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1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
2 DAVID MULVAIN,)
3)
4 Complainant,)
5)
6 vs.) PCB 1998-114
7)
8 VILLAGE OF DURAND,) VOLUME II
9)
10 Respondent.)

11 The following is the transcript of a
12 hearing held in the above-entitled matter, taken
13 stenographically by Gabrielle Pudlo, a Notary Public
14 within and for the County of Cook, State of
15 Illinois, and a Certified Shorthand Reporter of said
16 state, before John C. Knittle, Hearing Officer, at
17 519 Blackhawk Boulevard, South Beloit, Illinois, on
18 the 11th day of August, A.D., 1999, commencing at
19 the hour of 9:05 a.m.
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23
24

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1 PRESENT:
2 HEARING TAKEN BEFORE:
3 ILLINOIS POLLUTION CONTROL BOARD
4 BY MR. JOHN C. KNITTLE
5 100 West Randolph Street
6 Suite 11-500
7 Chicago, Illinois 60601
8 (312) 814-3473
9 LAW OFFICES OF WARREN H. LARSON, P.C.
10 BY MR. WARREN H. LARSON
11 6367 Sebring Way
12 Loves Park, Illinois 61111
13 (815) 636-4444
14 appeared on behalf of the Complainant;
15 LAW OFFICES OF HERBERT I. GREENE
16 BY MR. HERBERT I. GREENE
17 401 West State Street
18 Suite 600
19 Rockford, Illinois 61101
20 (815) 965-3055
21 appeared on behalf of the Respondent.
22 ALSO PRESENT:
23 Ms. Jerri Greene

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1 HEARING OFFICER KNITTLE: Hello. My name is
2 John Knittle. I am a hearing officer with the
3 Pollution Control Board. This is the second day of
4 hearing in PCB 98-114, David Mulvain versus Village
5 of Durand. Today is August 11th.

6 I know we still have one member of the
7 public present. Once again, you will be given an
8 opportunity to make a statement, if you want, later
9 on in the hearing.

10 As I recall we had just finished with the case
11 in chief of the Complainant. Respondent, it is your
12 case in chief. If you have a witness you would like
13 to call, you can begin with that.

14 MR. GREENE: Yes, I do.

15 Mr. Jim Thomas.

16 HEARING OFFICER KNITTLE: Mr. Thomas, do you
17 want to have a seat in the witness chair?

18 THE WITNESS: Okay.

19 (Witness sworn.)

20 JAMES M. THOMAS,
21 called as a witness herein, having been first duly
22 sworn, was examined and testified as follows:

23 HEARING OFFICER KNITTLE: Your witness.

24

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EXAMINATION

1
2 BY MR. GREENE:

3 Q Mr. Thomas, would you state your full name,
4 please?

5 A My full name is James M. Thomas.

6 Q Are you associated with the Village of
7 Durand?

8 A Yes, I am. I am the village president as
9 of April 1997.

10 Q Do you know when the 1997 sewer project was
11 completed?

12 A Yes, I do.

13 Q What date was that?

14 A The completion date was in November of
15 1997, the 20th.

16 Q The day --

17 A 20th of November, 1997.

18 Q For the record, yesterday I mentioned
19 November 4th, and I just -- I misspoke.

20 What was the cost of that 1997 sewer
21 project?

22 A The cost of the project was estimated at
23 \$141,615.65.
24 Q Are you accessible to the residents of the
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1 village?
2 A Yes.
3 Q If they have -- do they have any problem
4 calling you and talking to you about any concerns
5 that they may have?
6 A No, they do not. They can call me through
7 my administrative assistant at the village hall,
8 through my beeper; or through a telephone they, yes,
9 can call me at night.
10 Q Since the completion date of the '97 sewer
11 project, November 20, '97, did you receive directly
12 or indirectly any complaints of sewer backups or
13 sewer problems in residents' homes?
14 A No, I did not.
15 Q Are the time records of the employees of
16 the Village of Durand kept under your supervision
17 and control?
18 A Yes, they are.
19 Q Do you have with you the time records of
20 Michael Sweet, the superintendent of public works,
21 and in particular for April 23, 1999?
22 A Yes, I do.
23 Q Was Mr. Sweet employed at that time?
24 A (No verbal response.)
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1 Q Was he an employee at that time?
2 A Yes.
3 Q Did he work that day?
4 A That day Mr. Sweet came in from 6:00 in the
5 morning until 7:00 in the morning to do his regular
6 checking of the pumps. After that Mr. Sweet, on the
7 23rd of April, was not at work. He had a seminar
8 class at Rock Valley College. It started at
9 8:00 o'clock that morning, so he had time off on
10 that day to go to the seminar.
11 Q Did he check in again on that day at all?
12 A No.
13 MR. GREENE: No further questions.
14 HEARING OFFICER KNITTLE: Mr. Larson,
15 cross-examination?
16 MR. LARSON: As an administrative matter, first
17 of all, the records that Mr. Thomas testified to,
18 are they going to be marked for identification and
19 tendered as an exhibit?
20 MR. GREENE: We can, if you wish.
21 MR. LARSON: I would like you to do that,
22 please.
23 HEARING OFFICER KNITTLE: Do you need exhibit
24 tags? I have exhibit tags.
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1 MR. GREENE: Oh, do you?

2 HEARING OFFICER KNITTLE: Yes, as I am sure the
3 court reporter does, too.
4 MR. GREENE: Since you started with 1, I will
5 start with A?
6 HEARING OFFICER KNITTLE: You can just mark them
7 Respondent's No. 1.
8 MR. LARSON: Either way is fine.
9 HEARING OFFICER KNITTLE: Are they intended to
10 be your exhibits? Are you going to be offering them
11 into evidence?
12 MR. GREENE: I will do that.
13 HEARING OFFICER KNITTLE: It is up to you.
14 (Respondent's Exhibit
15 No. 1 marked for identification.)
16 BY MR. GREENE:
17 Q I have marked an exhibit Respondent's
18 Exhibit 1. Can you identify that?
19 A Yes. Exhibit No. 1 is the time sheet for
20 Michael Sweet from the date of 4-18 of '99 to 4-25
21 of '99.
22 MR. GREENE: No further questions.
23 MR. LARSON: Can I see that, please?
24 THE WITNESS: Certainly.
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1 MR. LARSON: Thank you.
2 EXAMINATION
3 BY MR. LARSON:
4 Q Mr. Thomas, do you personally maintain
5 these records?
6 A Yes, I do. I look at all the time sheets
7 that come across my desk.
8 Q Do you make the entries on each day?
9 A The entries are made by the employees.
10 Q Okay. On Friday, April 23rd, did you have
11 occasion to speak to Mr. Sweet at any time?
12 A No, I did not.
13 Q Now, with regard to the class at Rock
14 Valley College, do you know when that started?
15 A Yes. It started at 8:00 o'clock in the
16 morning.
17 Q How do you know that?
18 A I have the sheet here in front of me from
19 Rock Valley College, indicating the class that he
20 took. It does not say the time Mr. Sweet indicated,
21 that it started at 8:00 o'clock.
22 Q Okay. So Mr. Sweet told you that he was
23 present at that class at 8:00 o'clock in the
24 morning?
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1 A Yes.
2 Q Did you have any further conversation with
3 Mr. Sweet concerning his attendance at that class?
4 A No, I did not.
5 Q Do you know what Mr. Sweet did prior to
6 6:00 o'clock in the morning?
7 A Prior to or at 6:00 o'clock?
8 Q Prior to 6:00 o'clock.

9 A No, I do not.
10 MR. LARSON: I have nothing further.
11 HEARING OFFICER KNITTLE: Any redirect?
12 MR. GREENE: No redirect.
13 HEARING OFFICER KNITTLE: Thank you very much,
14 sir. You can step down.
15 THE WITNESS: Thank you.
16 HEARING OFFICER KNITTLE: You may want to give
17 that sheet marked as an exhibit back to the attorney
18 for the Respondent, Mr. Greene.
19 MR. GREENE: Let me have the completion
20 certificate, too.
21 HEARING OFFICER KNITTLE: Mr. Greene, you can
22 offer that at the close, if you would like.
23 MR. GREENE: I call Mr. Mitch Miller.
24 Would you raise your right hand to be
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1 sworn?
2 (Witness sworn.)
3 MARION A. MILLER,
4 having been first duly sworn, was examined and
5 testified as follows:
6 EXAMINATION
7 BY MR. GREENE:
8 Q Would you state your full name, please?
9 A Marion A. Miller.
10 Q Where do you reside, Mr. Miller?
11 A 309 West Howard, Durand.
12 Q Are you employed?
13 A I am a part-time employee, yes.
14 MR. GREENE: Can you direct your answers to her?
15 She can't hear you.
16 HEARING OFFICER KNITTLE: Mr. Miller, you can
17 pull the seat back if you are not going to be using
18 that chair; and you can face them both, if you want.
19 BY MR. GREENE:
20 Q Where are you employed part-time?
21 A Village of Durand.
22 Q In what department?
23 A Pardon?
24 Q In what department?
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1 A Sewer and water department.
2 Q Were you so employed in June of 1999?
3 A Yes, I was.
4 Q Did you receive a complaint or a call with
5 regard to Rhonda Wells, a resident of the Village of
6 Durand?
7 A Yes.
8 Q Did you investigate whatever that call was
9 about?
10 A Yes.
11 Q What was the call about?
12 A They had a couple inches of water in their
13 basement.
14 Q What if anything did you observe outside of
15 the house when you arrived at the residence?

