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ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

vs) PCB 97-103

STATE OIL COMPANY, WILLIAM ANEST)

f/d/b/a S & S PETROLEUM PRODUCTS,)

PETER ANEST f/d/b/a S & S PETROLEUM)

PRODUCTS, CHARLES ABRAHAM, JOSEPHINE)

ABRAHAM, and MILLSTREAM SERVICES,)

INC.,)

Respondents,)

CHARLES ABRAHAM, JOSEPHINE ABRAHAM)

and MILLSTREAM SERVICES, INC.,)

Cross-Complainants,)

vs)

WILLIAM ANEST and PETER ANEST)

CORPORATION,)

Cross-Respondents.)

L.A. REPORTING (312) 419-9292

1 The following is a transcript held in
2 the above-entitled cause before HEARING OFFICER
3 BRADLEY P. HALLORAN, taken stenographically before
4 TERRY A. STRONER, a notary public within and for the
5 County of Cook and State of Illinois, at 2 South
6 Main Street, Algonquin, Illinois, on the 21st day of
7 October, A.D., 2002, scheduled to commence at 9:00
8 o'clock a.m., commencing at 9:15 o'clock a.m.

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

2 ILLINOIS POLLUTION CONTROL BOARD,
3 100 West Randolph Street
4 Suite 11-500
5 Chicago, Illinois 60601
6 (312) 814-8917
7 BY: MR. BRADLEY P. HALLORAN, HEARING OFFICER

8 ASSISTANT ATTORNEY GENERAL,
9 188 West Randolph Street
10 Chicago, Illinois 60601
11 (312) 814-3369
12 BY: MR. GERALD T. KARR

13 Appeared on behalf of the Complainant,

14 KARAGANIS, WHITE & MAGEL, LTD.,
15 414 North Orleans Street
16 Suite 810
17 Chicago, Illinois 60610
18 (312) 836-1177
19 BY: MR. MARK D. ERZEN and
20 MS. BARBARA A. MAGEL

21 Appeared on behalf of Charles and
22 Josephine Abraham and Millstream
23 Services, Inc.,

24 CHURCHILL, BAUMGARTNER & QUINN, LTD.,
Center & Whitney - BOX 124
Grayslake, Illinois 60030
(847) 223-1500
BY: MR. JOHN C. BAUMGARTNER

Appeared on behalf of State Oil Company,
William and Peter Anest, S & S Petroleum.

21 ALSO PRESENT:

22 Mr. Abraham
23 Mr. Gurnik

24

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1 HEARING OFFICER HALLORAN: Good
2 morning. My name is Bradley Halloran. I'm the
3 hearing officer with the Illinois Pollution Control
4 Board. I'm assigned to this matter, PCB 97-103,
5 People of the State of Illinois, complainant, versus
6 State Oil Company, William Anest formerly doing
7 business as S & S Petroleum Products, Peter Anest,
8 formerly doing business as S & S Petroleum, Charles
9 Abraham, Josephine Abraham and Millstream Service,
10 Inc., respondents. We have Charles Abraham,
11 Josephine Abraham and Millstream Service, Inc.,
12 cross-complainants versus William Anest and Peter
13 Anest, cross-respondents.

14 It's approximately 9:15 on
15 August -- or excuse me, October 21st in the year
16 2002. I want to note for the record there are no
17 members of the public here, but if there were,
18 they'd be allowed to testify subject to
19 cross-examination.

20 We're going to run this hearing
21 pursuant to Section 103.212 and Section 101, subpart
22 F, under the Board's general provisions.

23 I note that this hearing is
24 intended to develop a record for review for the

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1 Illinois Pollution Control Board. I will not be
2 making the ultimate decision in this case. The
3 decision will be left to the Board members of the
4 Illinois Pollution Control Board. They'll review
5 the transcript in this hearing and the remainder of
6 the record and render a decision.

7 My job is to ensure an orderly
8 hearing and to rule upon any evidentiary matters
9 that may arise.

10 After the hearing, the parties
11 will have an opportunity to submit post-hearing
12 briefs. These, too, will be considered by the
13 Board.

14 For clarification, I'm going to
15 read excerpts from the April 4th, 2002, Board order,
16 which will hopefully set the course for this
17 hearing.

18 This case involves a site in
19 McHenry County -- McHenry, McHenry County. The
20 People of the state of Illinois allege that all
21 respondents caused or allowed water pollution in
22 violation of Section 12(a) of the Environmental
23 Protection Act. The People seek to recover from
24 respondents, the Abrahams and Millstream, over

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1 \$150,000 the People expended to remediate the
2 contamination from underground storage tanks at
3 the site. The People seek these costs under Section
4 57.12(a) of the Act.

5 On March 6th, 1997, the Abrahams
6 and Millstream filed a cross-complaint against the
7 Anests. The cross-complaint alleges that based
8 on prior fraudulent activities, the Anests should
9 be held liable to the Abrahams and Millstream for
10 any cause or penalties assessed under Count II of
11 the People's complaint.

12 In the April 4th order, the Board
13 denies the Anests' motion for summary judgment
14 against the Abrahams on their cross-complaint, but
15 strikes Count II of the cross-complaint and any
16 portion of the cross-complaint that seeks
17 reimbursement of penalties.

18 The Board grants the People's
19 motion for partial summary judgment against State
20 Oil and the Anests.

21 The Board grants the People's
22 motion for summary judgment against the Abrahams and
23 Millstream in part and denies it in part.

24 Specifically, the motion for

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1 representing State Oil Company, Bill Anest and Peter
2 Anest, S & S Petroleum Products.

3 MR. ERZEN: Good morning. I'm Mark
4 Erzen representing Chuck and Josephine Abraham
5 and their company, Millstream Service, and with me
6 is Barbara Magel as well as Mr. Abraham sitting with
7 us at counsel table.

8 MR. KARR: Gerald Karr, assistant
9 attorney general on behalf of the complainant,
10 People of the State of Illinois. Present with me is
11 Mark Gurnik, counsel for the Illinois EPA.

12 HEARING OFFICER HALLORAN: Thank you.
13 Any preliminary issues or comments
14 you want to make?

15 MR. KARR: We had discussed some
16 exhibits that we would like to be made part of the
17 hearing record. There's some that are pleadings
18 in this case and I'm not sure -- I mean, it would be
19 the complainant exhibits, I think they're joint
20 exhibits or -- but we would -- nobody has -- in our
21 prior discussions off the record has any objection
22 to these being made part of the hearing record.

23 HEARING OFFICER HALLORAN: Okay. We
24 can -- I'm sorry.

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1 MR. KARR: I can identify these.

2 HEARING OFFICER HALLORAN: Okay. We
3 can make them complainant's exhibits if you want.
4 Would you like to make them complainant's exhibits?

5 MR. KARR: Well, I think they're --
6 okay. That's fine.

7 HEARING OFFICER HALLORAN: Or hearing
8 officer exhibits?

9 MR. KARR: That's fine also. I don't
10 really have --

11 HEARING OFFICER HALLORAN: Let's keep
12 it complainant's exhibits.

13 MR. KARR: Very good.

14 I've labeled some of my exhibits
15 already through seven so the ones I have I guess
16 will start after that.

17 The first one would be
18 Complainant's Exhibit No. 8, that's the Board's
19 April 4th, 2002, order.

20 Number nine, complainant's Exhibit
21 No. 9, is a copy of the Abraham/Millstream answer to
22 the complaint and cross-claim.

23 Number ten is a copy of --
24 Complainant's Exhibit No. 10 is a copy of the

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1 Anests' and State Oil's answer -- answer to first
2 set of interrogatories.

3 Complainant's Exhibit No. 11
4 is a copy of State Oil and the Anests' response
5 to the complainant's first request for admission of
6 fact.

7 HEARING OFFICER HALLORAN: I'm sorry.
8 That was Complaint's No. 11?

9 MR. KARR: Correct.

10 HEARING OFFICER HALLORAN: Thanks.

11 MR. KARR: And finally, Complainant's
12 Exhibit No. 12 is the respondents, Abrahams' and
13 Millstream's, response to the complainants and the
14 Anests' request for admission of fact.

15 We also had another off-the-record
16 discussion regarding exhibits that I had planned to
17 introduce during the course of the hearing and there
18 were some of them which the parties agreed will be
19 admitted subject to obviously the hearing officer
20 admitting them as exhibits in this matter. I can
21 identify those.

22 HEARING OFFICER HALLORAN: Please.

23 MR. KARR: The first one is
24 Complainant's Exhibit No. 1, that's a document dated

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1 December 5th, 1984, entitled incident control sheet.

2 Second, Complainant's No. 2, is
3 a letter dated February 25th, 1987, to Mr. Abraham
4 from the Illinois EPA.

5 The next one, Complainant's
6 Exhibit No. 3, is a letter dated April 9th, 1987, to
7 Mr. Abraham from the Illinois EPA.

8 The next exhibit is Complainant's
9 Exhibit No. 4, that's a January 18th, 1989, letter
10 to Mr. Abraham from the Illinois EPA.

11 The next exhibit is Complainant's
12 Exhibit No. 6, this is a January 5th, 1990, Illinois
13 EPA document addressed to Mr. Abraham.

14 And finally, Complainant's Exhibit
15 No. 7 is a document that is dated December 10th,
16 1990. It's the Illinois EPA order requiring
17 corrective action and those were all the exhibits.

18 HEARING OFFICER HALLORAN: And those
19 were agreed to as well, no objection?

20 MR. BAUMGARTNER: No objection.

21 MR. ERZEN: No objection.

22 HEARING OFFICER HALLORAN:
23 Complainant's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10,
24 11 and 12 are all admitted.

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1 Do you want to give an opening,
2 Mr. Karr?

3 MR. KARR: Yes, please, a brief
4 opening.

5 Mr. Hearing Officer, counsel, as
6 everyone here today is well aware, this case has a
7 very long history both before the filing of the
8 complaint and after, but one thing will stand out
9 from the testimony, the complainant, the People of
10 the State of Illinois, and the Illinois EPA have
11 never given up on this site. This includes
12 attempting to ensure a clean and safe environment
13 and recovering the approximately \$156,000 spent by
14 the Illinois EPA in addressing the gasoline
15 contamination in and around Boone Creek.

16 The People have filed a two-count
17 complaint in this matter. The first count alleges
18 violations of Section 12(a) of the Environmental
19 Protection Act against all the named respondents.

20 Count two seeks to recover costs
21 incurred by the Illinois EPA pursuant to Section
22 57.12 of the Act, formerly Section 22.1(a) from the
23 respondents, Abrahams and Millstream.

24 In an opinion and order of the

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1 Illinois Pollution Control Board dated April 4th,
2 2002, on the People's motion for summary judgment,
3 the Board found all the respondents liable for
4 violating Section 12(a) of the Act, causing water
5 pollution in Illinois.

6 Specifically, the Board found that
7 State Oil and the Anests discharged gasoline into
8 Boone Creek that was likely to result in water
9 pollution. The Board made a similar finding against
10 the Abraham respondents and Millstream.

11 Specifically, the Board stated that it is
12 uncontested that gasoline continued to seep from
13 the site entering Boone Creek during the Abrahams'
14 and Millstream's tenure. Because of these prior
15 findings of liability, the portion of this
16 proceeding relating to Count I will be limited to a
17 penalty determination for the 12(a) violation.

18 Count II of the complaint seeks a
19 finding of liability only against the Abrahams and
20 Millstream. This count is brought pursuant to
21 Section 57.12(a) of the Act. That section provides
22 that notwithstanding any other provision or rule of
23 law, the owner or operator or both of an underground
24 storage tank shall be liable for all costs of

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1 investigation, preventative action, corrective
2 action and enforcement action incurred by the State
3 of Illinois resulting from an underground storage
4 tank.

5 The Abrahams and Millstream have
6 admitted they are either the owner or operators of
7 the USTs at the site. The Illinois EPA, after
8 repeated attempts and notice to the Abrahams and
9 Millstream and a failure to act on their part, had
10 no alternative but to respond to the gasoline
11 entering Boone Creek.

12 The Abrahams and Millstream
13 have admitted that Illinois EPA, through its
14 contractors, excavated a trench, removed soil and
15 filled the trench with gravel. This response was
16 not meant to be a total and complete clean-up of the
17 site, but only an attempt to prevent further
18 quantities of gasoline from entering the creek.

19 Only after the Illinois EPA had
20 expended financial and personnel resources, the
21 Abrahams agreed to take certain steps at the site.
22 However, to date, all steps requested and approved
23 by the Illinois EPA remain unfinished and the
24 Illinois EPA is -- \$156,647.77 remains unreimbursed.

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1 Today, the complainant, the People
2 of the State of Illinois, is asking the Illinois
3 Pollution Control Board to enter an order imposing a
4 penalty against all respondents to the maximum
5 extent permitted under the statute for the violation
6 of Section 12(a) of the Act, to order the Abrahams
7 and Millstream to reimburse the Illinois EPA for its
8 outstanding costs and any other relief the Board
9 feels appropriate based on the record. Thank you.

10 HEARING OFFICER HALLORAN: Thank you,
11 Mr. Karr. Mr. Erzen? Ms. Magel? Mr. Baumgartner?

12 MR. BAUMGARTNER: I will waive any
13 opening statement.

14 HEARING OFFICER HALLORAN: Okay.
15 Thank you.

16 MR. ERZEN: Mr. Halloran, thank you.

17 First of all, before we get
18 started, I want to say that Mr. Karr and I discussed
19 the exclusion of witnesses and we agreed that
20 witnesses would be excluded, however, as to the
21 first two witnesses we have here today, that's not
22 an issue, so we're -- Mr. Osowski and Mr. Klopke can
23 stay here where it's warm as opposed to waiting
24 outside.

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1 HEARING OFFICER HALLORAN: Thank you.

2 MR. ERZEN: Thank you.

3 To give a little background as to
4 why we're here today, the reason that we're here
5 today is that Chuck and Josephine Abraham bought a
6 station -- a gas station from the Anests. That gas
7 station had environmental problems when it was
8 purchased. Those problems continued after they
9 purchased it in spite of the fact that as later
10 litigation showed those problems should have been
11 taken care of by the Anests. The record, I believe,
12 will show that following their purchase of the
13 station the Abrahams did, in fact, make extremely
14 substantial efforts to clean up the station
15 to conform to the Illinois EPA's requirement, but
16 were, in fact, stymied by the IEPA and in particular
17 the IEPA's failure to act upon the Abrahams' LUST
18 fund application and the failure to act towards
19 their other requests.

20 The evidence will show that the
21 State of Illinois, although as Mr. Karr said has
22 never lost sight of the station, that the State of
23 Illinois, in fact, sat on its cost claim for years
24 and years and years, literally five, seven years.

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1 The evidence will show that that failure to act upon
2 its cost claim prejudiced the Abrahams and I'll tell
3 you exactly why.

4 In 1990, the Abrahams filed an
5 action against the Anests for fraud and breach of
6 contract concerning the sale of the station from the
7 Anests to the Abrahams. That case went to trial in
8 1994. A judgment was entered in favor of the
9 Abrahams and against the Anests awarding the
10 Abrahams full reimbursement for what they had spent
11 and the costs that they incurred as a result of the
12 environmental problems of the station, in other
13 words, that litigation was designed and intended to
14 determine who, between the Anests and the Abrahams,
15 were responsible for the environmental problems at
16 the station.

17 The state's claim for \$156,000 was
18 not part of that litigation and the reason why it
19 was not part of that litigation was that the State
20 sat on its claim for more than five, seven years.

21 After that judgment in favor of
22 the Abrahams and against the Anests was rendered by
23 a jury, affirmed by the Second District Court of
24 Appeals, only two years later did the State come

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1 forward and say pay us \$156,000. At that point, it
2 was too late to make that part of the case. That is
3 the prejudice to the Abrahams that has resulted from
4 the state's sitting on its rights. That, your
5 Honor, or I'm sorry, Mr. Halloran, what we contend
6 is a laches. Laches is an unexplained failure to
7 advance your rights that results in a prejudice to
8 the other party.

9 There's a couple other aspects to
10 it. If we do, in fact, get to costs, I think the
11 evidence will show that the costs are highly
12 overstated, that they were improvidently incurred
13 and I also think -- excuse me, the evidence will
14 also show that the Abrahams have cross-claimed
15 against the Anests in this action and that as
16 between the Abrahams and the Anests, to the extent
17 that the Pollution Control Board finds any of those
18 costs should be borne by the Abrahams, the Pollution
19 Control Board should, and we'll ask them to,
20 transfer those costs as a consequence of the
21 cross-claims to the Anests as the jury did in the
22 civil case between the Abrahams and the Anests and
23 as that jury verdict was affirmed by the Second
24 District Court of Appeals. Thank you.

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1 HEARING OFFICER HALLORAN: Thank you,
2 Mr. Erzen.

3 Mr. Karr, call your first witness.

4 MR. KARR: The complainant, the People
5 of the State of Illinois, would like to call
6 Mr. Ed Osowski.

7 (Witness sworn.)

8 WHEREUPON:

9 E D W A R D O S O W S K I,
10 called as a witness herein, having been first duly
11 sworn, deposeeth and saith as follows:

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

13 by Mr. Karr

14 Q. Mr. Osowski, could you please state
15 your name and spell it for the court reporter,
16 please?

17 A. Sure. It's Edward, last name is
18 spelled, O-s-o-w-s-k-i.

19 Q. And are you currently employed?

20 A. Yes, I am.

21 Q. And where is that at?

22 A. With the Illinois Environmental
23 Protection Agency.

24 Q. And how long have you been with the

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1 Illinois EPA?

2 A. It will be -- since December '81.

3 Q. And what position do you currently
4 hold there?

5 A. I'm an environmental -- I'm an
6 emergency responder.

7 Q. And how long have you been in that
8 position?

9 A. Roughly since 1984 -- '84, '85.

10 Q. And was that your first position with
11 the Agency?

12 A. No, it wasn't.

13 Q. And what was your position before
14 that?

15 A. I was an environmental protection
16 specialist for the division of air pollution
17 control.

18 Q. How long were you in that position?

19 A. When I started the position in '81.

20 Q. You've been with the Illinois EPA
21 since 1981?

22 A. Yes.

23 Q. A long time?

24 A. Yes.

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1 Q. And could you generally describe what
2 you do as an emergency responder?

3 A. I respond to environmental emergencies
4 in the northern part of the State from Indiana to
5 the Mississippi River, from the Wisconsin border to
6 a line roughly drawn through the city of Pontiac.

7 Q. And what are the nature of these
8 emergencies?

9 A. They vary, anything from releases --
10 chemical releases, air releases, requests for
11 assistance from local communities, fire departments,
12 police departments, abandoned materials, anything
13 associated with the environment.

14 Q. And how do you become aware of these
15 emergencies?

16 A. Usually either through the Springfield
17 office who directs my work or through phone calls to
18 our office.

19 Q. And say a phone call comes in, what
20 steps do you take?

21 A. I gather information about the
22 incident and then discuss the matter with the person
23 who's calling or if the call is coming from
24 Springfield, they will give me the information where

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1 they're requesting me to proceed to and then to
2 proceed to that site.

3 Q. And when you come to the site, what
4 steps do you take?

5 A. Take a look and try to get information
6 to see what's going on, what the situation involves,
7 what materials are involved, what's going on and
8 then try to remediate and/or alleviate some of the
9 concerns associated with the material released.

10 Q. And was it through one of these
11 emergency responses that you became familiar with
12 the site at issue here?

13 A. Yes.

14 Q. Do you recall when you went to the
15 site?

16 A. No. I would have to take a look at my
17 notes.

18 MR. KARR: May I approach the witness,
19 Mr. Hearing Officer?

20 HEARING OFFICER HALLORAN: Yes, you
21 may.

22 BY MR. KARR:

23 Q. I'm showing you a document that's been
24 admitted into evidence as Complainant's Exhibit

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1 No. 1. Are these the notes you're referring to?

2 A. Yes.

3 Q. And what is that document?

4 A. It's an --

5 MR. BAUMGARTNER: I would object at
6 this point to the witness reading the document.
7 Either it's a refreshment of his recollection or
8 else it's the document itself, which just reading it
9 is inadmissible.

10 HEARING OFFICER HALLORAN: Mr. Karr?

11 MR. KARR: I was just asking him what
12 the document was. I wasn't asking him to read it at
13 this point.

14 MR. BAUMGARTNER: I guess he's right
15 on my objection to that specific question. I was
16 premature.

17 HEARING OFFICER HALLORAN: Thank you.
18 You may proceed.

19 BY THE WITNESS:

20 A. This sheet is a copy of an incident
21 control sheet.

22 BY MR. KARR:

23 Q. Okay. And what's the purpose of the
24 incident control sheet?

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1 Mr. Karr? Mr. Baumgartner?

2 MR. BAUMGARTNER: No questions.

3 HEARING OFFICER HALLORAN: Mr. Erzen?

4 MR. ERZEN: Thank you.

5 C R O S S - E X A M I N A T I O N

6 by Mr. Erzen

7 Q. Are all of the notations on
8 Complainant's Exhibit 1 yours?

9 A. Can I take a look at it, please? No,
10 it isn't.

11 Q. So which ones are yours and which ones
12 are made by someone else?

13 A. All right. As far as I could tell,
14 everything in the first box, the notification
15 information, appears to be my handwriting and the
16 second -- the general information, the material
17 involved, the container and size, the liable party
18 and on-scene coordinator is my information. The
19 physical state does not appear to be -- I'm not
20 clear about the physical state to be honest with you
21 and the contact person is definitely not mine,
22 nature of emergency, that is not my handwriting.
23 Should I proceed?

24 Q. Please do.

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1 A. Okay.

2 Q. Assistance needed, is that your
3 handwriting?

4 A. No, that is not. On the second page,
5 personnel involved, the first line appears to be
6 mine along with the second, Greg Thompson, Diane
7 Tully appears to be mine. I'm not certain. The
8 rest does not appear to be mine at all. In the
9 environmental assessment response, that writing is
10 not mine.

11 Q. Okay. That's the box underneath the
12 heading that says letter requesting?

13 A. Correct. As far as the log of events,
14 the information written down on 12/5/84 is my
15 handwriting and the information written down on
16 12/6/84 is my handwriting, 12/27 is not my
17 handwriting.

18 Q. 2/27/86?

19 A. I apologize, 2/27/86 is not my
20 handwriting, 1/28/87 is not my handwriting and
21 2/5/87 is not my handwriting.

22 Q. Mr. Osowski, was it your practice to
23 make notes of information received from individuals
24 and organizations involved in an emergency response

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1 action in your response -- or excuse me, in your
2 incident control sheets?

3 A. Yes.

4 Q. Okay. Is there anything in your
5 incident control sheet, Complainant's Exhibit 1,
6 indicating that a tank tightness test was performed
7 in December of 1984?

8 A. On 12/5/84 there's a statement stating
9 that the storage tanks are to be pressure tested
10 on 12/5/84, testing was to be done by IT.

11 Q. Have you any notation in Complainant's
12 Exhibit 1 that that tank tightness testing was ever
13 done?

14 A. I have no information about that.

15 Q. Is there any indication in
16 Complainant's Exhibit 1 that there was a study done
17 of the geology or hydrogeology of the site?

18 A. There's nothing in my handwriting on
19 the report.

20 Q. Is there any indication in
21 Complainant's Exhibit 1 that there was a proposal
22 for a clean-up of the site submitted to you or any
23 other emergency responders?

24 A. There was a request for a proposal

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1 for a clean-up to be submitted after studies were
2 conducted of the geology and hydrogeology of the
3 area.

4 Q. My question was, is there any
5 indication in Complainant's Exhibit 1 that any such
6 study was ever provided to you?

