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ILLINOIS POLLUTION CONTROL BOARD

FOREST PRESERVE DISTRICT OF)
DU PAGE COUNTY, ILLINOIS,)
a body politic and corporate)
in the County of DuPage,)
State of Illinois,)
Complainant,)
vs.)
MINERAL LAND AND RESOURCES)
CORPORATION, a Delaware)
corporation, SOUTHWIND)
FINANCIAL, LTD., an Illinois)
corporation, formerly known)
as ABBOTT CONTRACTORS, INC.,)
BLUFF CITY MATERIALS, INC.,)
an Illinois corporation, as)
assignee of ABBOTT)
CONTRACTORS, INC.,)
Respondents.)

No. PCB No. 96-84

VOLUME VI

The following is the transcript of a hearing held in the above-entitled matter taken stenographically by LISA H. BREITER, CSR, RPR, CRR, a Notary public within and for the County of DuPage and State of Illinois, before MICHAEL WALLACE, Hearing Officer, at 505 North County Farm Road, Wheaton, Illinois, on the 23rd day of October 1997 commencing at 9:45 a.m.

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APPEARANCES

HEARING TAKEN BEFORE:

ILLINOIS POLLUTION CONTROL BOARD
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(312) 814-4925
by: MR. MICHAEL WALLACE

CHAPMAN AND CUTLER, by
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MR. ROBERT G. TUCKER
111 West Monroe Street
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on behalf of the Complainant;

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on behalf of the Respondents
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Southwind Financial, Ltd.,

BUTLER, RUBIN, SALTARELLI & BOYD, by
MR. MICHAEL A. STICK
Three First National Plaza
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Chicago, Illinois 60602
(312) 444-9660

on behalf of the Respondents
Bluff City Materials, Inc., and
Southwind Financial, Ltd.,

(continued)

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GOULD & RATNER, by
MS. KARIN O'CONNELL
222 North LaSalle Street
Chicago, Illinois 60601

on behalf of the Respondent
Mineral Land and Resources
Corporation, a Delaware
corporation.

I N D E X

WITNESS	PAGE
JOAN G. ANDERSON	
CROSS EXAMINATION BY MR. STICK.....	1288
CROSS EXAMINATION BY MS. O'CONNELL...	1314

E X H I B I T S

	MARKED	IN EVIDENCE
Complainant's Exhibit No. 39	1292	
Complainant's Exhibit No. 29		1334

1 HEARING OFFICER WALLACE: Well, pursuant
2 to adjournment, I now call docket PCB 96-84. This
3 is the matter of Forest Preserve of DuPage County
4 vs. Mineral and Land Resources, et al. Let the
5 record show the same appearances as yesterday.

6 Are there any preliminary matters,
7 Mr. Makarski?

8 MR. MAKARSKI: No, sir.

9 HEARING OFFICER WALLACE: Mr. Stick?

10 MR. STICK: No, sir.

11 HEARING OFFICER WALLACE: Ms. O'Connell?

12 MS. O'CONNELL: No.

13 HEARING OFFICER WALLACE: We left off
14 yesterday with cross examination of Ms. Anderson.
15 Ms. Anderson, you're back on the stand. Please
16 remember you're still under oath. You may
17 proceed.

18 MR. STICK: Thank you, your Honor.

19 JOAN ANDERSON,
20 called as a witness herein, having been first duly
21 sworn, was examined and testified as follows:

22 CROSS EXAMINATION

23 BY MR. STICK:

24 Q Good morning, Ms. Anderson.

1 A Good morning.

2 Q Ms. Anderson, during yesterday's
3 session, you referred to a piece of stone with a
4 red color. Do you recall that testimony?

5 A Uh-huh.

6 Q That you had observed at the Stearns
7 Road site. Did you do any chemical analysis of
8 the stone with the red color that you had seen at
9 the site on your first visit?

10 A No.

11 Q Do you know what the aggregate material
12 that was being mined at the site looks like?

13 A Yes.

14 Q Did you recognize the dark red stone as
15 a piece of aggregate material?

16 A No.

17 Q Do you know whether the stone was
18 brought to the site or whether it was a piece of
19 stone found at the site?

20 A I don't know.

21 Q You said you knew what the aggregate
22 material of the site looks like. Could you
23 describe what the aggregate material that was
24 being mined at the site looks like.

1 A Well, it was the pile that appeared to
2 be the material that was mined at the site that
3 was at the northern -- near the north entrance on
4 the west side. That is what I'm referring to, and
5 it looked like pebbles, gravel, stone like, but
6 tan in color predominantly.

7 Q Now, the material you described was
8 material that had been processed and stockpiled
9 for sale, correct?

10 A That was my assumption.

11 Q Is it fair to say that you did not
12 actually see what the aggregate that was coming
13 out of the ground at the site looked like?

14 A That's correct.

15 Q And I take it if you don't know whether
16 the red-colored rock came from off-site or was
17 something that had been originally on site, that
18 that red rock does not form any basis for your
19 opinion that the material that was brought to the
20 site was waste?

21 A Where it was sitting at the site at that
22 time quite a long distance south, it was there
23 with other materials that I observed, and that by
24 and large, that area appeared to consist of

1 materials that had been dumped there.

2 Q Other than that observation, do you have
3 any reason to believe that the red rock
4 specifically that you saw had any connection with
5 the materials being brought on to the site?

6 A The stone was not red. It was what was
7 attached to it that was a sandy type material that
8 looked as if it had been some adhesive material
9 had been placed so that the sand stuck on this big
10 stone, rounded stone.

11 Q Now, you don't know from your own
12 personal knowledge how the plastic tubing and the
13 flexible metal material that you saw that you
14 testified that you saw in your first visit came to
15 be lying on the ground at the Stearns Road site?

16 A From my observation, I can answer?

17 Q Yes.

18 A My observation indicated that the
19 materials -- it was part of the materials that
20 were on top of the site generally, some of them
21 sticking out of the soil, some of them partially
22 covered by soil, and these materials did not
23 appear to be distinctive from those other
24 materials in any way such as the brick and

1 asphalt.

2 Q My question to you is you do not have
3 personal knowledge regarding how those two
4 specific types -- those two specific materials
5 came to be present on the Stearns Road site,
6 correct?

7 A No.

8 Q Now, you indicated on your second visit,
9 you had seen pieces of concrete and concrete
10 culverts and metal material, correct?

11 A Among others, yes.

12 MR. STICK: Your Honor, I'd like to mark
13 a photograph as an exhibit.

14 HEARING OFFICER WALLACE: It would be
15 Respondent's Exhibit 39.

16 MR. STICK: Thank you very much.

17 HEARING OFFICER WALLACE: I guess you
18 can only have three more exhibits today. Off the
19 record.

20 (Document marked)

21 (Discussion off the record.)

22 MR. STICK: Your Honor, may I approach
23 the bench?

24 HEARING OFFICER WALLACE: Yes.

1 MR. STICK: This is the only copy of the
2 photograph I have.

3 Q Ms. Anderson, let me show you what's
4 been marked as Respondent's Exhibit 39 for
5 identification purposes. First of all, have you
6 ever seen that photograph before?

7 A Not that I recall.

8 Q Now, on your second visit on the site,
9 does that photograph depict the area that you
10 viewed some of the metal -- I mean, concrete and
11 concrete culverts that you described in your
12 testimony?

13 A I am not sure. The placement of the
14 other materials -- this really does not appear to
15 be what I was looking at.

16 Q Thank you very much. Ms. Anderson, is
17 it your opinion that is not the Stearns Road site?

18 A Oh, no.

19 Q Your testimony is this does not -- you
20 can't recognize this area as one of the areas you
21 inspected?

22 A I recognize that as an area that was
23 over there, but I do not recognize it as an area
24 that I inspected in relation to my testimony.

1 Q You have seen this area, though, the
2 Stearns Road site?

3 A I believe I have, yes.

4 Q Was there some reason you did not
5 inspect this particular area of the Stearns Road
6 site?

7 A No, there was no particular reason other
8 than when we drove in where the car was parked and
9 I did not do any complete walk-through of the
10 site.

11 Q Now, I want to make sure I understand
12 what your opinion is from yesterday. Is it your
13 opinion that whether material constitutes a waste
14 is determined by the definition of waste in the
15 Environmental Protection Act?

16 A Yes.

17 Q And would you agree with me that if a
18 material is not a waste under the definition
19 contained in the Act, the landfill regs have no
20 application to that particular material?

21 A The landfill regs?

22 Q Yes.

23 A That is not really correct.

24 Q You wouldn't agree with me that if the

1 material was not a waste, the landfill regs do not
2 apply?

3 A No, I would not.

4 Q So is it your opinion that the landfill
5 regs apply to material that is not a waste?

6 A Yes, they certainly can.

7 Q Now, would you agree with me that the
8 important consideration in determining whether a
9 material is a waste is whether it's discarded?

10 A Yes.

11 Q Do you have a definition of discarded?

12 A The only definition, per se, would be
13 access to the dictionary, and certainly as
14 enunciated in cases before the Pollution Control
15 Board.

16 Q Can you tell me what that definition is
17 that you're relying upon in formulating your
18 opinion.

19 A I do not have that kind of a definition
20 in front of me, but the first thing I would look
21 at is to see whether there was an indication that
22 it was not discarded. Then I would look to see
23 whether it was more or less separated from and put
24 away, thrown away. The concept of discarded is

1 where the material has left -- has left the -- in
2 this case the source of what it was. It has been
3 removed.

4 Q I want to talk about disposal for a
5 minute. Would you agree with me that disposal
6 requires that a waste material be accumulated with
7 no certain plan for disposal somewhere else?

8 A Yes.

9 Q And would you agree with me that this
10 requires that the waste material be placed on
11 property without there being an intent to, within
12 a short period of time, remove it somewhere else?

13 A No.

14 Q You would not agree with that statement?

15 A No.

16 Q Now, I believe you stated an opinion on
17 direct that the material that came to the Stearns
18 Road site was not clean construction or demolition
19 debris, correct?

20 A Yes.

21 Q Now, you've never personally seen test
22 pits that were excavated and showed what was below
23 the surface of the Stearns Road site, correct?

24 A No.

1 Q I'm sorry. Are you saying that my
2 statement is incorrect or that you -- strike that.

3 A I did not see the test pits.

4 Q You personally did not see the test
5 pits?

6 A Correct.

7 Q You did see photographs, I believe you
8 said, of certain test pits?

9 A Yes.

10 Q Did these photographs depict the test
11 pits themselves or material that had purportedly
12 been excavated from the test pits?

13 A There were pictures taken of the
14 trenches and the material, yes.

15 Q Did you attempt to determine the
16 percentage of the material in the test pits that
17 fell outside the definition of clean construction
18 or demolition debris?

19 A No.

20 Q Do you base your opinion that the
21 material was not clean construction or demolition
22 debris on the percentage of the material depicted
23 in the photographs that you believe fall outside
24 the scope of that definition?

1 A No.

2 Q You prepared a written report that's
3 been offered as an exhibit prior to the recent
4 amendment to the definition of clean construction
5 or demolition debris, correct?

6 A Yes.

7 Q And you stated an opinion yesterday that
8 clean construction or demolition debris under the
9 prior definition that was contained in the Act in
10 your opinion is a waste, correct?

11 A Yes.

12 Q And is it correct that you based the
13 opinion that clean construction or demolition
14 debris under the old definition was a waste
15 because of the word "debris"?

16 A Not solely.

17 Q Let me rephrase that question. Is it
18 true that you base your opinion that clean
19 construction or demolition debris as defined
20 previously was a waste because it constituted
21 debris?

22 A Not solely.

23 Q Would you agree with me that part of the
24 basis for your opinion that clean construction or

1 demolition debris as previously defined in the Act
2 as a waste was that it was debris?

3 A That's part of the reason, but --

4 Q Under the old definition of clean
5 construction or demolition debris, did clean
6 construction or demolition debris become a waste
7 in your opinion as soon as it was excavated?

8 A It became -- it became a waste as soon
9 as it became debris, in this case after it was
10 excavated.

11 MR. STICK: May I approach the bench?
12 There's an exhibit that's been previously offered
13 into evidence that I need to use for this witness.

14 HEARING OFFICER WALLACE: Yes.

15 MR. STICK: May I approach the witness,
16 your Honor.

17 HEARING OFFICER WALLACE: Yes.

18 BY MR. STICK:

19 Q Ms. Anderson, let me show you what's
20 been marked as Respondent's Exhibit No. 10. Now,
21 since your written opinion, the legislature passed
22 bill 1887 amending the definition of clean
23 construction or demolition debris, correct?