16 A Well, when I arrived, there was a hose
17 stuck in the sewer. Rockford Blacktop had been
18 pumping from one manhole to the other manhole.
19 Q When you -- did you go into the house after
20 that?
21 A I didn't go in and observe the water. I
22 stopped and talked to the gentleman that was there.
23 Blacktop had stopped pumping at that time. And he
24 said the water was receding after they quit pumping.
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1 MR. LARSON: Move to strike as hearsay.
2 MR. GREENE: This is his investigation in the
3 course of his occupation, report of a water problem
4 in the basement.
5 HEARING OFFICER KNITTLE: Anything else,
6 Mr. Larson?
7 MR. LARSON: No, sir.
8 HEARING OFFICER KNITTLE: I will sustain the
9 objection and grant the motion to strike. However,
10 it will be in the record. I am going to direct the
11 Board not to consider it.
12 However, if you disagree with that,
13 Mr. Greene, you can make the appropriate motion to
14 the Board.
15 MR. GREENE: What portion of his testimony was
16 the objection with regard to?
17 HEARING OFFICER KNITTLE: I am just sustaining
18 it as to the last statement where he stated what
19 that person told him.
20 MR. GREENE: That is fine.
21 BY MR. GREENE:
22 Q Subsequent to that occurrence, did you
23 receive any further notifications or complaints
24 regarding Rhonda Wells?
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1 A No.
2 Q How long have you been employed part-time
3 by the Village?
4 A I don't know exactly.
5 Q Was it before or after January 1st of '97?
6 A I have to think when I retired from
7 Chrysler. Before what date?
8 Q January 1, 1997.
9 A I wasn't employed, no, before that.
10 Q During the time that you have been employed
11 there, have you received personally -- directly or
12 indirectly -- any reports of sewer problems other
13 than the one you just testified to regarding Rhonda
14 Wells?
15 A No.
16 Q I may have asked you this, but just to make
17 sure that I didn't, as far as you know were there
18 any other problems reported by Rhonda Wells
19 subsequent to this June '99 occurrence?
20 A No.
21 MR. GREENE: No further questions.
22 MR. LARSON: Nothing.

23 HEARING OFFICER KNITTLE: Thank you very much,
24 sir. You can step down.
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1 MR. GREENE: Mitch, if you want, you can go; or
2 you can stay.

3 THE WITNESS: Thank you.

4 HEARING OFFICER KNITTLE: Do you have another
5 witness, Mr. Greene? Or do you want to take a
6 second to organize?

7 MR. GREENE: No. I am about as organized as I
8 am going to get this morning, Judge. Sorry. I just
9 can't get out of the habit.

10 HEARING OFFICER KNITTLE: That is fine. That is
11 fine.

12 MR. GREENE: I would like to call Mr. Mulvain as
13 an adverse witness.

14 HEARING OFFICER KNITTLE: Mr. Mulvain, can you
15 take the stand again, please?

16 Could you swear him in again, please? He
17 was sworn yesterday, but I would like to have him
18 resworn.

19 (Witness sworn.)

20 DAVID MULVAIN,
21 called as an adverse witness, having been first duly
22 sworn, was examined and testified as follows:
23
24

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1 EXAMINATION

2 BY MR. GREENE:

3 Q Mr. Mulvain, prior to our beginning these
4 proceedings yesterday and today, you and your
5 attorney were served with a notice -- or rather with
6 a request for answers to interrogatories that were
7 answered by you. Do you recall those?

8 A Yes, I do.

9 Q Let me read to you the Question No. 5. It
10 says, "State the dates of each occurrence following
11 the completion of sewer repairs by Respondent in the
12 fall of 1997 up to the date of the filing of your
13 formal complaint on March 9, 1998, and every fact on
14 each of those dates upon which you base the
15 allegations contained in your formal complaint in
16 Paragraph 5, Subparagraph 2."

17 Do you recall that Paragraph 5,
18 Subparagraph 2 are your allegations claiming sewer
19 backups in the Village of Durand?

20 A I don't recall that specifically, no.

21 MR. LARSON: I would ask at this time to hand
22 Mr. Mulvain a copy of his formal complaint for the
23 purpose of refreshing his memory, should he need
24 that document.

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1 HEARING OFFICER KNITTLE: Is there an objection
2 to that, Mr. Greene?

3 MR. GREENE: No objection.
4 THE WITNESS: Where are we at, Mr. Greene?
5 MR. GREENE: Paragraph 5, Subparagraph 2.
6 THE WITNESS: Okay.
7 BY MR. GREENE:
8 Q Is that an allegation that there was backup
9 of sewage in the basements?
10 A Yes, it is.
11 Q Do you have a copy of your answers to those
12 interrogatories?
13 A I --
14 Q I just read you the question.
15 A Oh, yes. Oh, yes. I have it in front of
16 me now.
17 Q That is your complaint, isn't it?
18 A Oh, okay. Yes. This is the original
19 formal complaint, correct.
20 Q Do you have a copy of the answers that you
21 gave to the interrogatories that were asked?
22 A From -- no.
23 Q Does your attorney have a copy?
24 MR. GREENE: Do you have a copy, Mr. Larson?
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1 MR. LARSON: I didn't bring a copy with me.
2 There was no subpoena. I didn't bring one.
3 BY MR. GREENE:
4 Q Let me read the answer that is contained on
5 my copy, and I am going to ask you if this is what
6 your answer was.
7 "Sewer backup in residence on North Street,
8 Durand, spring 1998 based on oral reports. Sewer
9 backup, Mulvain Street, February '98 based on repair
10 estimates for connections to 207, 211 Mulvain Street
11 and 704 Washington Street. Jack Adams' telephone
12 record dated March 9, 1998, contains reference to
13 sewer backups after fall of 1997. Cost estimate,
14 February 9, 1998, relating to sewer backup repair.
15 Several reports after March 1998. Investigation
16 continues."
17 If you would like, I can show you this. It
18 has got my handwritten notes on it.
19 A Yes.
20 Q Would you take a look at that, please, and
21 tell me if that was the answer that you gave?
22 MR. LARSON: I would ask him to clarify the
23 question.
24 HEARING OFFICER KNITTLE: Can you restate the
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1 question, Mr. Greene?
2 BY MR. GREENE:
3 Q I would ask you to take a look at that and
4 tell me if those are the answers that you gave for
5 Interrogatory No. 5.
6 MR. LARSON: For purposes of clarification,
7 again, the interrogatory states a time frame
8 beginning with the date of the filing of the formal
9 complaint -- beginning with the completion of

10 repairs in 1994 and the date of the filing of the
11 formal complaint, which the record will show is
12 March 8th --
13 MR. GREENE: March 9th.
14 MR. LARSON: -- March 9th of 1998.
15 You are talking about the period between
16 those two dates?
17 MR. GREENE: March 9, 1998. Yes, I am.
18 MR. LARSON: Okay. Go ahead and answer the
19 question.
20 A I have no record. I gave Mr. Larson
21 written answers. I can't tell you if these are
22 exactly what I gave him or not.
23 BY MR. GREENE:
24 Q Can you turn to the last page?
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1 A (Witness complying.)
2 Q Does that contain your signature?
3 A Oh, yes, it does.
4 Q Does it contain the date that you wrote
5 below your signature?
6 A Yes, it does.
7 Q What is the date?
8 A August 2, 1999.
9 Q Is that the answer that you gave to
10 Mr. Larson -- in the answers to Interrogatory No. 5?
11 A I signed this as being -- well, I can tell
12 you that I didn't check against my notes to see if
13 it was exactly accurate. Let me read this, and I
14 can tell you if it is accurate as to the information
15 that I would have had in there. We are looking at
16 item No. 5 only?
17 Q Correct.
18 A In terms of the phrase, "several reports
19 after March 1998," I don't know if I gave more
20 detail in my notes or not.
21 Q But that is the answer that is contained in
22 your answers to the interrogatories; is that right?
23 A Yes.
24 Q Would you turn to Paragraph -- or
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1 Interrogatory No. 7?
2 A Okay.
3 Q Would you read the question, please?
4 A "State the dates of each additional
5 occurrence following the completion of sewer repairs
6 by Respondent in the fall of 1997 and every fact on
7 each of these dates upon which you claim that the
8 Village of Durand violated the Environmental
9 Protection Act by the backup of sewage in the
10 basements in violation of Title 35, Subtitle C,
11 Section 306.204"
12 Q What is the answer?
13 A "See answer to No. 5. Investigation
14 continues."
15 Q Thank you. Was there any reference
16 anywhere in any of the answers to these

17 interrogatories to an alleged sewer backup in either
18 June of '98 or April 23rd of '99 or April 27th of
19 '99 that you have testified to that you experienced?
20 A It is not in these interrogatories.
21 Whether or not it is in my notes, I would have to
22 check. But as I recall when I got the -- I really
23 would have to go back --24 Q Mr. Mulvain --
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1 A -- and look at records I don't have here.
2 Q Just answer the question.
3 Are there any --
4 A I do not believe that these are the
5 questions on the interrogatories. I believe that
6 the questions were divided into two parts.
7 Q One prior to --
8 A There was one that gave a beginning date
9 and an end date and another one that gave the dates
10 after that date. I believe -- to the best of my
11 recollection, there were two questions.
12 Q Do you believe the questions were different
13 than that?
14 A I believe -- to the best of my
15 recollection, there were two questions; one -- and I
16 don't remember the date -- beginning, I believe --
17 one of them began with -- in 1997 and ended in 1998,
18 and the other was 1998, on. And I am not sure of
19 that; but to the best of my recollection, I believe
20 I answered two questions. And I am trying to --
21 Q Are they the two questions that you just
22 read, the one that I read and the one that you read?
23 A That might be.
24 Q First read Question No. 5.
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1 A (Witness complying.)
2 Q Is that the same question that I read out
3 loud a moment ago?
4 A Without referring to the original
5 interrogatory that I answered, I can't answer that
6 question. I don't know -- it seemed to me that one
7 of the questions had -- maybe it was No. 4. Okay.
8 Maybe it is No. 4. Okay. That one has a terminal
9 date on it.
10 HEARING OFFICER KNITTLE: What document is
11 Mr. Mulvain looking at right now?
12 THE WITNESS: I am looking at the interrogatory.
13 MR. GREENE: Answers to interrogatories
14 propounded by the Village of Durand to the
15 Complainant.
16 HEARING OFFICER KNITTLE: Is this the only set
17 of interrogatories that were propounded?
18 MR. GREENE: It is the only set that we -- yes,
19 it is.
20 HEARING OFFICER KNITTLE: Okay. You can
21 proceed, Mr. Mulvain.
22 A I see there is -- Question No. 4 refers to
23 the other question. That was confusing me. When I
24 read Question No. 4, that is the --

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1 Q Question No. 4 deals with excessive
2 infiltration.

