
17 becomes irrelevant. All we are trying to do is
18 ascertain whether or not he is in charge of the -- if
19 he is completely apprised of the Respondent's current
20 financial position or not.

21 HEARING OFFICER CROWLEY: The information is in
22 the record. The Board can give it whatever weight it
23 chooses to give it.

24 Q (By Mr. Gubkin) Mr. Runyon, are you familiar
25 with opportunity costs, that term?

1 A Somewhat.

2 Q Okay. If you don't have to make a loan, if
3 you don't make a loan where you would have to pay
4 interest, but instead are able to keep that money --

5 MR. BENOIT: Objection. It does not make any
6 sense. If you don't make a loan, do you keep that
7 money.

8 MR. GUBKIN: I am sorry. I will rephrase the
9 question.

10 Q (By Mr. Gubkin) Isn't it true that if,
11 hypothetically, someone were to instead of paying off
12 on a loan, kept the money and invested it in the bank
13 they would gain economically from that?

14 MR. BENOIT: Hold on. Can you read that back,
15 please.

16 (Whereupon the requested portion of the record was
17 read back by the Reporter.)

18 MR. GUBKIN: I can break it down --

19 MR. BENOIT: I don't understand it.

20 MR. GUBKIN: -- and make it a little clearer, I
21 believe.

22 Q (By Mr. Gubkin) Generally speaking, if you
23 have a loan you have to pay interest on it; isn't that
24 true?

25 A Yes.

1 Q Also, generally speaking, if you invest in
2 the bank you would get interest on that investment;
3 isn't that true?

4 A Yes.

5 Q If you don't have to pay off on that loan,
6 but instead can invest in the bank and gain interest,
7 aren't you gaining money from that as opposed to
8 losing it on the loan?

9 A If you --

10 MR. BENOIT: Objection. His statement was -- he
11 said if you don't have to pay on a loan. If you don't
12 have to pay on a loan, then somebody has given you the
13 money and it is not a loan.

14 Q (By Mr. Gubkin) Well, what I am trying to say
15 here is if instead of getting the loan and paying
16 interest --

17 MR. BENOIT: Objection. He is arguing.

18 HEARING OFFICER CROWLEY: I assumed you were
19 restating the question; am I right.

20 MR. GUBKIN: I was trying to make things clear for
21 the witness and everyone here and the record.

22 HEARING OFFICER CROWLEY: In other words, you are
23 restating the question?

24 MR. GUBKIN: Yes.

25 Q (By Mr. Gubkin) As a hypothetical, if I give

1 you a loan of \$200.00 at ten percent interest --

2 MR. BENOIT: I am going to object. They didn't
3 call him as an opinion witness. Now they are dreaming
4 up some new hypotheticals that are outside the scope
5 of direct.

6 MR. GUBKIN: Excuse me. Mr. Runyon was called as
7 the Respondent's opinion witness. He gave an opinion
8 as to economic benefit. He said that there was no
9 economic benefit. I am just clarifying and
10 establishing whether or not that is truly the case.
11 My questioning is going directly to his answer that
12 there was no economic benefit.

13 HEARING OFFICER CROWLEY: I understand the type of
14 testimony you are attempting to elicit. Give it a
15 whirl.

16 MR. GUBKIN: Thank you.

17 Q (By Mr. Gubkin) Hypothetically, if I were to
18 give you a loan of \$200.00 at ten percent interest,
19 would you, in effect, be losing money in that you have
20 to pay back this ten percent interest?

21 A What do you mean by losing money?

22 Q Well, you could instead take that money and
23 invest it in the bank and gain interest instead of
24 having to pay off extra money; isn't that true?

25 A If you made an investment in the bank at a

1 stated rate of interest you would have income, and you
2 have interest income in addition to your investment.

3 Q Okay. Therefore, if you don't get a loan but
4 you keep the money and can do something else with it,
5 that's an economic benefit, isn't it?

6 A If the -- if you are investing money and
7 receive earnings on it in the form of interest income
8 you would have income that would not be there if you
9 had not made that investment.

10 Q Thank you. Even if you don't reinvest it but
11 you just keep that money, you are, in fact, getting an
12 economic benefit, aren't you, because you don't have
13 to pay off on the interest, you don't have that loss,
14 isn't that true?