24 A Yes.

1 Q Do you recognize the exhibit I've shown
2 you as the current definition of clean
3 construction or demolition debris under the Act?

4 A Yes.

5 Q You stated an opinion yesterday that
6 clean construction or demolition debris under the
7 new definition is a waste. Do you recall that?

8 A Yes.

9 Q Does the fact that clean construction or
10 demolition debris is called debris constitute any
11 basis for your opinion that clean construction or
12 demolition debris under the new definition is a
13 waste?

14 A The way I read the language here, it is
15 not under the definition of waste that it is still
16 a waste except were not considered a waste in the
17 following language and definition. I would read
18 that myself as meaning that it would not be
19 regulated as a waste if the conditions following
20 the definition were met.

21 MR. STICK: Your Honor, I'm going to
22 move to strike that answer as non-responsive.

23 MR. MAKARSKI: I object.

24 MR. STICK: I asked her whether the fact

1 that clean construction or demolition debris is
2 labeled debris forms any basis for her opinion
3 that it is a waste under the new definition, and I
4 don't recall hearing a response to that answer.

5 HEARING OFFICER WALLACE: All right, the
6 answer is stricken.

7 MR. STICK: May I reask that question,
8 your Honor?

9 HEARING OFFICER WALLACE: Yes.

10 BY MR. STICK:

11 Q Ms. Anderson, does the fact that clean
12 construction or demolition debris is labeled
13 debris form any basis for your opinion that clean
14 construction or demolition debris as currently
15 defined is a waste?

16 A In part, yes.

17 Q Is it your opinion that under the
18 current definition of clean construction or
19 demolition debris, that material becomes a waste
20 under -- as soon as it is excavated?

21 A As soon as it becomes a debris,
22 discarded.

23 HEARING OFFICER WALLACE: Further cross?

24 MR. STICK: May I have just a moment,

1 your Honor, for my co-counsel.

2 HEARING OFFICER WALLACE: All right.

3 BY MR. STICK:

4 Q Ms. Anderson, I want to move along to
5 the issue of a landfill. Is it your opinion that
6 a land -- in order to constitute a landfill, a
7 site needs to be a location where waste is
8 accumulated over time for disposal?

9 A Yes.

10 Q Can you quantify for me the temporal
11 requirement associated with the phrase accumulated
12 over time?

13 A There is no exact time frame. However,
14 if it is -- if no showing is made that it is not
15 there for storage and that demonstration has to be
16 made within a year, then it would be disposal.
17 That is the only time related thing, but it is
18 certainly not exclusive to that determination.

19 Q Let me see if I understand your
20 testimony. The one-year time frame is pertinent
21 to the issue of whether waste material has been
22 disposed, correct?

23 A Correct, rather than stored.

24 Q My question to you was what is the

1 temporal requirement associated with the phrase
2 accumulated over time as it relates to whether a
3 site is a landfill?

4 A Beyond what we just discussed?

5 Q Yes.

6 A There is -- that is obviously a judgment
7 call. Obviously if something is there --
8 obviously if the disposal -- there were a couple
9 of loads disposed somewhere, it would not -- I
10 don't -- I can't imagine somebody saying that
11 constitutes a landfill.

12 Q In other words, if one truckload of
13 material was placed on a site -- strike that.

14 Would you agree with me that if one
15 truckload of waste was placed on a site, that
16 might constitute waste disposal, but it would not
17 necessarily mean that the site was a landfill?

18 A Correct.

19 Q In order for the site to become a
20 landfill or to constitute a landfill, there must
21 be disposal of waste that is accumulated over
22 time, correct?

23 A Yes.

24 Q And does that phrase accumulated over

1 time imply repeated conduct over a certain period
2 of time?

3 A I don't -- the question is not clear to
4 me.

5 Q Is it that you need the question reread
6 or you need a question reposed to you?

7 A I need the question reposed to me.

8 Q Very well. Ms. Anderson, you agree that
9 if one truckload of material is placed at a site,
10 that would not constitute that site as a landfill,
11 correct?

12 A Correct.

13 Q Something in addition to one load is
14 required, correct?

15 A I would view it as a considerable amount
16 in addition to one load, but yes.

17 Q Is there a requirement that a certain
18 number of loads be placed at the site, or is it a
19 temporal requirement, a time limit?

20 A I would consider it both.

21 Q How many loads -- strike that.

22 What is the time limit necessary to
23 show that a site constitutes a landfill?

24 A I'm having difficulty. Are you asking

1 something different from what you asked before?

2 Q Well, I'm rephrasing the question
3 before, but I'm trying to get at the same type of
4 information.

5 A The only time limits in the regulations
6 is the use of the term over time when it is
7 disposed over time, and it connotes a time frame
8 that is not -- it connotes ongoing.

9 Q And my question to you is how much time
10 is necessary to establish that there has been
11 disposal over time as required by the regulations?

12 A I would not take over time in isolation
13 from the frequency of the disposal.

14 Q How frequent does the disposal have to
15 be in order to establish that the facility or site
16 is a landfill?

17 A It would have to -- it would have to be
18 on a repeated basis, not necessarily continual,
19 but on a repeated basis for -- that there is some
20 -- a continuum established, if you will, is how I
21 would view it.

22 Q What I'm trying to ascertain from you,
23 Ms. Anderson, is what is the requirement for
24 repeated or a time limit involved? Can you give

1 me what those two factors are.

2 A I cannot, nor during the regulatory of
3 all those regulations were being developed could
4 there be that kind of precision placed on the
5 regulations.

6 The opinion discussed this difficulty.
7 So at the -- it tended to discuss them as to what
8 wasn't and what was obvious, and so the definition
9 was chosen with that knowledge, that it would
10 require evaluation on a specific basis.

11 Q Is it fair to say that in interpreting
12 the requirement that there be a disposal over
13 time, it is not possible for you to give me a
14 precise time period that that implies?

15 A No.

16 Q No, you cannot give me a precise time
17 period, or no, the question is --

18 A No, I cannot except as I have testified
19 prior to this.

20 Q Is it fair to say that you also cannot
21 give me a precise degree of regularity with
22 respect to the disposal activities that is
23 required for a site to constitute a landfill?

24 A No.

1 Q No, you cannot give me that kind of
2 precise requirement?

3 A Other than what I have already testified
4 to.

5 MR. STICK: Your Honor, may I again
6 approach the bench to obtain exhibits?

7 HEARING OFFICER WALLACE: Yes.

8 MR. STICK: May I approach the witness,
9 your Honor.

10 Q Ms. Anderson, let me show you
11 Respondent's Exhibits 7, 8 and 9.

12 Ms. Anderson, with respect to Exhibit
13 No. 7, can you state an opinion regarding whether
14 the concrete depicted in that photograph
15 constitutes a waste?

16 A It appears to be a waste.

17 Q With respect to Exhibit No. 8, can you
18 state an opinion regarding whether the material
19 depicted in that photograph constitutes a waste?

20 A It appears to be a waste.

21 Q With respect to the material depicted in
22 Exhibit No. 9, can you state an opinion regarding
23 whether that material constitutes a waste?

24 A That creates some more difficulty, but

1 it does appear to be a waste discarded.

2 Q Why does that photograph, the material
3 depicted in that photograph, create more
4 difficulty?

5 A Because of the complexity of the
6 material and the fact that there are what appear
7 to be discards there as part of it.

8 Q Do you have some question as to whether
9 the material depicted in Exhibit No. 9 in fact
10 constitutes a waste?

11 A I really can't without more -- I can't
12 without more on any of these.

13 Q With respect to the material depicted in
14 Exhibit No. 7, can you state an opinion regarding
15 whether that material has been disposed of?

16 A No.

17 Q Why can't you state an opinion with
18 respect to Exhibit No. 7 regarding whether that
19 material has been disposed of?

20 A Because I have -- I have no idea whether
21 it has been stored, for example.

22 Q Is it fair to say that with respect to
23 Exhibit No. 7, you can't determine from that
24 photograph whether that material was to be

1 transferred someplace else?

2 A No.

3 Q So is your answer that you in fact
4 cannot tell from that photograph whether that
5 material was intended to be transferred someplace
6 else?

7 A No.

8 Q Let me rephrase the question.

9 A I'm agreeing with your statement. I'm
10 trying to.

11 Q This is my problem in posing a question,
12 I apologize.

13 Can you tell from Exhibit No. 7 whether
14 that material was intended to be transferred
15 someplace else or whether it was intended to
16 remain on site?

17 A I cannot tell.

18 Q And is that the reason you cannot state
19 an opinion regarding whether there has been a
20 disposal as depicted in Exhibit No. 7?

21 A Yes. Essentially, but not solely, yes.

22 MR. STICK: Your Honor, I only have a
23 few more questions. If I could take a moment to
24 review my notes, I would appreciate it.

1 HEARING OFFICER WALLACE: All right.

2 (Recess taken.)

3 BY MR. STICK:

4 Q Ms. Anderson, would you agree with me
5 that the amendment to the clean construction or
6 demolition debris has at least in part superseded
7 your written opinion that was offered as an
8 exhibit in this case?

9 A No.

10 Q Would you agree with me that at least in
11 part the amendment to the definition of clean
12 construction and demolition debris has altered the
13 opinions that you have formed about whether or not
14 the material at issue is a waste?

15 A My opinion was correct.

16 Q Has the amendment to the definition of
17 clean construction or demolition debris altered in
18 any respect the basis for your opinion that the
19 material at issue was a waste?

20 A You're referring to clean construction
21 and demolition debris?

22 Q Yes.

23 A The amendment obviously altered the
24 definition.

1 Q Isn't it correct that it also altered in
2 certain respects the basis for your opinion, that
3 clean construction or demolition debris is a
4 waste?

5 A In certain areas, it is not considered a
6 waste.

7 Q And in certain areas, certain
8 circumstances, permits are not required for the
9 use of them, correct?

10 A Correct.

11 Q Ms. Anderson, Mr. Tucker asked you on
12 direct examination to state an opinion based upon,
13 I believe, a reasonable degree of expertise
14 certainty. Do you recall that question?

15 A No.

16 Q Do you recall that Mr. Tucker used the
17 phrase "a reasonable degree of expertise
18 certainty"?

19 A I honestly don't recall that phrase.

20 Q When you stated your opinion on direct
21 examination, what was the field of expertise that
22 you were drawing upon in stating that opinion?

23 A My expertise in the field of
24 environmental regulations and the landfill

1 regulations specifically.

2 MR. STICK: May I approach the witness,
3 your Honor, to retrieve exhibits?

4 HEARING OFFICER WALLACE: Yes, further
5 cross?

6 MR. STICK: Yes, your Honor. I need one
7 moment, your Honor, and then I believe I have one
8 series of questions and then I'll be done.

9 Q Ms. Anderson, is it your opinion that if
10 a contractor puts clean construction and
11 demolition debris to form a berm, that site
12 requires a landfill permit?

13 A Not necessarily, not necessarily a
14 landfill permit.

15 Q Is it your opinion that if a contractor
16 brings clean construction or demolition debris on
17 to a site to create shoreline stabilization, that
18 that site constitutes a landfill?

19 A No, not a landfill permit.

20 Q Ms. Anderson, if you will assume that a
21 legal conclusion is an assertion of the truth of a
22 statement on one of the ultimate issues to be
23 determined in a proceeding, would you agree with
24 me that your opinion in this case constitutes a

1 legal conclusion?

2 MR. MAKARSKI: Objection to that, your
3 Honor. He wants her to figure out what the
4 appellate court or somebody else would think of
5 something about that. It's beyond anything that
6 she testified to in this case.

7 MR. STICK: Your Honor, I think I'm
8 entitled to ask her that question based upon that
9 definition of a legal conclusion and ask her
10 whether she agrees that her opinion would fall
11 within that definition.

12 HEARING OFFICER WALLACE: Objection
13 sustained. I think that's for the Board to figure
14 out.

15 MR. STICK: Your Honor, may I rephrase
16 that -- I'm going to rephrase that question and
17 see if I can do it in a different way.

18 HEARING OFFICER WALLACE: All right.

19 BY MR. STICK:

20 Q Ms. Anderson, would you agree that the
21 opinions you have stated in this proceeding
22 constitute an assertion of the truth of a
23 statement on one of the ultimate issues to be
24 determined in this proceeding?