3 A Well, I just remembered that one had a
4 termination date. That is what I remembered from
5 the interrogatory when I originally filled it out.
6 And so I --

7 Q Mr. Mulvain, the question is is it correct
8 that nowhere in the answers to the interrogatories
9 did you mention the June 1999/1998 backup that you
10 testified to yesterday? And is it correct that none
11 of your answers refer to the alleged April 23rd,
12 '99, or April 27, '99 sewer backups that you
13 testified that you experienced yesterday?

14 A I would find it highly unlikely that I did
15 not mention those.

16 Q Is it correct that in the document you have
17 in your hands it does not mention it?

18 A No.

19 Q That is correct?

20 A That is correct.

21 Q So that we have an exhibit that is marked,
22 I am marking the document you are holding in your
23 hand, Respondent's Exhibit 2.

24

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1 (Respondent's Exhibit
2 No. 2 marked for identification.)

3 BY MR. GREENE:

4 Q Isn't it a fact, Mr. Mulvain, that you
5 actually picked the dates of April 23rd and April
6 27th as dates to testify to regarding an alleged
7 sewer backup based upon high flow rates, I/I rates
8 from the records that you had already obtained from
9 the Village of Durand after examining those records?

10 A You are asking if I looked at high I/I
11 levels after the fact?

12 I have been unable to obtain any I/I
13 records from the Village of Durand after the date of
14 April of 1998. And I have asked many --

15 Q When did you obtain the exhibits that were
16 introduced as Complainant's exhibits yesterday?

17 A Those were given to Mr. Greene, not to me.
18 Any I/I records --

19 Q Given to whom?

20 A To Mr. Larson.

21 Any I/I records, any effluent records, any
22 influent records, any -- let me just make this very
23 clear in terms of I/I records because there are
24 probably a lot of things that would serve as I/I

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1 records.

2 The influent records, the operational
3 report records, the effluent records, the time sheet
4 records, I have some of those up to the date of June

5 of 1997. I have the influent records up to the date
6 of April of 1998. I have asked for updated records.
7 I have not been able -- I have not been given them.
8 So I have not -- I have yet to date not seen any of
9 those types of records beyond the date of April of
10 1998 unless it was presented to me yesterday in
11 testimony. I don't think it was. So I have seen
12 none of those records.

13 Q Let me show you the last three pages of
14 Complainant's Exhibit 6. Have you seen those
15 before?

16 A No, I have not, Mr. Greene.

17 Q You have not?

18 A No.

19 Q This is the first time you have seen them?

20 A Yes, it is. In fact, I wish I could get --
21 I have asked for copies of them from the Village,
22 the various village people several times.

23 Q Just so that we know what you are referring
24 to, can you state what they are?

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1 A These are the effluent meter records from
2 April of '99, May of '99, and June of '99.

3 Q This is the first time you have seen these?

4 A This is the first time that I have ever
5 seen those records.

6 Q Let me show you what are the last three
7 pages of Complainant's Exhibit 5 and ask you to
8 state what they are first.

9 A These are the influent records from April
10 of '99, May of '99, and June of '99.

11 Q Have you seen those before this moment?

12 A Never, no. In fact, if you ask Mr. Sweet,
13 he will tell that you I asked for them last week for
14 a different purpose; having nothing to do with this
15 case, having to do with the purpose of trying to get
16 a grant.

17 Q Do you recall who brought these into this
18 hearing room yesterday?

19 A I did not carry those particular records
20 into this room.

21 Q Do you know who did?

22 A Yes, my attorney, Mr. Larson. In fact,
23 Mr. Thomas also knows that I asked for those records
24 last week.

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1 Q You indicated yesterday that on April 23rd
2 and April 27th of 1999 you observed a plume of water
3 coming out of your drain pipe in the basement of
4 your home?

5 A Yes. I have to apologize. I checked --

6 Q Just a yes or no.

7 A Yes, I did.

8 Q How high was what plume?

9 A I do not recall my testimony, but I checked
10 my visual records, my photographic records. I will
11 apologize. The night before, Monday night, we had a

12 bitter battle at a board meeting; and I get a little
13 upset about those. I didn't sleep, and I was tired.
14 Q Mr. Mulvain, just answer the question.
15 A I may have made a mistake.
16 Q I don't recall what your testimony was.
17 A The plume on April 23, 1999 -- and I may be
18 correcting previous testimony -- was about 1 inch.
19 On April 27th there was backup running from the
20 drain area to the -- to the -- let me check the --
21 let me just -- I have the photographs in front of me
22 from -- actually, I have the house next door from
23 April 23rd, and I have a photograph taken --
24 Q Just how high was the plume?
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1 A The plume was about an inch on April 23rd.
2 Q So about the same on each date?
3 A No. There was no plume on April 27th.
4 There was just a flow of water from the drain to the
5 sump pump.
6 Q With all of the research and investigation
7 that you have done and the conversations that you
8 had over the -- as you testified to yesterday, would
9 it be your opinion that if you were having this
10 backup problem in your basement that your neighbors
11 to your left, right, across the street which were
12 hooked up to the same sewer system would have the
13 same problem?
14 A Absolutely.
15 Q Have you produced any of these people as a
16 witness to substantiate that they had the same
17 problem you have alleged you had?
18 A No, I have not. I have notes, however,
19 from conversations with them in my files.
20 Q You have not asked them to be here to
21 testify?
22 A No, I haven't. I really --
23 Q Just answer the question.
24 A No, I haven't.
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1 Q How high was -- was there a plume? Let me
2 back up. Going back to the June 25, 1998 incident
3 that you have testified to where you had the backup
4 in your basement --
5 A Yes.
6 Q -- was there a plume of water coming out
7 of --
8 A Yes, there was. That was the 10-inch
9 plume.
10 Q Ten inches high?
11 A Yes.
12 Q Almost a foot?
13 A Yes. It was right up there. I was pretty
14 amazed. Not that high; about that high
15 (indicating).
16 Q Okay. Would you expect the other people
17 surrounding you hooked up to the same sewer line
18 would have had the same problem you did?

19 A Yes.
20 Q Have you produced any of those people as
21 witnesses to testify to corroborate --
22 A No. We have not produced them as
23 witnesses.
24 Q -- to corroborate your testimony?
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1 A No.
2 Q Have you produced any witnesses to
3 substantiate that there were any people besides you
4 and besides those that were listed in our response
5 to your discovery request --
6 MR. LARSON: Objection. What Mr. Mulvain has
7 produced in terms of witnesses' testimony, the
8 evidence is in the record. Having to testify as to
9 what the record shows is meaningless.
10 HEARING OFFICER KNITTLE: I will sustain that.
11 BY MR. GREENE:
12 Q Are you -- tell me if I am wording this
13 correctly. Is it correct that you testified that
14 you do not oppose -- do not oppose the growth of the
15 community of Durand?
16 A That's correct.
17 Q And that you approve the expansion of
18 the -- were not in favor of the expansion of the
19 treatment facility --
20 A Correct.
21 Q -- because it would be made excessively
22 large based on a 20-year growth projection? Is
23 that -- am I wording that right?
24 A No. That is not quite right. We have
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1 adequate capacity at our present rate of growth,
2 which is an accelerated rate of growth,
3 incidentally, over the long rate -- long-term rate
4 of growth for about 40 years. And if we go back --
5 if growth returns to its normal long-term rate, we
6 would have adequate capacity in the present sewer
7 system based on the PE numbers only, based on a PE
8 of 1900, or a people equivalent of 1900 for -- up
9 into the next century. Actually not into 2000, but
10 just over the line into the -- it would be the 22nd
11 century.
12 Q Notwithstanding the fact that you are
13 saying that we have adequate capacity for the
14 immediate growth --
15 A Based on the EPA practice of using the
16 driest three months for assessment, yes.
17 Q Based upon the fact that you say that you
18 are not opposed to growth, is there -- is it not a
19 fact, however, that you have threatened to argue for
20 a very restricted remedy from the Pollution Control
21 Board that would, in effect, prevent new hookups
22 unless a sewer stub was within 200 feet of the
23 location to be hooked up?
24 A I have argued that the settlement that my
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1 attorney, Mr. Larson, and I offered --

2 MR. LARSON: I am going to ask that any response
3 related to settlement negotiations and proposals be
4 stricken and ask leave to instruct my client not to
5 testify concerning settlement proposals, as those
6 are not properly before this body.

7 HEARING OFFICER KNITTLE: Mr. Greene?

8 MR. GREENE: The question is as to whether or
9 not he has threatened to ask for this Pollution
10 Control Board to enact a restriction prohibiting the
11 connection of additional connections to the sewer
12 system.

13 THE WITNESS: I have not. I have been
14 misquoted.

15 MR. LARSON: Your Honor, I am going to object to
16 the question, based on the fact that it is based on
17 a letter contained in the settlement proposal in
18 this matter. The settlement proposal was proposed
19 in a letter which I drafted and delivered to
20 Mr. Greene. The question that Mr. Greene just asked
21 is based on the contents of that letter.