15 A You have avoided an expense.

16 Q I am sorry. What's that?

17 A You have avoided an expense.

18 MR. GUBKIN: Okay. Thank you. No more
19 questions.

20 MR. BENOIT: I have just two follow-up questions.

21 REDIRECT EXAMINATION

22 BY MR. BENOIT:

23 Q If a person is unable to obtain a loan, do
24 they avoid the expense inherent in that loan as far as
25 the interest?

1 A I am sorry. Would you repeat that?

2 HEARING OFFICER CROWLEY: Could you read that
3 back, please. I have lost a thread there.

4 (Whereupon the requested portion of the record was
5 read back by the Reporter.)

6 THE WITNESS: There is only interest expense if a
7 loan is made. So if I understand your question
8 correctly, yes, you are avoiding interest expense if
9 there is no loan compared to if you do have a loan you
10 do have interest expense.

11 Q (By Mr. Benoit) I guess my follow-up question
12 or to clarify, but if you cannot obtain that loan, are
13 you avoiding an interest expense?

14 A Based on -- I don't know how to answer that
15 question. The testimony that I gave earlier indicates
16 that the Bergers would not be able to qualify based on
17 their current income or their estimated income
18 historically. So the fact that they did not qualify
19 for a loan, they did not have the opportunity to have
20 that loan to incur that expense.

21 MS. MENOTTI: The State moves to strike the last
22 response. It is not responsive to the hypothetical
23 question. The witness just told us what he was called
24 to testify to and what he thought, and that was not
25 the question posed by Counsel.

1 HEARING OFFICER CROWLEY: That answer was not
2 responsive to your specific question.

3 MR. BENOIT: Okay. No further questions. This is
4 so --

5 HEARING OFFICER CROWLEY: There is one question
6 that, again, I may have missed something so please
7 bear with me.

8 Is it your testimony that Mr. Berger applied for
9 one letter of credit from your bank and that your bank
10 issued one letter of credit?

11 THE WITNESS: That is correct.

12 HEARING OFFICER CROWLEY: Thank you.

13 MR. BENOIT: I have nothing.

14 HEARING OFFICER CROWLEY: I just wanted to make
15 sure that that didn't generate any additional
16 questions for you folks.

17 Okay. Thank you very much.

18 THE WITNESS: You are welcome.

19 (The witness left the stand.)

20 HEARING OFFICER CROWLEY: It is now 1:30. Was
21 there anything additionally that you wanted to present
22 in what I would say is the few minutes remaining this
23 afternoon?

24 MR. BENOIT: No, that's all of the witnesses I had
25 scheduled and ready for today.

1 HEARING OFFICER CROWLEY: Okay. We then will be
2 recessing for today. I would ask that we have
3 tomorrow's witnesses scheduled close, that you have
4 them here so that we don't have time in which we have
5 to wait for witnesses. The circumstances of today
6 were beyond anyone's control and certainly beyond your
7 control, I understand. But I would appreciate it if
8 we could continue throughout the day, once we begin.

9 MR. BENOIT: Am I to understand that we are going
10 to start at 9:00 tomorrow and end --

11 HEARING OFFICER CROWLEY: I am prepared to start
12 at 9:00 tomorrow. Is the State prepared to start at
13 9:00?

14 MS. MENOTTI: Yes, we will be here.

15 HEARING OFFICER CROWLEY: We will conclude the day
16 no later than 5:00 tomorrow.

17 MR. BENOIT: Okay. I am -- I do have a witness
18 scheduled to start right at 9:00, and the other
19 witness will be here at that time, so the morning
20 ought to really go good.

21 Scott Kains has asked me that I call him to -- one
22 of the witnesses that I listed and it is my IEPA
23 witness, to firm up exactly what time I want him
24 here. And then --

25 MS. MENOTTI: Is this relevant to -- I don't think

1 you need to explain this for the record. I mean,

2 unless you want it on the record --

3 HEARING OFFICER CROWLEY: You don't need to but
4 you may.

5 MR. BENOIT: Forget it.

6 HEARING OFFICER CROWLEY: Okay. Thank you. I
7 will say, while we are doing scheduling things,

8 though, again, I am prepared to commence Friday at

9 9:00 if we need to. The State also --

10 MS. MENOTTI: We will be here if so needed.

11 HEARING OFFICER CROWLEY: Thank you. We will see
12 everybody back here at 9:00 tomorrow morning. Thank
13 you.

14 MR. BENOIT: Thank you.

15 MS. MENOTTI: Thank you.

16 (Exhibits retained by Hearing
17 Officer Crowley.)

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