1 MR. MAKARSKI: I object to that.

2 MR. STICK: Your Honor, there I'm not
3 asking her to assume anything. I'm just asking
4 her whether that properly characterizes her
5 opinions.

6 HEARING OFFICER WALLACE: Overruled.
7 You may answer the question.

8 THE WITNESS: Please ask it again.

9 MR. STICK: Could you read that question
10 back.

11 (Record read.)

12 THE WITNESS: Yes.

13 MR. STICK: Thank you, your Honor.
14 Thank you, Ms. Anderson. I have no further
15 questions.

16 HEARING OFFICER WALLACE: Ms. O'Connell.

17 MS. O'CONNELL: I have just have one
18 question.

19 CROSS EXAMINATION

20 BY MS. O'CONNELL:

21 Q Ms. Anderson, when Mr. Stick asked you
22 whether it's your opinion that if a contractor
23 brings clean construction or demolition debris on
24 to a site to create a berm, that site requires a

1 landfill permit, you answered not necessarily.

2 Why did you answer that way?

3 A Because the creation of so-called berms
4 where it has -- could in fact become a dumping
5 ground, and if done repeatedly, it could
6 constitute landfilling.

7 Q But suppose that it did not constitute a
8 dumping ground. It was strictly a berm, say, for
9 aesthetic purposes along a roadway. Would that
10 require a landfill permit?

11 A My personal opinion is not necessarily
12 that. That is in another regulatory area that
13 does in fact have some gray areas involved with
14 it.

15 Q So you don't have an opinion on that one
16 way or another based on the Illinois Environmental
17 Protection Act and the regulations thereunder?

18 A I have an opinion as to whether that
19 type of activity would be covered, but the nature
20 of a -- of the permit to be issued would not
21 necessarily be a landfill permit.

22 Q What kind of permit would it be?

23 A It would be another kind of solid waste
24 permit.

1 Q Such as?

2 A There are areas where berms, embankments
3 and that sort of thing where waste has been used
4 and it has been expressed in varying ways
5 including specific -- or where it has even been
6 addressed specifically by statute. It's an area
7 -- it's not what I would call a clean area as to
8 how to proceed.

9 Q Is there any permit other than a
10 landfill permit that would be required in such a
11 situation as constructing a berm from clean
12 construction and demolition debris? I'm just
13 asking what kind of permit.

14 A I'm not -- a solid waste permit. It
15 would be -- of clean construction, demolition
16 debris? It would require a permit.

17 Q What kind of permit?

18 A If it did not fall under the exceptions
19 in the definition of clean construction and
20 demolition debris where it is not -- you know,
21 where it talks about not being considered a waste.
22 I do not know exactly the kind of permit that
23 would be issued.

24 Q So your response then is when a

1 contractor brings clean construction and
2 demolition debris on to a site to create a berm
3 without engaging in open dumping, that does not
4 require a landfill permit and you don't know of
5 any other type of permit which might be required?

6 MR. TUCKER: Objection, her answer is
7 her answer.

8 MS. O'CONNELL: I'm not understanding
9 her answer, Mr. Hearing Officer. If you want to
10 sustain the objection, I'll ask another question.

11 HEARING OFFICER WALLACE: Can you answer
12 the question, Ms. Anderson.

13 THE WITNESS: I have not given the kind
14 of consideration under the state's regulations
15 that that question implies. The question, with
16 the information that you have given me so far, is
17 not -- is not enough in any event to be able to
18 answer the question.

19 MS. O'CONNELL: So you can't answer the
20 question?

21 THE WITNESS: No.

22 MS. O'CONNELL: Okay, thank you. That's
23 all.

24 HEARING OFFICER WALLACE: Redirect?

1 MR. TUCKER: No, your Honor.

2 HEARING OFFICER WALLACE: Thank you,
3 Ms. Anderson. You can step down.

4 (Witness excused.)

5 MR. STICK: May I approach the bench to
6 return the exhibits.

7 HEARING OFFICER WALLACE: Oh, yes.
8 Mr. Makarski.

9 MR. MAKARSKI: Mr. Hearing Officer, the
10 only -- we have no more witnesses. We have three
11 things left that have to be decided. One is the
12 Emcon report. The second is that we wanted to
13 offer or do offer into evidence the response of
14 Southwind Financial, Abbott, the contractors of
15 Bluff City, the interrogatories which we submitted
16 to them in a case involving litigation between
17 them and us, 95 MR 0297 in the Circuit Court here.

18 And the reason I offer these is that
19 they are admissions which are applicable to this
20 case, and I think an answer to an interrogatory
21 can be used in other cases, and it goes to the
22 amount of off-site material that was brought to
23 the site and the amount of money that was paid to
24 Bluff City for the delivery of that to the

1 facility -- or to the site.

2 MR. KNIPPEN: Judge, my only question at
3 this point is Mr. Makarski seeking to introduce
4 the entire answers to interrogatories which then
5 deal with some issues which are irrelevant and
6 immaterial to this procedure, and I would object,
7 or if he's only seeking to introduce that
8 particular information with regard to those
9 interrogatories which he just articulated, then I
10 have no objection. So I'm not sure what he's
11 trying to do here.

12 MR. MAKARSKI: I agree. I only want to
13 give the front page and then that page that that
14 information is on. I don't care about the rest of
15 the stuff.

16 MR. KNIPPEN: Your Honor, based on the
17 way this exhibit's been prepared, I would have no
18 objection to the admission of this document and
19 particularly this interrogatory, Exhibit B, so
20 long as the interrogatories that led to these
21 responses are attached.

22 In other words, what you have in this
23 exhibit is you've got the responses to the
24 interrogatories, but without seeing the

1 interrogatories themselves, i.e. the questions
2 that led to these responses, these responses are
3 in a total vacuum, and they would be practically
4 impossible to interpret the meaning of in the
5 absence of those questions.

6 HEARING OFFICER WALLACE: All right, I
7 suggest, Mr. Makarski, could you redo this?

8 MR. MAKARSKI: Yes.

9 HEARING OFFICER WALLACE: And you
10 probably won't be able to do it today, but if you
11 could redo it taking Mr. Knippen's suggestions.

12 MR. KNIPPEN: I would not assert an
13 objection, Judge, that it wasn't submitted in
14 their case in chief if we reach the stipulation
15 later and leave this particular issue open with
16 regard to the resting of their case.

17 Although if they rest their case, I
18 want the rest of their case rested at that point.
19 But with regard to this specific issue, I have no
20 difficulty in stipulating that that can remain
21 open until we can reach a stipulation or present
22 argument to the Court as to why it would or
23 wouldn't be admissible. I think we're going to be
24 able to reach a stipulation without any

1 difficulty.

2 MR. MAKARSKI: I have no objection to
3 including the question and then the answer behind
4 it or something like that. That's the only
5 interest we have in these pleadings, and we can do
6 that. I don't have the whole thing here today
7 from the other case.

8 HEARING OFFICER WALLACE: Ms. O'Connell,
9 do you have any objection?

10 MS. O'CONNELL: Yes, I do, Mr. Hearing
11 Officer. These are interrogatories from a case in
12 the Judicial Circuit of DuPage County to which
13 Mineral and Land Resources isn't even a party.
14 It's the first time I've seen these responses. I
15 would ask that the ruling not -- that these cannot
16 be used in any fashion as to MLR since it's
17 completely hearsay as to MLR.

18 We were never there to -- we haven't
19 been involved in litigating that case. We have no
20 input whatsoever. So as long as it's not applying
21 to MLR in this case, I would ask for a ruling to
22 that effect on the record.

23 HEARING OFFICER WALLACE: Okay. I guess
24 the only ruling is we'll have to defer it to see

1 what kind of final document is entered. I would
2 suggest that once we see that, then we could admit
3 it with your objections noted.

4 MS. O'CONNELL: The only change is going
5 to be putting the interrogatories in.

6 MR. MAKARSKI: And we'll just have the
7 one answer instead of all the rest of the stuff.

8 MS. O'CONNELL: You don't have any
9 objection to not having it apply to MLR?

10 MR. MAKARSKI: Well, I do, because I
11 think under respondeat superior agency theory, it
12 should apply. If it applies to Bluff City, it
13 automatically applies to MLR.

14 MS. O'CONNELL: If that's the case, Mr.
15 Hearing Officer, then we should have been involved
16 in this lawsuit somehow. We're not a party to
17 that lawsuit. There's no allegation of respondeat
18 superior there. To bring into these other
19 lawsuits that we haven't been a party or present
20 is --

21 MR. MAKARSKI: There is another lawsuit
22 when I sued you.

23 MS. O'CONNELL: These aren't from that
24 lawsuit.

1 HEARING OFFICER WALLACE: We're getting
2 off schedule here. Let's go back and try to come
3 up with a stipulation in a written form, re-submit
4 that, and I think that I would have to say that it
5 wouldn't apply to MLR in this case if they weren't
6 a party to that interrogatory that you're
7 referring to.

8 MR. KNIPPEN: For the record, Judge, I
9 would state on behalf of the plaintiffs, who I
10 represent in this case, which is 95 MR 0297, that
11 we did not serve a copy of these answers on MLR or
12 Ms. O'Connell so they do not have them.

13 MR. STICK: Your Honor, may I address an
14 issue before we get on to other issues regarding
15 their case. I had one issue I wanted to present
16 regarding Ms. Anderson's testimony.

17 HEARING OFFICER WALLACE: All right.

18 MR. STICK: And that is at this time, I
19 move to strike her entire testimony based upon her
20 testimony at the end of my cross examination that
21 stated that her opinion in this case was an
22 assertion of the truth of a statement on one of
23 the ultimate issues to be determined by the
24 Pollution Control Board.

1 I believe that qualifies her opinion as
2 a legal conclusion, and I will tender to the Court
3 a definition of legal conclusion out of Black's
4 Law Dictionary, and I will also offer the Court
5 the assertion that the case law in Illinois is
6 very clear that no witness, neither a lay witness
7 nor an attorney nor any other witness with any
8 degree of expertise can offer a legal conclusion
9 in a proceeding, and if -- I challenge the
10 complainant to offer any argument or assertion
11 that that is in fact an appropriate type of
12 opinion in any proceeding in the State of
13 Illinois.

14 MS. O'CONNELL: Mr. Hearing Officer, I
15 agree with everything Mr. Stick said and join in
16 his objection to the entirety of Ms. Anderson's
17 testimony and opinion.

18 MR. STICK: And I would add my motion
19 includes not only her oral testimony, but her
20 written opinion which I believe was Exhibit 33.

21 MR. TUCKER: That sounds correct.

22 HEARING OFFICER WALLACE: Yes.
23 Response.

24 MR. TUCKER: Obviously we object to the

1 motion. I would assume to a certain extent
2 Mr. Stick is not doing this to preserve the record
3 because this has been ruled on numerous times by
4 your Honor already.

5 For reasons stated previously during
6 this proceeding as well as our response to their
7 original motion in limine related to Ms. Anderson,
8 for all those reasons, we think her testimony is
9 more than proper for this kind of proceeding.

10 HEARING OFFICER WALLACE: I am going to
11 deny the motion. If possibly you can include it
12 in a brief. The Complainant's Exhibit 33 has been
13 admitted and will stay in the record, and
14 Ms. Anderson's testimony will stay in the record,
15 also. Was there another --

16 MR. MAKARSKI: Yes. Mr. Hearing
17 Officer, I had -- there was a gentleman, I think
18 he's going to testify in their case, who had
19 worked for the Bluff City, Mr. Fiordiroso, and we
20 took his deposition in the case of that 95 MR 297
21 although we agreed that it would be applicable to
22 all the other litigation.

23 It was a discovery deposition. It was
24 not an evidentiary deposition, but in it, he made

1 what we believe are a significant number of
2 admissions against interest to the Bluff City in
3 that he said the materials brought to the site and
4 various and sundry different places and they were
5 paid to receive it and what have you.

6 I've excerpted out the pages on which
7 that appears through -- the whole deposition
8 wasn't being brought in, although it's not that
9 long, 200 pages, 164, and I would offer those
10 pages into evidence or if it would be preferable
11 to the other side, if they wanted to, the whole
12 deposition put in. I just didn't think it would
13 do anything to the record to have the rest of it,
14 but I think the fact that he is no longer with the
15 company is immaterial.