22 It is improper to introduce testimony or
23 questions of any kind concerning the settlement
24 proposals that are pending prior to this hearing. I

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1 think it is improper to raise those questions. I
2 think it is out of bounds; it is unethical; it is
3 wrong; it is bad. And I would ask this Court to
4 strike that question because it just goes into
5 matters that are not properly before this Board.

6 HEARING OFFICER KNITTLE: One second,
7 Mr. Greene.

8 I don't see -- I agree with you,
9 Mr. Larson; and I would be content to disallow any
10 questions relating to settlement negotiations. And
11 I would also allow you to instruct your witness not
12 to discuss settlement matters or negotiations. I
13 don't see how that question is related -- at least
14 on the face of it -- to any settlement discussions.
15 It seems to be regarding what the complaint is
16 seeking.

17 Is that your -- maybe you could read the
18 question to me again, Mr. Greene.

19 MR. GREENE: I prefaced it by indicating that
20 Mr. Mulvain was not opposed to growth and that he
21 agrees that the treatment facility is adequate at
22 the present time.

23 BY MR. GREENE:

24 Q However, is it not a fact that you have

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1 threatened to ask the Pollution Control Board to
2 prevent any new hookups unless there is a sewer stub
3 within 200 feet of the location to be hooked up?

4 MR. LARSON: Don't answer the question.

5 HEARING OFFICER KNITTLE: Mr. Greene, you never

6 responded to Mr. Larson's arguments; but is that
7 based on the settlement discussions between you and
8 the Complainant?
9 MR. GREENE: It is based upon a letter that was
10 a settlement offer.
11 HEARING OFFICER KNITTLE: Anything else,
12 Mr. Larson?
13 MR. LARSON: No, sir.
14 HEARING OFFICER KNITTLE: I will grant --
15 MR. GREENE: Before you rule, I would --
16 HEARING OFFICER KNITTLE: Okay, please.
17 MR. GREENE: I would ask --
18 HEARING OFFICER KNITTLE: Now is your time,
19 because I am going to grant his motion.
20 MR. GREENE: I don't have a problem with your
21 granting his objection -- or sustaining his
22 objection, provided he doesn't argue at the close
23 that this is a remedy that ought to be sought.
24 MR. LARSON: What on earth does that have to do
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1 with whatever my final argument is going to be?
2 MR. GREENE: Because it is going to show that
3 there are inconsistent statements that Mr. Mulvain
4 has made about that topic, to establish that there
5 are inconsistent statements that he has made in
6 other areas of his testimony.
7 MR. LARSON: The fact is, your Honor, that
8 Mr. Greene has acknowledged that the question that
9 he just asked came from a letter which was from me
10 to him in the form of a settlement proposal. He has
11 explicitly acknowledged that that is where that came
12 from. He is trying to impeach my witness --
13 MR. GREENE: Absolutely.
14 MR. LARSON: -- with a settlement proposal which
15 came from his attorney as part of a settlement
16 negotiation. That is exactly improper and exactly
17 wrong. It is exactly unethical and must be stricken
18 by this body.
19 HEARING OFFICER KNITTLE: Yes. I agree with a
20 majority of that statement and I would sustain the
21 objection and ask you to ask a new question.
22 However, if the letter is important to you or your
23 case, as I have said before, you can attempt to
24 appeal this decision, my decision, to the Pollution
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1 Control Board in your final brief or in a motion
2 before your final brief.
3 MR. GREENE: I may make an offer of proof.
4 HEARING OFFICER KNITTLE: Yes. I would also
5 allow an offer of proof. I would rather it be --
6 are you going to -- how do you intend to make your
7 offer of proof? Are you going to attempt to ask
8 this witness questions?
9 MR. GREENE: No. I think I will just state what
10 I think the response will be.
11 HEARING OFFICER KNITTLE: That I will allow. I
12 will allow you to state what you think the testimony

13 will show, in the form of an offer of proof.
14 MR. GREENE: I will hold off on that for a
15 moment.
16 MR. LARSON: Does that mean, Mr. Knittle, that
17 we are going to have to hear an offer of proof at
18 some future point in time?
19 HEARING OFFICER KNITTLE: That is up to
20 Mr. Greene.
21 If you want to give an offer of proof about
22 what this testimony you are trying to elicit would
23 show --
24 MR. GREENE: I can do it right now.
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1 HEARING OFFICER KNITTLE: -- I would allow that.
2 I would also allow it at a future time; but I think
3 in terms of keeping things clean for the Board, it
4 might be better to have it now.
5 MR. GREENE: Okay. Let's do that.
6 I think that the answer to that question
7 would be yes, that that is a threat that Mr. Mulvain
8 made and that, effectively -- Mr. Mulvain would have
9 to have admit that that would effectively prevent a
10 hookup by Otter Creek and Twin Creeks. In his
11 testimony yesterday Mr. Mulvain had stated that he
12 did not file this complaint for the purpose of
13 preventing Twin Creeks subdivision from becoming
14 developed.
15 With that, I will continue with my
16 questioning.
17 MR. LARSON: I would like to make a comment with
18 regard to the offer of proof on the record.
19 HEARING OFFICER KNITTLE: Yes. I will allow
20 that.
21 MR. LARSON: The offer of proof not only goes to
22 the settlement negotiations contained in the letter
23 from myself to Mr. Greene, it substantially
24 misstates the contents of that letter. And going
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1 beyond that would require a more detailed discussion
2 of the settlement proposal that was contained in the
3 letter.
4 I object most strongly not only to the
5 introduction -- the attempted introduction of this
6 matter but to the mischaracterization of the
7 contents of the settlement proposal. I have nothing
8 further.
9 HEARING OFFICER KNITTLE: That is noted for the
10 record.
11 Mr. Greene, do you want to continue with
12 your questioning of this witness?
13 MR. GREENE: Yes. I would also indicate for the
14 record that I have marked a letter that I received
15 from Mr. Larson as Respondent's Exhibit 3 for the
16 purpose of my offer of proof.
17 HEARING OFFICER KNITTLE: Do you want to do that
18 as, kind of, a bulk offer of proof along with your
19 oral offer of proof?

20 MR. GREENE: Yes.
21 HEARING OFFICER KNITTLE: I will accept that for
22 the limited purpose of the offer of proof.

23 And I will allow you to make a new
24 statement about the exhibit, if you would like,
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1 Mr. Larson.
2 MR. LARSON: I have nothing further except to
3 restate my earlier strenuous objection to this whole
4 procedure.
5 HEARING OFFICER KNITTLE: Duly noted.
6 (Respondent's Exhibit
7 No. 3 marked for identification.)
8 BY MR. GREENE:
9 Q Mr. Mulvain, I think we have established
10 you filed your complaint on March 9, 1998. This
11 was -- was it not after the completion of the 1997
12 sewer project?
13 A Yes.
14 Q Is it correct that at that time the
15 contract had already been let for the 1999 sewer
16 project? Do you recall if that is correct?
17 A I don't recall.
18 Q Do you recall -- were you on the board at
19 that time, on March 9, '98?
20 A Yes.
21 Q Do you recall if there had been discussions
22 regarding the obtaining of the DCCA grant and other
23 funds with which to fund the 1999 sewer project
24 prior to your filing the complaint?
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1 A I do recall discussions on those things. I
2 cannot put them in any kind of time frame.
3 Q Do you recall if they had -- if these
4 discussions were in the process, if it looked like
5 there were plans to begin this project prior to the
6 time you filed your complaint on March 9th of '98?
7 A I do not recall the time frame which those
8 discussions took place, relative to the complaint.
9 Q So it is your testimony you don't recall if
10 there were any plans at the time you filed your
11 complaint to have -- to become involved in the 1999
12 sewer repair project?
13 MR. LARSON: Objection, asked and answered.
14 HEARING OFFICER KNITTLE: Is that a different
15 question, Mr. Greene?
16 MR. GREENE: I think it was phrased slightly
17 different. Even if it is the same question --
18 HEARING OFFICER KNITTLE: Well, if it is the
19 same question, I am going to allow the asked and
20 answered objection; and I will sustain that. But I
21 think there was a difference in the question. I
22 think the first question related to discussions and
23 the second related to plans. On that basis, I will
24 allow the question.
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1 MR. LARSON: Go ahead and answer.

2 A I didn't say that. That is not what I
3 said. I was aware of plans before, yes. I don't
4 recall when the discussions took place, relative to
5 the time frame.

6 BY MR. GREENE:

7 Q Do you recall if the plans appeared to be
8 rather imminent?

9 A No. The plans go all the way back -- the
10 DCCA grant was written by Jeff Barger before I was
11 ever elected, so I have been aware of the plans for
12 a long time.

13 Q Do you know if the DCCA grant had been
14 approved before you filed your complaint?

15 A Let me think about that. It is perhaps my
16 shortcoming that I don't keep good track of
17 timeliness of events. I do not recall.

18 Q Do you recall what the point was of your
19 filing the complaint?

20 A Well, you just gave me the date.

21 Q No, not the date. What was your purpose?

22 A The purpose of filing my -- you are
23 talking -- well, I don't know whether you are
24 referring to, again, the original complaint that I

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1 filed as a pro se litigant or the complaint as it
2 was taken over by Mr. Larson.

3 Are we referring to the original complaint
4 that I filed against Rockford Blacktop?

5 Q It is the only complaint. It is the
6 complaint against Rockford Blacktop, the EPA, and
7 the Village of Durand.

8 A I filed that complaint to prevent the
9 aggravation of our infiltration and sewer backup
10 problems as it would be affected by Otter Creek at
11 that time. Twin Creeks was not in the picture.

12 Did you ask specifically about why I --
13 MR. LARSON: Excuse me. There is no question
14 pending.

15 Allow me to instruct my witness to keep his
16 mouth shut.

17 HEARING OFFICER KNITTLE: I will allow that
18 instruction.

19 MR. LARSON: Thank you, sir.

20 BY MR. GREENE:

21 Q Is it a fact, Mr. Mulvain, that you would
22 take whatever steps are necessary to see that Twin
23 Creeks subdivision is never developed?