7 A. It states here proposal submitted on
8 Monday, 12/10, I would assume it's '84, I can't read
9 that date.

10 Q. When was that -- according to your
11 incident control sheet, and I realize you don't have
12 any recollection of it, when was that 12/10/84 date
13 written?

14 A. I have no recollection.

15 Q. Would it, in fact, have been written
16 on 12/6/1984?

17 A. Once again, I have no recollection.

18 Q. Let me ask it this way: If a proposal
19 for a clean-up would have been submitted to you,
20 would it have been noted in the incident control
21 sheet?

22 A. If I did get the report, yes.

23 Q. So the absence of such an entry in
24 your incident control sheet would tend to indicate

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1 that no such report was made?

2 MR. BAUMGARTNER: Let me object to
3 that question, it's simply argumentative.

4 HEARING OFFICER HALLORAN: Mr. Erzen?

5 MR. ERZEN: We're working on past
6 recollection recorded. His practice, as he said, is
7 to note information received about emergency
8 responses. The absence of an entry in a record, in
9 a business record or recollection recorded tends to
10 indicate that such an incident or such information
11 was not received. I think it's a legitimate
12 question.

13 HEARING OFFICER HALLORAN:
14 Mr. Baumgartner, anything further?

15 MR. BAUMGARTNER: I think he just
16 explained that all he's doing is making an argument.

17 HEARING OFFICER HALLORAN: Overruled.
18 Thank you.

19 BY MR. ERZEN:

20 Q. Mr. Osowski, in order to do a proper
21 remediation for an emergency response, is it
22 essential to first obtain control of a source?

23 A. In a situation such as this, the idea
24 is to minimize the impact to the environment and

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1 then proceed with a clean-up of the situation.

2 Q. Is source control one of the first
3 steps you engage in --

4 A. Yes.

5 Q. -- in emergency responses?

6 And is source control important
7 because without source control then all the actions
8 trying to collect the contaminant are simply
9 Band-Aids on a wound?

10 A. Yes, to a degree, yes.

11 Q. Is that -- I'm sorry. Again, talking
12 about responses to releases, Complainant's Exhibit 1
13 makes note of a geological and hydrogeological
14 study. I realize you don't have any current
15 recollection of this particular site, but why is
16 it important to do a geological and hydrogeological
17 study?

18 A. It would give you an idea of the
19 extent of contamination associated with the release
20 of material.

21 Q. Without a geological and
22 hydrogeological study, is it possible that money
23 spent in an attempt to address a release might be
24 spent unwisely?

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1 A. That's hard to say. It would be
2 helpful.

3 Q. Okay. Why are hydrogeological and
4 geological studies done then?

5 A. To determine where the material is at
6 and then to address proper actions to take care of
7 that material.

8 Q. Without a hydrogeological or
9 geological study, is it possible that, for example,
10 an excavation would be done in a wrong spot?

11 A. That is a possibility.

12 Q. And that's one of the reasons why
13 those studies are performed, is that correct?

14 A. Correct.

15 Q. Mr. Osowski, as early as spring of
16 1994, were you aware that there was a lawsuit that
17 had been brought by the Abrahams against the Anests
18 concerning the gas station and the contamination of
19 the gas station?

20 MR. KARR: I'm going to object, that's
21 going way beyond direct examination.

22 HEARING OFFICER HALLORAN: Mr. Erzen?

23 MR. ERZEN: Your Honor -- I keep
24 addressing you as your Honor, I apologize.

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1 Mr. Osowski testified concerning this in that
2 lawsuit and as such it's a -- I'm sorry. Let me
3 start over again, please.

4 First of all, your Honor --
5 Mr. Halloran, the Pollution Control Board provides
6 you with the authority to run this as an orderly and
7 efficient hearing. What I would like to do is take
8 Mr. Osowski briefly through the fact that he did
9 testify in 1994 in an action between the Abrahams
10 and the Anests simply to establish that the IEPA was
11 aware of the litigation and was aware of the basis
12 of the litigation in 1994. If Mr. Karr's willing to
13 stipulate that the IEPA was aware of that, then I
14 have no problem with that, otherwise it's just a
15 short series of questions to establish that
16 Mr. Osowski was involved in litigation and the IEPA
17 and its counsel were aware of that litigation.

18 HEARING OFFICER HALLORAN: Mr. Karr?

19 MR. KARR: Again, it's going beyond
20 the direct. The fact that litigation took place is
21 irrelevant to this proceeding.

22 HEARING OFFICER HALLORAN: I would
23 have to agree, it's way beyond the direct.

24 MR. ERZEN: Your Honor, may I be

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1 allowed to ask Mr. Osowski to -- to take him on
2 direct and to take that at this point rather than
3 delay him?

4 HEARING OFFICER HALLORAN: Sure. You
5 can either do that or I guess we can do an offer of
6 proof as well.

7 MR. ERZEN: Well, if I'm allowed to
8 take him on as a direct witness, then I can just do
9 that right now and we can be done with that very
10 quickly.

11 HEARING OFFICER HALLORAN: Mr. Karr,
12 any objection?

13 MR. KARR: I can't object to that.

14 HEARING OFFICER HALLORAN: Thanks.
15 Mr. Erzen?

16 MR. ERZEN: I appreciate it. It's a
17 good resolution.

18 BY MR. ERZEN:

19 Q. Mr. Osowski, did you testify in a --
20 in some litigation where the Abrahams had sued the
21 Anests over the responsibility for contamination
22 costs at the site?

23 A. I did testify at a case.

24 Q. Okay. Was it between the Abrahams and

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1 the Anests?

2 A. I believe so, but -- like I said in
3 '94 -- I was in court.

4 MR. KARR: Excuse me. Can we go off
5 the record for a second?

6 HEARING OFFICER HALLORAN: We can go
7 off the record.

8 (Whereupon, a discussion
9 was had off the record.)

10 HEARING OFFICER HALLORAN: I'm sorry.
11 Mr. Erzen, you may proceed.

12 BY MR. ERZEN:

13 Q. Mr. Osowski, before this case in which
14 you testified in 1994, did you become involved in a
15 response to a subpoena that was provided to the
16 Agency?

17 A. If I was required to testify, I would
18 assume it was through a subpoena.

19 Q. Did you provide that subpoena to
20 counsel for IEPA?

21 A. I believe I -- I don't have any
22 recollection. I don't have any recollection.

23 Q. Mr. Osowski, I'm going to read you
24 what I'll represent is from your testimony in that

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1 1994 litigation -- excuse me, your 1994 testimony in
2 the litigation and ask if this refreshes your
3 recollection. This is questions by Mr. Baumgartner.

4 By the way, do you remember
5 Mr. Baumgartner?

6 A. He looks a little familiar.

7 Q. Okay.

8 Question: Mr. Osowski, do you
9 have any personal memory, I mean at all, memory of
10 any of that?

11 Answer: No, sir.

12 Question: You were just telling
13 us what the records say?

14 Answer: Yes, sir.

15 BY MR. ERZEN:

16 Q. This is just for context and I will
17 skip a question and answer.

18 Question: How did you obtain
19 these records?

20 Answer: I'm sorry?

21 Question: How did you get these
22 records?

23 Answer: These here?

24 Question: Yes.

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1 Answer: I pulled them out of the
2 file.

3 Question: When?

4 Answer: When I received the subpoena.

5 Question: The reason I'm asking is I
6 notice you have a mailing envelope with you and I
7 wondered if they had been sent to you by somebody?

8 Answer: They were sent -- after the
9 subpoena, I met with the Agency's attorney.
10 He requested those records to be looked at.

11 Question: Okay. And they were sent
12 to him?

13 Answer: Yes, sir. They were handed
14 to him. I personally met him.

15 Question: He returned them?

16 Answer: Yes, sir.

17 Question: That's from Springfield,
18 isn't it?

19 Answer: Correct.

20 Does that refresh your recollection,
21 Mr. Osowski, that you were involved in a subpoena
22 in the Abraham versus Anest case and did, in fact,
23 discuss that subpoena with counsel for IEPA?

24 A. If that's my testimony, then, yes.

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1 Q. Is it your understanding, Mr. Osowski,
2 that the Abraham versus Anest case in which you
3 testified in 1994 was an attempt to resolve who is
4 responsible for costs related to the environmental
5 conditions at the gas station at issue in this case
6 here today?

7 A. All I could sort of recollect was
8 there was a dispute about the station.

9 Q. Okay. And that dispute involved
10 environmental issues at the station?

11 A. I'm not aware of that.

12 Q. Do you know of any other reason you
13 would have been asked to testify if it didn't
14 involve environmental --

15 A. I have no clue in that regard.

16 Q. Mr. Osowski, were you being paid in
17 1984 by the State of Illinois?

18 A. Yes.

19 Q. So costs were incurred as a result of
20 your going out to that gas station site in 1984?

21 A. Yes.

22 Q. Mr. Osowski, are you aware of any
23 justification for the delay in the State of Illinois
24 advancing the cost claim in its action in this case

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1 here today?

2 MR. KARR: I'm going to object. He
3 has no foundation to ask that question. He hasn't
4 testified that he has any --

5 HEARING OFFICER HALLORAN: I'm sorry.
6 Could you read the question back, please, Terry?

7 (Whereupon, the requested
8 portion of the record
9 was read accordingly.)

10 HEARING OFFICER HALLORAN: Mr. Erzen,
11 your response to Mr. Karr's objection?

12 MR. ERZEN: That's certainly an area
13 Mr. Karr can raise in cross-examination. It's just
14 a question of a longstanding employee of the IEPA of
15 whether he's aware of any reason for the delay.

16 HEARING OFFICER HALLORAN: I'll allow
17 it. Overruled.

18 BY THE WITNESS:

19 A. Can I have the question?

20 BY MR. ERZEN:

21 Q. Sure. I'll try to do my best with it.

22 Are you aware of any reason or
23 justification for the delay in the State of Illinois
24 advancing a cost claim for this gas station that's

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1 at issue here today?

2 A. My answer to your question would be I
3 wasn't aware of any delay or I wasn't aware of the
4 situation with the facility after I stopped
5 involvement in this after these two days.

6 Q. And your last involvement was in 1984?

7 A. Correct.

8 Q. Are you aware of any NPDES permits
9 issued to State Oil, S & S Petroleum or the Anests
10 for this gas station?

11 A. I'm not aware of those.

12 Q. Mr. Osowski, what does it cost to
13 purchase 100-foot boom suitable for use in a low
14 flow stream?

15 A. Current -- I'm guessing, I don't do
16 costs per se, but I've heard it's roughly \$100 for a
17 boom of roughly 30 feet in length.

18 Q. So 100-foot boom may cost three to
19 \$400?

20 A. If you do the math, yeah.

21 Q. Has that cost, to your knowledge,
22 changed substantially since the 1980s?

23 A. I would assume it was cheaper at that
24 time than it is now.

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1 MR. ERZEN: Okay. I don't have any
2 further questions.

3 HEARING OFFICER HALLORAN: That was
4 your direct and then --

5 MR. ERZEN: Yes.

6 HEARING OFFICER HALLORAN:
7 Mr. Baumgartner, do you want to --

8 MR. BAUMGARTNER: I have some cross in
9 connection with that direct.

10 HEARING OFFICER HALLORAN: Mr. Karr,
11 you can follow-up after Mr. Baumgartner.

12 MR. KARR: Very good.

13 C R O S S - E X A M I N A T I O N
14 by Mr. Baumgartner

15 Q. Mr. Osowski, am I correct in my
16 understanding that you have no record of anything
17 there after these two days?

18 A. Correct.

19 Q. Am I also correct in my assumption
20 that you had really nothing to do with this location
21 after those two days?

22 A. That is correct.

23 Q. So if a report came in or a test was
24 done after those two days, you wouldn't know

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1 anything about it?

2 A. Correct.

3 MR. BAUMGARTNER: That's all the
4 questions.

5 HEARING OFFICER HALLORAN:
6 Thank you, Mr. Baumgartner. Mr. Karr, cross?

7 MR. KARR: Just briefly.

8 C R O S S - E X A M I N A T I O N

9 by Mr. Karr

10 Q. Mr. Osowski, as an emergency
11 responder, do you have any role in tabulating Agency
12 expenses and attempting to recover those expenses
13 from responsible parties?

14 A. No.

15 MR. KARR: That's all.

16 HEARING OFFICER HALLORAN: Do you have
17 any redirect --

18 MR. KARR: No, I do not -- I believe I
19 don't.

20 HEARING OFFICER HALLORAN: Thank you.
21 Anything further?

22 MR KARR: Not from the State.

23 HEARING OFFICER HALLORAN: Okay.

24 You may step down, sir. Thank you very much.

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1 MR. ERZEN: Thank you.

2 HEARING OFFICER HALLORAN: Mr. Karr,
3 put on your second witness.

4 MR. KARR: The complainant would like
5 to call Mr. Don Klopke to the stand.

6 (Witness sworn.)

7 WHEREUPON:

8 DONALD KLOPKE,
9 called as a witness herein, having been first duly
10 sworn, deposeth and saith as follows:

11 DIRECT EXAMINATION

12 by Mr. Karr

13 Q. Mr. Klopke, could you state your name
14 and spell it for the court reporter, please?

15 A. It's Donald Klopke, K-l-o-p-k-e.

16 Q. And, Mr. Klopke, are you employed?

17 A. Yes.

18 Q. And where is that at?

19 A. State of Illinois, Environmental
20 Protection Agency.

21 Q. And what position do you currently
22 hold?

23 A. Emergency responder.

24 Q. And how long have you been in that

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1 position?

2 A. Roughly 1984.

3 Q. And how long have you been with the
4 Illinois EPA?

5 A. Since 19 -- March 24th, 1980.

6 Q. Two long-time employees here today.

7 Would you briefly describe your
8 duties as an emergency responder?

9 A. Respond to environmental incidents,
10 try to safeguard public health safety in the
11 environment, emergency basis.

12 Q. And in your role as an emergency
13 responder, did you become familiar with the service
14 station at issue in this case?

15 A. Yes, I did.

16 Q. And how did that come about, do you
17 recall?

18 A. I would imagine either a call from
19 local authority or maybe some assistance from --
20 either a call from our Springfield office.

21 MR. ERZEN: I object to the
22 speculation, Mr. Halloran.

23 HEARING OFFICER HALLORAN: I'll let it
24 stand. Overruled.

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1 MR. KARR: May I approach the witness,
2 Mr. Hearing Officer?

3 HEARING OFFICER HALLORAN: Sure.

4 BY MR. KARR:

5 Q. Mr. Klopke, I'm showing you a document
6 that's already been admitted into evidence as
7 Complainant's Exhibit No. 1 and ask you to take a
8 look at that and see if there's any portions that
9 you filled out.

10 A. On page two, lower right-hand corner,
11 appears to be my handwriting.

12 Q. Okay. Any other parts?

13 A. On page three the section I believe
14 that's 2/27/86.

15 Q. And anything else?

16 A. I don't believe so.

17 Q. Are there any portions that indicate
18 that you were present at the station?

19 A. My entry on 2/27/86 would be the first
20 and then looking under 1/28/87, it appears that I
21 was there with another emergency responder.

22 Q. Do you recall if there were any other
23 instances where you were at the site?

24 A. Do not -- I do not recall.

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1 Q. So we know you were at least there on
2 February 27th, '86 and January 28th, 1987?

3 A. Correct.

4 Q. Okay. Do you recall the conditions at
5 the site on either of those two visits?

6 A. Not without referring to my notes.

7 Q. Would you like to take a look at
8 those?

9 A. Okay.

10 Q. Now that you've had an opportunity to
11 look at them, does that refresh your recollection as
12 to when you were out there --

13 A. Yes.

14 Q. -- what the conditions were?

15 A. Yes.

16 Q. Could you describe the conditions on
17 your first visit of February 27th, 1986?

18 A. Based on the notes, there was a sheen
19 coming off of the west side of the creek.

20 MR. ERZEN: Mr. Halloran, I'm --
21 this is not a comment on the witness because
22 he -- obviously, a large number of years have
23 passed, which is part of the problem with this case,
24 but if the witness has a present recollection,

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1 certainly he can testify to his present
2 recollection. If, in fact, he's simply interpreting
3 or reading his notes, then that is not a proper
4 testimony because he's not testifying from his
5 current recollection, but is simply reciting his
6 interpretation of a recorded recollection. So we
7 should find out whether you have a current
8 recollection, if so, you can testify. If he doesn't
9 have a current recollection, then it's simply his
10 recorded recollection going through the record and
11 he has nothing to say because he has no current
12 recollection of anything.

13 HEARING OFFICER HALLORAN: Mr. Karr?

14 MR. KARR: I asked the witness if that
15 refreshed his recollection and he respond
16 affirmatively.

17 MR. ERZEN: And then in the course of
18 his answer he said based upon my notes, I can tell
19 you and so I wanted to clarify whether it's a
20 refreshed recollection or whether he's simply
21 interpreting his notes.

22 HEARING OFFICER HALLORAN: I heard
23 that as well. Could you ask the witness a question
24 whether it's refreshed his recollection?

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1 BY MR. KARR:

2 Q. Mr. Klopke, after reviewing your
3 notes, do those help you to refresh your
4 recollection currently or as counsel stated were you
5 just interpreting the --

6 A. It refreshes my recollection.

7 Q. You may continue on with the first
8 time you were out there, February 27th, 1986.

9 A. Yes. There was a sheen apparent on
10 the -- I believe, it's Boone Creek and it was coming
11 from the west side of Boone Creek, the side that the
12 gas station resides on and I believe -- I do recall
13 that a boom had been placed there.

14 Q. Okay. And your second visit on
15 January 28th, 1987, had conditions changed? Were
16 they the same? What do you recall?

17 A. I think -- I don't have a specific
18 recollection of that one. I'd have to refer to my
19 notes.

20 Q. Complainant's Exhibit No. 1 on the
21 January 28th, 1987, entry makes a reference to
22 100 percent LEL. Can you describe what that's all
23 about?

24 A. That's the lower explosive limits and

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1 it's read with a combustible gas indicator, an
2 explosimeter (phonetic).

3 Q. And what would that signify when its
4 100 percent LEL?

5 A. That it's approaching a danger zone
6 where if an ignition source were applied and the
7 proper air to gas mixture was present that there
8 could be an explosion.

9 MR. KARR: I have nothing further.
10 Thank you.

11 HEARING OFFICER HALLORAN: Thank you,
12 Mr. Karr. Mr. Erzen?

13 MR. ERZEN: I'd like to mark a
14 document as -- what would be appropriate, Abraham
15 Respondent 1?

16 HEARING OFFICER HALLORAN: Yeah, that
17 would be appropriate.

18 C R O S S - E X A M I N A T I O N

19 by Mr. Erzen

20 Q. Abraham Respondent 1 is a single sheet
21 of paper headed Office of the State Fire Marshall,
22 Division of Fire Protection, complaint and/or
23 incident report. At the bottom it has received
24 Maywood office, April 15, 1987, Illinois EPA/DAPC,

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1 State of Illinois.

2 Mr. Klopke, you worked at the
3 Maywood office of the IEPA, is that correct, in
4 1987?

5 A. Yes, I did.

6 Q. Okay. I'd like to show you Abraham
7 Respondent Exhibit 1. First of all, on the lower
8 right-hand corner there's a handwritten notation,
9 Brad/Don. Is it your understanding that refers to
10 Brad Benning and yourself?

11 A. I would -- yes.

12 Q. Do you recall seeing this document on
13 or about April of 1987?

14 A. No, I do not.

15 Q. Is this a complaint and/or incident
16 form relating to your January 27, 1987, visit to the
17 gas station that's at issue in this case?

18 A. Could you repeat that? I'm sorry.
19 I'm trying to read and listen.

20 Q. That's quite all right.

21 Is this a complaint and/or
22 incident report relating to your January 27th, 1987,
23 visit to the gas station that's at issue in this
24 case?

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1 A. It appears so.

2 Q. Okay. I'd like to direct your
3 attention to the action taken section.

4 A. Okay.

5 Q. In particular, the second line.

6 HEARING OFFICER HALLORAN:
7 Mr. Baumgartner?

8 MR. BAUMGARTNER: Well, I have to wait
9 until he asks a question. I'm going to be
10 objecting, yes.

11 BY MR. ERZEN:

12 Q. And I'll read the second sentence and
13 then I'll have a question for you subject to
14 Mr. Baumgartner's objection.

15 MR. BAUMGARTNER: I'm going to be
16 objecting to the document be read into the record
17 too.

18 HEARING OFFICER HALLORAN:
19 Mr. Baumgartner, your grounds? I guess this is a
20 tad premature since Mr. Erzen hasn't started reading
21 the document.

22 MR. BAUMGARTNER: Mr. Erzen has
23 indicated that he will be reading portions of the
24 document, which then places those portions into the

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1 record. There's been no foundation for this
2 document other than simply the markings that are on
3 it and until there is a foundation, it can't be
4 introduced into evidence and until it can be
5 introduced into evidence, it can't be read into the
6 record.

7 HEARING OFFICER HALLORAN: Mr. Erzen?

8 MR. ERZEN: Your Honor, I could
9 probably lay the foundation with Mr. Klopke and I
10 would be happy to do. Alternatively, and I'm not
11 sure how you want to conduct the hearing, I can move
12 it into evidence at this point as being a document
13 produced by the State.

14 Mr. Klopke's already indicated
15 that he did work at the Maywood office, which has
16 the received stamp on it. I guess would it be
17 appropriate for me to make a motion that Abraham
18 Respondent 1 be moved into evidence?

19 MR. BAUMGARTNER: I think that would
20 be a way to start, yeah.

21 MR. ERZEN: I so move.

22 MR. BAUMGARTNER: And I would object
23 to its introduction. We don't know if this is the
24 entire document. We don't know how it got anywhere.

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1 We know simply that we have a photocopy of a piece
2 of paper which has a stamp on it that says received,
3 Maywood office and I don't know how it's relevant to
4 anything that's at issue in this cause. Those are
5 my objections.

6 HEARING OFFICER HALLORAN:

7 Mr. Karr, do you want to weigh in on this?

8 MR. KARR: I have no objection to this
9 document.

10 HEARING OFFICER HALLORAN: Mr. Erzen?

11 MR. ERZEN: It's relevant in that
12 insofar as the State is seeking penalties against my
13 clients. One of the issues in penalties is the
14 equities, including the equities -- I'm sorry. One
15 issue is equities. This document intends to
16 indicate that the cause of the response of 1987
17 or the leak in 1987 was, in fact, a release that
18 took place before my clients even knew the station
19 existed.

20 MR BAUMGARTNER: Can I respond at this
21 point?

22 HEARING OFFICER HALLORAN: Yes,
23 you may, Mr. Baumgartner.

24 MR. BAUMGARTNER: The statement in

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1 question does not indicate a cause, it indicates a
2 belief and it says specifically we believe without
3 necessarily indicating who the we is and goes on to
4 state their belief as to the source of the gasoline.
5 I don't know the basis for Mr. O'Shea's belief. His
6 belief at that point is strictly hearsay. I don't
7 know if he's an expert, if he had information to
8 back up that belief or anything else, but in the
9 sense of bringing it in to state his belief, it's
10 hearsay.

11 HEARING OFFICER HALLORAN: I think
12 there's a problem with foundation. I think at this
13 point I will sustain Mr. Baumgartner's objection,
14 but I will take it with the case as an offer of
15 proof and you may proceed, but the record will
16 reflect it is not admitted, but taken with the case
17 as an offer of proof.

18 MR. BAUMGARTNER: May I have the
19 concession that I don't have to keep objecting to
20 each question, that we can just --

21 HEARING OFFICER HALLORAN: It's a
22 continuing objection.

23 MR. BAUMGARTNER: It's a continuing
24 objection.

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1 HEARING OFFICER HALLORAN: Correct,
2 sir.