16 I've looked to research that. I can't
17 find any law one way or the other, and he was --
18 the testimony he gave was about activities he did
19 while he was an employee of the respondents in
20 this case, Bluff City, not MLR.

21 HEARING OFFICER WALLACE: Response.

22 MR. KNIPPEN: Judge, this document is
23 hearsay. I know of no rule of law in the State of
24 Illinois at this point which would permit the

1 admission of a discovery deposition.
2 Mr. Fiordirosa can be called. This is
3 particularly important in the context of the
4 burden of proof.

5 The Board's rules clearly state that it
6 is their burden of proof to prove their case.
7 What they've done here is they've taken a
8 deposition, and if you look at what they're
9 proposing to submit as exhibits, they pick and
10 choose out of what they want to submit. That's
11 number one.

12 Number two, with regard to the issue of
13 whether it's an admission against interest, when
14 this man's deposition was taken, he was not an
15 employee or an agent of Bluff City Materials,
16 Southwind Financial or MLR. It therefore does not
17 constitute an admission against interest because
18 at the time these statements were made, he was not
19 an agent for purposes of the deposition.

20 If there was a question in here, for
21 example, that said at the time you worked for
22 Bluff City Materials, did you tell Mr. Makarski X,
23 and the answer to that was yes, then that is an
24 admission against interest because he is an agent

1 at the time that the statement is made, but he is
2 not at the time that these statements are made.
3 This is not an evidence deposition. Supreme Court
4 Rule 212 would prohibit the admission of a
5 discovery deposition for substantive evidentiary
6 purposes in any proceeding.

7 There is no reason whatsoever that they
8 couldn't have called this man to testify in this
9 case other than they don't want to hear his whole
10 testimony. So then they try to back door it in by
11 using a non-evidentiary deposition which isn't
12 even an admission and an exception to the hearsay
13 rule. This is hearsay, and it does not meet the
14 foundational requirements for the witness'
15 testimony to be admitted. I think Ms. O'Connell
16 may have some comments as well on the issue.

17 MS. O'CONNELL: I do, Mr. Hearing
18 Officer. The Illinois Supreme Court has spoken on
19 this issue in a 1994 case, Taylor vs. Kohli,
20 K-O-H-L-I, found at 162 Ill. 2d 91. Not only was
21 Mr. Fiordiroso not an employee of Bluff City at
22 the time he purportedly made these purported
23 admissions, he was never an employee of MLR.

24 So to the extent Mr. Makarski is trying

1 to enter this as an admission against MLR, it
2 clearly can't be used that way under this case.
3 So we'd ask that it be not applied as against MLR.

4 HEARING OFFICER WALLACE: Response,
5 Mr. Makarski.

6 MR. MAKARSKI: Based on your prior
7 ruling, I'm not offering it against MLR.

8 HEARING OFFICER WALLACE: Any response
9 to Mr. Knippen?

10 MR. MAKARSKI: No. Well, I think, as I
11 recall the rule, you can -- I mean, you
12 can -- obviously an evidentiary deposition goes in
13 as evidence, but a deposition can be used as
14 anyplace that can otherwise be allowed. Certainly
15 admissions against interest made in a deposition
16 are used all the time in pleadings. They're used
17 all the time in summary judgment procedures. I
18 see no reason why they couldn't be used in the
19 hearing itself. It's not, you know, being offered
20 as an evidentiary deposition but only as an
21 admission.

22 HEARING OFFICER WALLACE: All right.
23 The offered deposition pages of Mr. Fiordiroso are
24 not accepted into evidence. They do not appear to

1 fit the requirements of allowing a deposition into
2 evidence, and further, unless you challenge
3 Mr. Knippen's assertion that Mr. Fiordirosa was
4 not an agent, they would not appear to be
5 admissions against interest.

6 MR. MAKARSKI: Your Honor, one thing,
7 he's going to be brought in as a witness by them,
8 and I would ask that our case be left open for the
9 purpose of examining him in that proceeding rather
10 than --

11 HEARING OFFICER WALLACE: No. I don't
12 think so, Mr. Makarski. If you want to -- well, I
13 don't see any way to do that. Mr. Fiordirosa was
14 not identified as one of your witnesses. He's not
15 -- you are not alleging that he was not available
16 to appear on behalf of the Forest Preserve so I
17 think the motion, if that -- or the request to
18 bring Mr. Fiordirosa in or question him later as
19 your witness is denied.

20 I think we should take a break before
21 we go into the report, if your threat is accurate
22 that it will take quite some time.

23 (Discussion off the record.)

24 HEARING OFFICER WALLACE: Back on the

1 record. The next item is Complainant's Exhibit
2 No. 29, the Emcon site evaluation report. It's
3 been offered, and I believe you put an objection
4 on the record against it.

5 MR. STICK: Your Honor, may I address
6 one issue before we get to that.

7 HEARING OFFICER WALLACE: Oh, okay.

8 MR. STICK: I apologize.

9 HEARING OFFICER WALLACE: That's all
10 right.

11 MR. STICK: We have a witness waiting,
12 and he's not really the witness we were intending
13 to put on first, but the person who we intended to
14 put on first will not be here until 1:00 o'clock
15 or so, after lunch, but the witness we have
16 waiting is here.

17 This is our second witness, and he's
18 here simply on the chance that we need to put a
19 witness on before the lunchtime hour. If it looks
20 like we're not going to use him before lunch, I
21 would like to let him go for a couple hours and
22 bring him back in the mid afternoon. On the other
23 hand, if there's any possibility we will be
24 putting witnesses on before we break, I don't have

1 a problem with that.

2 MR. KNIPPEN: Judge, in terms of order
3 just so you know, I checked with Mr. Makarski
4 before I released Mr. Slade, our first witness,
5 and said do you care whether we put Mr. Donovan or
6 Mr. O'Keefe on first, and he said he didn't care.
7 So that's the only reason we released the first
8 witness because we knew we would have a witness
9 available.

10 HEARING OFFICER WALLACE: Only in
11 dealing with Exhibit No. 29 will take an extensive
12 amount of time, he can be released.

13 MR. STICK: We think it will take an
14 extensive amount of time.

15 HEARING OFFICER WALLACE: Then tell him
16 to go home.

17 MR. STICK: I will let him go at least
18 for the lunch hour and ask him to return in the
19 afternoon. Thank you, your Honor.

20 HEARING OFFICER WALLACE: While we're
21 waiting for Mr. Stick to return, Mr. Makarski, did
22 you affirmatively say you would take out
23 appendix 5.

24 MR. MAKARSKI: Well, I said we could.

1 Let's see what that is. Well, 4 and 5. The only
2 reason I have some concern about that at this
3 point is that there was considerable -- 4, I don't
4 have a problem. I take that out. 5, there was
5 considerable examination over those P & P reports
6 and this and that and the other thing.

7 HEARING OFFICER WALLACE: Okay. I was
8 just checking to see if you were withdrawing
9 those.

10 MR. MAKARSKI: No.

11 HEARING OFFICER WALLACE: You're not,
12 okay.

13 MR. KNIPPEN: Your Honor, if you'd like
14 to commence, I think we can commence without
15 Mr. Stick at least with regard to the
16 preliminaries pertaining to this report.

17 HEARING OFFICER WALLACE: Okay. My
18 ruling on the overall introduction of Exhibit 29
19 is that Complainant's Exhibit 29 is the normal
20 type of evidence that the Board does consider in
21 cases before it.

22 It seems to fit the Board's procedure
23 rules on the admission of evidence. It would be
24 the type of thing normally relied upon. So for

1 that reason, Complainant's Exhibit No. 29 is
2 admitted into evidence.

3 (Document received
4 in evidence.)

5 MR. KNIPPEN: Judge, then with regard to
6 your ruling, I think now that we have to go
7 through the report in much greater detail because
8 there are narrower and more specific objections to
9 specific sections of the report, to specific
10 sentences that are contained in the report.

11 The reason for that from a general
12 standpoint is this, Judge. If the Pollution
13 Control Board and/or an Appellate Court acting as
14 administrative review in this case or the Supreme
15 Court acting as an appeals court with regard to
16 this particular matter concluded that some
17 portions of the report were admissible but that
18 there would have been valid grounds to exclude
19 other portions of the report, our general
20 objections will not suffice with regard to the
21 specific objections that we have to specific
22 sections of the report and specific comments that
23 are made in the report.

24 For example, there are sections of the

1 report which there is absolutely no testimonial
2 evidence to support. There wasn't a shred of
3 testimony that would support the statement that is
4 made. There are a number of opinions that are
5 contained in the report. The opinions were never
6 properly put in in terms of a foundation.

7 Questions were not asked, are these
8 conclusions drawn within a reasonable degree of
9 engineering and scientific certainty, and those
10 specific areas of the report may be objectionable
11 and incompetent, and unfortunately, in order to
12 deal with those specific issues, it is necessary
13 to go through the report in detail so my client is
14 not forced into a position of having waived those
15 objections if a Court would determine or if the
16 Pollution Control Board would determine that some
17 portions of the report were admissible and other
18 portions were not.

19 HEARING OFFICER WALLACE: All right.

20 MR. KNIPPEN: So as a consequence,
21 Judge, we are requesting at this time to make
22 specific objections to specific portions of this
23 report. We have sat down and we have gone through
24 the report. We have an annotation of the report

1 with pages, paragraphs, lines and the specific
2 legal objections we make to the specific use of
3 terms or sentences, and we're prepared to proceed
4 in that regard so as not to unduly burden the
5 hearing.

6 HEARING OFFICER WALLACE: Mr. Makarski
7 or Mr. Tucker, do you care to respond?

8 MR. MAKARSKI: Well, I think the report,
9 which you have already said, it should be admitted
10 without being taken apart by specifics. My
11 suggestion would be if they -- to save the time,
12 would be for them to make a list of these
13 particular things and provide that as the detail
14 which he says he needs in order to meet the
15 requirements of the appellate court. I think he's
16 done more than an adequate job of objecting to the
17 Court already.

18 HEARING OFFICER WALLACE: And why would
19 that not suffice?

20 MR. KNIPPEN: The reason that it won't
21 suffice, Judge, is that we have to know how to
22 prepare our witnesses to respond, and we have to
23 prepare our trial strategy based around the ruling
24 of what is and what isn't admissible evidence. If

1 you determine that something is inadmissible as a
2 result of a specific objection, then we may not
3 want to introduce any evidence.

4 If it is their burden of proof in this
5 case to prove their case and they have failed to
6 prove a particular element through competent
7 evidence, and then we're stuck with having to face
8 what we don't know, whether it's competent or not.
9 Say, for example, that there's something in here
10 that's incompetent. We prepared a list, and the
11 subsequent ruling was, yes, that evidence was
12 inadmissible, and we didn't have a ruling on that
13 before we put our witnesses on, and then we get
14 our witnesses on, and they testify about something
15 or in response to something that's incompetent and
16 then they put on rebuttal testimony, we've
17 essentially waived our objection, and we lose the
18 ability to maintain at that point that we've been
19 prejudiced.

20 HEARING OFFICER WALLACE: All right.
21 I'm not sure that I agree with you 100 percent on
22 this, but at the risk of being over cautious which
23 all of us lawyers have to do that. Let's start.

24 MS. O'CONNELL: Mr. Hearing Officer, I'd

1 like the record to reflect, also, on behalf of MLR
2 that we join in all of the objections to the
3 admissibility of these certain portions of the
4 report.

5 HEARING OFFICER WALLACE: Let's begin.

6 MR. KNIPPEN: Thank you, Judge, if I may
7 proceed. Other than our general objection to the
8 entire report, Judge, we would start with page 1,
9 which is the executive summary, second paragraph,
10 second sentence makes the following statement:

11 "The site's improper land form configuration, the
12 presence of unsuitable waste fill materials and
13 the potential environmental impacts of the
14 proposed wetland park development all represent
15 items requiring corrective action."

16 Our objection to that particular
17 statement is it states a legal conclusion with
18 regard to its statement that the fill materials
19 are waste. There was no evidence from
20 Mr. McGuigan or any other witness that it was
21 waste. We motion that the word "waste" be
22 stricken, and we also motion that the word
23 "unsuitable" be stricken because if you'll recall
24 Mr. McGuigan's testimony, he said that there were

1 two bases for his opinion that waste is
2 unsuitable.

3 One was regulatory. One was
4 non-regulatory i.e. the specific concerns of the
5 Forest Preserve District. The specific concerns
6 of the Forest Preserve District, as they are
7 non-regulatory, are irrelevant and immaterial in
8 this matter, and you cannot ascertain by reading
9 that sentence whether the reference to unsuitable
10 is the regulatory or the non-regulatory concern.