24 A I have problems with Twin Creeks that go
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1 beyond aggravation of our existing sewer problems;
2 that is true.

3 Q Would you answer the question?

4 A Yes.

5 MR. GREENE: No further questions.

6 HEARING OFFICER KNITTLE: Do you have any
7 redirect, Mr. Larson?
8 MR. LARSON: Yes, sir.
9 EXAMINATION
10 BY MR. LARSON:
11 Q Mr. Mulvain, did you at any time see the
12 discovery responses from the Village of Durand in
13 this matter at the time you were preparing your
14 answers to interrogatories?
15 A No.
16 Q With regard to Exhibit 6, the last three
17 pages of that exhibit, did you see the last three
18 pages of Exhibit 6 prior to preparing your answers
19 to interrogatories in this matter?
20 A No.
21 Q With regard to Exhibit 5, same question.
22 A No.
23 Q With regard to Respondent's Exhibit 3, you
24 authorized your attorney, did you not, to make a
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1 settlement proposal in that matter?
2 A I did.
3 Q To your knowledge did your attorney send a
4 letter to the Village of Durand in care of
5 Mr. Greene containing that settlement proposal?
6 A Yes.
7 Q What was the date of the filing of your
8 informal complaint?
9 A I don't recall the date.
10 Q Was it prior to or after March 9, 1998?
11 A Oh, it was prior to. I filed an informal
12 complaint first.
13 Q Okay. Would it have been before
14 January 1, 1998?
15 A Probably.
16 MR. LARSON: Nothing further.
17 HEARING OFFICER KNITTLE: Any redirect?
18 MR. GREENE: Nothing further.
19 HEARING OFFICER KNITTLE: Thank you,
20 Mr. Mulvain. You can resume your seat next to your
21 attorney. I guess that would be retake your seat.
22 MR. GREENE: I call Mr. Sweet.
23 HEARING OFFICER KNITTLE: Mr. Sweet?
24 Can you please swear the witness in?
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1 (Witness sworn.)
2 MICHAEL SWEET,
3 called as a witness herein, having been first duly
4 sworn, was examined and testified as follows:
5 HEARING OFFICER KNITTLE: Your witness.
6 EXAMINATION
7 BY MR. GREENE:
8 Q Mr. Sweet, you are the superintendent of
9 public works for the Village of Durand and you
10 testified yesterday; is that correct?
11 A Yes, I am.
12 Q Is it correct that the answers that we

13 prepared to the discovery request of the Complainant
14 was in most part answered by you and prepared by me?
15 A Yes.
16 MR. GREENE: In case you need it for your
17 recollection, here is a copy.
18 MR. LARSON: Could I see that, please?
19 (Witness complying.)
20 MR. LARSON: This copy contains marks. I would
21 like to ask the witness whether or not the marks and
22 amendments contained in it were made by him or
23 someone else before we proceed using these to
24 refresh his memory.
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1 HEARING OFFICER KNITTLE: Mr. Greene?
2 MR. GREENE: Let me give you a copy without any
3 marks.
4 HEARING OFFICER KNITTLE: Give it to Mr. Larson
5 first so he can take a look.
6 MR. GREENE: You want to examine this?
7 BY MR. GREENE:
8 Q Regarding the question concerning sewer
9 backups that were reported, which would be Question
10 No. 4, did you provide me with the answer to
11 Question No. 4?
12 A Priscilla Heinen --
13 Q Just answer with a yes or no.
14 A Yes.
15 Q Okay. Are there four reports that you
16 indicated in your answer to Question No. 4?
17 A There is a sheet missing here. I had four
18 on my -- there is only two here.
19 Q Well, there are two pages in between -- go
20 to the next page. Turn to the next page.
21 A Next page?
22 Q One more page.
23 A Okay. There we go. Yes.
24 Q You personally investigated the Priscilla
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1 Heinen complaint?
2 A Yes, I did.
3 Q The date of that complaint was what?
4 A 6-16 of '97.
5 Q What did your investigation disclose was
6 needed to alleviate the problem?
7 A There was an outside line that was
8 fatigued, and we needed to replace it.
9 Q Was that report prior to the completion of
10 the '97 sewer project?
11 A No.
12 MR. LARSON: I would ask that this testimony is
13 for the purpose of rebuttal because this testimony
14 has already been given in Mr. Sweet's testimony as
15 part of the Complainant's case in chief. If he is
16 rebutting his own testimony, that is one thing. If
17 he is not, I would object to the testimony. The
18 question has been asked and answered.
19 HEARING OFFICER KNITTLE: Mr. Greene?

20 MR. GREENE: I just wanted to make sure it got
21 in the record, Judge. I frankly couldn't recall.
22 HEARING OFFICER KNITTLE: Off the top of my
23 head, Mr. Larson, I don't recall whether this has
24 been asked and answered. I am going to allow the
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1 question.
2 MR. LARSON: I would just, then, make the
3 comment that it is my understanding that this
4 testimony now is not for purposes of rebuttal.
5 HEARING OFFICER KNITTLE: Is that correct,
6 Mr. Greene?
7 MR. GREENE: Correct.
8 HEARING OFFICER KNITTLE: You can answer the
9 question if you are capable, Mr. Sweet.
10 BY MR. GREENE:
11 Q Mr. Sweet, you say that this was reported
12 on June 16th of '97?
13 A Yes.
14 Q The testimony is that the '97 sewer project
15 was completed November 20th of '97. Is that your
16 recollection, also?
17 A Yes, yes.
18 Q So this report was prior to the completion
19 of the '97 sewer project?
20 A Yes.
21 Q You stated that your investigation
22 indicated that some sewer pipe needed to be
23 replaced?
24 A Yes.
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1 Q Was it replaced?
2 A Yes.
3 Q When was it replaced?
4 A In March of '98.
5 Q Were there any further reports of sewer
6 backups by anyone else?
7 A No.
8 Q The second report that you listed is whom?
9 A Sally Waller.
10 Q What report was that? What did she report?
11 A She had backup in her lift pump, in her
12 sump pump.
13 Q When was that?
14 A That was in the summer of '97.
15 Q What did your investigation indicate needed
16 to be done?
17 A Down the -- a couple -- a few feet down the
18 main line was a collapsed main, a broken main; and
19 we needed to -- we repaired a section of pipe.
20 Q Was that repaired?
21 A Yes, it was.
22 Q When was it repaired?
23 A It was repaired soon after the
24 investigation, which was probably the following
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1 month, which was around sometime in June.
 2 Q Were there any further reports or
 3 complaints by the Wallers after the repairs?
 4 A No, no.
 5 Q The third report is the report you did
 6 testify about yesterday concerning Mr. Mulvain's --
 7 A Yes.
 8 Q -- alleged backup on June 25th of '98?
 9 A Yes.
 10 Q Is that correct?
 11 A Yes.
 12 Q The final report is the report of June of
 13 '99 with Rhonda Wells that Mr. Miller has already
 14 testified about today; is that correct?
 15 A Yes.
 16 Q Were there any other reports of sewer
 17 backups, to your knowledge?
 18 A No.
 19 Q With regard to the June 25, '98 incident
 20 with Mr. Mulvain, were you present on that day when
 21 Mr. Mulvain was interviewed by Channel 17 News?
 22 A Yes, I was.
 23 Q Have you viewed a video clip that was
 24 provided by -- to the Village by Channel 17 News as
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1 a result of a subpoena?
 2 A No.
 3 Q You have not viewed it?
 4 A No, I have not.
 5 MR. GREENE: I would --
 6 BY MR. GREENE:
 7 Q Do you have the video?
 8 A Yes.
 9 MR. GREENE: Oh, okay. Can we set that up? I
 10 would like Mr. Sweet to take a look at this video
 11 clip, and we can see if he can testify if this
 12 was --
 13 HEARING OFFICER KNITTLE: I am going to see if
 14 there is any objection.
 15 MR. LARSON: Could we have some clarification as
 16 to what the purpose of this procedure would be?
 17 MR. GREENE: For Mr. Sweet to be able to testify
 18 if the video clip is the video clip interview of
 19 Mr. Mulvain that occurred on June 25th of '98.
 20 MR. LARSON: If that is the only purpose that we
 21 are going to look at the clip for, I will have no
 22 objection.
 23 MR. GREENE: It is the purpose for which I want
 24 him to look at the clip.
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1 HEARING OFFICER KNITTLE: Are you attempting to
 2 lay a foundation for the videotape, Mr. Greene?
 3 MR. GREENE: Correct.
 4 HEARING OFFICER KNITTLE: I will allow the
 5 videotape to be shown.
 6 Let's take a recess to set this up.