3 MR. ERZEN: That would be agreeable.
4 Let me work a little on the foundation.

5 BY MR. ERZEN:

6 Q. First of all, Mr. Klopke, do you
7 recognize this document, Abraham Respondent Exhibit
8 1, or the form of the document?

9 A. No, I do not.

10 Q. Have you ever received a complaint
11 and/or incident form from the Office of the State
12 Fire Marshall?

13 A. Not that I recall.

14 Q. Okay. Do you recall Daniel O'Shea
15 from the Office of the State Fire Marshall being
16 present when you responded to the gas station on
17 January 27th, 1987?

18 A. I do not recall.

19 Q. If you look at Complainant's Exhibit
20 1, page four of four, and in the section under the
21 time, 1/28/87, do you see that, sir?

22 A. Yes.

23 Q. Does that say DJK/BPB met with chief
24 Bennett (phonetic) and Dan O'Shea, SFM?

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1 A. Yes.

2 Q. And in your ordinary practice of
3 taking notes in an incident control sheet, what does
4 DJK stand for?

5 A. Donald J. Klopke.

6 Q. That's you, sir?

7 A. Yes.

8 Q. And BPB stands for Brad Benning?

9 A. Yes.

10 Q. And what does SFM stand for?

11 A. State Fire Marshall.

12 Q. So the State Fire Marshall was, in
13 fact, based upon Complainant's Exhibit 1, present at
14 this gas station in January of 1987?

15 A. Based on my notes refreshing my
16 memory, true.

17 Q. In Complainant's Exhibit 1 I believe
18 you indicated that you were the one who wrote the
19 note at the bottom of page two, the lower right-hand
20 side?

21 A. Yes.

22 Q. Can you read that for us, please?

23 A. Yeah. Letter requesting one; log in
24 sump drawdowns; two, check depth of existing sumps

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1 versus depth of water table, adjust accordingly;
2 last pressure test, long term -- and No. 4, long
3 term solution in the event sumps do not eliminate
4 A; excavation, B; continuous system.

5 Q. When you read last pressure test, is
6 there a punctuation mark at the end of that?

7 A. There's a question mark.

8 Q. Does that question mark indicate that
9 you did not have a pressure test available for the
10 tanks?

11 A. The question is asking when in my
12 letter -- in this reference the letter would be
13 requesting when the last pressure test took place.

14 Q. So apparently that was information
15 you wanted to know, but did not know?

16 A. Yes.

17 Q. When you responded to the site in 1986
18 on page three of four --

19 A. Okay.

20 Q. -- S & S is noted in your entry of
21 2/27/86, is that correct?

22 A. I can look at my notes?

23 Q. Yes, please.

24 A. Yes. Under No. 2 I believe and

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1 three.

2 Q. And No. 3 says requested S & S
3 Petroleum and Rich Barnes to contact Agency ASAP to
4 review problems, is that a correct reading of that?

5 A. Yes.

6 Q. So as of 2/27/86 you, on behalf of the
7 IEPA, were contacting S & S Petroleum, is that
8 correct?

9 A. It appears so based on these notes.

10 Q. Mr. Klopke, in 1987, did you receive
11 information indicating that Mr. Abraham had hired a
12 company to address some requirements that you had
13 set forth for the site?

14 A. I do not recall that.

15 Q. Do you know if that happened or did
16 not happen?

17 A. I don't recall that.

18 Q. Okay. Mr. Klopke, I've handed you a
19 copy of a letter, it's dated May 28th, 1987, from a
20 Mark T. Williams, marketing manager/geologist and
21 addressed to Donald J. Klopke at 1701 First Avenue,
22 Suite 600, Maywood, Illinois and it has a received
23 Maywood office May 29, 1987, IEPA/DAPC, State of
24 Illinois stamp on the bottom.

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1 Does this refresh your
2 recollection that, in fact, Mr. Abraham did retain
3 a company to address the requirements that you set
4 forth in 1987?

5 A. I don't recall that.

6 Q. Do you have any reason to believe that
7 this letter is not, in fact, a letter that was sent
8 to you and that you received?

9 A. No reason to believe that either way.

10 MR. ERZEN: Mr. Halloran, based upon
11 what we've -- the procedure I think we've worked out
12 with the first exhibit, I now move to admit Abraham
13 Respondent Exhibit No. 2, please.

14 HEARING OFFICER HALLORAN:
15 Any objection?

16 MR. KARR: No objection.

17 MR. BAUMGARTNER: No objection.

18 HEARING OFFICER HALLORAN: Okay.
19 Respondent Abraham's Exhibit No. 2 is admitted.

20 MR. ERZEN: Can I have a moment
21 please? I'd like to have this marked as Abraham
22 Respondent Exhibit 3 and if it will help those who
23 are following along, this is similar to
24 Complainant's Exhibit 1, but has additional entries.

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1 It was also used as a deposition exhibit in the
2 case. If there's no objection, I'd like to move
3 that Abraham Respondent Exhibit No. 3 be admitted
4 into evidence.

5 HEARING OFFICER HALLORAN: Any
6 objection?

7 MR. KARR: No objection.

8 HEARING OFFICER HALLORAN:
9 Mr. Baumgartner?

10 MR. BAUMGARTNER: No objection.

11 HEARING OFFICER HALLORAN: Okay.
12 Respondent Abraham Exhibit No. 3 is admitted.

13 BY MR. ERZEN:

14 Q. Mr. Klopke, I've handed you a document
15 that's marked as Abraham Respondent Exhibit No. 3,
16 which is similar, as I've explained, to
17 Complainant's Exhibit 1, but this has additional
18 entries and I believe on page four of four,
19 in particular, I'd like to address your attention to
20 the entry 2/20/87.

21 MR. KARR: Just for clarification,
22 there's two page four of four.

23 MR. ERZEN: I'm sorry. The first page
24 four of four. The one -- I'm sorry. The first page

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1 four of four, the one that has a 2/20/87 entry at
2 the bottom of that page, which is actually the
3 fourth page of Abraham Respondent Exhibit 3.

4 BY THE WITNESS:

5 A. If you could work me through that.
6 Again, I'm trying to listen and read. I should do
7 one or the other.

8 BY MR. ERZEN:

9 Q. Okay. The entry for 2/20/87, is that
10 your writing, Mr. Klopke?

11 A. I'm not sure.

12 Q. If it isn't your writing, do you know
13 whose writing it would be?

14 A. Either -- possibly Brad Benning's.

15 Q. Okay.

16 A. Or Ed Osowski. Those would be the
17 only two that would be in our office at the time.

18 Q. The 2/20/87 note refers to a Mark
19 Williams of Groundwater Tech, do you see that in the
20 second line?

21 A. Yes.

22 Q. Okay. Is that the same name that
23 appears in the letter to you that's been marked as
24 Abraham Respondent Exhibit 2?

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1 A. Yes.

2 Q. If you could flip to the next page,
3 which ironically is marked page three of four at the
4 bottom, but is actually the fifth page of this
5 document, of Abraham Respondent Exhibit 3, and
6 I'd like to direct your attention to the entry,
7 March 2, 1987?

8 A. Yes.

9 Q. Is that your writing, Mr. Klopke?

10 A. I do not believe so.

11 Q. Do you know whose writing that is?

12 A. Again, either Brad Benning's or Ed
13 Osowski.

14 Q. Okay. Does that note indicate that a
15 boom has been deployed at the site?

16 A. Yes.

17 Q. Okay. And going to -- the next line
18 ends, question of liability, appears to be delay in
19 action, do you see that there, sir?

20 A. Yes.

21 Q. You're not sure who wrote that, but
22 you don't believe it is you?

23 A. Yes.

24 Q. On a whole different point.

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1 Mr. Klopke, are you aware of any NPDES permits
2 issued to the Anests or State Oil or S & S Petroleum
3 for the gas station at issue in this case?

4 A. No.

5 Q. Mr. Klopke, do you know how much a
6 boom suitable for use in a body of water like Boone
7 Creek for containing a gasoline seep, how much that
8 kind of boom would cost?

9 A. Not directly.

10 Q. Do you have any rough estimate of how
11 much such a boom would cost?

12 A. Several hundred dollars.

13 Q. For, say, 100 foot length?

14 A. Installed?

15 Q. Yes.

16 A. Several hundred dollars.

17 Q. Okay. Mr. Klopke, on the first page
18 of either Abraham Respondent Exhibit 3 or
19 Complainant's Exhibit 1, in the assistance needed
20 section, smack in the middle of the page, is that
21 your writing?

22 A. No.

23 Q. Okay. Do you know whose writing that
24 is?

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1 A. Not specifically.

2 Q. On page two of either Complainant's
3 Exhibit 1 or Abraham Respondent Exhibit 3, you did
4 write the material in the lower right-hand corner?

5 A. Correct.

6 Q. Are you aware of any information in
7 which sump drawdowns were logged?

8 A. No, I do not.

9 Q. Are you aware of whether depths of the
10 existing sumps versus the depth of the water table
11 was ever compared or checked and if need be,
12 adjusted?

13 A. I do not recall.

14 Q. Did you ever recall receiving any
15 information as to when the tanks at this gas station
16 were last tested?

17 A. No, sir.

18 Q. I'd like to have a document marked as
19 Abraham Respondent Exhibit 4.

20 Mr. Klopke, I hand you a document
21 that's marked as Abraham Respondent Exhibit 4, which
22 is a letter dated April 27th, 1987.
23 The letterhead is Millstream Union 76, the addressee
24 is James Patrick O'Brien of IEPA in Springfield and

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1 the signature on the letter is from Charles Abraham.
2 There's a received stamp from the Maywood office May
3 5, 1987, Illinois EPA/DAPC, State of Illinois.

4 Mr. Klopke, do you recall
5 receiving this letter?

6 A. No.

7 Q. Do you ever recall reviewing this
8 letter?

9 A. No, I do not.

10 Q. When you're involved with a site as an
11 emergency responder as you were with the gas station
12 at issue in this case, do you then not receive any
13 subsequent communications relating to the site?

14 A. It depends on the number of people
15 involved in the site. Within our group it's not
16 unusual for one of us to -- in this case, there were
17 three people that were involved. One person might
18 not see all the information that's in there.

19 Q. Does the received stamp at the Maywood
20 office, the indication underneath it, does that
21 indicate that this letter was, in fact, received at
22 the Maywood office?

23 A. Yes.

24 Q. And it was addressed to the

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1 Springfield office, correct?

2 A. Yes.

3 Q. Does that suggest to you that it was
4 sent from Springfield to Maywood?

5 A. Yes.

6 Q. Who at Maywood would have looked at
7 this letter, if you know, sir?

8 A. I don't.

9 Q. Okay. At the bottom of this letter
10 the paragraph that starts on page one and runs over
11 to page two -- I'm sorry. Let me do this.

12 MR. ERZEN: I'd like to move Abraham
13 Respondent Exhibit 4 into evidence.

14 HEARING OFFICER HALLORAN: Any
15 objection?

16 MR. KARR: No objection.

17 MR. BAUMGARTNER: No.

18 HEARING OFFICER HALLORAN: So
19 admitted.

20 MR. ERZEN: Thank you.

21 BY MR. ERZEN:

22 Q. At the bottom of this letter it says,
23 and I'm picking up on the sentence that carries on
24 over to page two, in fact, when Don Klopke of your

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1 Maywood office first came to see me in February he
2 told me himself the problem was not mine because of
3 an ongoing problem before I ever purchased the
4 station. The next time I saw Don he had talked with
5 State Petroleum who informed him I was aware of the
6 problem before the purchase was closed. For this
7 reason Don told me that, in fact, the problem was
8 mine.

9 Mr. Klopke, it's your testimony
10 you have -- you don't recall ever having seen this
11 letter?

12 A. No.

13 Q. Is there any other Don Klopke at the
14 Maywood office?

15 A. No.

16 Q. So it's your presumption that the Don
17 Klopke referred to in this letter is you?

18 A. Yes.

19 Q. You do not recall having this letter
20 provided to you?

21 A. Yes. I do not recall.

22 Q. I'm sorry. It was a bad question.
23 Thank you for your better answer than I deserved.

24 Okay. Do you recall a

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1 conversation with Mr. Abraham?

2 A. No.

3 Q. Okay.

4 A. Not directly. I mean, in the course
5 of our involvement, there's always conversations.

6 Q. But you don't recall any specific
7 conversation --

8 A. Not specific.

9 Q. -- is that correct?

10 MR. ERZEN: I don't have any other
11 questions.

12 HEARING OFFICER HALLORAN: Thank you,
13 Mr. Erzen. Mr. Baumgartner, cross?

14 MR. BAUMGARTNER: No questions.

15 HEARING OFFICER HALLORAN: Thank you,
16 Mr. Baumgartner. Any redirect, Mr. Karr?

17 MR. KARR: No sir.

18 HEARING OFFICER HALLORAN: Thank you.
19 It looks like we're finished. You may step down.
20 Thank you, Mr. Klopke.

21 (Whereupon, after a short
22 break was had, the
23 following proceedings
24 were held accordingly.)

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1 HEARING OFFICER HALLORAN: All right.
2 We're back on the record. Mr. Karr is going to be
3 calling his third witness.

4 (Witness sworn.)

5 WHEREUPON:

6 S T E P H E N C O L A N T I N O,
7 called as a witness herein, having been first duly
8 sworn, deposeth and saith as follows:

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

10 by Mr. Karr

11 Q. Mr. Colantino, could you please state
12 your name and spell it for the court reporter,
13 please?

14 A. Stephen Colantino, S-t-e-p-h-e-n,
15 C-o-l-a-n-t-i-n-o.

16 Q. And are you currently employed?

17 A. Yes.

18 Q. And where is that at?

19 A. The Illinois Environmental Protection
20 Agency.

21 Q. Could you briefly run through your
22 employment history with the Agency?

23 A. Yes. I was initially hired by the
24 Illinois EPA as a contractor in 1978, worked on a

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1 hydrological study being conducted throughout the
2 state. It was an 18-month contract. At the end of
3 that 18-month period, I was hired as a full-time
4 state employee in the special waste hauling section
5 I believe of the Bureau of Land for the Illinois
6 EPA, worked there for several years in that
7 department, moved to the resource conservation and
8 recovery act reporting section, worked there for a
9 couple of years, moved to the immediate removal
10 section, worked there for a couple of years.
11 In about 1986, I moved to the leaking underground
12 storage tank program and then in 1990 I resigned
13 from the Agency, worked as a private consultant
14 until 1994, returned to the Agency, worked as a
15 special assistant to the division manager in the
16 Bureau of Land and later was -- accepted a position
17 as the Office of Brownfield assistance, manager,
18 which I currently hold.

19 Q. Mr. Colantino, did you give a
20 deposition prior in this proceeding?

21 A. Yes.

22 Q. And in that deposition you stated, I
23 believe, that you left the Agency in 1989?

24 A. I believe I did.

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1 Q. Here you said it was 1990?

2 A. I was incorrect in the deposition.

3 Q. And do you recall about when in 1990
4 that you left?

5 A. November.

6 Q. Okay. So from some time in 1986 to
7 November 1990 you were with the LUST section of the
8 Illinois EPA?

9 A. Yes.

10 Q. And what does LUST stand for?

11 A. Leaking underground storage tank.

12 Q. What type of activities did you do --
13 what were your job duties in the LUST section?

14 A. I was a LUST project manager
15 responsible for responding to releases or suspected
16 or threatened releases from underground storage
17 tanks.

18 Q. And in the course of your work in the
19 LUST section, did you become familiar with the site
20 that is at issue in this case?

21 A. Yes.

22 Q. And how did you become familiar with
23 it?

24 A. As I recall, there was a complaint or

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1 a notice of petroleum on the Boone Creek that was
2 filed by the local chief of -- fire chief.

3 Q. And do you recall approximately when
4 that was?

5 A. Late 1980s, but I do not recall the
6 specific date.

7 Q. It was during your employment in the
8 LUST section, though?

9 A. Yes.

10 Q. Did you ever personally visit this
11 site?

12 A. Yes.

13 Q. Do you recall how many times?

14 A. Not specifically. I can recall four,
15 five times perhaps.

16 Q. Could you run through the -- each one
17 of those visits for us, please?

18 A. Yes. My first visit was shortly
19 after the LUST section or LUST program group, it
20 wasn't a section then, received notice of the
21 complaint from the fire department and I was sent
22 to follow-up on that complaint to verify or to see
23 if there was anything that the LUST program could do
24 in response to the complaint. So I visited the site

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1 at that time initially.

2 Q. Mr. Colantino, I'm going to show you a
3 document that's been marked as Complainant's Exhibit
4 No. 1 and ask you to take a look at it and on page
5 four of four at the top there's an entry, January
6 28th, 1987. It says contacted by Chris Bennett,
7 local fire chief, gasoline entering creek at Union
8 76 station. Do you see that entry?

9 A. Yes, I do.

10 Q. Is that the complaint from the fire
11 chief or fire department that you were referring to?
12 Was it about that time frame?

13 A. No, I do not. I believe it was a
14 subsequent complaint by the fire department. It was
15 not, to my recollection in 1987. I would put it
16 more in the time frame of 1989.

17 Q. Okay. So as you recall some time in
18 1989 you went out there in response to the complaint
19 from the fire department to assess the situation?

20 A. If I may, I'd like to clarify that.
21 I did not receive the complaint directly, it was
22 passed up through the Agency. Whether or not it was
23 the complaint that you showed me in 1987 that
24 finally made it to the LUST program, if it was --

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1 I don't believe so. It's my sense that it was a
2 subsequent complaint to that, but I did not talk
3 to the chief of police or the fire department
4 specifically on the complaint. It was passed on
5 that -- the complaint was received by the Agency and
6 that I -- it was believed to be something related to
7 a leaking underground storage tank and it eventually
8 worked to my group.

9 Q. So you went out there to assess the
10 situation, is that the extent of your first visit?

11 A. Yes.

12 Q. And your second visit?

13 A. As I recall, my second visit was
14 to talk to Mr. Abraham about taking steps to
15 investigate and mitigate what was believed to be
16 releases from underground storage tanks on that site
17 and to inform him that if he was unable or unwilling
18 to do certain activities to investigate and try and
19 mitigate the releases and keep the release -- the
20 petroleum that was reaching the creek under control,
21 that the Agency would undertake those activities and
22 we would seek to recoup our costs.

23 Q. Is that the extent of your second
24 visit that you recall?

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1 A. Well, no, not completely.
2 Mr. Abraham showed me the site, showed me where
3 recovery trenches were -- excuse me, recovery sumps
4 were, showed me where tank locations were. I seem
5 to recall that we walked around the site. I was
6 probably there for a couple of hours.

7 Q. And your third visit?

8 MR. ERZEN: Excuse me, your Honor, in
9 order to be able to work through the visits, is it
10 possible to have Mr. Colantino give us, to the best
11 of his recollection, when this second visit was to
12 set a foundation for it?

13 HEARING OFFICER HALLORAN:

14 Mr. Karr -- and while I'm at it, you don't have to
15 stand when you're making an objection. In fact, you
16 can sit when you're doing your direct or cross. I
17 should have mentioned that earlier, but the
18 objection is sustained. Mr. Karr?

19 BY MR. KARR:

20 Q. To the extent you can, Mr. Colantino,
21 do you recall the time frame of this second visit?

22 A. I cannot recall with any certainty,
23 no.

24 Q. Okay. As you recall, the first visit,

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1 though, you thought was some time in '89?

2 A. Yes. I can speculate. I recall that
3 it was a cold wintery day, there was snow and there
4 was ice on the creek and it was January is what I
5 recall. I do not have a specific knowledge of the
6 day.

7 Q. That was your first visit or second
8 visit?

9 A. That was my first visit. My second
10 visit, I recall, was shortly thereafter, February --
11 into February, maybe the first of March, that time
12 frame is what I recall.

13 Q. Mr. Colantino, I'm going to show you
14 an exhibit that's been admitted into evidence as
15 Complainant's Exhibit No. 4 and ask you to take a
16 look at that.

17 A. Yes.

18 Q. Does that help refresh your
19 recollection as to when you were out there and spoke
20 with Mr. Abraham?

21 A. I still can't pin it down, the exact
22 time or dates.

23 Q. And your third visit?

24 A. My thirist visit, as I recall, was to

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1 meet with state multi-site contractors to discuss
2 and possibly lay out the location of an interceptor
3 trench that was to be installed in an effort to halt
4 the migration of petroleum to the creek.

5 Q. What was the time relationship between
6 the second visit and this one when you met with the
7 contractor?

8 A. It was in the general -- generally the
9 same time frame. As I recall, it seemed to be
10 warmer, certainly a sunnier day. I recall it was
11 dry. I'm going to say late winter, early spring,
12 but there, again, I have no specific recollection of
13 the day.

14 Q. And your fourth visit?

15 A. My fourth visit, as I recall, was
16 sometime immediately after the installation of the
17 recovery trench and there again, I recall, but I
18 cannot testify as to a specific day, that it was
19 spring, perhaps middle to late spring.

20 Q. Mr. Colantino, I'm going to show you a
21 document that's been marked as Complainant's Exhibit
22 No. 5 for identification and ask you to take a look
23 at that if you would, please.

24 A. Yes.

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1 Q. Have you seen this letter before?

2 A. Yes.

3 Q. And what is the date on this letter?

4 A. February 7th, 1989.

5 Q. And what's going on with this letter?

6 What's the purpose of this letter?

7 A. This letter was sent to Heritage
8 Remediation, which was at the time a multi-site
9 contractor for the Illinois Environmental Protection
10 Agency as authorization for them to prepare to
11 design and install a recovery trench and interceptor
12 recovery sumps at the site.

13 Q. When you multi-site contractor, what's
14 that?

15 A. Multi-site contractor would be an
16 environmental firm hired by the Illinois
17 Environmental Protection Agency to do engineering
18 services on behalf of the Agency at a number of type
19 of sites or under a number of different types of
20 environmental programs in the Agency. It's called
21 multi-site because there were multiple contractors
22 that would work on multiple sites.

23 MR. KARR: At this time, I'd like to
24 move for the admission of Complainant's No. 5 for

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1 identification into evidence.

2 HEARING OFFICER HALLORAN: Any
3 objection?

4 MR. ERZEN: If I might ask a question,
5 voir dire?

6 BY MR. ERZEN:

7 Q. Mr. Colantino, did you sign
8 Complainant's Exhibit 5?

9 A. Is that the February 7th letter?

10 Q. Yes, sir.

11 A. No, I did not.

12 Q. Did you prepare Complainant's Exhibit
13 5?

14 A. I do not recall.

15 Q. Do you know if Complainant's Exhibit 5
16 was sent?

17 A. Do I have personal knowledge that it
18 was? I do not.

19 Q. Do you know who signed your name on
20 Complainant's Exhibit 5?

21 A. I can only judge by the initials
22 underneath my name that it was Carmen Yung.

23 MR. ERZEN: I don't believe that
24 there's an adequate foundation, but I'm not going to

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1 object, your Honor.

2 HEARING OFFICER HALLORAN:

3 Mr. Baumgartner?

4 MR. BAUMGARTNER: I would take the
5 same position.

6 HEARING OFFICER HALLORAN: Okay. No
7 objection. And you can call me anything, don't call
8 me late for dinner.

9 MR. ERZEN: I'm sorry about that.

10 HEARING OFFICER HALLORAN: If you feel
11 more comfortable -- but...

12 MR. BAUMGARTNER: Off the record.

13 (Whereupon, a discussion
14 was had off the record.)

15 HEARING OFFICER HALLORAN: We're back
16 on the record. Complainant's Exhibit 5 is admitted
17 without objection.

18 BY MR. KARR:

19 Q. Is Heritage the contractor that you
20 met with out at the site?

21 A. I believe it is.

22 Q. And you previously testified that you
23 were -- met with them on your third visit, on your
24 fourth visit you were out there after the

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1 installation of the trench. What was the purpose
2 for this trench and what was going on with all that?