11 Finally, Judge, with regard to the
12 statement, "The potential environmental impacts to
13 the proposed wetland development," there's been no
14 competent testimony in this case that Mr. McGuigan
15 has any competence to draw any conclusions with
16 regard to wetlands. He in as much admitted that
17 and admitted that no one at Emcon who worked on
18 the report is a wetlands expert.

19 So that conclusion is incompetent
20 because there is no competent testimony to support
21 it. In other words -- and this will be kind of a
22 longer objection as we get into it. I won't
23 repeat myself so much. But if no one is competent
24 to offer that opinion, how do we cross examine

1 this document? It is hearsay.

2 We've got a bald statement in here that
3 the unsuitable waste materials and the potential
4 environmental impacts to the proposed wetland all
5 represent items requiring corrective action, how
6 do we cross examine it? There's not been a single
7 witness that has testified and substantiated that
8 particular position in this case. And as a
9 consequence, that statement is improper and
10 incompetent.

11 MR. MAKARSKI: Well, this is his
12 opinion. This is a summary -- he was on the stand
13 for a day and a half. I recall testimony to the
14 effect that if something is -- if the
15 contamination that it would be improper to use a
16 conservation facility or wetland, but all that
17 aside, I think that it is not being offered as
18 anything but opinion evidence which is what --
19 which can be contested by any party.

20 HEARING OFFICER WALLACE: All right, the
21 objection is noted and overruled.

22 MR. KNIPPEN: Just one additional, it's
23 foundation as well. The foundation is that there
24 has been no testimony that this is stated within a

1 reasonable degree of engineering or scientific
2 certainty.

3 The fourth paragraph, your Honor, on
4 page 1, statement, "It appears that the excavation
5 of native sand and gravel deposits extended both
6 vertically and laterally beyond the original
7 limits identified on the plan sheets included as
8 part of the license agreement." We would object
9 to that. It is irrelevant, immaterial.

10 Mr. McGuigan admitted in cross
11 examination that it had no pertinence to this
12 proceeding.

13 MR. MAKARSKI: I have the same
14 observation as previously.

15 HEARING OFFICER WALLACE: All right,
16 objection noted and overruled.

17 MR. KNIPPEN: Page 1, 5th paragraph, the
18 sentence, "Numerous locations investigated during
19 this site evaluation as well as during previous
20 investigations identified waste materials at or
21 below the surface."

22 Waste materials is a legal conclusion
23 which Emcon is not competent to draw. In
24 addition, Judge, with regard to the previous

1 investigations, there has been no foundation
2 whatsoever that those previous investigations of
3 P & P, TSC or Goodwin and Brahms are
4 scientifically reliable, no foundation to
5 establish that.

6 In fact, Mr. McGuigan, when he was
7 cross examined on that point, indicated that he
8 didn't know whether proper Q and A and QC had been
9 performed with regard to those tests, and as a
10 consequence, couldn't confirm it. To let those
11 tests in as substantive evidence of a
12 contamination or a violation has no foundation in
13 this case. Again there is no opinion stated by
14 any witness called by the Forest Preserve that
15 these opinions are drawn within a reasonable
16 degree of engineering and/or scientific certainty.

17 HEARING OFFICER WALLACE: All right,
18 objection is noted and overruled.

19 MR. KNIPPEN: Paragraph 6 on page 1, the
20 statement is made, "Current configuration site is
21 therefore not compatible with a final productive
22 use, especially the proposed wetlands conservation
23 area development."

24 Mr. McGuigan admitted that he had no

1 basis to draw the conclusion that it was
2 especially the proposed wetlands conservation area
3 development and that no one at Emcon did. There
4 is no foundation for that, and there is no
5 evidence to support it in the record. It should
6 be stricken.

7 HEARING OFFICER WALLACE: Objection is
8 noted and overruled.

9 MR. KNIPPEN: Page 2, first incomplete
10 paragraph that may be a carry-over from the
11 previous page which states, "Investigation of
12 subsurface materials has revealed a variety of
13 waste materials contained in the fill."

14 Waste materials is a legal conclusion
15 for which Emcon has no basis to draw that
16 conclusion. In addition, legal conclusions are
17 inadmissible under Illinois law. I'm sorry.

18 HEARING OFFICER WALLACE: I'm sorry, I
19 didn't mean to interrupt you. I thought you were
20 finished.

21 MR. KNIPPEN: It is for the judge and
22 the tryer of fact to determine what legal
23 conclusions are in the case.

24 HEARING OFFICER WALLACE: Not to throw

1 you off, but I understand your objections to going
2 to the use of the word "waste" as utilized by
3 Emcon throughout this entire report, and for the
4 reasons you just stated that it is a legal
5 conclusion, okay.

6 MR. KNIPPEN: And Judge, maybe to
7 expedite things, any time the term waste,
8 putrescible waste, inert waste or special waste
9 appears in the report, the same objections would
10 hold, legal conclusion, foundation with regard to
11 reasonable degree of scientific certainty, and
12 that should cover those particular aspects.

13 So we don't need to be belabor that
14 point, but that would be anywhere it appears in
15 the report or anywhere that those conclusions are
16 based upon the test results that were appended to
17 the report but which have not been proved up as
18 being -- having a proper foundation for admission
19 as being qualified scientific conclusions.

20 HEARING OFFICER WALLACE: I would note
21 for the record that the respondents have objected
22 to the use of the words waste, putrescible waste,
23 insert waste. What was the other?

24 MR. KNIPPEN: Putrescible, inert,

1 special --

2 HEARING OFFICER WALLACE: Where those
3 four words appear in the report, both the summary
4 and the appendices, is that correct?

5 MR. KNIPPEN: Yes, Judge, anywhere.

6 HEARING OFFICER WALLACE: The objection
7 is that those are legal conclusions and are not
8 supported by the evidence. The objections are
9 noted and overruled.

10 MR. KNIPPEN: Page 2 of the report, your
11 Honor, the third paragraph down which starts with
12 the sentence, "The presence of these wastes,"
13 specifically referring your attention to the third
14 line of that paragraph, it contains the word "yard
15 waste." There's been no testimony in this case
16 that there's any yard waste on the site
17 whatsoever.

18 There's been testimony that there may
19 be some leaves and grass and trees on the site,
20 but there's no testimony that it wasn't on the
21 site to begin with at the time that the site was
22 processed and developed. The yard waste is the
23 legal conclusion that was brought to the site from
24 another location.

1 There's simply no evidence that would
2 support that conclusion in the record. So there's
3 a lack of foundation for that testimony, and it's
4 a legal conclusion as well. I should have added
5 yard waste to my list of wastes before.

6 HEARING OFFICER WALLACE: All right.
7 The objection's noted and overruled.

8 MR. KNIPPEN: In that same paragraph,
9 your Honor, on page 2, there is a statement that
10 those particular items that they allege are
11 contained in the fill would not meet the
12 definition of the clean construction and
13 demolition debris as defined in the Illinois
14 Environmental Protection Act or by the Illinois
15 Department of Transportation, (IDOT)
16 specifications. That is a legal conclusion. In
17 addition the IDOT specifications are irrelevant to
18 the issues before this Board.

19 HEARING OFFICER WALLACE: The
20 objection's noted and overruled.

21 MR. KNIPPEN: The next sentence, Judge,
22 in that paragraph 3 which is in addition neither
23 the license agreement nor the site's Illinois
24 Department of Mines and Minerals permit appear to

1 contemplate or authorize the limitation of outside
2 fill.

3 That is a legal conclusion. In
4 addition to that, with regard to the license
5 agreement, it purports to interpret the intent of
6 the parties. Any witness cannot competently
7 interpret the intent of a legal document, and
8 that's precisely what that sentence purports to do
9 and therefore is inadmissible.

10 HEARING OFFICER WALLACE: Objection
11 noted, overruled.

12 MR. KNIPPEN: The next paragraph on page
13 2, that in its entirety, Judge, is a legal
14 conclusion.

15 HEARING OFFICER WALLACE: Objection
16 noted and overruled.

17 MR. KNIPPEN: Your Honor, this will also
18 expedite matters, I think. On page 2, the last
19 paragraph of that page, there's a reference again
20 to previous site investigations. In order to
21 expedite things, any time the word previous site
22 investigations appears in the report, we would
23 motion to strike it based upon the lack of
24 foundation for the admission of those site

1 investigations.

2 There has been no evidence that they
3 are scientifically reliable, and in addition to
4 that with regard to Mr. McGuigan's opinion, in
5 order for a witness to be able to rely on that as
6 part of his opinion or as a basis for his opinion,
7 there must be a foundation met that the witness --
8 that it is the type of information that an expert
9 witness would reasonably rely upon in formulating
10 his opinions, and that question was never asked
11 with regard to any of the opinions that are
12 contained in this report and specifically those
13 previous site investigations, and that's another
14 basis as to why the evidence is incompetent at
15 this point.

16 What it essentially does, Judge, is the
17 P & P report, for example, comes into evidence
18 just based on what's alleged in this report
19 without that scientific foundation. It prohibits
20 us from cross examining that report.

21 HEARING OFFICER WALLACE: Actually, you
22 are correct in that regard. The objection to
23 appendix 5, which are the reports of the previous
24 investigations. The previous investigations do

1 present a very severe problem to the extent that
2 they are offered for the truth of the matter
3 asserted in the documents themselves. To the
4 extent Mr. McGuigan testified he looked at these
5 or his other testimony, I see no real way of
6 sorting that out at this point.

7 So if someone could help me out here
8 with a relatively easy way to excise this, I'm all
9 for it. I do agree that those investigations
10 should not be used.

11 MR. KNIPPEN: Your Honor, one thing
12 that's obviously easy is striking the appendices
13 with regard to the substance and content of those
14 documents. The other thing is that when there is
15 a conclusion stated in the report that references
16 previous site investigations as part of the
17 conclusion, then the conclusion should be stricken
18 because you can't tell what they're relying on
19 when they draw that conclusion, how much weight
20 they put on those reports versus something else
21 that they may have relied upon in drawing that
22 conclusion.

23 That's the only efficient way I can
24 think to do it, Judge. Otherwise -- and this

1 would really be onerous -- we're going to have to
2 go through it sentence by sentence by sentence and
3 attempt to figure out where those problems lie. I
4 think that you're correct, though, this is a
5 Wilson v. Clark violation, and it's incompetent.

6 MR. MAKARSKI: Your Honor, my
7 observation is this. In fact, Mr. McGuigan
8 testified he didn't rely on the P & P report
9 because he had a problem with it. The reason
10 these reports are in there is not to prove the
11 truth of what they say.

12 An expert is allowed to rely on
13 material beyond what's in the evidence in the
14 case, and that's the only purpose of what they
15 looked at, what their investigation involved.
16 We're not offering them for the fact that there
17 were so many percentages of PNAs or whatever they
18 may be. I think the record is clear and should be
19 clear.

20 The fact that they're in here is just
21 as material which was looked at by the experts in
22 the process, and they were here and they were
23 cross examined, and they testified as to what they
24 looked at, what they didn't look at. We're not

1 offering it if that's the case, and I want that
2 abundantly clear.

3 MR. KNIPPEN: The problem with that,
4 Judge, the problem with that analysis is you don't
5 know that that's the case and the proper questions
6 aren't asked of the witness to establish that
7 that's the case. What Mr. Makarski has
8 essentially done here now is he has testified with
9 regard to what their intent was, but if the
10 questions are never asked of the witness, what did
11 you rely upon, can you reasonably rely upon it as
12 an expert and to what degree did you rely upon it
13 in formulating which opinions, you've got no idea
14 of what the foundation of the opinion is and how
15 those incompetent reports have affected that
16 opinion.

17 You just don't know. The questions
18 weren't asked, and you know, there may be an
19 argument, well, those questions are just technical
20 requirements. Technical requirements are posed
21 from an evidentiary standpoint in order to provide
22 a fair basis for a hearing for all, and the
23 questions weren't asked, just as simple as that.
24 The foundational requirements were not satisfied

1 under Wilson vs. Clark.

2 HEARING OFFICER WALLACE: Your
3 suggestion is -- I will adopt your suggestion.
4 Appendix 5 is stricken. All references in the
5 summary to the prior investigations are also
6 stricken.