7 (Brief recess taken.)
8 HEARING OFFICER KNITTLE: We are back on the
9 record. We have set up the TV and VCR. We are
10 going to view the videotape.
11 Mr. Sweet, you can move to where you can
12 see it.
13 MR. GREENE: For the record, the files should
14 contain a served subpoena duces tecum served upon
15 Channel 17 News, requesting a videotape of an
16 interview aired on June 26th of David Mulvain of
17 Durand, Illinois, regarding the rain that occurred
18 on June 25, 1998. And this is what I was provided
19 with (indicating).
20 Mr. Thomas, would you run the videotape?
21 MR. LARSON: This is an exhibit?
22 MR. GREENE: It will be.
23 (Whereupon, a videotape was presented to
24 the attendees of the hearing.)
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1 HEARING OFFICER KNITTLE: You don't want to show
2 any more of that tape?
3 MR. GREENE: That is really the end. I think we
4 might have about 2 seconds left of that clip.
5 BY MR. GREENE:
6 Q Mr. Sweet, is that an interview that
7 occurred in your presence on or about June 25, 1998?
8 A Yes, it was.
9 MR. GREENE: I would like to mark the videotape
10 as Respondent's Exhibit 5. I am getting to 4.
11 HEARING OFFICER KNITTLE: We don't have 4 yet?
12 MR. GREENE: We don't have 4 yet.
13 (Respondent's Exhibit
14 No. 5 marked for identification.)
15 What I would like to do is to have
16 Mr. Thomas play it back so that the court reporter
17 can just take down that portion of the actual
18 interview and comments of Mr. Mulvain.
19 HEARING OFFICER KNITTLE: You want her to make a
20 transcript of the comments?
21 MR. GREENE: Yes, of what Mr. Mulvain's
22 statement is on the interview.
23 HEARING OFFICER KNITTLE: The court reporter can
24 transcribe it from her audio tape.
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1 MR. GREENE: That is fine.
2 HEARING OFFICER KNITTLE: Is that sufficient,
3 Mr. Greene? I don't want to deprive you of
4 showing --
5 MR. GREENE: No. That is fine. You are not
6 making the decision, anyway, if it is going on the
7 record. As long as it is on the record --
8 MR. LARSON: Your Honor, I will object, lack of
9 foundation as to what the contents of the entire
10 interview was; what is included, what is not
11 included. The contents of a highly edited snippet
12 of tape is of limited probative value with that of
13 the context in which the entire matter took place.

14 I will object as potentially prejudicial.
15 HEARING OFFICER KNITTLE: I understand. I don't
16 know that the tape has been moved to be admitted
17 yet. Are you objecting to it being included on the
18 transcript, then?
19 MR. LARSON: I am. And I will make that
20 objection and continue it until we hear the rest of
21 the testimony, and then I will revisit it.
22 HEARING OFFICER KNITTLE: Sounds good.
23 MR. GREENE: I would like a ruling on whether or
24 not it can go on the transcript. That is like
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1 saying --.
2 HEARING OFFICER KNITTLE: Well, it is going to
3 be on the transcript whether I allow it or not. It
4 is a matter of whether it is part of the record. I
5 would overrule that objection at this point. The
6 objection is overruled at this point.
7 MR. GREENE: Okay.
8 (The following comment was made by
9 Mr. Mulvain on the videotape:)
10 MR. MULVAIN: I have sewage running in my
11 floor drain. Actually, it is really ground water;
12 but I am pumping it out as fast as it comes in.
13 (Respondent's Exhibit
14 No. 6 marked for identification.)
15 BY MR. GREENE:
16 Q Mr. Sweet, let me show you what I have
17 marked as Respondent's Exhibit 6 and ask you to look
18 at that and ask you, can you identify it?
19 A Yes, I can identify it.
20 Q Is that a copy of an affidavit signed by
21 you?
22 A Yes, it is.
23 Q The date that it was signed?
24 A It is dated 9th day of November, 1998.
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1 Q Are the statements that are contained in
2 that affidavit true and correct?
3 A Yes, they are.
4 Q Does that -- let me just direct your
5 attention to the incident of June 25, 1998. There
6 was some testimony by yourself and Mr. Mulvain
7 yesterday regarding the circumstances of that
8 incident; is that correct?
9 A Yes.
10 Q Did Mr. Mulvain ask you to inspect his
11 basement?
12 A No.
13 Q Did you get a chance to inspect his
14 basement?
15 A No.
16 Q Did you -- were you able to observe whether
17 or not there were any other things indicating that
18 anybody was pumping sewage from their basement, out
19 of the basement?
20 A Yes, I was.

21 Q What did you observe?
22 A I observed no other situations in the area
23 where anybody was pumping any water out of their
24 basements due to backup. I had no other individuals
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1 approach me about any backups in the area -- or the
2 whole village.
3 Q Is there some reason why you did not make
4 an inspection or investigate Mr. Mulvain's claim
5 that he had sewage backed up in his basement on that
6 day?
7 A I was at the time busy. I was checking
8 manholes. I was checking for new construction, how
9 the -- on Mulvain Street; and I was working my way
10 down North Street, looking for bottlenecks in the
11 sewer system. I was just more or less checking that
12 out. And Mr. Mulvain approached me, and he was
13 working with me down the line. We popped three or
14 four manholes, and he was kind of being interested
15 in what I was doing. And we got to one manhole and
16 he suggested he had some sort of water in his
17 basement. And we conversed, and I said, "Well, it
18 might be surface water." I left it at that, and
19 then I went on -- the TV --
20 Q Who is it that you had this conversation
21 with?
22 A Where?
23 Q Who.
24 A Dave.
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1 Q Is that who you made the comment to, that
2 it might --
3 A He said it might be sewage. I said with
4 the amount of rain we had, it might be surface
5 water.
6 Q Okay.
7 A And then the TV camera crew came. I was
8 checking manholes. Dave got interviewed, and I --
9 after that we split up.
10 Q Mr. Mulvain testified that he had another
11 sewage backup on April 23rd of 1999 and that on that
12 day he ran into you and notified you of that backup.
13 Have you ever been notified by Mr. Mulvain
14 or anyone else of an alleged sewage backup in his
15 residence on or about April 23, '99?
16 A No, I haven't.
17 Q Where were you on April 23, '99?
18 A I had to go to a class at Rock Valley
19 school. It started at 8:00 o'clock, and it was over
20 at noon.
21 Q Did you begin work in the Village before
22 you left for class?
23 A April 22nd we had a large amount of
24 precipitation. I was concerned about problems at
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1 the facility. I got up early. I went in at
2 6:00 o'clock. I went around town and made sure all
3 the pumps were pumping, and I called my backup,
4 Marion Miller; and I told him I had to be at class
5 at 8:00 and he needed to make sure that everything
6 stayed on-line. I left town at 7:00, and I didn't
7 return until later that day, around 2:00 or 3:00.
8 Q Did you receive a certificate -- completion
9 certificate on that date?
10 A Yes, I did.
11 (Respondent's Exhibit
12 No. 4 marked for identification.)
13 BY MR. GREENE:
14 Q Let me show you what I have marked as
15 Respondent's Exhibit 4.
16 MR. GREENE: I apologize to Counsel. I don't
17 have an extra copy.
18 MR. LARSON: That is fine.
19 BY MR. GREENE:
20 Q Is that the completion certificate that you
21 received on April 23rd?
22 A Yes, it is.
23 Q You returned to the Village at what time?
24 A It was in the afternoon, around 2:00 or
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1 3:00.
2 Q Did you run into Mr. Mulvain at any time
3 that day?
4 A No, I didn't.
5 Q The next day?
6 A No, I didn't.
7 Q Any other day with regard to his notifying
8 you that there was a sewer backup on or about April
9 23rd?
10 A I don't recall.
11 Q Mr. Mulvain testified that he had another
12 sewage backup on April 27, 1999; and I believe he --
13 his best recollection was that he notified you on
14 the 28th.
15 Did you ever get notified by Mr. Mulvain at
16 any time that he had a sewage backup on or about
17 April 27th of 1999?
18 A I do not recall being approached.
19 Q Mr. Mulvain testified that on both of those
20 occasions, the time that he notified you of the
21 April 23, '99, and the April 27, '99 backups, that
22 he wanted you to inspect it and that you indicated
23 that you were too busy.
24 A What dates were that?
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1 Q April 23rd -- the notification of the
2 April 23 and April 27, '99 backups, that when he had
3 these conversations with you -- whenever they
4 were -- that you stated to him that you were too
5 busy to come and take a look.
6 A I don't recall any conversation like that.
7 Q Is it possible that you would have, had you

8 been notified, told him that you were too busy to
9 take a look?
10 A After the first -- 6-25-98, there would
11 have been -- if there was even an inkling that he
12 had sewage backup, I would have been there.
13 Q Why?
14 A Because of the conflict we have had with
15 the Village, and I would want to monitor it.
16 Q Were there any reports by anyone else
17 besides Mr. Mulvain anywhere during the month of
18 April of 1999 of their having any kind of sewage
19 backup problems?
20 A None.
21 Q Did you observe anyone during any time in
22 April of 1999 or any evidence of anyone discharging
23 sewage from their basements onto their property?
24 A No, I have not.
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1 Q Have you made any observations along those
2 lines during any time since the completion of the
3 '97 sewer project on November 20th of '97?
4 A Yes, I have.
5 Q Were they any other than those that you
6 have testified to that were contained in your
7 answers to Interrogatory No. 4?
8 A No.
9 Q The four incidents?
10 A No.
11 Q Any others?
12 A No.
13 MR. GREENE: That is all I have.
14 HEARING OFFICER KNITTLE: Redirect, Mr. Larson?
15 EXAMINATION
16 BY MR. LARSON:
17 Q Is it your testimony, Mr. Sweet, that
18 Mr. Mulvain did not have sewage backup in his
19 basement in June of 1998, April of 1999, and June of
20 1999?
21 A June of -- I am unclear of June 6th of '98;
22 but my testimony in the April incidents is yes, it
23 is my testimony.
24 Q That he had, in fact, no backup on those
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1 days?
2 A Yes.
3 Q What do you base that on?
4 A I base that on the village -- nobody else
5 had any isolated incidents anywhere else in the
6 village. I have been there 15 years; and I know if
7 he was to have backups in his basement, it wouldn't
8 be an isolated area. There would be more backups in
9 his area -- in that area.
10 MR. LARSON: Ask to go off for a second?
11 HEARING OFFICER KNITTLE: For what purpose?
12 MR. LARSON: To converse with my client.
13 HEARING OFFICER KNITTLE: Okay. Take a recess.
14 (Brief recess taken.)

15 BY MR. LARSON:

16 Q If Mr. Mulvain has pictures showing sewer
17 backup in his basement that are dated in April of
18 1999, would that affect your testimony concerning
19 whether or not he had backup in his basement on
20 those dates?