3 A. The trench was installed in an effort
4 to halt or mitigate the migration of petroleum
5 towards the creek, to intercept it prior to its
6 reaching the creek and, therefore, hopefully stop
7 the pooling or seeping of the petroleum into the
8 creek.

9 Q. Mr. Colantino, I'm now showing you a
10 document that's been admitted into evidence as
11 Complainant's Exhibit No. 6 and ask you to take a
12 look at that for a moment if you would, please.

13 Have you had an opportunity to
14 look at it?

15 A. Yes.

16 Q. And what is the date on this?

17 A. January 5th, 1990.

18 Q. And what is this document?

19 A. This is a corrective action notice.

20 Q. And what was the purpose of this
21 notice?

22 A. From my perspective, it was a notice
23 to an entity or an individual deemed responsible
24 for release from underground storage tanks to take

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1 certain action in response to that release.

2 Q. Was this notice sent after the action
3 that the contract -- state's contractor took out at
4 the site?

5 A. I believe so.

6 Q. Did you have a role in developing this
7 document?

8 A. Yes, I did.

9 Q. Do you know if the response action in
10 section six, which begins on page five of this
11 document, was ever fully complied?

12 A. During the period that I was involved
13 with the site, it was not fully complied with.

14 Q. And turning your attention to page
15 seven of the document, Section 8, reimbursement of
16 costs. Do you know if the Agency had ever recovered
17 any of its costs that it incurred for this site?

18 A. I'm not aware of any cost recovery
19 actions.

20 Q. Mr. Colantino, I'm now giving you a
21 large packet of documents that are Bates stamped
22 beginning with page 243 and going through page 355
23 that's been marked as Complainant's Exhibit No. 13
24 for identification and ask you to kind of flip

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1 through that and become familiar with this.

2 Are you done?

3 A. Yes.

4 Q. Do you recognize these documents?

5 A. I don't have a specific recollection
6 of them. They are familiar.

7 Q. Do you know what they represent?

8 A. Yes, I do.

9 Q. And what is that?

10 A. They represent invoices and billings
11 and charges for the services the Agency -- and
12 actions the Agency performed at the site.

13 Q. As a project manager in the LUST
14 section, from time to time would you see these type
15 of documents?

16 A. Yes.

17 Q. Okay. Within this document there's
18 some stapled pack and the first pack is entitled
19 Millstream Union 76, McHenry, breakdown of personnel
20 service expenditures, do you see that?

21 A. Yes, I do.

22 Q. And what does that portion of this
23 document represent?

24 A. It appears to be accounting of Agency

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1 time, personnel time, charged against the project --
2 the Millstream Union 76 McHenry project.

3 MR. ERZEN: Your Honor -- your
4 Officer, unless the State intends to show that
5 Mr. Colantino had some personal involvement in
6 selecting, preparing or organizing and putting this
7 document together, I'm going to object to it.
8 Putting a document in front of a witness and asking
9 him what it appears to be is not a proper line of
10 inquiry unless he's got some information he can add
11 to that as a witness.

12 HEARING OFFICER HALLORAN: Mr. Karr?

13 MR. KARR: The witness doesn't have to
14 actually prepare a document, he just has to be
15 familiar with how the documents are prepared in the
16 course of a business and that the business does
17 prepare such documents and uses them in their
18 regular course of business. As an employee of the
19 Illinois EPA who bills his time as a project manager
20 for LUST sites, he would be familiar with the
21 billings and invoicing costs that the Illinois EPA
22 engages in.

23 HEARING OFFICER HALLORAN: And you're
24 talking about the business records exception?

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1 MR. KARR: Yes.

2 MR. ERZEN: This is an add mixture of
3 a number of different types of documents with a
4 number of different sources. I don't believe all of
5 them are business records and this type of trying to
6 shove a lot of stuff in as a business record where
7 some may be business records and some may not, some
8 Mr. Colantino may be familiar with, some he may not.
9 He's going to have to break it down. The top page,
10 that is no business record, and I'm afraid he's
11 going to try and lay a foundation for this entire
12 document which is inappropriate.

13 HEARING OFFICER HALLORAN:

14 Mr. Baumgartner, do you want to weigh in?

15 MR. BAUMGARTNER: Just simply that the
16 witness is being asked to comment on the context of
17 a document which has not yet been introduced and for
18 which no foundation has been laid.

19 HEARING OFFICER HALLORAN: Thank you.

20 MR. BAUMGARTNER: He's not being asked
21 foundation, he's being asked to comment on the
22 content.

23 HEARING OFFICER HALLORAN: Mr. Karr?

24 MR. KARR: I'm trying to get to

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1 foundation, but I'd certainly be willing to
2 stipulate to just the EPA identified records,
3 not summaries or the cover sheets.

4 MR. ERZEN: What are those?

5 MR. KARR: Anything that's generated
6 by the Illinois EPA, computer printouts, the invoice
7 vouchers.

8 MR. ERZEN: Your Honor, I'm turning
9 now to the -- I guess the page that would have been
10 stamped with the number 00246, it's a computer
11 printout with a large amount of material blacked
12 out. It's the first packet.

13 HEARING OFFICER HALLORAN: Okay.
14 Sorry.

15 MR. ERZEN: Unless Mr. Colantino is
16 willing to testify under oath that these are
17 normally produced in a blacked out fashion, this is
18 not -- this has been redacted in some way, it's been
19 selected in some way. This is not the way they're
20 kept in the ordinary course of business. These are
21 not ordinary business records. They have been
22 selected and unless we go through the process of
23 showing how they were selected for purpose of this
24 case, I don't think this witness is competent to

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1 testify as to what these things are. These aren't
2 the ordinary course of business records.

3 HEARING OFFICER HALLORAN:
4 Mr. Karr, anything further?

5 MR. KARR: These are the ordinary
6 course of business records for this site. Those
7 blacked out areas are not part of this site. These
8 are Agency billings. I was going to get into how
9 they time code sites and keep track of the time.
10 The Illinois personnel services -- Illinois EPA
11 personnel service quarterly report, right at the top
12 of the document.

13 MR. ERZEN: Perhaps I can voir dire --
14 HEARING OFFICER HALLORAN: Yes,
15 Mr. Erzen.

16 BY MR. ERZEN:

17 Q. Mr. Colantino, do you ordinarily
18 see quarterly personnel reports -- did you when
19 you were with the LUST section?

20 A. Can I have an example of one?

21 MR. KARR: If I may approach the
22 witness?

23 HEARING OFFICER HALLORAN: Yes, you
24 may.

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1 BY THE WITNESS:

2 A. Yes. Could you restate your question?

3 BY MR. ERZEN:

4 Q. Did you receive and review in the
5 course of your work with the IEPA when you were with
6 the LUST section or whatever it was before it became
7 a section quarterly personnel reports?

8 A. Yes.

9 Q. Were they blacked out?

10 A. I recall seeing some that are blacked
11 out. I don't -- I cannot testify that every one I
12 have seen was blacked out. If I may, I'll restate
13 that. This does not appear to be an unusual
14 process.

15 MR. ERZEN: Perhaps we should just --
16 I will -- I think the best thing to do would be for
17 Mr. Karr to try and lay a foundation for this I
18 think rather than trying to slug at it.

19 HEARING OFFICER HALLORAN: I agree
20 and also these summaries on the first page of every
21 packet you were going to take -- not submit these as
22 an exhibit or --

23 MR. KARR: Well, if there's an
24 objection to them and it's sustained, I'll certainly

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1 remove them. I can't --

2 HEARING OFFICER HALLORAN: Well, let's
3 -- if you can go step-by-step and try to set a
4 foundation for each packet. I did think Mr. Erzen
5 -- I think Mr. Baumgartner did have an objection
6 also to the summary.

7 MR. KARR: And I don't have a problem
8 with that. We can remove the summaries from this
9 exhibit. I understand. We'll stick with the
10 Illinois EPA's own documents. I can -- maybe it
11 would be best if I just relabel these as individual
12 exhibits.

13 HEARING OFFICER HALLORAN: That would
14 probably help me out anyway and the Board, which is
15 more important.

16 MR. KARR: I don't have additional
17 copies. I'd have to pull that one apart.

18 HEARING OFFICER HALLORAN: Okay.
19 We can go off the record.

20 (Whereupon, a discussion
21 was had off the record.)

22 HEARING OFFICER HALLORAN: We're back
23 on the record. Mr. Karr, you were talking about
24 your Complainant's Exhibit 13?

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1 MR. KARR: Right. In light of the
2 discussions both on and off the record, I modified
3 this and I'm not going to pursue Exhibit 13. I can
4 withdraw it from the record.

5 HEARING OFFICER HALLORAN: Okay.
6 Thank you.

7 BY MR. KARR:

8 Q. Mr. Colantino, in your employment with
9 the Illinois EPA, do you keep track of your time?

10 A. Yes.

11 Q. And how does that work?

12 A. I would turn in a time sheet twice a
13 month.

14 Q. And does it relate to what you're
15 doing or how do you keep track or identify it?

16 A. During the time I was in the LUST
17 program?

18 Q. Sure. That would be fine.

19 A. I would code time spent on individual
20 projects as well as I would code or enter time that
21 I spent on administrative activities. So it would
22 be a variety of entries on the timecard.

23 Q. Why does the Illinois EPA time code
24 a specific site or project?

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1 A. Number one, I believe it's just to
2 keep track of time -- the employee's time and
3 two, it could play -- it could be an advantage for
4 cost recovery.

5 Q. And how is it an advantage?

6 A. So that we would have an accurate
7 account of an employee's time in the event the
8 Agency would seek to recoup that individual's --
9 costs for that individual's time in performing
10 certain activities.

11 Q. And once you turn in your time sheets,
12 what happens?

13 A. Not ever having worked in the fiscal
14 department, I can only theorize that --

15 MR. ERZEN: In that case, I'll object
16 to his testimony.

17 HEARING OFFICER HALLORAN: Mr. Karr?

18 MR. KARR: I'm asking what he knows
19 happens with time sheets.

20 MR. ERZEN: And I believe he's already
21 said he doesn't know, he's theorizing.

22 HEARING OFFICER HALLORAN: Objection
23 sustained.

24

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1 BY MR. KARR:

2 Q. Mr. Colantino, you mentioned one of
3 the reasons for timing specific sites was to aid in
4 cost recovery?

5 A. That is correct.

6 Q. Were you involved in any LUST sites
7 where that took place?

8 A. Yes.

9 Q. Which sites were those?

10 A. I'm afraid other than this site, I
11 can't recall specifics. Well, there are -- I'm
12 sorry. Can you rephrase the question? I'm not sure
13 exactly what your question is.

14 Q. Sure. You bill or you code your time
15 to a specific site?

16 A. Yes.

17 Q. One of the purposes for doing that is
18 to aid in recovering the Illinois EPA's costs?

19 A. That's correct.

20 Q. I'm going to change facts here.

21 Do you know what those costs
22 entail, is it just your time or what's involved in
23 the Agency's costs?

24 A. As I recall, we would code a specific

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1 time spent on projects on an employee -- an
2 individual employee timecard. We would also code
3 travel vouchers towards specific projects that were
4 thought to be or known to be cost recovery projects
5 and contractors/subcontractor's times would be coded
6 the same way as an employee's time for tracking of
7 those charges.

8 Q. And when -- strike that.

9 When the Illinois EPA would hire a
10 contractor to do work at a specific site, obviously
11 that contractor would bill the Agency for those
12 costs, right?

13 MR. ERZEN: Objection, leading.

14 HEARING OFFICER HALLORAN: Mr. Karr?

15 MR. KARR: I'll withdraw the question.

16 HEARING OFFICER HALLORAN: You can
17 rephrase it.

18 BY MR. KARR:

19 Q. Mr. Colantino, does the Illinois EPA
20 hire contractors to do work at sites?

21 A. Hire isn't the right word.

22 Q. Okay. Maybe you can describe the
23 process.

24 A. What we would do is we would engage

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1 contractors. If you recall, they were multi-site
2 contractors, they were already selected or hired
3 based off of certain bidding qualifications and
4 expertise and experience and there were multiple
5 contractors and when there was a program need to use
6 their services, they were engaged.

7 Q. When a contractor was engaged for a
8 specific site, how would that process work?

9 A. As I recall, there were two primary
10 criteria for the engagement of a multi-site
11 contractor, the first being -- well, I guess there
12 would be three; availability of the firms on the
13 multi-site contractor list, the proximity of the
14 firm to the location where the services would be
15 performed and then a rotation of when that firm
16 was last used and how much dollar value of services
17 they had acquired or received up to that point so
18 that the multi-site contractors tried to be kept
19 equal in the amount of work that they received.

20 Q. When a multi-state contractor was
21 engaged to do work --

22 MR. ERZEN: Multi-site.

23 MR. KARR: I'm sorry.

24

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1 BY MR. KARR:

2 Q. When a multi-site contractor was
3 engaged to do work at a specific site, how would
4 the billing and reimbursement occur?

5 A. They would invoice the Agency.

6 Q. And then what would the Agency do in
7 response to that?

8 A. They would review the invoices for
9 accuracy relative to the charges on the invoice to
10 the authorization for work given to that contractor
11 and then they would be -- the invoices would be
12 after reviewed and any adjustments made, sent down
13 to the fiscal department.

14 Q. As a LUST project manager, did you
15 have occasion to engage in such activity?

16 A. Yes.

17 Q. Likewise, when you traveled to various
18 sites, how would you be compensated for that or what
19 was the process of, you know, vehicles, hotels, that
20 type of stuff?

21 A. As an employee of the Agency, there
22 were Agency vehicles made available to you. If one
23 was not available, you were authorized to drive your
24 own vehicle and charge a mileage rate, whatever was

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1 deemed acceptable by the state at that particular
2 time.

3 As far as motel accommodations at
4 that time, the preferred procedure was to get a
5 direct bill with a particular motel if you knew you
6 were going to have an overnight -- a reason for an
7 overnight stay, in other words, you would contact
8 that motel in advance, tell them that the employee
9 would wish to stay there, have them accept a direct
10 bill voucher from that employee and the employee
11 would just present that direct bill voucher which
12 would eliminate any transactions with the employee,
13 it would all be done between the establishment, the
14 motel, and the State.

15 Things like fuel and food, fuel
16 would be -- if you were driving your own car, it
17 would be a cash transaction where the receipts would
18 be turned in. If it was a State car, you'd use a
19 State credit card.

20 Meals were on a per diem basis
21 depending on how long you were away from the office
22 in the field traveling.

23 Q. And was there any paperwork associated
24 with this travel?

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1 A. Yes. There were travel vouchers that
2 were prepared at a regular frequency by the
3 traveler. Really it was up to the traveler on how
4 often they would prepare a travel voucher.

5 Q. Have you done that in your employment
6 with the Agency?

7 A. Yes.

8 Q. Mr. Colantino, I'm going to show you a
9 document that's been marked as Complainant's Exhibit
10 No. 15 for identification and ask you to take a look
11 at that if you would.

12 A. I have.

13 Q. What is this document?

14 A. This is a State of Illinois travel
15 voucher.

16 Q. And was this travel voucher prepared
17 by personal knowledge or from the information -- I'm
18 sorry, completed by a person with knowledge or from
19 information transmitted by a person with knowledge
20 of the information, acts or events appearing on it?

21 A. Yes.

22 Q. And were they prepared at or near the
23 time of the events occurring on it?

24 A. Can you restate?

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1 Q. Sure. Were these documents prepared
2 at or near the time of the act or events appearing
3 on them?

4 A. Yes.

5 Q. And is it the regular practice of the
6 Illinois EPA to make such records?

7 A. Yes.

8 Q. And were these records kept in the
9 regular course of IEPA's business activities?

10 A. Yes.

11 MR. KARR: Mr. Hearing Officer, I move
12 that Complainant's Exhibit No. 15 for identification
13 be admitted into evidence.

14 HEARING OFFICER HALLORAN: Any
15 objection?

16 MR. BAUMGARTNER: I would ask that you
17 reserve until we get a chance to ask some questions
18 about this document.

19 HEARING OFFICER HALLORAN: You can
20 voir dire now if you'd like.

21 MR. KARR: I would venture that the
22 proper foundation for this has been laid and it
23 should be admitted.

24 HEARING OFFICER HALLORAN: I'll allow

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1 him to ask some questions.

2 BY MR. BAUMGARTNER:

3 Q. Do you have the document in front of
4 you?

5 A. Yes.

6 Q. Is this the same as Bates stamped 359?

7 MR. KARR: Yes.

8 BY MR. BAUMGARTNER:

9 Q. Can you identify anything on this
10 document which relates it to the particular site
11 that's at issue in this hearing?

12 A. In the purpose of travel it says Union
13 76, Millstream site visit.

14 Q. All of this travel?

15 A. I can't answer that.

16 Q. I don't find the reference to purpose
17 of travel.

18 MR. ERZEN: I do not either.

19 MR. KARR: It's on the second page,
20 the third page and the fourth page.

21 MR. BAUMGARTNER: I only have one page
22 of travel voucher.

23 BY MR. BAUMGARTNER:

24 Q. Just referring you to the first page,

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1 the one that's Bates stamped 359.

2 A. I'm sorry. I don't believe I have the
3 same documents you have. I have 361, an ineligible
4 number and then -- I'm sorry, I must have shuffled
5 them out of -- this is 359? I'm sorry.

6 MR. BAUMGARTNER: This is what was
7 given to me.

8 HEARING OFFICER HALLORAN: The witness
9 can use mine.

10 MR. KARR: This one is the same.

11 HEARING OFFICER HALLORAN: We can go
12 off the record.

13 (Whereupon, a discussion
14 was had off the record.)

15 BY THE WITNESS:

16 A. Can you repeat the question?

17 BY MR. BAUMGARTNER:

18 Q. Can you find anything on that document
19 which in any way relates to the location that's in
20 question in this hearing?

21 A. On this front sheet?

22 Q. Yes.

23 A. I cannot.

24 Q. Okay. Referring you to Bates stamped

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1 page 361.

2 A. Yes.

3 Q. That's not your claim, is it?

4 A. No, it is not.

5 Q. Bates stamped 362.

6 A. Yes.

7 Q. That's not your claim?

8 A. That is correct.

9 Q. 364?

10 A. Yes.

11 Q. That relates to two site visits,
12 doesn't it?

13 A. It appears to, yes.

14 Q. And can you break it down as to what's
15 what?

16 A. Only from the information provided on
17 the voucher.

18 MR. BAUMGARTNER: That's all the
19 questions I have.

20 HEARING OFFICER HALLORAN: Thank you.
21 Any questions, Mr. Erzen, voir dire?

22 BY MR. ERZEN:

23 Q. Mr. Colantino, page 361, which I
24 believe is the travel voucher for Ken Page, do you

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1 know who prepared this?

2 A. No.

3 Q. Do you know when it was prepared?

4 MR. KARR: I believe he already
5 answered, at or around the time of the events
6 depicted.

7 BY MR. ERZEN:

8 Q. Do you know when it was prepared
9 yourself, sir?

10 A. Only by going off the date on the
11 voucher.

12 Q. The date on the voucher is July 22,
13 1991?

14 A. Yes.

15 Q. And the actual activities that are a
16 part of the voucher were a month earlier roughly?

17 A. Yes.

18 Q. Okay. And page 362, do you know who
19 prepared that voucher?

20 A. No.

21 Q. And other than the date on the voucher
22 itself, do you know when it was prepared?

23 A. No.

24 Q. Do you know the gap in time between

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1 the events recorded in the voucher and the date of
2 the voucher?

3 A. Off the top of my head, no.

4 Q. On page Bates No. 364 there's a
5 notation in the upper right-hand side, Union 76, it
6 looks like McHenry although it's cut off, is that
7 correct?

8 A. Yes.

9 Q. Whose handwriting is that?

10 A. I do not know.

11 Q. Do you know when that was recorded?

12 A. No.

13 Q. Was that recorded at or about the time
14 this record was made?

15 A. I can only assume.

16 Q. So you don't know?

17 A. I do not know.

18 MR. ERZEN: Your Honor, I would object
19 on the fact that the foundation has not been
20 established that these business records except I
21 believe as to Mr. Colantino's own travel voucher on
22 that I would object to relevance in that there's no
23 basis for it to establish it is in any way related
24 to this site and that's page 359.

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1 HEARING OFFICER HALLORAN: Mr. Karr?

2 MR. KARR: Mr. Colantino testified
3 that these travel vouchers are made in the regular
4 course of the Agency's business and it's the regular
5 course to maintain them. He doesn't need to be the
6 actual person who prepares the record to have it
7 admitted as a business record and, therefore, we
8 would renew our motion to have it entered as an
9 exhibit.

10 HEARING OFFICER HALLORAN: Sir, as far
11 as irrelevancy this -- I'm looking at page Bates
12 stamped 359, it's the first page, 10/16 site visit
13 and 11/1 site visit. Did you testify that that was
14 the site visit for the matter at hand or you had no
15 recollection?

16 THE WITNESS: I have no recollection.

17 HEARING OFFICER HALLORAN: I can't see
18 where it qualifies as a business record nor do I
19 find any relevance for this travel voucher.

20 MR. KARR: Just the first page or --

21 HEARING OFFICER HALLORAN: Any of
22 them. I don't see the relevance in the first page
23 because we don't know what site he was going to and
24 the last three or the next three, I don't think it

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1 would qualify as a business record exception.
2 However, I will do this, I will take it as an offer
3 of proof and the Board can take a look at it and
4 decide. With that said, I assume you're going to
5 proceed to question the witness on these vouchers.

6 MR. KARR: I believe that's been done.

7 HEARING OFFICER HALLORAN: Okay.

8 MR. KARR: Likewise, I'm going to do
9 the same thing with the rest of these vouchers.

10 HEARING OFFICER HALLORAN: Okay. I
11 guess we'll just have to take them in order.

12 MR. ERZEN: Mr. Halloran, just to be
13 complete, I realize we're in kind of an offer of
14 proof situation here and I asked Mr. Colantino about
15 the handwriting in the upper right-hand corner of
16 page 364 where it says Union 76, McHenry cut off.

17 BY MR. ERZEN:

18 Q. Mr. Colantino, if you could look at
19 pages 361 and 362, both of which say Union 76,
20 Millstream in the upper right-hand side.

21 A. Yes.

22 Q. Do you know when that was written?

23 A. I do not.

24 Q. Do you know who wrote it?

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1 A. I do not.

2 Q. Okay. Do you know the basis upon
3 which that was written?

4 A. I do not.

5 MR. ERZEN: Okay. Thank you.

6 HEARING OFFICER HALLORAN: Thank you,
7 Mr. Erzen.

8 HEARING OFFICER HALLORAN: Based on
9 the respondents' objection, I will deny
10 Complainant's Exhibit No. 15, but I will take it
11 with the case as an offer of proof.

12 MR. KARR: Can we go off the record
13 for a second?

14 HEARING OFFICER HALLORAN: Sure.

15 (Whereupon, a discussion
16 was had off the record.)

17 HEARING OFFICER HALLORAN: We're back
18 on the record.

19 MR. KARR: During the recess, counsel
20 for respondents and myself reviewed documents that
21 have been identified as Complainant's Exhibit Nos.
22 16, 17 and 18, they represent various invoice
23 vouchers and billings of the Illinois EPA.
24 We are willing to stipulate that I would ask

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1 Mr. Colantino essentially the same questions and he
2 would give essentially the same answers, the same
3 objections would be raised and we can anticipate
4 that the same ruling would be made, so we're just
5 going to make an offer of proof of these exhibits in
6 the interest of streamlining here.