7 MR. MAKARSKI: Well, there's one problem
8 with that. There is a prior investigation by
9 Mr. Urbanski which is not -- I think is in
10 appendix 5, but it's already in evidence.

11 MR. KNIPPEN: Judge, we won't object to
12 the Urbanski investigation. That's not what our
13 concern is.

14 MR. MAKARSKI: I don't have a problem,
15 if we want to strike 4 and 5 out of this document
16 but that doesn't impact what's already in
17 evidence, I don't see there's a problem with it
18 just so I'm not striking something that went into
19 evidence because he came in and testified.

20 MR. KNIPPEN: No, we're not suggesting
21 that the testimonial evidence be stricken, Judge.

22 HEARING OFFICER WALLACE: I wasn't
23 actually -- I'm not going to strike appendix 4.
24 I'm just striking appendix 5, and I'm not striking

1 the prior exhibits.

2 MR. KNIPPEN: We'll get to appendix 4 in
3 a minute.

4 HEARING OFFICER WALLACE: Complainant's
5 Exhibit No. 13, Urbanski's report, has been
6 admitted and will stay in, into evidence. It's
7 not being stricken.

8 MR. KNIPPEN: Page 3, your Honor, I
9 think we can kind of deal with these as group
10 objections. In the first complete paragraph,
11 second complete paragraph and third complete
12 paragraph, they purport to draw a variety of
13 conclusions with regard to the wetlands.

14 Foundation, incompetent testimony and
15 no evidence to support those allegations based on
16 the testimony of the witnesses presented, and
17 based on your prior rulings, Judge, we would just
18 make that general objection anywhere wetlands
19 conclusions appear in this report because it's
20 essentially the same objection.

21 No testimony to support it, no
22 competence of this witness to testify with regard
23 to it or any witness, and therefore, these are
24 statements -- it's a matter that's not in

1 evidence, and there's no evidence to support it.

2 HEARING OFFICER WALLACE: The objection
3 is noted and overruled.

4 MR. KNIPPEN: Page 3, third to the last
5 sentence, there is a legal conclusion that the
6 fill materials, "would potentially place the owner
7 at risk." Motion to strike that as a legal
8 conclusion.

9 HEARING OFFICER WALLACE: Objection is
10 noted and overruled.

11 MR. KNIPPEN: Judge, to speed things
12 along again, can we show a continuing objection
13 anywhere that appears in the report to the use of
14 the phrase unsuitable fill material based on the
15 fact that it's impossible to ascertain whether the
16 references to the Forest Preserve's criteria or
17 the regulatory criteria. That will speed things
18 up.

19 HEARING OFFICER WALLACE: Even in light
20 of Mr. McGuigan did explain what that definition
21 was.

22 MR. STICK: May I?

23 HEARING OFFICER WALLACE: Yes.

24 MR. STICK: The problem with that, your

1 Honor, is he did explain that unsuitable fill
2 material is based upon a two-prong analysis, what
3 they'd like and what the regulations require. And
4 in some specific instances in his testimony,
5 particularly on cross, he specifically talked
6 about the types of remedies he would advocate
7 based upon each of those two standards, but
8 throughout this report, when he uses the term or
9 Emcon uses the term unsuitable fill material, they
10 nowhere articulate whether their determination in
11 that particular instance that it's unsuitable is
12 based upon the Forest Preserve District's desires,
13 the environmental regulations or some combination
14 of both.

15 And so the basis of our motion to
16 strike that phrase from the report is in none of
17 the instances in the report where it's used is
18 there any attempt by Emcon in the text to explain
19 which of the two bases they're relying upon or
20 whether they're relying upon both. I would agree
21 with you that on the stand when he was cross
22 examined, there were particular issues where he
23 did make a distinction, but that distinction is
24 not apparent in the report.

1 HEARING OFFICER WALLACE: All right,
2 thank you. Your objection -- continuing objection
3 to the use of the word unsuitable throughout the
4 report is noted and overruled. Unsuitable fill
5 materials is noted and overruled.

6 MR. KNIPPEN: Page 1-4, second to the
7 last paragraph contains the phrase, "In several
8 cases the depth of the waste fill exceeded the
9 maximum reach of the backhoe 20 feet."

10 We're motioning to strike the word
11 "waste" in that sentence, Judge, because there is
12 no evidence of waste fill below 20 feet.
13 Mr. Urbanski was the only witness that testified
14 with regard to what was below the backhoe bucket,
15 and what he said was, I've looked down into the
16 pit, there was something down there, but I
17 couldn't tell what it was. I didn't know if it
18 was rocks. I didn't know if it was waste. I
19 simply didn't know what it was.

20 Other than that, there is no evidence
21 from any witness in this case that would say that
22 there was waste in the fill below the 20-foot
23 level. So that statement is unsupported by the
24 evidence. Once again, we don't know who wrote

1 that, and we haven't been given an opportunity to
2 question them as to where they got the conclusion
3 from that the waste in the fill was below the
4 level of the backhoe.

5 HEARING OFFICER WALLACE: Do you care to
6 respond?

7 MR. MAKARSKI: I thought the testimony
8 was he thought he saw stuff down there. I mean,
9 it goes to the -- arguments as to the opinion, not
10 whether or not it should be there. I think it's
11 proper the way it is.

12 MR. TUCKER: I would further note, your
13 Honor, that they did have the opportunity to cross
14 examine Mr. Heuer as well as Mr. McGuigan on that
15 point if they chose to do so.

16 MR. KNIPPEN: Judge, it's their burden
17 of proof to establish the foundation for this
18 evidence. It's not our burden to cross examine
19 them if they failed to establish proper
20 foundations, and that seems to be the general
21 tenor of the responses to the objection. Gee,
22 they could have cross examined on it.

23 When you have a burden of proof, you
24 have an obligation to meet foundational

1 requirements, and if you don't meet them, that
2 doesn't shift the burden to the other party.

3 HEARING OFFICER WALLACE: All right. I
4 am troubled by that. I'm going to note the
5 objection and overrule it at this time.

6 MR. KNIPPEN: Page 1-6, your Honor, the
7 first paragraph, "The main condition of the
8 license agreement was that upon completion of the
9 five-year agreement, the site was to be left in
10 suitable condition to be converted to a public
11 accessible wetland conservation area which
12 provided for specific topographic contours."

13 That is Emcon's legal conclusion as to
14 the meaning of a 35-page license agreement, the
15 main condition of the license agreement. They
16 have no competence to interpret the license
17 agreement and draw the conclusion what the main
18 condition of that document is. We also stipulate
19 the license agreement, it speaks for itself.

20 HEARING OFFICER WALLACE: Objection's
21 noted and overruled.

22 MR. KNIPPEN: Page 1-6, third paragraph,
23 "In March of 1993, members of the FPD staff
24 visited the site and noted the presence of debris

1 and a petroleum odor. As a result, the FPD shut
2 down operations and issued a stop work order
3 (appendix 2) as allowed under the license
4 agreement pending a resolution of the observed
5 conditions."

6 As allowed under the license agreement
7 is a legal conclusion with regard to what the
8 license agreement does and does not permit with
9 regard to the specific facts of this particular
10 case. It is a legal conclusion that Emcon draws
11 that they have no competence to draw.

12 HEARING OFFICER WALLACE: All right,
13 objection noted, overruled.

14 MR. KNIPPEN: Page 1-6, fourth
15 paragraph, first sentence, "The FPD decided that
16 the site should remain closed until their concerns
17 could be addressed but allowed the contractors
18 access to empty their trailer and remove their
19 pinion." That sentence states the intent of the
20 Forest Preserve District.

21 Number one, I don't know how anyone can
22 draw an intent as to a corporate body in Illinois
23 as they've done here, but what the second thing
24 does is it has a witness testify as to what the

1 intent of another is, and it's incompetent.

2 HEARING OFFICER WALLACE: Objection
3 noted and overruled.

4 MR. KNIPPEN: Page 1-6, fourth
5 paragraph, last sentence, "Based on a review of
6 the file material, there is a question as to the
7 legal validity of the interim agreement as there
8 appears to have been no documented DuPage County
9 Board authorization. This interim agreement
10 purports to expand the permittee on-site
11 activities to include the importation of clean
12 fill and recycling operations."

13 Once again, that is a legal conclusion.
14 It's a bald legal conclusion. There's no other
15 way to interpret it. I mean, you can't even put
16 another evidentiary spin on that as to what that's
17 supposed to mean. That's a legal conclusion.
18 Emcon is incompetent to draw legal conclusions
19 interpreting the interim agreement.

20 And Mr. McGuigan, I would point out,
21 Judge, with regard to this objection and the prior
22 one I just made, he admitted they were incompetent
23 to do it.

24 HEARING OFFICER WALLACE: All right,

1 your objection's noted and overruled.

2 MR. KNIPPEN: Judge, just for
3 clarification, this next paragraph which is, "In
4 May of 1993, the FPD contract with the
5 environmental consultant which resulted in a
6 determination PNAs were present within the fill
7 material," that is a prior investigation, Judge,
8 that you struck previously, and I just want to
9 make sure that that ruling applies to that
10 paragraph.

11 The May 15th, 1993, investigation was
12 the P & P investigation. It doesn't specifically
13 use the term prior investigation so the prior
14 ruling you entered I just want to make sure
15 applies to that paragraph.

16 HEARING OFFICER WALLACE: All right,
17 paragraph 5 on page 1.6 is stricken.

18 MR. KNIPPEN: Page 1-6, the last
19 paragraph, "It was later reported by FPD that the
20 area in question had been re-graded almost
21 immediately following presentation of a video
22 (identifying the placement of waste materials) to
23 the contractor."

24 No evidence. Cite one witness in this

1 case that testified to that. No evidence
2 whatsoever in this case, your Honor, that there
3 was any re-grading of the site, none. How can I
4 cross examine that statement in absence of
5 evidence?

6 HEARING OFFICER WALLACE: Okay, hold on,
7 let's go off the record a minute.

8 (Discussion off the record.)

9 HEARING OFFICER WALLACE: Paragraph 6 on
10 page 1.6 is stricken.

11 MR. KNIPPEN: Your Honor, maybe to
12 expedite things, going over to page 1-7 through
13 1-11 up to but not including 1.3.1, the general
14 objections other than the prior general objections
15 would be those are legal conclusions. So that
16 covers quite a few pages.

17 HEARING OFFICER WALLACE: All right, the
18 objection is noted and overruled.

19 MR. KNIPPEN: Page 1-11, the first
20 paragraph after the bullet at the top of the page,
21 "It was determined based on discussions with FPD
22 that these conditions required further evaluation
23 as they would have a major impact on the viability
24 of the anticipated final use of the site as a

1 wetlands conservation area with public access."
2 Foundation, no evidence whatsoever in this record
3 to support that statement.

4 MR. MAKARSKI: I think there was. I beg
5 to differ. I think McGuigan testified at length
6 about the eventual use and why TACO might not be
7 appropriate and all of the rest of it.

8 HEARING OFFICER WALLACE: Objection is
9 noted and overruled.

10 MR. KNIPPEN: Page 2-1 and 2-2, with the
11 exception of the observation report of Mike Wells,
12 your Honor, which has been properly introduced
13 into evidence with proper foundation, this relates
14 to appendix 4, everything in here is hearsay, and
15 let's look at one of those in particular, Judge,
16 if you want to see how egregious this is.

17 If you look at page 2-2, the 3-30-93
18 entry, estimated, parentheses, estimated. What
19 does that mean, it's an estimated date, that this
20 is an estimated paragraph? It references
21 unidentified Forest Preserve District employees.

22 The rest, of course, is hearsay as
23 well. If the Forest Preserve District had wanted
24 to introduce this in this case, they could have

1 called these witnesses and asked them about these
2 documents, just the way they did with Mr. Wells to
3 establish the proper foundation. They did it
4 right in that case. The rest of this is all
5 blatant, bald hearsay.

6 It's a vehicle to attempt to do
7 indirectly what the law does not permit them to do
8 directly, use the report to introduce hearsay. If
9 they had gotten -- for example, Judge, when
10 Mr. Utt was on the stand, they had said, Mr. Utt,
11 what did Mr. Day tell you on March 26, 1993, and
12 their intent was to introduce that for the truth
13 of the matter asserted.

14 A hearsay objection would have been
15 sustained, and you would not have permitted that
16 in because that's hearsay. That's exactly what
17 they're doing here, but instead of trying to do it
18 through a witness, they're doing it through a
19 document, and it relates to all those paragraphs
20 except the Wells report which is 3-1-93.