21 A If I was sure that is when he took them.

22 Q So if he had photographs that would relate
23 to that date, that might change your opinion as to
24 whether or not he had --

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1 A I wouldn't even know if that was his
2 basement them pictures were from.

3 Q Assuming, sir, for the purposes of this
4 question, without regard to any other matter, that
5 Mr. Mulvain has pictures showing sewer backup in his
6 basement in April of 1999, would that change your
7 testimony --

8 MR. GREENE: Objection.

9 MR. LARSON: -- concerning whether or not he had
10 sewage backup in his basement on that day?

11 HEARING OFFICER KNITTLE: Hold on Mr. Sweet.
12 Let Mr. Greene --

13 MR. GREENE: Objection. The hypothetical
14 question is the same question as saying, "Assuming
15 he had backup, would that change your testimony that
16 he didn't have backup?" There is no point to the
17 question.

18 HEARING OFFICER KNITTLE: Is there a response,
19 Mr. Larson?

20 MR. LARSON: Your Honor, Mr. Sweet has testified
21 that he did not inspect the premises on that day.
22 Mr. Sweet has testified that his only basis for
23 assuming that there was no backup on that day was
24 his knowledge of the system and not any personal or

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1 direct observation. I am asking him now if there
2 were photographs of that scene on that day, showing
3 that there was sewage backup in the basement on that
4 day, would that change his testimony.

5 I believe that it goes directly to the
6 point and that it is a proper question.

7 HEARING OFFICER KNITTLE: I think he has already
8 answered that question, though, hasn't he? He said
9 that if he could ascertain that the photographs were
10 valid, that that would change his testimony.

11 MR. LARSON: I guess I clarified the question by
12 asking it hypothetically to eliminate any question
13 of whether or not there was any question regarding
14 the photographs. I wanted the answer to strictly
15 reflect not any questions about the veracity of the
16 testimony or evidence, but simply to directly
17 address the question of whether or not if there were
18 such pictures, would that change his testimony.

19 HEARING OFFICER KNITTLE: Anything else,
20 Mr. Greene?

21 MR. GREENE: Same objection, same reason.

22 HEARING OFFICER KNITTLE: I will allow the
23 question to go on.
24 MR. LARSON: Could you read it back, please?
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1 (Question read.)
2 HEARING OFFICER KNITTLE: Do you understand the
3 question, Mr. Sweet?
4 THE WITNESS: Well, I don't like hypothetical
5 questions.
6 HEARING OFFICER KNITTLE: Well, I understand
7 that. I am going to allow him to ask this question,
8 assuming that the photographs are valid and that you
9 are 100 percent sure that they are of
10 Mr. Mulvain's basement and as Mr. Larson put it to
11 you, if you could answer that.
12 THE WITNESS: Would I see the pictures first
13 before I made that answer?
14 HEARING OFFICER KNITTLE: I think not. I think
15 this is strictly a hypothetical.
16 MR. GREENE: Is that any different than asking,
17 assuming that he had sewage in his basement that he
18 had sewage in his basement?
19 HEARING OFFICER KNITTLE: It is not much
20 different. Nor is it much different than asking him
21 if he was magically transported to the basement at
22 the time and saw backup, would that in fact change
23 his testimony. But I am still going to allow the
24 question to be asked.
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1 A I will reply with no.
2 BY MR. LARSON:
3 Q The interview, a portion of which was
4 extracted and shown to this body as part of
5 Exhibit No. 5, was there other conversation between
6 Mr. Mulvain and the reporter on that day that you
7 witnessed?
8 A Yes.
9 Q In the affidavit identified previously as
10 Exhibit 6, in Paragraph 7 you say that "Though I am
11 the first person that residents contact to complain
12 about any problems they may be experiencing
13 regarding the sanitary sewer system, no other
14 persons in the village notified me or complained to
15 me about sewer backup or other sewage problems on
16 the date of the above referred incident, and I have
17 not received a notice or complaint from any other
18 person of a sewer backup or any other sewer problem
19 in the village since sewer repairs were completed in
20 1997."
21 Now, since that time, since the 9th day of
22 November, 1998, you have responded to
23 interrogatories which you have testified to in this
24 matter that after November 9, 1998, there were four
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1 incidents and you reported those in your

2 interrogatories; is that correct?
3 A Yes, that is correct.
4 Q I would ask for your forbearance. I have a
5 specific question, and I am looking for a specific
6 piece of paper.
7 HEARING OFFICER KNITTLE: Do you want to take
8 some time?
9 MR. LARSON: It looks like -- No.
10 BY MR. LARSON:
11 Q The conversation you had with Mr. Mulvain
12 which is shown on the videotape -- or the
13 conversation that the TV reporter had with
14 Mr. Mulvain that is shown on the videotape, did you
15 have your conversation with Mr. Mulvain concerning
16 ground water before or after that interview?
17 A I don't recall.
18 Q When you say you don't recall, does that
19 mean it could have been either before or after or
20 you just don't recall at all?
21 A It could have been. It seems to me that we
22 were popping a manhole and he was talking to me
23 before the reporter came. And I believe the
24 conversation was before the reporter, because after
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1 the reporter left we split up. We parted.
2 Q Were there any other manholes that you and
3 Mr. Mulvain inspected other than the one that you
4 are shown inspecting and after the time of the
5 television interview?
6 A We may have inspected one more. I don't
7 recall.
8 Q Where did the interview take place, if you
9 know?
10 A On the corner of West North Street and
11 Center Street.
12 Q Is that close to Mr. Mulvain's home, if you
13 know?
14 A It's a block away.
15 Q Do you recall if in your inspections of
16 manholes after the television interview you and
17 Mr. Mulvain identified the possible presence of an
18 obstruction in the sewer line?
19 A No. There was no obstruction in the sewer
20 line.
21 MR. LARSON: I have nothing further of this
22 witness.
23 HEARING OFFICER KNITTLE: Mr. Greene, do you
24 have redirect?
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1 MR. GREENE: No, nothing further.
2 HEARING OFFICER KNITTLE: Thank you very much
3 again, Mr. Sweet. You can step down.
4 MR. LARSON: If there is going to be a motion to
5 admit the videotape, I would like to speak to it.
6 HEARING OFFICER KNITTLE: Are you planning on
7 moving to admit your exhibits now?
8 MR. GREENE: Yes. Why don't we do that now.

9 HEARING OFFICER KNITTLE: We can get that over
10 with.
11 Let's see. I have got 1, 2, 4, 5, and 6
12 that have not been moved. Do you want to do --
13 MR. LARSON: Can we do them one at a time?
14 HEARING OFFICER KNITTLE: Let's do them one at a
15 time.
16 MR. GREENE: 3 is already admitted for the
17 purpose of the offer of proof.
18 HEARING OFFICER KNITTLE: For the offer of
19 proof, correct. You can leave all of them with me
20 if you are done with them.
21 Let's go through them one by one, I think,
22 unless you want to do this later, Mr. Greene. It is
23 up to you.
24 MR. GREENE: No. This is fine.
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1 HEARING OFFICER KNITTLE: No. 1 is the time
2 sheet of Mr. Sweet.
3 MR. LARSON: The time sheet, I have no objection
4 except for the fact that Mr. Thomas' testimony with
5 regard to it was that he did not oversee the actual
6 recording of the notations on the time sheet. Other
7 than that, I have no objection.
8 HEARING OFFICER KNITTLE: I will admit it and
9 note your comment.
10 Exhibit No. 2 is the -- I can't read my
11 writing on Exhibit No. 2.
12 MR. GREENE: No. 2 were the answers --
13 HEARING OFFICER KNITTLE: Oh, the interrogatory
14 response.
15 Mr. Larson, I just Note on Exhibit No. 3,
16 the offer of proof exhibit, that there is a fax
17 sheet and a cover letter attached, as well. You may
18 want to take a look.
19 MR. GREENE: We can tear those off if you like,
20 Mr. Larson.
21 HEARING OFFICER KNITTLE: It is up to you guys.
22 MR. GREENE: The other copy that I have is all
23 marked up.
24 HEARING OFFICER KNITTLE: That is understood.
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1 MR. LARSON: I just note for the record that the
2 exhibit that is tendered contains a fax sheet from
3 Mr. Greene to his client.
4 HEARING OFFICER KNITTLE: It is duly noted.
5 So we are up to Respondent's No. 2?
6 MR. GREENE: Do you still have that, Dave? That
7 was the sheet that I handed to you to read, the
8 questions.
9 MR. MULVAIN: One of those is Warren's.
10 MR. GREENE: No. Those are mine.
11 Any objection?
12 MR. LARSON: I would note for the record that
13 Exhibit 2, which is the interrogatory response, is
14 marked up, has amendments, is not in the form
15 originally provided. And it is on that basis I