7 HEARING OFFICER HALLORAN: You are
8 absolutely right, Mr. Karr, my ruling would remain
9 the same and I will take Complainant's Exhibit
10 Nos. 16, 17 and 18 with the case as an offer of
11 proof.

12 MR. KARR: And just to note for the
13 record, there have been some intermediate documents
14 removed from these, though, what you have in front
15 of you is the full exhibit as we are offering it.

16 MR. ERZEN: So to make it clear, the
17 Bates stamping will not run consecutively through
18 those documents.

19 HEARING OFFICER HALLORAN: All right.
20 Thank you.

21 MR. KARR: At this time, I'm finished
22 with Mr. Colantino.

23 HEARING OFFICER HALLORAN: Thank you.
24 Mr. Erzen, cross?

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1 MR. ERZEN: Just give me a second.

2 C R O S S - E X A M I N A T I O N

3 by Mr. Erzen

4 Q. Mr. Colantino, Mr. Karr asked you
5 about a visit you made to the site at issue in this
6 case, I believe it was visit No. 3, where you met
7 with the contractor to plan a construction of an
8 interceptor trench, do you recall that?

9 A. Yes.

10 Q. At that time, how was the interceptor
11 trench engineered or how was it designed?
12 What basis was the -- did you have at hand for
13 designing that trench?

14 A. The basis for the design of the trench
15 was wrapped up in the purpose or need of the trench
16 as perceived by the Agency which was to intercept
17 the flow of petroleum in the soil as it migrated or
18 flowed towards the creek.

19 Q. Perhaps I can be more specific.

20 Was there any written plan or
21 design prior to the construction of the interceptor
22 trench?

23 A. No.

24 Q. Was there any engineering work done --

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1 by engineering work, work done by an engineer on the
2 design of the interceptor trench prior to the trench
3 being installed?

4 A. No.

5 Q. Mr. Colantino, at the time that the
6 trench was installed, the Agency did not have any
7 information whatsoever with regard to the subsurface
8 conditions at the site, is that correct?

9 A. I wouldn't say that is not correct.

10 Q. What information did you have with
11 regard to the subsurface conditions?

12 A. Information that was available came
13 from a general knowledge of the geologic conditions
14 of the area and there was speculation of what was
15 underneath based off of the location, the
16 construction around the area.

17 Q. Is there a difference between
18 speculation and information?

19 A. Yes.

20 Q. Do you recall that Mr. Baumgartner and
21 I were present at your deposition that was taken in
22 this matter in August 2001 down in Springfield?

23 A. Yes.

24 Q. And you were sworn under oath at that

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1 deposition?

2 A. Yes.

3 Q. Do you recall me asking you this
4 question and you providing this answer and I'll give
5 -- read a question and answer to get some setting to
6 it.

7 Question: When the layout of the
8 interceptor trench was done, did you or the
9 contractor or anyone else to your knowledge have any
10 subsurface information, groundwater, depth to
11 groundwater type information, anything that would
12 help you design?

13 Answer: May I ask a question about
14 your question? Sure.

15 Answer: When the construction was
16 performed or did we have knowledge of soil
17 conditions prior to -- I'm not sure I understand
18 your question.

19 Question: When you were laying out
20 the trench.

21 Answer: So when -- actual
22 construction of the trench did we note any? No,
23 visit to a -- when you and the contractor's
24 representative were out there staking out the trench

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1 trying to figure out how to do it and get the
2 equipment in there to do it, what did you know about
3 the subsurface conditions? By the way, this starts
4 on page 30.

5 Answer: Nothing. I believe we made
6 speculation that it would probably be gravelly and
7 rocky considering where we wanted to install the
8 trench closer to the business than the creek and
9 we assumed there would be some natural glacial till,
10 rock, gravel in that specific area, but other than
11 casual discussions, I do not -- we did not have any
12 specific subsurface geological information.

13 Question: Okay.

14 Answer: Specific for that site that
15 we referred to.

16 Did you recall giving that answer
17 then?

18 A. Yes, I do.

19 Q. Did you have a target depth for the
20 interceptor trench when you started the trenching?

21 A. I don't recall if we had a target
22 depth, although generally you would try and --
23 from my experience in installing interceptor
24 trenches, we would try and ensure or start with the

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1 goal of having the depth of the interceptor trench
2 below the flow of the product and certainly below
3 the depth of the tank.

4 Q. But at the time that the trenching was
5 begun, you did not know the depth at which the
6 product flowed, is that correct?

7 A. That is correct.

8 Q. In your letter authorizing Heritage
9 to do work at the site that was admitted into
10 evidence, I believe -- not your letter, I'm sorry, a
11 letter that was signed with your name by Ms. Yung I
12 believe --

13 A. Yes.

14 Q. -- you authorized Heritage to, and I'm
15 paraphrasing, use a boom -- I'm sorry, I'll get it
16 exactly. This is Complainant's Exhibit No. 5, point
17 three, installation of absorbent booms on the Boone
18 Creek. I'm handing Mr. Colantino Complainant's
19 Exhibit No. 5.

20 How much are booms? How much do
21 booms cost?

22 A. I don't recall. I don't know now.

23 Q. Did you know then? By then I mean in
24 1989 or so.

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1 A. I knew that we had a rate from the
2 contractor as a state multi-site contractor for
3 material such as this. I'm not sure I knew what the
4 rate was.

5 Q. Okay. Do you know what it would cost
6 to purchase 100-foot boom suitable for use in the
7 Boone Creek -- excuse me, Boone Creek in about 1989?

8 A. I don't have any recollection.

9 Q. Mr. Colantino, when the interceptor
10 trench was constructed by IEPA's contractor, was
11 the source of the contamination controlled at that
12 point in time?

13 A. I don't know.

14 Q. Okay. Did you ask?

15 A. Can you be more specific?

16 Q. Strike the question.

17 Mr. Colantino, in Complainant's
18 Exhibit 6, which is a corrective action notice dated
19 January 5th, 1990, on page seven it speaks of
20 reimbursement of costs and that page states, and
21 I'll quote it, the Agency shall submit to the party
22 an accounting of all response and oversight costs
23 incurred by the State of Illinois with respect to
24 this notice and with respect to this site and it

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1 goes on to say some further things.

2 Mr. Colantino, when was that
3 accounting of all response and oversight costs
4 incurred by the State of Illinois presented to
5 Mr. Abraham?

6 A. I don't know.

7 Q. Was it presented during your tenure in
8 the LUST section, which ran, I believe, now through
9 November of 1990?

10 A. I don't know.

11 Q. How long does it normally take for
12 the Agency to submit to the party an accounting of
13 all response and oversight costs?

14 A. Again, I don't know the answer to
15 that.

16 Q. Does it take years?

17 A. I do not know.

18 Q. Mr. Colantino, were you aware of the
19 litigation between the Abrahams and the Anests
20 over who would be responsible for the costs of
21 environmental clean ups and conditions at this gas
22 station site?

23 MR. KARR: I'm going to object as
24 beyond the scope of the direct examination.

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1 HEARING OFFICER HALLORAN: Mr. Erzen?

2 MR. ERZEN: I'll withdraw the
3 question.

4 HEARING OFFICER HALLORAN: Thank you.
5 Sustained.

6 BY MR. ERZEN:

7 Q. Mr. Colantino, we had some discussion
8 and I believe now it's kind of evolved into an offer
9 of proof on these vouchers, but I'd like to ask you
10 some questions about them.

11 In the processing of contractor's
12 bills, is that done in a timely fashion? By that I
13 mean, are the bills presented and paid by the State
14 in a timely fashion?

15 A. I would say it's a timely fashion.
16 I'm not sure the contractors would agree with that.
17 There are times when the State pays sooner than
18 later or more quickly than others depending on cash
19 flow and the time of the year and that sort of
20 thing, but I've always felt it was timely.

21 Q. When did you first understand that the
22 State of Illinois had incurred response costs
23 relating to the site at issue in this case?

24 A. Can you say that -- ask that again?

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1 Q. I can try.

2 When did you believe that the
3 State of Illinois had incurred -- first incurred
4 response costs relating to the gas station at issue
5 in this case?

6 A. I don't have a specific date.
7 I recall a meeting with Mr. Abraham advising him
8 that if certain actions weren't taken on his part,
9 that the Agency, because of the health and safety
10 concern of the petroleum reaching the Boone Creek,
11 if he didn't take these certain actions, the Agency
12 would and that at that time there would be a cost --
13 there's a potential for cost recovery. That
14 decision for cost recovery was not left up to me.

15 MR. ERZEN: Mr. Halloran, may I move
16 to strike everything after his initial response
17 as not responsive to the question?

18 HEARING OFFICER HALLORAN: Mr. Karr?

19 MR. KARR: He asked him when he became
20 aware that there may be cost recovery and that's
21 when he became aware.

22 HEARING OFFICER HALLORAN: You know,
23 I'm going to allow a little latitude. Objection
24 overruled -- or motion overruled.

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1 BY MR. ERZEN:

2 Q. Mr. Colantino, your recollection on
3 the dates of your visits is not particularly
4 definite, I'm not trying to pin you down, but is
5 that a fair statement?

6 A. Yes.

7 Q. You kept a log book during your time
8 in the LUST section or division of the IEPA, is that
9 correct?

10 A. Can you --

11 Q. Did you keep a log when you were
12 working in the LUST section of your -- that would
13 record your activities on a day-to-day basis?

14 A. I kept logs of certain things;
15 day-to-day activities, no.

16 Q. Are you aware of any logs that you
17 kept with regard to this site?

18 A. Other than my travel vouchers,
19 notations, if you could call that a log of travel
20 times and times spent, phone log of conversations,
21 documentation logs for meetings and reviews and
22 things of that nature. I have nothing specific
23 that I can point to. General business procedural
24 type of logs I kept, but I'm not sure of what you're

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1 asking, but I'm trying to give you a response.

2 Q. I appreciate it and that's fine.

3 MR. ERZEN: No further questions.

4 Thank you.

5 HEARING OFFICER HALLORAN: Thank you,

6 Mr. Erzen. Mr. Baumgartner?

7 MR. BAUMGARTNER: No questions.

8 HEARING OFFICER HALLORAN: Thank you.

9 Mr. Karr any redirect?

10 MR. KARR: Just briefly.

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

12 by Mr. Karr

13 Q. Mr. Colantino, what was the goal of
14 the Illinois EPA with regard to having the
15 contractor's action taken at the site? What was it
16 trying to accomplish?

17 A. The goal of the action that I was
18 directly involved with, meaning the installation of
19 the interceptor trench, was to stop the migration
20 of petroleum from reaching the Boone Creek and
21 causing a substantial hazard. The trench was
22 designed for one purpose and that was to collect
23 free product that because of the geography and
24 geology was making its way to the creek and causing

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1 environmental problems.

2 Q. Would that be considered a final
3 clean-up of the site?

4 A. No.

5 MR. KARR: Nothing further.

6 HEARING OFFICER HALLORAN:

7 Mr. Erzen, any re-cross?

8 R E - C R O S S E X A M I N A T I O N

9 by Mr. Erzen

10 Q. When the interceptor trench was
11 constructed, were there already recovery sumps on
12 the site?

13 A. Yes. There was a monitoring well
14 that was being used as a recovery sump up at the
15 tank farm where the tanks were actually located.

16 Q. Were there any other recovery wells or
17 recovery trenches?

18 A. At the time of the --

19 Q. Prior to the IEPA --

20 A. Not that I was aware of.

21 Q. I'm going to hand you Complainant's
22 Exhibit No. 1 and I'm sorry, I don't mean to bend
23 over you here, but there's an action taken and
24 assistance needed. Do those refer to the existence

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1 of a recovery trench and recovery sumps that are
2 designed to intercept product?

3 HEARING OFFICER HALLORAN: Are we
4 talking about the first page, Mr. Erzen?

5 MR. ERZEN: Yes, the first page of
6 Complainant's Exhibit 1 which is the same as Abraham
7 Respondent's Exhibit 4.

8 BY THE WITNESS:

9 A. I'm not sure I recall specifically
10 what your question is.

11 BY MR. ERZEN:

12 Q. My question is, does Complainant's
13 Exhibit 1 on the first page refer to the existence
14 of two recovery sumps and a recovery trench already
15 on the site?

16 A. I have no way of knowing.

17 Q. Did you review the IEPA's file on
18 this site prior to going out and having the
19 contractor construct an interceptor trench?

20 A. I have no specific knowledge of an
21 actual review, but I assume I would have.

22 Q. If that review had -- well, strike
23 that?

24 MR. ERZEN: I'll withdraw that.

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1 Thank you. No further questions.

2 HEARING OFFICER HALLORAN: Thank you.

3 Mr. Baumgartner?

4 MR. BAUMGARTNER: Nothing.

5 HEARING OFFICER HALLORAN: All right.

6 Mr. Karr?

7 MR. KARR: Nothing further.

8 HEARING OFFICER HALLORAN: You may
9 step down. Thank you very much. We can go off the
10 record.

11 (Whereupon, after a short
12 break was had, the
13 following proceedings
14 were held accordingly.)

15 HEARING OFFICER HALLORAN: We're back
16 on the record. We took a 45-minute lunch break.

17 Mr. Karr is going to call his fourth witness.

18 MR. KARR: Correct. I call Jay
19 Hamilton to the stand.

20

21

22

23

24

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1 (Witness sworn.)

2 WHEREUPON:

3 J A Y H A M I L T O N,

4 called as a witness herein, having been first duly
5 sworn, depose and saith as follows:

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

7 by Mr. Karr

8 Q. Could you state your name and spell it
9 for the court reporter, please?

10 A. Yes. First name is Jay, J-a-y, last
11 name is Hamilton, H-a-m-i-l-t-o-n.

12 Q. And are you currently employed,
13 Mr. Hamilton?

14 A. Yes, I am.

15 Q. And where is that at?

16 A. With the State of Illinois, Illinois
17 EPA.

18 Q. And how long have you been there?

19 A. About 11 years.

20 Q. And what's your current position?

21 A. I'm an environmental protection
22 specialist III in the leaking underground storage
23 tank section.

24 Q. Have you had any other positions with

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1 the Illinois EPA?

2 A. No.

3 Q. Could you generally describe your
4 job duties in the leaking underground storage tank
5 section, please?

6 A. Yes. Basically my job is to review
7 and evaluate any reports, plans, budgets, billing
8 packages that come in for a site under the LUST
9 program.

10 Q. Are these for specific sites?

11 A. Yes.

12 Q. Okay. Do people sometimes refer to
13 you as a project manager?

14 A. Yes, they do.

15 Q. What does that mean?

16 A. Basically what it says is I manage
17 the project, work with the consultants, contractors,
18 just make -- the owner/operators, to keep them
19 going, make sure they're doing what they're supposed
20 to do.

21 Q. And is this limited to when there's
22 leaks or is there other aspects of it?

23 A. Well, I would only work on them if
24 they did leak.

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1 Q. Are you familiar with the service
2 station that's at issue in this case?

3 A. Yes.

4 Q. And how is it that you're familiar
5 with it?

6 A. That I'm the project manager for this
7 case, was assigned to it, and have reviewed the
8 division of -- the Bureau of Land's division file
9 on this site.

10 Q. Are you -- today, are you still a
11 project manager for the site?

12 A. Yes.

13 Q. Can you describe the conditions at the
14 site as you know them?

15 A. As far as today, I'm not sure the
16 condition of the site if it's changed any since
17 1996. There are possible soil and --

18 MR. ERZEN: Excuse me, your Honor --
19 I'm sorry, Mr. Halloran. I believe that he's
20 reporting based upon hearsay evidence that was
21 provided to him so if we can establish foundation
22 whether this is firsthand or whether it's hearsay, I
23 would appreciate it.

24 HEARING OFFICER HALLORAN: Mr. Karr?

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1 MR. KARR: I'll attempt to do that.

2 BY MR. KARR:

3 Q. Mr. Hamilton, have you been to the
4 site?

5 A. No, sir.

6 Q. And where do you derive your knowledge
7 of the condition of the site?

8 A. From the files -- the division file.

9 Q. What type of materials have you looked
10 at?

11 A. Everything that's in the file, there's
12 technical documents, physical documents and legal
13 documents in the file.

14 Q. When you talk about the technical
15 documents, what type of documents are you
16 specifically referring to?

17 A. There's inspections from EPA
18 personnel, there are reports from the Agency's
19 contractors and Mr. Abraham's contractors.

20 Q. You indicated you didn't know how the
21 site had changed, if at all, since 1996. Why did
22 you pick that year?

23 A. That's the year I became involved in
24 the site.

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1 Q. And are there any documents subsequent
2 to that that talk about the condition of the site?

3 A. No.

4 Q. What additional activities would need
5 to be completed at the site to satisfy you as
6 project manager?

7 MR. BAUMGARTNER: I object. He's
8 asking him a question based -- an expert opinion and
9 we have no idea what facts he's basing his opinion
10 on, whether it's -- so far he's indicated he has
11 nothing but hearsay knowledge.

12 HEARING OFFICER HALLORAN: Terry,
13 could you please read the question back? I'm sorry.

14 (Whereupon, the requested
15 portion of the record
16 was read accordingly.)

17 HEARING OFFICER HALLORAN: Mr. Karr,
18 a response to Mr. Baumgartner, please?

19 MR. KARR: Mr. Hamilton testified he
20 is the project manager for the site and I'm asking
21 -- asking him from -- since the time he became
22 project manager what type of activities he would
23 like to see done at the site to satisfy him as
24 project manager.

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1 HEARING OFFICER HALLORAN:

2 Mr. Baumgartner?

3 MR. BAUMGARTNER: I would add to my
4 objection, satisfying him is not the standard that
5 we have to meet. I know of nothing in the
6 regulations that says something needs to be done at
7 a site if the project manager is not satisfied. It
8 becomes a factual question. This got raised once
9 before, there was an affidavit from Mr. Hamilton
10 filed in connection with the summary judgment motion
11 in 1998. Do you have it there? And I move to
12 strike it on the grounds that it was hearsay, that
13 all he had done is examine records and that he was
14 testifying from -- his sole source of knowledge was
15 examining records and the Board granted that motion
16 and struck the testimony or struck the sections of
17 the affidavit in which he attempted to recite facts
18 based on the affidavit. So this has already been
19 presented to the Board and ruled on once and they
20 ruled he can't do it.

21 HEARING OFFICER HALLORAN: Mr. Karr?

22 MR. KARR: Maybe it's just poor
23 questioning, I'm not asking him what facts he's
24 relying on, I'm asking him as an Illinois EPA

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1 project manager for a LUST site what needs to be
2 done.

3 HEARING OFFICER HALLORAN: Mr. Erzen,
4 do you have anything to add?

5 MR. ERZEN: Yes, your Honor. I was
6 going to say that to the extent that this falls into
7 the category of opinion, I believe it does, I don't
8 believe his opinion was disclosed as part of the
9 discovery process so for that reason under the
10 Illinois Rules of Civil Procedure which require
11 disclosure of opinion testimony in advance, I would
12 also object.

13 HEARING OFFICER HALLORAN: Mr. Karr?

14 MR. KARR: One, we don't operate under
15 the Illinois Civil Procedure rules here, they're
16 only advisory and two, we're not seeking an opinion,
17 I'm asking him in his experience what factually
18 needs to be done to characterize the site.

19 HEARING OFFICER HALLORAN:

20 Mr. Baumgartner, go ahead.

21 MR. BAUMGARTNER: Actually, you're
22 not, you're asking him what would satisfy him and
23 that may very well be a different standard. He may
24 have incredibly high standards.

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1 HEARING OFFICER HALLORAN: I'm going
2 to overrule both of your objections. I think
3 Mr. Karr simply asked the witness what else needs to
4 be done down there at the site and also, I'm looking
5 at Section 101.626, the hearing officer may admit
6 evidence that is material, relevant and would be
7 relied upon by prudent persons in the conduct of
8 series affairs unless the evidence is privileged.
9 So I'm going to allow the questioning and answer to
10 go forward and I overruled both of your objections.
11 Thank you.

12 MR. KARR: I can attempt to rephrase
13 the question to the extent I was making him the
14 arbiter of what would satisfy him.

15 BY MR. KARR:

16 Q. All I'm asking is what additional work
17 needs to be done to characterize the site?

18 A. Well, and I'll say, not my opinion,
19 but we would do this for any LUST site, not just
20 this one in particular, we would ask that an
21 investigation be conducted to find the extent of
22 soil and/or groundwater contamination at the site,
23 basically that would be what's there, how much is
24 there and then to ask for some type of corrective

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1 action plan, remedial plan to address the findings
2 of the investigation --

3 Q. Have you identified such documents in
4 the file?

5 A. -- plans?

6 Q. Well, if you need to break it up,
7 break it up.

8 A. There are -- there were some plans
9 submitted on this site.

10 Q. Have those plans been followed through
11 with?

12 A. They were proved -- there was a plan
13 by Groundwater Technologies that was subsequently
14 approved, but it was with the understanding that it
15 was an interim only emergency-type plan --

16 MR. BAUMGARTNER: I'm going to raise
17 an objection, it was under -- on the understanding
18 that -- whose understanding, is this is a documented
19 item. This again -- he's setting forth that there
20 was an agreement on something and I'd like a
21 foundation. Was it a conversation? Was it in
22 writing?

23 HEARING OFFICER HALLORAN: Mr. Erzen?

24 MR. ERZEN: And I would join in the

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1 objection and basically phrase it as I believe
2 Mr. Hamilton is expressing his view based upon
3 documents which he has reviewed and the documents
4 describe transactions to which he was not a party so
5 to the extent they are the documents, the documents
6 are the evidence. Mr. Hamilton, I don't believe is
7 qualified to express views upon documents relating
8 to transactions he was not a party to.

9 HEARING OFFICER HALLORAN: Mr. Karr?

10 MR. KARR: To the extent he's
11 expressing views of agreements he wasn't a party to,
12 I will withdraw that part of the question and
13 answer. To the extent that there's plans in the
14 file and whether or not there's a corrective action,
15 that's basically -- and that's been implemented,
16 that's basically where I'm going with this.

17 HEARING OFFICER HALLORAN: In that
18 case, I'm going to overrule your objection, the
19 respondents' objections. If you can rephrase that
20 and go forward, we'll see how that runs.

21 BY MR. KARR:

22 Q. Mr. Hamilton, you indicated that
23 generally the LUST section seeks an investigative
24 plan and a corrective action plan and would you seek

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1 to have that plan implemented?

2 A. Yes.

3 Q. Was any such plan implemented at this
4 site?

5 A. No.

6 Q. When a plan is implemented at the
7 site, is it -- does the Illinois EPA have a
8 preference as to who implements that -- funds those
9 type of projects?

10 A. Yes. It's the owner/operator's
11 responsibility to implement the plan in connection
12 with his consultant contractor.

13 Q. Do you know if the Illinois EPA has
14 any outstanding costs attributable to this site?

15 A. Yes, they do.

16 Q. Have you ever indicated or are you
17 aware of anybody at the Illinois EPA that has
18 indicated to Mr. and Ms. Abraham that it was not
19 going to seek to recover those outstanding costs?

20 A. That they were not going to seek?

21 Q. To recover them.

22 A. No, nobody has ever said that.

23 MR. KARR: That's all I have.

24 HEARING OFFICER HALLORAN: Thank you,

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1 Mr. Karr. Mr. Erzen?

2 C R O S S - E X A M I N A T I O N

3 by Mr. Erzen

4 Q. Mr. Hamilton, you spoke of a plan in
5 the file from Groundwater Technology?

6 A. Uh-huh.

7 Q. Who hired and paid presumably
8 Groundwater Technology to prepare that plan and
9 submit it to IEPA for IEPA's approval?