21 MR. MAKARSKI: I think it goes back to
22 what we discussed earlier is that this is not -- I
23 said it before. It is not offered to prove the
24 truth of these. This says allegations.

1 That's their background of why they
2 went to the investigation in the first place. I
3 think it's clear that they aren't being offered
4 for the truth that somebody said this.

5 MR. KNIPPEN: If they had had testimony
6 that that's what this was, Mr. McGuigan had simply
7 said this was historical background information
8 that we used to form the basis of our
9 investigation, I would agree with that, but
10 there's no testimony that supports that conclusion
11 in the record.

12 HEARING OFFICER WALLACE: All right. To
13 the extent that I believe Mr. McGuigan did testify
14 that he looked through files provided by the
15 Forest Preserve District, I would allow 2.1 and
16 appendix 4 only for the purpose that Emcon
17 reviewed those files as background, but certainly
18 not for the truth of the matter asserted in the
19 documents except for the observation report by
20 Mike Wells which is already in evidence.

21 MR. KNIPPEN: Page 2-3, your Honor,
22 first paragraph, actually it starts on page 2-2,
23 Judge. These are the P & P investigations which
24 you struck, the Goodwin and Brahms that you

1 struck, the Testing Service Corporation that you
2 struck. These are all appendix 5, your Honor, and
3 they go from 2.2 up to 2.3 which starts at page
4 2.5. I think you've already stricken those.

5 HEARING OFFICER WALLACE: Right.

6 MR. KNIPPEN: They're not specifically
7 referred to as, quote-unquote, previous
8 investigations but --

9 HEARING OFFICER WALLACE: Section 2.2
10 which appears on page 2.2 to the top of page 2.5
11 is stricken.

12 MR. KNIPPEN: Page 2-5, second bullet
13 paragraph, "It appears that BCM was prepared to
14 receive off-site fill material -- material in
15 parentheses -- although this does not appear to
16 have been addressed or contemplated by the license
17 agreement, the Illinois surface mining operations
18 permit or water pollution control permit." All
19 legal conclusions, and that's contained in the
20 summary now as opposed to being merely
21 informational.

22 That is set forth as a conclusion. It
23 is a legal conclusion, number one. If it is a
24 mixed conclusion of fact and law, it is an opinion

1 without proper foundation and without the proper
2 questions having been asked to give it proper
3 foundation.

4 HEARING OFFICER WALLACE: All right,
5 objection's noted and overruled.

6 MR. KNIPPEN: The same objection, Judge,
7 we would then have in section 2.3 on page 2-5 to
8 the third bullet point.

9 HEARING OFFICER WALLACE: Objection's
10 noted and overruled.

11 MR. KNIPPEN: On page 2-5, the fifth
12 bullet point, "Site personnel reportedly allowed
13 disposal of materials which contained putrescible
14 waste and/or materials exhibiting a petroleum odor
15 on multiple occasions. In addition it was
16 reported that the contractor may have knowingly
17 accepted materials which had been inadvertently
18 contaminated during the process of spraying truck
19 beds with diesel fuel in an effort to keep the
20 fill material from sticking during freezing
21 operations." Absolutely no evidence.

22 HEARING OFFICER WALLACE: Bullet point
23 No. 5 is stricken.

24 MR. MAKARSKI: I disagree. There is

1 evidence of that because Utt's testimony and Wells
2 was that the trucks came in and they stunk to high
3 heaven when they dumped their fill, and the only
4 reason it could be if they put oil in it.

5 HEARING OFFICER WALLACE: Subject to
6 being corrected by looking back at the transcript,
7 I don't recall any witness testifying that they
8 had observed or had any information that the truck
9 beds had been sprayed with diesel fuel.

10 MR. KNIPPEN: Page 2-5, the first
11 sentence in the last paragraph, "These items would
12 appear to indicate poor management practices and a
13 disregard for the lease agreement and/or
14 applicable environmental regulations."

15 Firstly, no foundation to draw a
16 conclusion of poor management practices, none
17 whatsoever. These guys don't know anything about
18 mining sites and how mining sites operate and are
19 reclaimed. There is no evidence in the record that
20 would relate at all to management practices at
21 mining sites.

22 The second part of the sentence, a
23 disregard for lease agreement. There is no lease
24 agreement in this case. There's been no lease

1 presented to this Court. I don't know what the
2 lease agreement is, and then the last part of it
3 is legal conclusion and/or applicable
4 environmental regulations.

5 HEARING OFFICER WALLACE: Objection's
6 noted and overruled. I would note that the word
7 "lease agreement" does appear for the first time.
8 We could infer that that was a typo and is meant
9 to be "license agreement."

10 MR. KNIPPEN: If it does mean license
11 agreement, then the objection would also include
12 an objection that they are legally interpreting
13 the licensing agreement again, and they are
14 incompetent to do so.

15 HEARING OFFICER WALLACE: Objection is
16 so noted and overruled.

17 MR. KNIPPEN: Next sentence, "Regardless
18 of the intent, the conditions noted would appear
19 to make the site unsuitable for its ultimate use
20 as a wetlands conservation area."

21 I guess, Judge, that falls into the
22 general objection I made before as to the
23 competence and foundation for wetlands opinions.

24 HEARING OFFICER WALLACE: So noted.

1 MR. KNIPPEN: Page 3-1, field
2 activities, third paragraph, "On completion of the
3 piezometer, soil borings and test pits, an Emcon
4 field survey crew obtained ground surface
5 elevations at the respective location, also
6 utilizing the Leitz 3, L-E-I-T-Z. The field notes
7 generated were reduced and input into a
8 computer-generated contour program."

9 I don't believe there's evidence in the
10 record that supports that statement.

11 HEARING OFFICER WALLACE: Objection
12 noted and overruled.

13 MR. KNIPPEN: We have the same
14 objection, Judge, for the first paragraph of
15 paragraph 3.1.2 on page 3-1.

16 HEARING OFFICER WALLACE: Objection's
17 noted and overruled.

18 MR. KNIPPEN: 3-1, last paragraph, the
19 phrase, "each soil sample was visually
20 classified." No evidence of that. Mr. Heuer
21 testified he didn't visually classify anything on
22 site.

23 HEARING OFFICER WALLACE: Objection is
24 noted and overruled.

1 MR. KNIPPEN: We would just note, Judge,
2 in addition for the purpose of our other
3 objections now, that if we look at the next
4 sections of the Emcon reports, being the Emcon
5 site investigation 3, which goes from 3-1 to 3-16
6 only, that it is the respondent's position that
7 the vast majority of the information contained
8 therein is the appropriate way to present this
9 type of testimony in report form if a report is
10 going to be admitted because of the way that it is
11 stated in an objective fashion and not in an
12 attempt to be adversarial.

13 Page 3-17, your Honor, the first bullet
14 point, "Minimum estimated volume of fill materials
15 which exhibit odors or have been observed to
16 contain materials which are not clean filled
17 equals 165,000 cubic yards."

18 Our objection there is there is no
19 evidence that supports that particular statement.
20 In fact, Mr. McGuigan add admitted in cross
21 examination that that statement's not true, that
22 what they meant to say was that within 165,000
23 cubic yards, there were materials that exhibited
24 odor and contained materials, but he did not mean

1 to say that the entire 165,000 cubic yards
2 contained an odor and contained materials which
3 are not clean filled. So that statement, as
4 written, is false.

5 HEARING OFFICER WALLACE: Objection's
6 noted and overruled.

7 MR. KNIPPEN: 3-17, the third bullet
8 point, "Estimated volume of material necessary to
9 finish the project to the proposed final grade,
10 i.e., which would need to be imported, 85,000
11 cubic yards."

12 We are motioning to strike that, Judge,
13 as being irrelevant and immaterial, and the reason
14 it's irrelevant and immaterial is Mr. McGuigan
15 couldn't state which plan that estimate related
16 to, and therefore, it has no meaning in the
17 context of these proceedings. It's an estimate
18 without meaning.

19 HEARING OFFICER WALLACE: The
20 objection's noted and overruled.

21 MR. KNIPPEN: Mr. Stick has some
22 additional comments to relieve my throat now,
23 Judge.

24 MR. STICK: Your Honor, on page 3-16 at

1 the top of the page, there's a statement,
2 "Groundwater samples in which contaminants were
3 detected were located either in or adjacent to the
4 filled soil areas."

5 Mr. McGuigan's testimony was that with
6 respect to the fill material, he didn't know
7 whether the water or fill material constituted
8 groundwater, and so we object and move to strike
9 that first sentence because it is -- it's
10 incorrect. It refers to groundwater samples in
11 the fill soil areas, and his testimony was with
12 respect to water samples from the fill. He didn't
13 know whether that constituted groundwater.

14 HEARING OFFICER WALLACE: All right,
15 objection's noted and overruled.

16 MR. STICK: Your Honor, and backing up
17 one more page to 3-15 in the second paragraph, the
18 last sentence, "Field observation suggests
19 contaminants encountered at D16 and TPU locations
20 are as a result of petroleum contamination."

21 Move to strike that sentence because
22 that is a stretch. For instance, the TPU location
23 was an odor, and there's no way to determine the
24 odor resulted in contamination. All they smelled

1 was an odor. I don't believe the evidence
2 supports that last sentence.

3 HEARING OFFICER WALLACE: All right.
4 Objection's noted and overruled.

5 MR. KNIPPEN: Page 2-18, your Honor,
6 fourth paragraph, "Chemical analysis of
7 groundwater and surface water samples selected
8 during the investigation indicates that several
9 PNA and VOC compounds were detected at low levels
10 in several groundwater samples obtained from
11 within or adjacent to filled areas."

12 There is no evidence in this case, your
13 Honor, that there has been any PNA or VOC compound
14 located in a surface water sample. The best
15 Mr. McGuigan could do on that is he said we got
16 one result from surface water of a pond, and we
17 don't know what it means.

18 It may or may not have contained PNAs.
19 He certainly had no reasonable conclusion within a
20 degree of scientific or engineering certainty that
21 it contained PNAs. He said he just didn't know.
22 There's no evidence in this case of PNAs or VOCs
23 in surface water samples, none.

24 HEARING OFFICER WALLACE: Your

1 objection's noted and overruled.

2 MR. KNIPPEN: If we then look to the
3 fifth paragraph of that same page 3-18, we see
4 that the report contradicts itself because then it
5 goes on to say, "Surface water analysis indicates
6 that surface water has not been impacted to date."

7 It absolutely contradicts the prior
8 statement that the surface water samples contain
9 PNAs and VOCs.

10 HEARING OFFICER WALLACE: All right, the
11 objection's noted and overruled.

12 MR. KNIPPEN: Page 4-6, I think we've
13 covered most of these objections, Judge, based on
14 our prior more specific objections, but if I can
15 go through this real quickly, I can see if there's
16 anything else.

17 Page 4-6, fourth paragraph, sentence,
18 "As the fill material of the site was obviously
19 discarded from another source, the presence of
20 foreign materials require that fill material be
21 classified as waste."

22 We haven't talked about the term
23 discarded in the report before, Judge. Our
24 objection to discarded would be twofold. A, it's

1 a legal conclusion under the Act, and B, because
2 it involves an element of intent, i.e. what was
3 the intent of the parties with regard to the
4 particular materials. It draws an incompetent
5 conclusion with regard to the intent of the
6 parties, and therefore, the conclusion is
7 incompetent as well as being a legal conclusion.

8 HEARING OFFICER WALLACE: The objection
9 is noted and overruled.

10 MR. KNIPPEN: Any sections of this
11 summary section, your Honor, which conclude that
12 the site requires a landfill permit are a legal
13 conclusion, and we would object to the legal
14 conclusion.

15 HEARING OFFICER WALLACE: Objection's
16 noted and overruled.

17 MR. KNIPPEN: With regard to the section
18 of the report that is entitled Applicable
19 Regulations, which is paragraphs 4-1 through 4-4,
20 we would object to strike that entire section as
21 being legal conclusions.

22 HEARING OFFICER WALLACE: Objection's
23 noted and overruled.

24 MR. KNIPPEN: Page 5-1, second

1 paragraph, second sentence, "These materials would
2 not be classified as clean fill from a physical
3 standpoint as large pieces of concrete with
4 protruding metal reinforcement bars, metal pipe,
5 fencing and remnants of putrescible materials
6 (wood, caulk, paper) were uncovered during the
7 on-site investigation."