10 A. I believe Mr. Abraham did.

11 Q. Do you know why that plan was not put
12 fully into effect?

13 A. I believe that would have been an
14 agreement between Mr. Abraham and Groundwater
15 Technology.

16 Q. Well, isn't it a fact, Mr. Hamilton,
17 that subsequent to approval of that plan the
18 Abrahams applied for LUST funding -- LUST fund
19 eligibility, is that correct?

20 A. They did apply.

21 Q. And isn't it a fact that the IEPA
22 refused or didn't or for whatever reason failed to
23 act upon their application for more than a year?

24 MR. KARR: I'm going to object.

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1 There's no evidence that the Illinois EPA is even
2 the appropriate party to rule on eligibility.

3 MR. ERZEN: Let's just start with the
4 documents.

5 BY MR. ERZEN:

6 Q. Mr. Hamilton, I'm handing you a
7 document that's been marked Abraham Respondent's
8 Exhibit 5. Do you recognize this? Do you recognize
9 Abraham Respondent's Exhibit 5?

10 A. There are quite a few documents in the
11 file like this.

12 Q. Okay. Well, let me ask a more plain
13 question.

14 Do you recognize Abraham
15 Respondent's Exhibit 5 as being an initial LUST
16 fund eligibility application on behalf of the
17 Abrahams submitted to the Illinois Environmental
18 Protection Agency?

19 A. You're asking me if this is an
20 application?

21 Q. I'm asking if this is a cover letter
22 for such an application.

23 A. Which are you asking me?

24 Q. Is this -- Abraham Respondent's

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1 Exhibit 5 a cover letter for an application for LUST
2 fund eligibility submitted to IEPA?

3 A. This looks like a cover letter for
4 that, yes.

5 Q. Okay. And this is in the file for
6 this site, this letter or a copy of this?

7 A. If it was sent to the Agency, yes.

8 Q. Mr. Hamilton, isn't it a fact that on
9 May 18th, 1992, on behalf of the Abraham respondents
10 I sent a letter to Ms. Julie Hollis. Do you know
11 who Ms. Julie Hollis is?

12 A. Uh-huh.

13 Q. And who is she -- or who was she in
14 1992?

15 A. She was a LUST project manager.

16 Q. Was she responsible for LUST fund
17 eligibility determinations?

18 A. Some.

19 Q. Okay. Was Ms. Hollis responsible for
20 LUST fund eligibility determinations for the site at
21 issue in this case?

22 A. I have seen correspondence back and
23 forth from you to her.

24 Q. Do you know if she was responsible for

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1 LUST fund eligibility determinations for this case?

2 A. I'm not sure other than my sites what
3 project manager was assigned what.

4 Q. And this wasn't one of your sites in
5 1992, is that correct?

6 A. That's correct.

7 Q. Mr. Hamilton, I'm showing you Abraham
8 Respondent's Exhibit 6. I'm sorry. I haven't shown
9 you that, let me do that.

10 Mr. Hamilton, do you recognize
11 Abraham Respondent's Exhibit 6 as one of the
12 documents in the file for this site?

13 A. Can I look it over first?

14 Q. Sure. Take your time.

15 A. I'm not sure if I've seen this exact
16 letter, but I have seen letters like this in the
17 file.

18 Q. Mr. Hamilton, didn't I, in fact, send
19 you a copy of that letter when you first became
20 project manager for the site?

21 A. You may have. You did send me a
22 pretty good size document.

23 Q. And part of that was to bring you up
24 to speed on the Abrahams' attempt to obtain LUST

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1 fund eligibility, is that fair to say?

2 A. Yes, that's fair to say.

3 Q. And does that letter that I just
4 handed you indicate on page two in the second full
5 paragraph, as I told you, this would be a major
6 bullet to my clients. They've expended very large
7 amounts of money in remediating the site prior to
8 this time and would not be financially able to
9 continue that process without LUST fund
10 reimbursement for prior expenditures.

11 A. I see where you're reading that.
12 What's your question?

13 Q. My question is does that explain why
14 the plan of remediation you mentioned and said was
15 not implemented in full?

16 A. It could be a reason.

17 Q. Do you know of any other reasons?

18 A. That they would not pursue the plan?

19 Q. Yes, sir.

20 A. Maybe they didn't agree with the plan.
21 There could be --

22 Q. Let me put it this way: Are there any
23 other reasons in the file to indicate --

24 A. There are no reasons in the file why

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1 the plan was not conducted.

2 Q. Okay. You don't consider this letter
3 to Ms. Hollis to be an explanation of the fact that
4 LUST fund eligibility determination was necessary
5 prior to proceeding with the plan?

6 MR. KARR: I'm going to object, he's
7 asking the witness to speculate.

8 MR. ERZEN: He said there was nothing
9 in the file. I'm asking if he doesn't consider this
10 Abraham Respondent's Exhibit 6 --

11 HEARING OFFICER HALLORAN: He may
12 answer if he's able.

13 BY THE WITNESS:

14 A. No, I don't consider that.

15 BY MR. ERZEN:

16 Q. Okay. You don't consider this to be a
17 reason?

18 A. No.

19 Q. Mr. Hamilton, I hand you a one-page
20 memo that's been marked as Abraham Respondent's
21 Exhibit 7. It's dated April 26, 1993 on IEPA
22 letterhead. Let me know when you've had a chance to
23 review it.

24 A. Okay.

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1 Q. Okay. Is this a document from the
2 file for this site?

3 A. Yes, it is.

4 Q. And does this document indicate that
5 quote, the site's owners are waiting on a UST fund
6 eligibility decision?

7 A. This says that, yes.

8 Q. Do you have any reason to believe that
9 Ms. Nifong's memo is incorrect?

10 A. No.

11 Q. This also indicates that Julie Hollis,
12 the project manager for eligibility, forwarded her
13 review to Dan Merriman, DLC, for a legal
14 interpretation 11 months ago, do you see that there?

15 A. Uh-huh, I see it.

16 Q. Who is Mr. Merriman or who was
17 Mr. Merriman in 1993?

18 A. I'm not sure what his job duties are.
19 He's an appeals attorney for the LUST section.

20 Q. And DLC stands for what?

21 A. Division of legal counsel.

22 Q. So this -- is it fair to say that this
23 memo indicates that Ms. Nifong believed that the
24 reason that the site plan was not being implemented

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1 in full was that there was no LUST fund eligibility
2 determination?

3 A. That's not strictly what it's saying.

4 Q. Okay. Does this indicate that there
5 is any other reason for the fact that the plan is
6 not being implemented in full?

7 A. To me there's two paragraphs; one, the
8 act's not being -- the plan's not being implemented;
9 two, their eligibility decision has been on hold.
10 Those are two separate issues and two separate
11 paragraphs.

12 Q. So you regard them as being totally
13 disconnected?

14 A. Correct.

15 Q. Are you serious about that?

16 A. Yes.

17 Q. Okay. Mr. Hamilton, I'm handing a
18 two-page letter marked Abraham Respondent's Exhibit
19 8 and it's a letter from me to Oran (phonetic)
20 Robinson dated May 18, 1992. Is Abraham
21 Respondent's Exhibit 8 also a letter that is in the
22 file for this site and take your time?

23 A. Yes, this is in the file.

24 Q. Does this letter state on the second

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1 page with regard to the position taken by ESDA that
2 the Abrahams, if I can paraphrase here, quote, are
3 trying to do the appropriate remediation, but are
4 dependent on the availability of LUST funds to be
5 able to continue, close quote. Do you see that
6 there?

7 A. Yes.

8 Q. Do you have any reason to believe that
9 this is not true?

10 A. No.

11 Q. And this letter was also, at least by
12 its terms, carbon copied to Ms. Hollis at the IEPA
13 LUST section, is that correct?

14 A. It says it was.

15 Q. And Respondent's Exhibit 8 is dated
16 May 18th, 1992.

17 Mr. Hamilton, I'm now handing you
18 a document that I've marked as Abraham Respondent's
19 Exhibit 9. This one is dated August 18th, 1992.
20 Is this also a letter that is in IEPA's files for
21 this site?

22 A. Yes.

23 Q. Okay. On the last paragraph of this
24 letter and it states, quote, again, we hope you

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1 realize that the availability of LUST fund monies is
2 important to our clients. We want to get the
3 clean-up underway and completed, but first we need
4 to know how that clean-up will be funded. We look
5 forward to hearing from you in the near future, end
6 quote. Do you see that?

7 A. Uh-huh.

8 Q. Okay. Does this also -- I'm sorry.
9 Does this indicate that it is the question of LUST
10 fund eligibility that is holding the clean-up or
11 preventing the clean-up from being implemented in
12 full?

13 A. That's what this is saying, yes.

14 Q. Do you have any reason to believe that
15 that is not correct?

16 A. No.

17 Q. Was LUST fund eligibility ever -- was
18 a determination of LUST fund eligibility ever made
19 for this site?

20 A. Yes, I believe it was.

21 Q. And when did that happen?

22 A. That, I'm not sure.

23 Q. Okay. Was LUST fund eligibility
24 finally determined for the Abrahams for this site

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1 on July 24, 1997?

2 A. I know they were deemed eligible with
3 a \$50,000 deductible. The date, I'm not sure.

4 Q. Okay. 1997, does that comport with
5 your recollection of when the LUST fund finally --
6 eligibility determination was finally made?

7 MR. KARR: I object, that's been asked
8 and answered. He wasn't sure on the date.

9 HEARING OFFICER HALLORAN: Mr. Erzen?

10 MR. ERZEN: I'll withdraw the
11 question.

12 HEARING OFFICER HALLORAN: Thank you.

13 MR. ERZEN: I do not have multiple
14 copies of this, but perhaps I can show it to --

15 HEARING OFFICER HALLORAN: Okay.
16 You can show it to him.

17 BY MR. ERZEN:

18 Q. Mr. Hamilton, I'm handing you a
19 document that's from the Office of the State Fire
20 Marshall dated July 24, 1997 addressed to Charles
21 and Josephine Abraham. I'd like to hand that to you
22 just to see if that refreshes your recollection as
23 to when a LUST fund eligibility determination was
24 finally made for the Abrahams for this site?

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1 A. Yes. It says July 24, 1997. I knew
2 they had been, I didn't know when.

3 Q. Okay. That's almost, say, five years
4 after the August 18th, 1992, letter, which is
5 Abraham Respondent Exhibit 9?

6 A. Uh-huh.

7 Q. Is that a yes?

8 A. Yeah, that is correct.

9 Q. In those -- that intervening time, are
10 you aware that the Abrahams and the Anests were
11 involved in litigation?

12 A. At one of our previous meetings to
13 this they -- I had heard that there had been
14 discussions between the Anests and the Abrahams.

15 Q. Discussions or litigation?

16 A. Both.

17 Q. Okay. And were you ever provided with
18 the results of that litigation?

19 A. Yes, I believe so.

20 Q. Mr. Hamilton, I've handed you a
21 document which has been labeled Abraham Respondent
22 Exhibit 10 and take your time and exam it and let me
23 know when you're ready.

24 A. Yes, I have seen this.

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1 Q. Is this, in fact, addressed to you?

2 A. Uh-huh, yes.

3 Q. And do you recall that this enclosed
4 the -- and I just have to put the first sheet on
5 here since it's a lengthy document, the Second
6 District Appeal -- the order of the Appellate Court
7 of the Second District affirming the jury verdict?

8 A. Yes.

9 Q. Okay. So at least as of May 20th,
10 1996, you were aware that there had been litigation
11 between the Abrahams and the Anests regarding
12 responsibility for the environmental conditions at
13 the station?

14 A. Yes.

15 Q. When did the IEPA first become aware
16 of the fact that there was litigation between the
17 Anests and the Abrahams over clean-up costs at the
18 station?

19 MR. KARR: I'm going to object to the
20 extent he's asking for the Illinois EPA's awareness.

21 HEARING OFFICER HALLORAN: I'm sorry?

22 MR. KARR: I'm going to object to the
23 extent he's asking for the Illinois EPA's awareness
24 of the litigation.

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1 HEARING OFFICER HALLORAN: Mr. Erzen?

2 MR. ERZEN: Mr. Hamilton has been
3 asked to -- give me a second.

4 Mr. Hamilton has indicated that he
5 has reviewed the entire file and I believe it's a
6 fair question to ask him to speak on behalf of the
7 IEPA since there's no one else who's here to speak.

8 HEARING OFFICER HALLORAN: I'm going
9 to give him a little latitude. If the witness can
10 answer, do so.

11 BY THE WITNESS:

12 A. Can you ask that question, please?

13 BY MR. ERZEN:

14 Q. I'll do it in the context of a
15 document which I think will be fair to you,
16 Mr. Hamilton.

17 Mr. Hamilton, I'm handing you
18 a document that's been marked Abraham Respondent's
19 Exhibit 11. It's a letter dated March 16th, 1994.
20 If you could look at it and let me know when you're
21 done.

22 A. Okay.

23 Q. Is this a document from the IEPA's
24 file for this site?

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1 A. Yes, it is.

2 Q. Does this document indicate that a
3 corrective action notice was issued to S & S
4 Petroleum dated March 4, 1994?

5 A. Yes.

6 Q. Was that, in fact, done?

7 A. Yes.

8 Q. And it was a corrective action notice
9 to S & S Petroleum for this site?

10 A. Yes.

11 Q. And that corrective action notice was
12 issued in March of 1994?

13 A. Yes.

14 Q. Okay. Does this letter indicate that
15 my client, who is S & S Petroleum Products, this is
16 the second paragraph, quote, is presently engaged in
17 litigation with Mr. and Ms. Abraham concerning
18 responsibility for the clean-up costs which resulted
19 from prior notifications by the Agency, close quote?

20 A. That's what it says.

21 Q. Okay. Do you have any information to
22 indicate that that is not, in fact, what was going
23 on as of March 16th, 1994?

24 A. No.

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1 Q. Okay. Mr. Hamilton, when was a --
2 Mr. Karr asked you about nonreimbursed costs, I
3 believe, is that correct? He asked you whether
4 there were non-reimbursed costs for this site?

5 A. Today he asked me that?

6 Q. I believe so.

7 MR. ERZEN: Did he?

8 MR. KARR: Yeah, I believe I did.

9 MR. ERZEN: Well, we'll take a vote.
10 It's hard on everybody.

11 BY MR. ERZEN:

12 Q. When was a set of cost expenditure
13 documents presented for the first time to the
14 Abrahams?

15 A. I'm not sure of the date.

16 Q. Okay. Can you give me an approximate
17 date?

18 A. You're asking me when we handed them a
19 bill?

20 Q. I'm going to hand you Complainant's
21 Exhibit No. 6 and on page 7 of that exhibit it says
22 quote, the Agency shall submit to the party an
23 accounting of all response and oversight costs
24 incurred by the State of Illinois with respect to

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1 this notice and with respect to this site. Have I
2 accurately quoted from Complainant's Exhibit No. 6?

3 A. Yes.

4 Q. When was that presentation made for
5 the first time?

6 A. I'm not sure.

7 Q. Do you have any idea?

8 A. Not without looking at the file.

9 I mean, the first time I'm not sure off the top of
10 my head.

11 Q. You are -- strike that.

12 As project manager, is that part
13 of your responsibilities?

14 A. To what?

15 Q. To present an accounting of all
16 response and oversight costs?

17 A. That's the Agency's responsibility.

18 Q. Okay. My question was is it your
19 responsibility?

20 A. No.

21 Q. Okay. Have you looked through the
22 file for the site in this case?

23 A. Have I looked through the file?

24 Q. Yes, sir.

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1 A. Yes.

2 Q. Have you seen anywhere where such a
3 presentation of an accounting for all response and
4 oversight costs has been made?

5 A. I'm not sure. We did at one time.

6 Q. Okay. Was that during your tenure as
7 project manager for this site?

8 A. Possible.

9 Q. You don't know?

10 A. I don't know.

11 Q. Okay. And you became project manager
12 in 1996?

13 A. Yes, I believe so.

14 Q. I'm sorry?

15 A. Yes, I'm fairly certain of that.

16 Q. So it's possible that the first time a
17 presentation or an accounting of the costs and
18 expenses was presented to the Abrahams was in 1996
19 or later?

20 A. Or earlier, I'm not sure.

21 Q. You just don't know?

22 A. Right.

23 Q. Okay. When were -- Mr. Karr asked you
24 about unreimbursed cost. When were those costs

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1 incurred?

2 A. They were incurred in '89, '90, '91.

3 Q. So if, and I'll ask this in a
4 hypothetical, if the first time a cost accounting
5 was presented to the Abrahams was in 1996 there
6 would have been a minimum of five years or
7 approximately five years between the last incurred
8 cost by the State and the presentation of the
9 accounting, is that correct?

10 A. No.

11 Q. No? What's incorrect? Did I slip a
12 digit in my math?

13 A. You said the last time.

14 Q. Costs were incurred by the State.
15 Well, you said the costs were incurred in '89, '90
16 and '91?

17 A. That's when they started.

18 Q. Okay. Well, if that's all there were
19 and there's a request to admit in the file which
20 says that that's all there were, isn't it a fact
21 that that would be another five years from the last
22 incurred cost until 1996 if, in fact, 1996 is the
23 date upon which a cost accounting was presented?

24 A. Yes, if what you're saying is correct.

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1 Q. I understand. We can get at that from
2 other directions.

3 Why five years, do you know?

4 A. I don't know.

5 Q. Do you have any explanation for it?

6 A. Some.

7 Q. Okay. What are those explanations?

8 A. Lack of manpower on the Agency's part.

9 We just don't have the staff.

10 Q. Any other reasons?

11 A. Not off the top of my head.

12 Q. Weren't there files lost?

13 A. No.

14 Q. No? Misplaced?

15 A. I wouldn't say misplaced, no.

16 Q. Misfiled?

17 A. Misfiled.

18 Q. Is that right?

19 A. There was some, and not just with this

20 site, there was some confusion in the Maywood

21 office.

22 Q. Is it fair to say then that the State

23 of Illinois essentially sat on their unreimbursed

24 cost claim for approximately five years if I'm

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1 correct in my dates?

2 A. I'd say those are harsh words.

3 Q. Are they incorrect?

4 A. The dates may be accurate.

5 Q. Okay. If the State of Illinois wasn't
6 sitting on its claim, then what was it doing?

7 A. That was prior to my time.

8 Q. Do you know of any NPDES permits
9 issued to State Oil, S & S Petroleum or the Anests
10 for this site?

11 A. I think there was, yes.

12 Q. When?

13 A. If they would have been, it would have
14 been early -- late '80s, I think.

15 MR. ERZEN: Okay. Let me just check
16 my notes for a second.

17 HEARING OFFICER HALLORAN: Sure.

18 BY MR. ERZEN:

19 Q. Mr. Hamilton, I hand you a letter with
20 two pages of attachments. It's been marked for
21 identification as Abraham Respondent Exhibit 12.
22 It's a May 14th, 1996, letter from me to you. Why
23 don't you look it over and let me know when you're
24 ready.

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1 Mr. Hamilton, I believe you
2 mentioned earlier in your testimony that I had sent
3 you a bunch of materials some of which included
4 these letters to Ms. Hollis that we -- some of which
5 we looked at earlier, is that correct?

6 A. That's correct.

7 Q. Is this that letter?

8 A. Yes.

9 Q. And are pages two and three of this
10 letter accurate listings of the enclosures that were
11 provided along with this cover letter?

12 A. Yes, I believe they are.

13 Q. Why did you request a collection of
14 the technical materials for the site in 1996?

15 A. I'm not sure if upon our first meeting
16 if I didn't have everything or if the Agency didn't
17 have everything.

18 Q. Was it a request -- strike that.

19 At that time, did you have some
20 suspicion that the Agency's files were incomplete
21 from the -- in the question of technical material in
22 the file?

23 A. On this site I wasn't sure what should
24 have been in there and what -- you know, what was

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1 missing and what wasn't.

2 MR. ERZEN: I'd like to move Abraham
3 Respondent Exhibits 5 through 12 into evidence.

4 HEARING OFFICER HALLORAN: Any
5 objection?

6 MR. KARR: No objection.

7 MR. BAUMGARTNER: No.

8 HEARING OFFICER HALLORAN: Okay.
9 Respondent Abraham Exhibits 5 through 12 are
10 admitted.

11 MR. ERZEN: We have no further
12 questions.

13 HEARING OFFICER HALLORAN: Okay.
14 Thanks. And for the record, the cross-complaint and
15 the direct and cross is kind of commingled.
16 Mr. Baumgartner, do you have any cross?

17 MR. BAUMGARTNER: I have a little,
18 yes.

19 HEARING OFFICER HALLORAN: Thank you.

20 C R O S S - E X A M I N A T I O N

21 by Mr. Baumgartner

22 Q. You indicated that some files may have
23 been misplaced or misfiled in the Maywood office at
24 one time, is that correct, concerning this location?

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1 A. I don't believe I said misplaced.

2 Q. Okay. Misfiled?

3 A. I don't think I said misfiled. I said
4 misplaced. Is that what I said?

5 Q. It amounts to the same thing for what
6 I'm talking about. Do you know specifically what
7 files were misplaced?

8 A. No.

9 Q. Do you know specifically that all of
10 the files that were misplaced were found?

11 A. From what I know, yes.

12 Q. How do you know that? How can you
13 know that a file you didn't see and didn't know
14 anything about wasn't in that file and got misplaced
15 and hasn't been found?

16 A. Well, I could tell you because a bunch
17 of us came up to Maywood and worked on the files for
18 a week from Springfield.

19 Q. And so by doing that you know that
20 there hadn't been anything else in there beforehand
21 that you didn't find?

22 A. Well, I've tried to double check
23 myself and that's why I asked Mr. Erzen to give me a
24 complete copy of what he and his client had.

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1 Q. Did you bring the files with you?

2 A. No.

3 Q. Is there any way that Mr. Erzen or I
4 could look at the materials?

5 A. Sure you can.

6 Q. Right now?

7 A. Yeah.

8 Q. Do you have them here?

9 A. No. I mean, you can go through the
10 freedom of information officer at the Agency.

11 Q. But you didn't produce it for your
12 examination?

13 A. I looked it over.

14 MR. BAUMGARTNER: At this point,
15 Mr. Halloran, I would restate my motion -- my
16 objection to the testimony. One of the requirements
17 for business records is that they be produced in
18 court so they can be examined for cross-examination
19 or used for cross-examination and I would move that
20 this witness' earlier testimony concerning the
21 conditions at the station be stricken.

22 HEARING OFFICER HALLORAN: Mr. Karr?

23 MR. KARR: We weren't attempting to
24 admit any business records through Mr. Hamilton.

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1 He's testifying as the project manager of this site,
2 what his personal knowledge is based on the review
3 of the file and his testimony that he's met with
4 Mr. Erzen and reviewed Mr. Abraham's and GTI's
5 documents.

6 HEARING OFFICER HALLORAN: Any further
7 comment, objections?

8 MR. BAUMGARTNER: Certainly, I'm not
9 saying that it's -- that they're attempting to
10 introduce business records, I am saying that their
11 requirement is that if they're going to have a
12 witness testify as to a summary of business records,
13 they must produce those business records at the
14 hearing and if they don't, then the witness can't
15 testify.

16 MR. ERZEN: I would join.

17 HEARING OFFICER HALLORAN: Okay.
18 Your objection is overruled. He's just testifying
19 as to what he knows as a project manager after
20 reviewing the files and, of course, you can appeal
21 my ruling within 14 days after the transcript, but I
22 do overrule your objection and the testimony stands,
23 but thank you.

24 Mr. Baumgartner, were you done

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1 with your cross?

2 MR. BAUMGARTNER: I'm done.

3 HEARING OFFICER HALLORAN: Okay.

4 Thank you. Is everyone finished with this witness?

5 MR. KARR: Nothing further.

6 HEARING OFFICER HALLORAN: Okay.

7 Thank you. Sir, you can step down. We'll take a
8 short break -- off the record.

9 (Whereupon, a discussion
10 was had off the record.)

11 HEARING OFFICER HALLORAN: We're back
12 on the record. I wanted the parties to again
13 address Complainant's Nos. 15, 16, 17 and 18.
14 These were exhibits -- I initially denied them and
15 took them as an offer of proof, but Mr. Karr, if you
16 could go through and I believe you were trying to
17 get them in under the business records exception, if
18 you could possibly give your argument as to
19 foundation, et cetera.

20 MR. KARR: Sure. Mr. Colantino
21 testified that he had made such type of records or
22 used such type of records in the Agency's regular
23 course of business to develop such travel vouchers
24 to ensure payment of bills from contractors to

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1 reimburse Agency employees for travel expenses,
2 automobile expenses, and that these documents
3 pursuant to Section 101.626 of the Board's
4 procedural rules and specifically Section E would
5 fall under that exception for the admission of
6 business records and that was my attempted argument
7 to get them in.

8 HEARING OFFICER HALLORAN: Mr. Erzen?
9 If I may interrupt, I guess, Mr. Karr, some of the
10 problem I'm having with -- take, for instance,
11 Complainant's Exhibit No. 15, I believe the witness
12 testified that he had no idea what this travel
13 voucher was for, whether it was for his visit --
14 site visit to Union 76 or whatever and part of the
15 problem I had especially with page one of this
16 four-page document in Complainant's Exhibit 15 is
17 the relevancy.

18 MR. KARR: On page one, I believe
19 those are multiple sites and multiple trips
20 reflected on one voucher and I don't see identifying
21 marks on page one of Exhibit 15 tying it to this
22 site, but page two, three and four of that exhibit,
23 I certainly do.

24 HEARING OFFICER HALLORAN: Mr. Erzen?

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1 MR. ERZEN: You're right, these are, I
2 think, admissible only if they fall into an
3 exception to the hearsay rule and I think that the
4 exception we're discussing is the business record
5 exception. I asked Mr. Colantino who wrote in the
6 handwriting Union 76, Millstream, in the upper
7 right-hand corner of pages two, three and four of
8 Exhibit 15 and he didn't know. In order to have a
9 business record, according to the Board's rule,
10 which is pretty similar to common law in the State
11 of Illinois, the writing in a record will have to
12 have been made in the regular course of business
13 which means that somebody has to testify that it was
14 made in the regular course of business. We don't
15 know who made these records. That is a failure of
16 the foundation of the record provided it was a
17 regular course of business to make the memorandum or
18 record at the time of the act, transaction,
19 occurrence and reasonable time thereafter. I point
20 out that there were some six-week gaps between the
21 events in the voucher dates. Whether that's
22 reasonable or not is something we didn't get into in
23 any great depth and the other side, all other
24 circumstances of the making of the writing in the

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1 record, including lack of personnel knowledge affect
2 the weight but not admissibility. If I might also
3 since we're here with Mr. Colantino for the record
4 indicate an additional objection which is the
5 business record exception under Illinois common law
6 is not available to a proponent if records are
7 prepared in anticipation of litigation. I can
8 provide you with some case law to support that. I
9 believe that that is also a foundational issue with
10 these documents.

11 HEARING OFFICER HALLORAN: When we say
12 these documents --

13 MR. ERZEN: I'm sorry. It would be
14 towards the late numbers, 16, 17 and 18.

15 HEARING OFFICER HALLORAN: Now these
16 -- Complainant's Exhibits 16, 17, 18, what does this
17 reflect?

18 MR. ERZEN: Actually, Mr. Halloran, I
19 should probably withdraw and reserve that in that
20 these have been stripped of their underlying
21 materials. There's a separate objection -- let me
22 -- I realize this isn't a very cogent argument, but
23 let me also provide you with an objection to 16, 17
24 and 18 if I might. Those documents are apparently,

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1 although there's been no testimony about what they
2 are, they're grouping sheets and invoice vouchers
3 for payments for various apparently contractors of
4 the IEPA. It is my belief if these documents are
5 going to be worked on further that those numbers on
6 these documents are taken from other documents which
7 have not been presented to us and hence are hearsay
8 upon hearsay. So I would object on that ground as
9 well as the lack of a foundation that these are a
10 business record. There's been no foundational
11 testimony to establish that they're a business
12 record.

13 HEARING OFFICER HALLORAN: Mr. Karr,
14 were you -- are you prepared to give foundational
15 testimony regarding these -- specifically 16, 17 and
16 18?

17 MR. KARR: I believe -- well, first of
18 all, those exhibits were not prepared in
19 anticipation of litigation. Mr. Colantino has
20 testified that multi-site contractors, that's how we
21 got paid for the site's specific work and secondly,
22 I believe Mr. Colantino has already testified that
23 contractors would submit bills, invoice vouchers
24 would be prepared such as these, as a project

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1 manager he would review that stuff and the
2 contractors would be paid. I believe we've laid a
3 foundation for these to be admitted as business
4 records and in addition, if there is -- and I think
5 this may be the case, if there's an argument as to
6 interpretation of what falls under this business
7 records, Section B of 101.62 --

8 THE REPORTER: I'm sorry, I can't hear
9 you.

10 MR. KARR: Also, I think there's a
11 good faith argument that these are -- fall under the
12 business record exception and if there's a
13 difference of opinion on the interpretation of
14 substantive law, the hearing officer will admit the
15 evidence and that's Section B, paragraph B, of
16 Section 101.626 of the Board's procedural rules.

17 HEARING OFFICER HALLORAN: Section D
18 as in dog?

19 MR. KARR: B.

20 HEARING OFFICER HALLORAN: B as in
21 boy. Ironically as it may be, I don't have -- I'm
22 missing page -- I'm sorry, page 40.

23 Mr. Baumgartner?

24 MR. BAUMGARTNER: I have an additional

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1 concern. Taking, for instance, Exhibit 15, of the
2 four pages of that exhibit, there's no way that I
3 can identify if the three of those pages is
4 necessarily having anything to do with this site.
5 The fourth page, which is actually I believe page
6 three, I can identify as being -- as involving two
7 sites, one of which is this site with no way of
8 indicating how much of the amount relates to this
9 site and how much relates to the other site.
10 I'm sorry. We have one that says Union 76,
11 Millstream site. We have one that relates to two
12 sites and two pages that don't relate to any site
13 necessarily. I believe we're entitled to have
14 something before these are introduced to show
15 specifically that they do relate to this
16 transaction, otherwise they're not relevant.

17 HEARING OFFICER HALLORAN: Mr. Karr, I
18 would agree with Mr. Baumgartner, they're rather
19 confusing and in that respect they don't help this
20 case at all as far as relevancy.

21 MR. KARR: On page two, three and
22 four of Exhibit 15, all three of them on down at
23 purpose of travel -- I'm sorry -- yes, purpose of
24 travel on page two, Exhibit 15, it says Union 76,

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1 Millstream site, LUST. The second -- third page of
2 Exhibit 15 in the big box there, it says purpose of
3 travel, LUST site visit to Millstream's Union 76 and
4 the last page of Exhibit 15 down in the bottom, site
5 visit, Millstream Union 76, McHenry.

6 HEARING OFFICER HALLORAN: My mistake.
7 The only one that is really not specific is the
8 first page.

9 MR. BAUMGARTNER: And the last page.

10 MR. ERZEN: The last page involves
11 multiple sites and there's no indication how you get
12 from here to there. I believe it actually involves
13 five separate -- two samplings and three sites, I
14 believe for the purpose of travel.

15 MR. BAUMGARTNER: And it seems to me
16 again that two and three are for the same item.
17 We have a travel voucher and an invoice voucher and
18 lodging for the same night, going from Springfield
19 to Crystal Lake.

20 MR. ERZEN: You're right.

21 MR. BAUMGARTNER: Without any
22 supportive documents, they're awfully hard to
23 interpret.

24 HEARING OFFICER HALLORAN: On

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1 Complainant's No. 16 take, for instance, page one of
2 Complainant's No. 16, and I'm throwing this out to
3 the floor, how do we tie that up with the Union 76
4 site, this voucher? It says grouping sheet, but I
5 assume it's a voucher or no?

6 MR. BAUMGARTNER: I believe the same
7 is true with the next page and the page after that.

8 HEARING OFFICER HALLORAN: On page
9 three of Complainant's No. 16 it does have vendor or
10 payee, Heritage, which was --

11 MR. BAUMGARTNER: But they were a
12 multiple site vendor. So this may be this site, it
13 may be the other site. Page three, the \$44,000 item
14 at the top corresponds to the \$44,000 item on the
15 next page, which may indicate that the 44 is for
16 this site and the rest of them are not for this site
17 and it may also indicate that we have duplications
18 right and left through this thing.

19 HEARING OFFICER HALLORAN: It may also
20 indicate --

21 MR. BAUMGARTNER: That we have
22 duplications. I'm not saying it does, but it's
23 possible, the \$157,000 is actually \$60,000 much of
24 which has been registered three or four times.

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1 HEARING OFFICER HALLORAN: The
2 contracts don't connect up, for instance, on the
3 fourth page it has FLU-9016, \$44,555.76 and the
4 third page where it has the \$44,000 again -- I guess
5 it does, it does connect up, the contract, FLU-9016,
6 but then again -- it has an invoice dated February
7 28th on page three and this one has a time period of
8 February 3rd, '89 through February 24th, '89 so it
9 appears it's a separate invoice, but it's kind of
10 ironic that they're the same amount of money.

11 MR. BAUMGARTNER: One of them on 2/28
12 and one of them on 6/5.

13 HEARING OFFICER HALLORAN: Well,
14 invoice date doesn't necessarily mean when the work
15 was done.

16 MR. BAUMGARTNER: True.

17 MR. ERZEN: I guess, Mr. Halloran,
18 I would object on the grounds of relevance and
19 materiality in the sense that if we can't -- I don't
20 think it's up to the attorneys to make sense of the
21 documents.

22 HEARING OFFICER HALLORAN: Mr. Karr?

23 MR. KARR: I think we've laid the
24 proper foundation and I move that they be admitted.

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1 HEARING OFFICER HALLORAN: You don't
2 find them confusing in any respect?

3 MR. KARR: To the extent that they
4 don't refer to the site, there probably is confusion
5 I would admit, but there are certain invoice
6 vouchers that refer directly to the Union 76 McHenry
7 site.

8 HEARING OFFICER HALLORAN: Well, I
9 think -- here's what I'm going to do. I think I am
10 going to reverse my decision earlier. I think any
11 confusion, and there is a little, may go to the
12 weight and not the admissibility and that was on
13 Complainant's 16, 17 and 18. Complainant's Exhibit
14 No. 15, page one of the four-page document regarding
15 Mr. Colantino's travel voucher, I don't see anything
16 where it connects up to the site visit to Union 76.
17 I would deny that on the grounds of relevancy and
18 confusion. The next three pages, it was brought to
19 my attention that they're all multiple, I guess,
20 site visits on here and I think the Board will
21 consider the weight of that, but I will admit the
22 second three pages of Complainant's No. 15 and I
23 will take Complainant's No. 15, page one, which is
24 -- that has typed -- what is it, 359, is that right,

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1 Mr. Karr?

2 MR. KARR: Yes, Bates stamped number.

3 HEARING OFFICER HALLORAN: Right.

4 Correct. I will take that as an offer of proof
5 now. Mr. Erzen, would you like to cross examine
6 further the witness on these exhibits?

7 MR. ERZEN: I feel I must.

8 HEARING OFFICER HALLORAN: Okay.

9 Please do so and, Mr. Baumgartner, you'll have an
10 opportunity afterwards. Sir, I'd like to remind you
11 you're still under oath.

12 THE WITNESS: Okay.

13 HEARING OFFICER HALLORAN: Thank you.

14 C R O S S - E X A M I N A T I O N

15 by Mr. Erzen

16 Q. Mr. Colantino, I've handed you
17 Complainant's Exhibits 16, 17 and 18. Tell me how
18 much money is not reimbursed for this site from
19 those documents.

20 A. Could you state your question again?
21 I'm sorry.

22 Q. Tell me how much unreimbursed expenses
23 have been incurred by the State of Illinois with
24 respect to this site based solely upon the documents

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1 that you have in your hand, 16, 17 and 18?

2 A. I would have no way of knowing.

3 Q. Thank you. Just one other question on
4 that. Sixteen, 17 and 18, are these based upon
5 bills that were submitted to the State of Illinois
6 by contractors? I'm sorry. Let me hand them back
7 to you or can you tell?

8 A. May I ask you to repeat your question
9 now that I've had a chance to review these?

10 Q. Complainant's Exhibits 16, 17 and 18,
11 are they based upon documents submitted or bills
12 submitted to the State by contractors or can you
13 tell?

14 A. It is my belief that they are based
15 on bills submitted by contractors to the State.
16 I feel very strongly in saying that for Exhibit 16
17 and 17. Exhibit 18, although from all appearance of
18 the documents they're consistent with Agency
19 procedures on invoicing, but my signature isn't on
20 any of these and I would be uncomfortable making any
21 comment to these. However, my signature is on 16
22 and 17 and to my recollection, they do represent
23 payment by the State for invoices received from
24 contractors.

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1 Q. So if I wanted to know what underlay
2 these exhibits, I would have to look at some other
3 documents that aren't here, is that right? In other
4 words, what the State is paying for, I'd have to
5 look at somebody else's documents?

6 A. Yes.

7 MR. ERZEN: Your Honor, I would renew
8 my objection on two grounds, one is that based upon
9 the fact that the number can't be determined and the
10 only relevance of these documents is to the cost
11 claim and Mr. Colantino has testified that that
12 can't be determined from these documents, the
13 documents then become irrelevant. The second is
14 that because they are based upon documents which are
15 not present as part of this collection, they are
16 hearsay upon hearsay and therefore although at one
17 level they do become business records, you cannot
18 use business records to bring in hearsay from other
19 persons such as contractors and that's what's going
20 on here. So I would renew my objection to these
21 documents and ask that they be disallowed.

22 HEARING OFFICER HALLORAN: Mr. Karr?

23 MR. KARR: One, Mr. Colantino said he
24 couldn't do that from these documents -- determine

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1 the total cost from these documents present as he
2 was sitting there. Secondly, they are Agency
3 business records and as such, I believe they were
4 properly admitted.

5 HEARING OFFICER HALLORAN:

6 Mr. Baumgartner?

7 MR. BAUMGARTNER: I would join in
8 Mr. Erzen's objection.

9 HEARING OFFICER HALLORAN: I'm going
10 to overrule Mr. Baumgartner's and Mr. Erzen's
11 objection. I will allow them in and again I state
12 it goes to the weight and not the admissibility and
13 that's my ruling.

14 BY MR. ERZEN:

15 Q. Mr. Colantino, I handed you a document
16 that's been marked as Abraham Respondent Exhibit 13,
17 I believe, which is an invoice voucher dated
18 5/31/89. Is that part of the package -- I'm sorry,
19 it bears a stamp on the bottom of 0291 and if you
20 can look at Complainant's Exhibit 16, I believe you
21 can see that the first page of Abraham Respondent's
22 Exhibit 13 is included as part of Complainant's
23 Exhibit 16, is that correct?

24 A. Yes.

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1 Q. Okay.

2 A. It appears to be correct.

3 Q. Okay. Is that your signature on
4 Abraham Respondent's Exhibit 13?

5 A. Yes.

6 Q. Why did you sign that?

7 A. Authorizing payment.

8 Q. And what are the steps in authorizing
9 payment? Why do you have to sign it? Why doesn't
10 it go straight to the fiscal division for issuing a
11 check?

12 A. To verify that the services were
13 performed and the services were authorized, that the
14 work for the bill was consistent with the tasks
15 assigned.

16 Q. Okay. Strictly from the first page of
17 Respondent -- Abraham Respondent's Exhibit 13 you
18 can't tell what was done to justify this \$2,516.74
19 invoice, is that correct?

20 A. Do I understand you to say by solely
21 looking at this front page?

22 Q. At the front page.

23 A. That's correct.

24 Q. So there's -- and that's from pages --

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1 all that's in Complainant's Exhibit 16, there's no
2 backup in Complainant's Exhibit 16?

3 A. I don't know that.

4 Q. Okay. If you can look at it to
5 confirm it. Am I correct?

6 A. That is correct.

7 Q. There is no backup for the voucher --
8 excuse me, the invoice voucher which was Abraham
9 Respondent's Exhibit 13 in Complainant's Exhibit 16?

10 A. None that I saw.

11 Q. So looking at Complainant's Exhibit
12 16, you couldn't tell what the contractor did, is
13 that correct?

14 A. Looking at this document?

15 Q. Yes. At the first page of Abraham
16 Respondent's Exhibit 13, you can't tell what the
17 contractor did, is that correct?

18 A. When you pose your question you,
19 you're referring to me?

20 Q. Yes, sir.

21 A. At this point in time with the lapse
22 of the years, no. When I looked at this when I
23 signed it, the answer would be yes.

24 Q. Well, let me ask you this:

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1 If somebody just jams an invoice voucher in front of
2 you, would you sign it without backup?

3 A. It depends upon what the invoice was
4 for, what the work pertained to. If it was work
5 that was ongoing that I directed, that I had
6 knowledge of, yes, I would sign it.

7 Q. Without looking at the backup, is that
8 right?

9 A. If there was backup, I would be -- it
10 would be preferable to look at it. Some invoices do
11 not have backup. It is a collective knowledge
12 process in signing invoices. If you've witnessed
13 the work, if you saw field notes, if you made
14 communication with your field people and observed
15 it, there may not be actual written supportive
16 documentation. There may be verbal confirmation,
17 there may be visual confirmation and I would indeed
18 sign it.

19 Q. Okay. But by signing an invoice
20 voucher you are, as an employee of the state,
21 vouching that the work done was necessary and
22 appropriate and fairly billed, is that fair?

23 A. To the best of my ability, yes.

24 Q. You are the front line guarding the

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1 state's pocketbook, is that right, that's why you
2 sign these vouchers?

3 A. I sign the vouchers as a process of
4 validating the charge -- that the charges were
5 appropriate and consistent with the tasks. I'm not
6 sure that I sign these as an agent to guard the
7 state's pocketbook. Signing this is a confirmation
8 that the work performed should be paid because it
9 was consistent with the tasks assigned, that was
10 what my signature represents.

11 Q. So it does not in any way then say
12 that the work performed was necessary or
13 appropriate, is that my understanding of what your
14 testimony is? Am I correct?

15 MR. KARR: I'm going to object, asked
16 and answered.

17 BY MR. KARR:

18 Q. By signing that, what are you telling
19 people, that this is part of a collective decision
20 process? What are you doing when you sign these
21 documents?

22 A. I'm confirming that the charges are
23 consistent with the tasks and the work performed and
24 that the work was conducted in a reasonable fashion

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1 according to any directives.

2 Q. So by signing these vouchers you're
3 making no determination that the work was necessary
4 or appropriate, is that correct?

5 A. In my opinion, by signing it there is
6 -- it does speak to that in that the work would not
7 have been directed if it was not necessary. As I
8 explained, the signature on this validates that the
9 work was done in accordance as directed. If it was
10 directed, it was directed with basis and regulation
11 or law and, therefore, I think it does carry that it
12 was appropriate.

13 Q. So because the work was directed, that
14 means it's necessary and appropriate?

15 A. Yes.

16 Q. Who in these packages has determined
17 that this work was necessary and appropriate?

18 A. In these packages?

19 Q. Right, Complainant's Exhibits 16, 17
20 and 18. If you were not the person, who did?

21 A. I believe I was one of the people.
22 I don't believe I said -- I don't believe there was
23 any comment on my part that said I was not.

24 Q. Let's look at Abraham Respondent's

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1 Exhibit 13 if we could for a second.

2 A. All right.

3 Q. Okay. And this has the backup
4 attached, is that correct?

5 A. Yes.

6 Q. And this is the backup -- you can look
7 at it and confirm that pages -- Bates stamps 292 and
8 29 -- well, there's no Bates stamp on the next page,
9 but that is the backup for the invoice voucher that
10 you signed on the front page of Abraham Respondent's
11 Exhibit 13, is that right?

12 A. I don't know that I can say that.
13 I don't know that this invoice is directly matched
14 with this voucher. I would have to study it for
15 some time.

16 Q. Take all the time you need.

17 A. As a matter of fact, I would probably
18 say -- well, the totals match up and the date of
19 services appear to match up, although some of the
20 typing is obscured by some copy marks. There seems
21 to be a discrepancy in an invoice number or voucher
22 number which I can't explain.

23 MR. ERZEN: Your Honor --

24 Mr. Halloran, once again, I would ask that these

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1 documents not be admitted in the record because from
2 Mr. Colantino's testimony, we cannot match these
3 invoices with backup from contractors and he's
4 testified that that's where these numbers come from.
5 These are either double hearsay, which is what we
6 found and now --

7 HEARING OFFICER HALLORAN: Even if it
8 was double hearsay, there are exceptions in the
9 business record, but proceed.

10 MR. ERZEN: All right. My objection
11 is overruled?

12 HEARING OFFICER HALLORAN: No, no.
13 Proceed with your argument. I want to ask Mr. Karr
14 regarding these statements and there's confusing
15 information here regarding the invoice.

16 MR. KARR: I don't believe there is.
17 These are -- the invoice voucher is a record of the
18 Agency used as Mr. Colantino testified to ensure
19 payment of the contractors for the work they have
20 done. He's testified to the process and again,
21 I think you ruled on this objection and I think
22 quite clearly it goes to the weight and not
23 admissibility. Counsel's free to make those weight
24 arguments in his closing brief.

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1 MR. ERZEN: Mr. Halloran, if the State
2 decides to make up invoice vouchers, let's say that
3 they have no basis at all or they have a basis that
4 they don't provide to us, which is apparently what
5 Mr. Colantino's saying because the basis of what was
6 provided to us he can't match up with the vouchers,
7 then these vouchers are not material or relevant to
8 this case because their own witness cannot match the
9 backup to the vouchers. So unless the State --

10 HEARING OFFICER HALLORAN: Well, in
11 this particular case. If you want to go through
12 each and every one then I'll make -- I've got until
13 whatever, 8:00 o'clock.

14 MR. ERZEN: I don't believe it's my
15 burden to prove that the expenses are reasonable and
16 necessary and were paid. What I'm doing here is
17 basically trying to represent that apparently the
18 State can't meet that burden.

19 HEARING OFFICER HALLORAN: You're
20 saying that all the -- I thought I heard you say --
21 all the invoices cannot match up to the backup
22 documents.

23 MR. ERZEN: Well, what I said is
24 Mr. Colantino cannot represent.

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1 HEARING OFFICER HALLORAN: I'm going
2 to stand on my ruling and you can appeal and again,
3 it will go to the weight and not the admissibility.
4 You may proceed, Mr. Erzen.

5 BY MR. ERZEN:

6 Q. Let's talk about some weight issues.

7 Let's assume hypothetically then
8 that the backup provided for the invoice voucher
9 which is the first page of Abraham Respondent
10 Exhibit 13 is, in fact, the next two pages of
11 Abraham Respondent Exhibit 13. Does that appear to
12 be the case by the way?

13 A. Yes.

14 Q. And you apparently signed off for the
15 State to pay Heritage for rental of slick boom, is
16 that correct, page three?

17 A. Yes.

18 Q. For 100 feet from May 6th to May 26th?

19 A. Yes.

20 Q. And that was for 21 days at \$70 a day?

21 A. That's what it indicates, yes.

22 Q. A total for this period of time for
23 \$1,470 for boom rental?

24 A. That's what it indicates, yes.

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1 Q. And you signed off on that?