8 There is no evidence in this case,
9 Judge, that any piece of concrete with metal
10 reinforcement bars was ever uncovered on this
11 site. Mr. Urbanski didn't testify to it.
12 Mr. Heuer didn't testify to it. There's no
13 evidence that there's concrete with rebar in it
14 that is buried in the fill.

15 MR. MAKARSKI: My recollection is there
16 was, and I'm trying to remember who said it. I
17 thought it was Utt or one of them, that they saw
18 it.

19 HEARING OFFICER WALLACE: The objection
20 is noted and overruled.

21 MR. KNIPPEN: We're getting close to
22 being finished, your Honor. I appreciate your
23 patience through this process.

24 Page 5-1 going over to page 5-2, the

1 sentence, "The practice of receiving and placing
2 off-site waste materials does not appear to have
3 been contemplated or authorized in the mines and
4 minerals operating permit application, permit or
5 associated reclamation plan and may constitute a
6 violation of this permit."

7 I have several objections to that.
8 It's a legal conclusion, number one. Number two,
9 it draws a conclusion with regard to the state of
10 mind of we don't know who, whether they're talking
11 about mines and minerals, the IEPA, the
12 contractor, the Forest Preserve District, and when
13 it says may constitute a violation of this permit,
14 you can't tell which of the permits they're
15 talking about.

16 HEARING OFFICER WALLACE: Objection is
17 noted and overruled.

18 MR. KNIPPEN: The remainder of that
19 paragraph with regard to an alleged deficiency in
20 the water pollution control permit application is
21 irrelevant and immaterial and is also a legal
22 conclusion.

23 HEARING OFFICER WALLACE: Objection's
24 noted and overruled.

1 MR. KNIPPEN: Page 5-2, second
2 paragraph, "Groundwater or surface water
3 investigations indicated that low level PNA or VOC
4 contamination is present within or adjacent to the
5 fill areas." Same objections we made to that
6 conclusion from before.

7 HEARING OFFICER WALLACE: Objection's
8 noted and overruled.

9 MR. KNIPPEN: First bullet point, same
10 objections we made to that prior bullet point.

11 HEARING OFFICER WALLACE: Noted and
12 overruled.

13 MR. KNIPPEN: And same objections, your
14 Honor, on page 5-2 to the fourth bullet point.

15 HEARING OFFICER WALLACE: So noted.

16 MR. KNIPPEN: Page 5-3, second to the
17 last paragraph which starts with, "in addition the
18 presence of debris containing fill." We have a
19 motion to strike that as a legal conclusion.

20 MR. MAKARSKI: What page, 5-3?

21 MR. KNIPPEN: 5-3, second to the last
22 paragraph.

23 HEARING OFFICER WALLACE: Objection's
24 noted and overruled.

1 MR. KNIPPEN: Just for purposes of the
2 record, Judge, we are also just generally
3 motioning to strike any opinion that is contained
4 in this entire report which has been asserted
5 without the proper Wilson v. Clark foundational
6 questions. Just for purposes of the record
7 generally we're making it.

8 HEARING OFFICER WALLACE: So noted.

9 MR. KNIPPEN: I would specifically note
10 that there are numerous of those type of problems
11 contained in 5.2.1, the no action section. For
12 example, "It should be noted, however, that the
13 presence of low level PNAs is a down gradient
14 groundwater sample (B6) suggests limited
15 contamination migration."

16 The next paragraph contains similar
17 conclusions, and they are all basically opinions
18 that have been asserted in this report without a
19 proper foundation under Wilson v. Clark.

20 HEARING OFFICER WALLACE: You were in
21 paragraph 5.2.1?

22 MR. KNIPPEN: 5.2.1, Judge.

23 HEARING OFFICER WALLACE: Thank you.

24 The objections are noted and overruled.

1 MR. KNIPPEN: Same basis for the motion
2 to strike on page 5-5, numbered paragraphs 1 and
3 2.

4 HEARING OFFICER WALLACE: Objection's
5 noted and overruled.

6 MR. KNIPPEN: And we would motion to
7 strike 5-3 which is on page 5-6 as legal
8 conclusions, section 5.3 on page 5-6.

9 HEARING OFFICER WALLACE: The objection
10 is noted and overruled.

11 MR. KNIPPEN: Judge, I think we're done,
12 but if you could give us one minute to confer.
13 Thank you, your Honor, we're done.

14 HEARING OFFICER WALLACE: Why don't we
15 go ahead and break for lunch for an hour.

16 (Lunch recess taken.)

17 HEARING OFFICER WALLACE: I think the
18 last thing we did before breaking for lunch was to
19 go through Complainant's Exhibit 29, and I needed
20 to ask are the complainants -- has the complainant
21 rested?

22 MR. MAKARSKI: Yes, subject to working
23 out what we did earlier, the interrogatory with
24 the amounts of money and that in it.

1 HEARING OFFICER WALLACE: All right.

2 MR. MAKARSKI: Other than that, we have
3 nothing further.

4 HEARING OFFICER WALLACE: All right,
5 thank you. Are the respondents ready to proceed?

6 MS. O'CONNELL: Mr. Hearing Officer, now
7 that complainant has rested, I have a couple of
8 motions to present.

9 MR. MAKARSKI: What is it?

10 MS. O'CONNELL: My first motion,
11 Mr. Hearing Officer, is a motion for finding in
12 complainant's favor.

13 MR. MAKARSKI: Complainant's favor?

14 MS. O'CONNELL: I'm sorry.

15 MR. MAKARSKI: That's all right, I'll
16 agree with that.

17 HEARING OFFICER WALLACE: Thank you.

18 MS. O'CONNELL: I'm sorry.

19 HEARING OFFICER WALLACE: Thank you. As
20 much as I'd like to, I unfortunately can't rule on
21 this motion.

22 MS. O'CONNELL: Right. And if I may,
23 for the record, Mr. Hearing Officer, the first
24 motion is a motion for a finding in favor of

1 Mineral and Land Resources and against the
2 complainant, and the thrust of this motion is that
3 the complainant has failed entirely to introduce
4 any evidence against MLR with respect to alleged
5 violations of the Illinois Environmental
6 Protection Act, basically that the allegations can
7 be broken down into three categories, illegal
8 dumping, creation of a water pollution hazard and
9 operation of a sanitary landfill.

10 There's been zero evidence that MLR
11 engaged in any of these activities. Now, I'm sure
12 Mr. Makarski will argue that the license agreement
13 itself is enough -- is sufficient to keep MLR in
14 this case, but under Illinois law, it is not.
15 This statute is not a strict liability statute.
16 Status based on that license agreement is not
17 sufficient, and in any event, Mr. Vick testified
18 that all of the rights and obligations were
19 assumed by respondent, Bluff City.

20 So we're making that motion. We're
21 making it to the Board, but I thought you would
22 like to know what the gravamen of it is. So my
23 second motion, therefore, is a motion to continue
24 the hearing until after ruling on that motion to

1 -- for a finding in MLR's favor, and the reasons
2 are twofold.

3 Number one, Mr. Hearing Officer, you're
4 authorized -- in fact I think mandated -- to
5 continue a hearing wherever justice requires under
6 Section 103.140, and in this instance, it would be
7 eminently unjust to require MLR to adduce evidence
8 in its defense and continue on in the hearing in
9 this case when we don't have a ruling from the
10 Board on a motion for a directed finding.

11 Secondly, and in a somewhat more
12 practical matter, it's prejudicial to MLR to
13 continue on with this case and have the
14 respondents now begin their case and have all this
15 into the record. I don't know what their evidence
16 is going to be. But have that submitted in the
17 transcript to the Board before there's been a
18 ruling on our motion for directed finding. So
19 based on those two reasons, we believe we're
20 entitled to have this hearing continued.

21 Now, for a third and completely
22 practical reason, it makes sense now. Since this
23 is our last day of hearing, perhaps this is a good
24 time to break in any event, and then let the Board

1 rule on our motion in its next -- I think November
2 6th is the next date. Mr. Makarski can respond
3 within his seven days, and we'll have a ruling and
4 we'll know whether MLR needs to appear at the next
5 session.

6 HEARING OFFICER WALLACE: Mr. Makarski,
7 Mr. Tucker?

8 MR. MAKARSKI: Well, we're here.

9 HEARING OFFICER WALLACE: Do you care to
10 say anything right now on the motion for finding
11 in its favor and against complainant?

12 MR. MAKARSKI: No, they haven't
13 presented any evidence or authority. I mean, I
14 don't know what Vick's -- I don't remember him
15 saying it, but the agreement is between them and
16 the District.

17 There's a sub-license agreement which
18 has been put before the Board. It's in the
19 complaint, and they're the principal in this whole
20 thing. So these are their agents. I don't know
21 that a principal can't be held liable for the acts
22 of his agents.

23 MS. O'CONNELL: May I respond to that?

24 HEARING OFFICER WALLACE: Just one more

1 minute. Do you wish to file a written response
2 within the seven-day time period?

3 MR. MAKARSKI: Yes, sir. Yes, sir.

4 HEARING OFFICER WALLACE: Ms. O'Connell,
5 you may respond.

6 MS. O'CONNELL: Mr. Makarski's statement
7 that we haven't presented any evidence, that's the
8 problem here. It's the complainant's burden of
9 proof to show by a preponderance of the evidence
10 the elements of its claim, and it's up to them to
11 bring forward the proof. It's not up to MLR to
12 bring forward a defense before it's required to.

13 With respect to the agency issue, Mr.
14 Hearing Officer, the existence of that agreement
15 alone is not sufficient to create an agency
16 relationship. There are a number of factors under
17 Illinois law that go into the determination of
18 whether an agency relationship exists, and one of
19 them is the right to supervise and the manner of
20 supervision of the work and the right to control
21 it, and there's been no evidence of anything like
22 that in this case.

23 HEARING OFFICER WALLACE: All right,
24 thank you. Now, back to the motion to continue

1 today's hearing. Mr. Makarski.

2 MR. MAKARSKI: I object to it. I think
3 we should finish.

4 HEARING OFFICER WALLACE: And Mr. Stick.

5 MR. STICK: We join in the motion to
6 continue, but based on our motion that we're going
7 to file tomorrow, we presented yesterday a motion
8 on the same basis. This seems like a good point
9 to recess this session and continue after the
10 Board has had an opportunity to have a meeting and
11 resolve Ms. O'Connell's motion and our motion.

12 HEARING OFFICER WALLACE: What motion
13 are you planning on presenting?

14 MR. STICK: That was the motion for a
15 mistrial that we had presented yesterday. It's
16 now -- we Federal Expressed it to Chicago
17 yesterday, but it's not on recycled paper. So my
18 current plan is to file that tomorrow once I get
19 back to my office.

20 HEARING OFFICER WALLACE: Did we kick it
21 out, is that it?

22 MR. STICK: No, we just -- they may have
23 taken it, but we decided it's not on recycled
24 paper, we may as well file it tomorrow.

1 MS. O'CONNELL: We're filing our motion
2 today with the Board.

3 HEARING OFFICER WALLACE: All right.
4 And so, Mr. Stick, you would join in a renewed
5 motion to continue at this point?

6 MR. STICK: Yes.

7 HEARING OFFICER WALLACE: Even though
8 you have witnesses waiting outside?

9 MR. STICK: Well, yes, your Honor, even
10 though I have witnesses waiting outside. And the
11 reason is that they are waiting outside, but, you
12 know, if our motion is going to be granted for a
13 mistrial, then we don't have to take up the rest
14 of today.

15 MS. O'CONNELL: Let me just reiterate.

16 HEARING OFFICER WALLACE: Thank you,
17 I've heard enough. I actually think this would be
18 an appropriate place to break given the motions to
19 continue before we get into the respondent's case.

20 It would probably be better just to
21 break for the afternoon and resume at a later date
22 for the respondent's case. So this matter is
23 recessed until further notice.

24 MS. O'CONNELL: Thank you, Mr. Hearing

1 Officer.

2 (Whereupon, this hearing was
3 continued sine die.)

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ILLINOIS POLLUTION CONTROL BOARD

LISA H. BREITER, CSR, RPR, CRR, being
first duly sworn, on oath says that she is a court
reporter doing business in the state of Illinois;
that she reported in shorthand the proceedings at
the taking of said hearing and that the foregoing
is a true and correct transcript of her shorthand
notes so taken as aforesaid, and contains all of
the proceedings had at said hearing.

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