2 A. Yes.

3 Q. And in doing so, you're trying to say
4 that this was what, appropriate, necessary, cost
5 effective?

6 A. It would appear that way, yes.

7 Q. Do booms cost that much?

8 A. I don't know.

9 Q. You don't know?

10 A. I don't know what the cost of booms
11 are. As you recall, it was a price negotiated when
12 the contractors were selected under the multi-site
13 contract process. Rates and fees were not
14 negotiated, they were addressed under the master
15 contract under which the work was left for
16 individual projects.

17 Q. So you had no responsibility to look
18 at a rental rate and say this is nuts, is that fair
19 to say?

20 A. No. I don't believe that was fair to
21 say.

22 Q. Okay. You looked at this one and you
23 didn't say anything about it, you signed off on it?

24 A. That's correct, apparently.

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1 Q. I'm handing you now Abraham Respondent
2 Exhibit 14, which bears Bates number 286. Again,
3 I will ask you, Mr. Colantino, is the first page of
4 Abraham Respondent Exhibit 14 also part of
5 Complainant's Exhibit 16?

6 A. Yes.

7 Q. And you signed off on that invoice
8 voucher, too, didn't you?

9 A. Yes, I did.

10 Q. And that's for \$4,632.24?

11 A. Yes.

12 Q. I'd like you to look at the cost of
13 slick boom rental on that backup material, again,
14 if, in fact, that is the backup for this voucher.
15 Let me ask that question first. Are the next two
16 pages of Abraham Respondent Exhibit 14 the backup
17 for the invoice voucher as part of Exhibit 14?

18 A. I'm sorry. I was looking at the
19 document, I didn't get the beginning of your
20 question.

21 Q. Yeah, it's complicated.

22 Looking at Abraham Respondent
23 Exhibit 14, it's an invoice voucher followed by a
24 two-page bill from Heritage, is that correct?

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1 A. Yes. I'm sorry. I'm having a hard
2 time hearing.

3 Q. Is the two-page bill from Heritage
4 the backup for Abraham Respondent Exhibit 14's first
5 page?

6 A. It appears to be, yes.

7 Q. And you signed off on that -- on
8 Abraham Respondent Exhibit 14, did you not?

9 A. Yes.

10 Q. Okay. And how much was the boom
11 rental in that -- that's included in that invoice
12 voucher?

13 A. The price was the same as before, \$70
14 and there was a 55-day rental and the fee is 3,000
15 something.

16 Q. I'd like to direct your attention to
17 the left of that, it says slick boom, 70 cents per
18 foot?

19 A. Yes.

20 Q. 5/6 to 6/30 and I think it says 100
21 feet, is that correct?

22 A. It appears to be correct.

23 Q. And didn't you already pay for boom
24 rental from May 6th to May 26th in the prior -- in

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1 Abraham Respondent Exhibit 13?

2 A. It appears we did.

3 Q. And that's something you can't
4 determine from Complainant's Exhibits 15, 16 -- I'm
5 sorry, 16, 17 and 18 because they don't have any
6 backup, do they?

7 A. I don't recall there being backup in
8 that, that's correct.

9 Q. Okay. By the way, how much was the
10 boom that was -- boom cost in Abraham Respondent
11 Exhibit 14, \$3,400 and some dollars?

12 A. It appears to be. That's a good
13 guess.

14 Q. Probably about 75 percent of the total
15 bill was in boom rental charges, is that right?

16 A. Roughly, correct.

17 Q. So that was a material part of this
18 bill?

19 A. Yes.

20 Q. And it was double paid in part?

21 A. It appears to have been, yes.

22 Q. Okay. In fact, if you look at Abraham
23 Respondent Exhibit 13 you'll notice you signed them
24 both on the same day, is that right?

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1 A. Yes.

2 Q. How many thousands of dollars of boom
3 rental charges were billed to this site?

4 A. That's a question I cannot answer.

5 Q. Okay. Can you answer it from
6 Complainant's Exhibits 16, 17 or 18?

7 A. I don't know. I don't have those in
8 front of me, but it's unlikely that I could with the
9 generality of your question. No.

10 Q. No, you can't tell?

11 A. I would be unable to answer that
12 question with this information.

13 Q. How many booms were used by Heritage?

14 A. I don't recall.

15 Q. Do you have any idea?

16 A. At this point in time, no.

17 Q. Would you agree that over \$2,000 was
18 spent for boom rental for the month of July 1989 by
19 the State of Illinois?

20 A. Can you direct me to where that is?

21 Q. Well, can you determine it from the
22 documents submitted by the State, Complainant's
23 Exhibit 15 -- I'm sorry, 16, 17 and 18?

24 A. The time period for?

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1 Q. July of 1989.

2 A. I don't believe I can from just
3 looking at the grouping sheet or the invoice
4 vouchers.

5 Q. Let me ask it generally. From looking
6 at Complainant's Exhibits 16, 17 and 18, can you
7 tell what was done at the site and what those
8 expenditures related to other than that they were
9 labeled to have something to do with the site?
10 Can you tell actually what was done?

11 A. Can you repeat your question?

12 Q. Not a chance.

13 MR. ERZEN: Can you read it back?

14 HEARING OFFICER HALLORAN: You can ask
15 me and I'll ask the court reporter to read it back.

16 MR. ERZEN: I'm sorry.

17 (Whereupon, the requested
18 portion of the record
19 was read accordingly.)

20 BY THE WITNESS:

21 A. With a few exceptions, no.

22 BY MR. ERZEN:

23 Q. I'd like to real quickly turn to an
24 invoice that was in Complainant's Exhibit 16, it's

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1 the page bearing the number at the bottom, 000274.

2 How much is that voucher for?

3 A. It appears to me that the voucher is
4 for \$38,377.36.

5 Q. Okay. How much of that relates to the
6 Millstream station site that we're talking about
7 today?

8 A. Looking at just the document 0274,
9 seeing the federal contract number, FLU-9018, which
10 based off the documents I've seen thus far indicates
11 that was the federal identification number for this
12 project since we're using federal fund, I'm going to
13 say all of it.

14 Q. Okay. All of it?

15 A. That would be my guess at this point
16 in time looking at this document to answer your
17 question.

18 Q. Let me ask the question then this way:
19 Is that a guess?

20 A. Yes.

21 Q. Okay. It's not a -- you're not
22 telling me that is the right number?

23 A. No. It would be an educated guess.

24 Q. Okay. And is there any way anyone

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1 could determine what is the right number based
2 solely upon that invoice voucher? By the right
3 number, I mean the right number for the Millstream
4 site.

5 A. Well, I'll be naive, but I'd like to
6 think there is if there's a document trail that
7 would lead to this.

8 Q. Where is the document trail?

9 A. I do not know.

10 Q. It's not in your hand, is it?

11 A. It does not appear to be.

12 Q. It's not part of Complainant's Exhibit
13 16, is it?

14 A. It does not appear to be.

15 Q. Okay. So Complainant's Exhibit 16
16 does not indicate how you get to the numbers, is
17 that right?

18 A. I believe it indicates it. I don't
19 believe all of the supportive documentation is
20 attached to it.

21 MR. ERZEN: Mr. Halloran, I think I
22 misplaced one set of documents. I'd like to have a
23 moment to look for it.

24 HEARING OFFICER HALLORAN: Sure.

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1 BY MR. ERZEN:

2 Q. Mr. Colantino, I've handed you a
3 document that's been marked for identification as
4 Abraham Respondent's Exhibit 15. Do you recognize
5 this?

6 A. I do not have a specific recollection
7 of this document.

8 Q. Do you recognize the general form of
9 the document?

10 A. Yes, I do.

11 Q. Okay. Does it appear to be an IEPA
12 LUST oversight form for the site at issue in this
13 case?

14 A. It appears to be that, yes.

15 Q. Does this form indicate that Heritage
16 arrived at the site at 8:30?

17 A. The form indicates that, yes.

18 Q. Okay. Does this form also indicate
19 that Heritage departed the site at 10:45?

20 A. That is correct.

21 Q. Okay. Between 8:30 and 10:45 is two
22 hours and 15 minutes, is that correct?

23 A. Yes.

24 Q. How much time did Heritage bill for on

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1 April 5th, 1989?

2 A. Your question was how much did
3 Heritage --

4 Q. How much in man-hours -- how many
5 man-hours did Heritage bill for for that two hour
6 and 15 minute appearance on site on April 5th, 1989?

7 A. I don't know what they billed for that
8 two hours and 15 minutes on site. I don't know what
9 their billing rate was.

10 Q. I'm not talking about dollars, I'm
11 talking hours, how many man-hours?

12 A. Based off the information you provided
13 me, I can only conclude that they billed for two
14 hours and 15 minutes on site.

15 Q. I'd like you to turn to the second
16 page of Abraham Respondent Exhibit 15.

17 A. Yes.

18 Q. Do you recognize this document which I
19 will represent came from IEPA files?

20 A. Yes.

21 Q. And what does that indicate that
22 Heritage billed for in terms of man-hours on April
23 5th, 1989 for that two hour and 15 minute appearance
24 on site?

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1 A. I can only conclude they billed for
2 two hours and 15 minutes on site.

3 Q. Okay.

4 A. And they have eight hours down. The
5 eight hours reflects mob time, transportation time,
6 demob time, clean-up and the log indicates they were
7 on site for two hours and 15 minutes, set up,
8 travel, travel back, wash.

9 Q. Two hours and 15 minutes -- eight
10 hours less than two hours and 15 minutes is five
11 hours and 45 minutes?

12 A. Yes.

13 Q. Okay. How far do they travel?

14 A. I'm not sure where this truck came
15 from. They had a service station in Lockport.

16 Q. What did they list as the mileage on
17 page two?

18 A. 130 miles.

19 Q. So in five hours and 15 minutes they
20 drove 130 miles and mobilized and demobilized and
21 that ate up the rest of the eight hours?

22 A. I would assume that to be the case.

23 Q. How long does it take to drive 130
24 miles?

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1 A. I don't know. I know what it would
2 take me in my sports car. I don't know what it
3 would take with a vac truck.

4 Q. Would it take five hours?

5 A. I would highly doubt that, but there
6 were prep time and pump time and wash out time and
7 that's the way of the business. I can't speak to
8 the eight hours. I could --

9 Q. You don't know if they spent eight
10 hours on the site or eight hours working, is that
11 fair to say?

12 A. No. I would not know if it was eight
13 hours and one minute or seven hours and 59 minutes
14 or six hours if that's your question.

15 Q. My question is for two hours and 15
16 minutes of time at the site they billed the State of
17 Illinois for 16 man-hours, is that right, two men,
18 eight hours each?

19 A. As you posed that question, yes.

20 Q. My question is, did you make any
21 determination that this five hours and 45 minutes is
22 unaccounted for as being site -- not site time for
23 which the State was billed, is that reasonable or
24 unreasonable, do you know?

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1 A. I don't know if we at that time -- at
2 the time that this was submitted to us or at the
3 time there was an invoice that we tried to determine
4 if the five hours associated with the two-and-a-half
5 hours on site was reasonable or unreasonable. I
6 have no recollection of that. To me now, I cannot
7 tell you whether or not that is reasonable or
8 unreasonable at this time. I can tell you from
9 professional experience that there is associated
10 time with every project, you spend one hour on site
11 and it may take five hours of prep time, it may take
12 one hour of prep time, depending on the job,
13 depending on conditions.

14 Q. You were the one who approved these
15 bills, is that correct?

16 A. I don't recall if I approved this one,
17 but I approved a number of them, that's correct.

18 Q. Well, I'll tell you what, we'll take a
19 minute and I'll get the documents and show you you
20 approved this bill.

21 Did you make any effort to
22 determine whether five hours and 45 minutes of prep
23 time is necessary and appropriate to support two
24 hours and 15 minutes of on-site time?

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1 A. I have no recollection if I did that
2 at that time.

3 Q. Okay. By the way, just as an
4 interesting curiosity, did Randolph & Associates at
5 this point recommend removing 100 feet of slick boom
6 and repositioning the remaining 100 feet? This is
7 at the 9:00 o'clock entry.

8 A. Yes, it appears they recommended.

9 Q. If you look at the last page of
10 Abraham Respondent Exhibit 15, what did Heritage
11 bill for for boom rental?

12 A. I'm sorry. Where are you? The last
13 page is employee --

14 Q. I'm sorry. The next to last page.
15 I'm sorry.

16 A. If you can show me what -- this is all
17 also -- this is vehicle -- material and expendable,
18 slick boom, 200 feet.

19 Q. Why does it take two vehicles to carry
20 two guys from Heritage to this site?

21 A. I do not recall specifically. I can
22 give you what it could possibly be.

23 Q. I don't want a could possibly, I want
24 to know if you know why it took two vehicles to

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1 carry two people to this site for Heritage?

2 A. Without having recollection of what
3 went on that day and not being there, only going off
4 of this log, they took a utility truck and a vac
5 truck. A utility truck carries equipment, material,
6 supplies, a vac truck is a large pump truck, it has
7 no capability of carrying equipment, supplies or
8 material that may have been needed at the site.
9 Apparently, whatever they were tasked to do,
10 whatever they were scheduled to do, there was either
11 a direct need or a potential need to have material
12 that required two vehicles to get men and material
13 there.

14 MR. ERZEN: Thank you, Mr. Colantino.

15 HEARING OFFICER HALLORAN: Thank you,
16 Mr. Erzen. Mr. Baumgartner?

17 MR. BAUMGARTNER: No questions.

18 HEARING OFFICER HALLORAN: I think --
19 do you have any re-redirect or --

20 MR. KARR: No, I'm finished.

21 HEARING OFFICER HALLORAN: Thank you.
22 You may step down. Thank you. We're off the
23 record.

24

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1 (Whereupon, a discussion
2 was had off the record.)

3 MR. ERZEN: I move Abraham Respondent
4 Exhibits 13 through 15 into evidence.

5 HEARING OFFICER HALLORAN: Mr. Karr?

6 MR. KARR: No objection.

7 MR. BAUMGARTNER: No objection.

8 HEARING OFFICER HALLORAN: Respondent
9 Abraham Exhibit -- what is it?

10 MR. ERZEN: Thirteen through 15.

11 HEARING OFFICER HALLORAN: They're
12 admitted and I do want to make clear for the record
13 that my ruling was that I found that the witness did
14 testify that the records in question were kept in
15 the regular course of business and any deficiency
16 goes to the weight, not the admissibility. I want
17 the record to reflect that.

18 In any event, we'll meet back here
19 -- this hearing will be continued on record.
20 We will meet back here tomorrow morning at 9:00 a.m.

21 I do want to note for the record
22 also, no members of the public showed up and before
23 I forget I'm supposed to make a credibility
24 determination on the witnesses and based on my legal

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1 experience and judgment I find that there's no
2 credibility issues with the witnesses that testified
3 here today. Thanks. Have a safe trip home.

4 MR. BAUMGARTNER: Thank you.

5 HEARING OFFICER HALLORAN: Thank you.

6 (Whereupon, the hearing was
7 concluded.)

8 HEARING OFFICER HALLORAN: We are back
9 on the record. It's not continued to tomorrow.
10 It's still October 20th, the parties have -- 21st.
11 The parties have agreed to a -- somewhat of a
12 stipulation. Mr. Baumgartner, would you care to
13 explain?

14 MR. BAUMGARTNER: The only witness I
15 would produce if we went over to tomorrow is
16 Mr. Richard Barnes. In 1984, Mr. Barnes was the
17 operation manager for State Oil Company and was
18 in charge of situations such as the one that's the
19 subject of this hearing. When he was informed that
20 there was a problem, he immediately contacted the
21 EPA and notified them that there was some water --
22 or some gasoline coming out of the --

23 MR. ERZEN: IEPA.

24 MR. BAUMGARTNER: IEPA, yeah.

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1 He also hired an organization called SET to take
2 care of the problem and to carry out any requests
3 that the IEPA made. Either he or SET hired an
4 organization called IT, neither of these
5 organizations exist today, to run pressure tests
6 on the tanks at the station. IT reported to
7 Mr. Barnes that they had run the pressure tests and
8 the tanks passed. Mr. Barnes was not present at the
9 time the tests were run and does not have any
10 firsthand knowledge about that and also has no
11 documents as of this date which would substantiate
12 that. Mr. Barnes is no longer an employee of State
13 Oil Company and has not been for about a decade.
14 Mr. Barnes is a resident of that immediate area and
15 has been for years and is familiar with this
16 location and the only other thing he would testify
17 to is that it was an operating gasoline service
18 station before Bill and Peter Anest bought it in
19 1974.

20 MR. ERZEN: And I would object to only
21 to Mr. Barnes' testimony insofar as he would testify
22 to what he was told -- supposedly told by IT.
23 I object on the grounds of hearsay.

24 HEARING OFFICER HALLORAN:

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1 Mr. Baumgartner, how would you respond?

2 MR. BAUMGARTNER: My only response
3 would be that I'm putting the testimony in for three
4 reasons, one relates to the State, which apparently
5 is not making an objection and is to establish that
6 we at least made every effort to find out what was
7 wrong. The second is that I'm putting it in to
8 establish just the mere fact that Mr. Barnes was
9 told that. From those two bases, it's not hearsay.
10 From the third basis to the degree that I would like
11 to have it construed that the tanks were pressure
12 tested and found to be tight, I would agree with
13 Mr. Erzen that it's hearsay.

14 MR. ERZEN: And cannot be used for the
15 purpose of proving that the tanks were tested.

16 MR. BAUMGARTNER: The tanks were, in
17 fact, tight, yes.

18 HEARING OFFICER HALLORAN: And I will
19 and would sustain Mr. Erzen's objection to the
20 hearsay argument.

21 MR. BAUMGARTNER: Off the record. I
22 just don't want to bring the man in so you can --

23 HEARING OFFICER HALLORAN: We're not
24 off the record yet. We're off the record.

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1 (Whereupon, a discussion
2 was had off the record.)

3 HEARING OFFICER HALLORAN: We're back
4 on the record. I think we have some documents the
5 parties wanted to submit.

6 MR. ERZEN: Why don't you go first,
7 John?

8 MR. BAUMGARTNER: Okay. The only
9 document that I would like to put in and I think --
10 no, Mark, you go first and then I will tie into your
11 numbers rather than have State Oil Exhibit 1, I will
12 just put it as Respondents Exhibit --

13 MR. KARR: His are labeled Abraham
14 Respondent.

15 MR. BAUMGARTNER: Are they?

16 MR. ERZEN: Yes, they are.

17 MR. BAUMGARTNER: Okay. The only
18 document I have is State Oil Exhibit 1 and it is
19 a set of request to admit that were served on both
20 the complainant and on the co-respondent and the
21 answers to those requests to admit, which I suppose
22 I have two answers, I better make it one, two and
23 three, one being the request for admissions; two
24 being the response of the complainant and three

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1 being the response of the co-respondent.

2 HEARING OFFICER HALLORAN: Any
3 objection?

4 MR. KARR: No objection.

5 MR. ERZEN: No objection.

6 HEARING OFFICER HALLORAN: Okay.

7 Respondent State Oil Exhibits 1, 2 and 3 are
8 admitted and that's all we have right now,
9 Mr. Baumgartner?

10 MR. BAUMGARTNER: Yes. I may have one
11 additional we might have to mark.

12 HEARING OFFICER HALLORAN: Mr. Erzen?

13 MR. ERZEN: Let's start with -- I
14 would like to tender to Mr. Halloran Abraham
15 Respondent's Exhibit 16, which is the response of --
16 actually, this -- Bill Anest to the request to admit
17 that were submitted by the Abraham respondents and
18 the answers were just typed in between the questions
19 which is why it looks like it's our document. I
20 also talked with Mr. Baumgartner and I believe he
21 will agree that the respondent -- the response for
22 Bill Anest is identical to the response for Peter
23 Anest, S & S --

24 MR. BAUMGARTNER: They are S & S, it's

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1 a partnership.

2 MR. ERZEN: And State Oil -- State
3 Petroleum, the other respondents.

4 MR. BAUMGARTNER: The other responses
5 were identical, yes.

6 MR. ERZEN: And as Abraham Respondent
7 Exhibit 17, complainant's response to respondent's
8 request to admit and then finally as Abraham
9 Respondent Exhibit 18, I'd like to offer into
10 evidence, it is the Rule 23 order, the Second
11 District Appellate Court filed June 26, 1995, which
12 is an appeal from a judgment in the Abraham versus
13 Anest civil litigation.

14 MR. KARR: Are you sure it has all the
15 pages? I was missing page 29, 30.

16 MR. BAUMGARTNER: So if Mr. Erzen is
17 going to introduce that --

18 MR. ERZEN: Perhaps I should formally
19 move 16, 17 and 18 -- Abraham Respondent's 16, 17,
20 18 into evidence.

21 HEARING OFFICER HALLORAN: Any
22 objection?

23 MR. BAUMGARTNER: My only objection
24 would be relevance and we can solve that by putting

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1 in the third amended complaint which is the
2 complaint upon which the case was tried along with
3 the judgment order. Without those my position is
4 it's irrelevant.

5 MR. ERZEN: I have no objection to the
6 admission of those documents.

7 HEARING OFFICER HALLORAN: This is the
8 third amended complaint?

9 MR. BAUMGARTNER: Yes.

10 HEARING OFFICER HALLORAN: This would
11 be your -- State Oil Exhibit No. 4?

12 MR. BAUMGARTNER: Four and five, yes.
13 The judgment order is five.

14 HEARING OFFICER HALLORAN: Mr. Karr?

15 MR. KARR: No objection to any of
16 those exhibits from either party.

17 HEARING OFFICER HALLORAN: Respondent
18 State Oil Exhibit 1, 2, 3, 4 and 5 is admitted --
19 are admitted and I believe I admitted Respondent
20 Abraham Exhibits 16, 17 and 18.

21 MR. ERZEN: Are there any exhibits
22 that were offered and refused?

23 MR. KARR: My 13, which I withdrew.
24 I'm not sure if that's floating around.

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1 HEARING OFFICER HALLORAN:
2 Respondent's Exhibit 1 was taken as an offer of
3 proof.

4 MR. ERZEN: That's correct. Other
5 than that, I believe all the exhibits offered by the
6 parties were admitted.

7 HEARING OFFICER HALLORAN: Correct.
8 We're going to have to go off the record again and
9 get a post-hearing brief.

10 (Whereupon, a discussion
11 was had off the record.)

12 HEARING OFFICER HALLORAN: We're back
13 on the record. We've been discussing the
14 post-hearing briefing schedule. We're going to do
15 things simultaneous. The opening post-hearing
16 briefs for all parties are due December 6th, but
17 with that said, the respondent and cross-complainant
18 will be filing two separate post-hearing briefs, one
19 with respect to the People's complaint and one with
20 respect to the cross-claims, am I right?

21 MR. ERZEN: That's correct.

22 HEARING OFFICER HALLORAN: And there's
23 going to be simultaneous replies due December 20th.
24 If there's no further comments --

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1 MR. BAUMGARTNER: Everybody has
2 rested.

3 HEARING OFFICER HALLORAN: Okay.
4 Thank you very much.

5 (Whereupon, the above-entitled
6 cause was concluded.)

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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF C O O K)

4

5

6 I, TERRY A. STRONER, CSR, do
7 hereby state that I am a court reporter doing
8 business in the City of Chicago, County of Cook, and
9 State of Illinois; that I reported by means of
10 machine shorthand the proceedings held in the
11 foregoing cause, and that the foregoing is a true
12 and correct transcript of my shorthand notes so
13 taken as aforesaid.

14

15

16

Terry A. Stroner, CSR

17

Notary Public, Cook County, Illinois

18

19

20 SUBSCRIBED AND SWORN TO
21 before me this ___ day
22 of _____, A.D., 2002.

22

23 _____
Notary Public

24

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