16 would object.
17 MR. GREENE: I would be willing to substitute an
18 unmarked one, if you want to compare them to see
19 that they are identical, without any marks on it.
20 MR. LARSON: I think that would be preferable.
21 HEARING OFFICER KNITTLE: Okay. Let's do that.
22 Do you have an unmarked copy now,
23 Mr. Greene?
24 MR. GREENE: I do.
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1 HEARING OFFICER KNITTLE: Because I could always
2 give you leave to send one in to the Board when you
3 obtain it. But if you have one, I have got -- oh,
4 you have got one.
5 MR. GREENE: Is that 2?
6 MR. LARSON: 2, yes.
7 HEARING OFFICER KNITTLE: Is there still an
8 objection to that, Mr. Larson?
9 MR. LARSON: No. Based on that change, I would
10 have no objection.
11 MR. GREENE: The only mark on it is the
12 received -- a stamp with the date that it was
13 received in my office.
14 MR. LARSON: I have no objection to that being
15 on there.
16 HEARING OFFICER KNITTLE: All right. Exhibit
17 No. 2 is admitted, which takes us to Exhibit No. 4,
18 the completion certificate.
19 MR. LARSON: No objection.
20 HEARING OFFICER KNITTLE: Exhibit No. 4 is
21 admitted.
22 MR. GREENE: Do you want to skip, please, to
23 No. 6?
24 HEARING OFFICER KNITTLE: Let's skip to No. 6,
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1 which is the affidavit of Mr. Sweet of November 9,
2 1998.
3 MR. LARSON: No objection.
4 HEARING OFFICER KNITTLE: That is admitted.
5 MR. LARSON: I would note that that is already
6 in the record as an exhibit to a previous motion for
7 summary judgment, which was denied.
8 HEARING OFFICER KNITTLE: Okay. That is noted.
9 MR. GREENE: And No. 5 is the videotape.
10 HEARING OFFICER KNITTLE: Can we hold on one
11 second, please, before we hear anything on that?
12 Okay, the videotape. Is there an objection
13 to the videotape, Mr. Larson?
14 MR. LARSON: It is my objection, in addition to
15 the objection that I have already made which you
16 have ruled on, is that according to Mr. Sweet's
17 testimony, there was other conversation between the
18 reporter and Mr. Mulvain at the time. This is an
19 excerpted and edited videotape according to that
20 testimony. And with regard to that, it is only a
21 portion of the relevant document. We have no
22 indication as to whether or not the raw footage, the

23 remainder of the interview is available. And
24 without that, without that foundation, I think that
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1 the videotape cannot be admitted.
2 HEARING OFFICER KNITTLE: Mr. Greene, do you
3 have a comment?
4 MR. GREENE: Yes, Judge -- sorry.
5 The videotape that was shown is the
6 videotape that we received from Channel 17 in
7 response to our subpoena duces tecum. It is offered
8 into evidence for the purpose of impeaching
9 Mr. Mulvain, whose testimony was that it was sewage
10 water. It is obvious from the videotape that he
11 specifically changed his mind from referring to it
12 as sewer water to ground water, contrary to his
13 testimony. And if there is any additional
14 conversation that took place, he is certainly free
15 to testify concerning that. But it should not go to
16 the inadmissibility of this exhibit.
17 HEARING OFFICER KNITTLE: Anything further,
18 Mr. Larson?
19 MR. LARSON: It is a portion of a document that
20 is incomplete and edited, and I think that renders
21 it inadmissible.
22 HEARING OFFICER KNITTLE: I am going to overrule
23 that objection and admit the videotape.
24 I will take that, if you have it.
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1 Mr. Greene, do you have any other exhibits
2 at this time?
3 MR. GREENE: Not at this time.
4 HEARING OFFICER KNITTLE: Would you like to call
5 your next witness?
6 MR. GREENE: Yes, Mr. Toerber.
7 HEARING OFFICER KNITTLE: Mr. Toerber, could you
8 please take the seat you had yesterday?
9 (Witness sworn.)
10 ERWIN D. TOERBER,
11 called as a witness herein, having been first duly
12 sworn, was examined and testified as follows:
13 HEARING OFFICER KNITTLE: Your witness,
14 Mr. Greene.
15 EXAMINATION
16 BY MR. GREENE:
17 Q Mr. Toerber, you testified yesterday. You
18 have introduced yourself. You have testified as to
19 your qualifications?
20 A Yes.
21 Q With regard to the Complainant's Exhibit 8,
22 which I would like to show you at this time -- some
23 of these questions might be duplicitous. So that I
24 can get just a complete information from you, I
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1 would ask for your indulgence.
2 Would you again explain what Exhibit 8 is?

3 A This is a tabulation of the information
4 taken from the initial overall village videotape of
5 the sewer system, and it indicates all of the areas
6 of problems within the collection system and shows
7 the location, type of problem, and also includes a
8 priority listing based on judgment of our viewing of
9 this information.
10 Q Is No. 1 -- the numbers of priority are 1,
11 2, and 3?
12 A Yes.
13 Q Is No. 1 the highest priority?
14 A Yes.
15 Q That exhibit consists of two pages; is that
16 correct?
17 A That's correct.
18 Q There are a number of different
19 descriptions of the type of sewer problem that was
20 found; is that correct?
21 A Yes.
22 Q Was Priority 1 given the top priority in
23 the replacement and repair projects of 1997 and
24 1999?
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1 A Yes. This was one of the key pieces of
2 information that we used to decide which sections of
3 the sewer to replace, in what order, and how to do
4 that.
5 Q What percentage, if you know, of the
6 Priority 1 items resulted in being repaired or
7 replaced?
8 A I have looked this over and reviewed the
9 math that goes with it and actually made the
10 calculation. Sixty-nine percent of the Priority
11 1 items have been repaired by full replacement.
12 Q What of the remaining Priority 1 items have
13 not been repaired or replaced?
14 A There are a total of 32 Priority 1 items.
15 Twenty-two of them are the 69 percent. Of the
16 remaining ten, all except two are on the far
17 northwest corner of the village at the far
18 extremities of the collection system. And we have
19 not at this point recommended any additional work be
20 done there, primarily because it has a minimal
21 impact on the overall infiltration into the system;
22 and also there is nothing upstream of it, so
23 blockage -- potential blockage from those items
24 again, has minimum impact. There are no additional
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1 sewers tributary to it at that point.
2 Q Have all of the critical Priority 1 items
3 been addressed?
4 A In my opinion, yes. We have really -- I
5 think from a cost effective standpoint, we have
6 addressed all of the critical ones, yes.
7 Q Have all of the potential sources of I/I
8 associated with the Priority 1 items been repaired?
9 A Yes.

10 Q Can you define repaired?
11 A Well, what we have done is replace -- fully
12 replace the entire pipe, manhole to manhole and also
13 replace the manholes; and that construction has been
14 done so that a tight system is created. The only
15 thing I would qualify that -- as I said yesterday,
16 we have not addressed the services that -- we made
17 the connections with services, but we did not repair
18 services to the homes.
19 Q There is a large number of items that are
20 categorized or labeled as hammer taps. What is a
21 hammer tap
22 A That is a term that the sewer -- TV
23 contractor used in preparing his notes. It is
24 really a process for putting a new service into an
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1 old line, just breaking into the line; really
2 literally using a hammer or some device to break a
3 hole in the line and insert the new service line and
4 grout around it. So they are visible on the tape,
5 and you can see a pipe protruding in small ways
6 into, usually, the upper quadrants of the pipe.
7 Q So other than the fact that you could
8 observe the pipe protruding into the sewer line,
9 does that necessarily mean that there is a crack or
10 an opening?
11 A It doesn't necessarily mean that. It is
12 not the best way to make a service connection. But
13 if done properly, it is okay.
14 Q Those items were listed as what priority?
15 A Those were Priority 3 items.
16 Q You heard Mr. Mulvain's testimony yesterday
17 regarding his observations on how the new sewer pipe
18 was laid in or about his home; is that correct?
19 A Yes.
20 Q I believe that Mr. Mulvain indicated that
21 he was not surprised by the I/I figures because of
22 the manner in which the pipe was installed.
23 Do you have any comments or response to
24 that testimony?
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1 A Well, the testimony dealt with the
2 backfilling of the trenches, and those -- wherever
3 we did excavation, those trenches were backfilled.
4 They were mechanically compacted. In fact, in some
5 areas we have even had a testing service come in and
6 verify that the compaction has been done to
7 95 percent of optimum density.
8 So it is granular backfill with a gradation
9 range from fairly coarse to fine. And once that is
10 compacted, that really is a solid -- it fills the
11 trench and creates a solid barrier in there. So in
12 my opinion, the migration of flow through that
13 backfill is not going to be increased by our
14 construction.
15 If anything, everywhere we worked, except
16 for a couple areas that we added new sewers, we were

17 working in old trenches anyway. So whatever was
18 there before is at least -- if not the same, at
19 least it is certainly the same or better from the
20 standpoint of compaction than it was originally.
21 Q So do you disagree, then, with his
22 conclusions that he reached in his testimony?
23 A Yes.
24 Q Have you had a chance to review the answers
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1 that the Village provided to the discovery request
2 of the Complainant?
3 A Yes.
4 Q With regard to Question No. 8 and the
5 answers to Question No. 8, did you have occasion to
6 investigate those dates and figures and compare them
7 with the records of the village?
8 A Yes, I did.
9 Q Is it a correct estimate that since the
10 completion of the '97 sewer project that all of the
11 violations regarding excess levels permitted by the
12 NPDES permit occurred during the spring and early
13 summer of '98 and '99?
14 A Yes.
15 Q Is this unusual, or is it to be expected?
16 A I think it is to be expected.
17 Q Why?
18 A The flow levels that we have seen here are
19 not uncommon in any collection system. We see this
20 in almost ever community. And as I have said
21 before, only the first phase of the work was done
22 during that time period. There are still sources of
23 extraneous waters that can enter when rainfalls
24 occur. The increasing of the pipe sizes allows
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1 flows to get to the plant. So it is just not
2 unusual in any collection system to see high flows
3 during certain time periods.
4 Q Do you have the date that the 1999 sewer
5 project started?
6 A Yes. I am just looking at it. It says the
7 construction was started officially on
8 April 20, 1999.
9 Q Do you have the completion date?
10 A Yes. With regard to substantial
11 completion; that is, all of the pipe -- everything
12 below grade being done, that was completed on July
13 28, 1999.
14 MR. LARSON: I would ask that the record show
15 that Mr. Toerber is refreshing himself from
16 documents that he has in his possession and that
17 those have not been marked.
18 MR. GREENE: No objection.
19 HEARING OFFICER KNITTLE: The record is noted.
20 BY MR. GREENE:
21 Q Have you compared the dates with regard to
22 the Village's answers to discovery, Paragraph No. 8
23 with the BOD and TSS violations?

24 A Yes, I have.
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1 Q What do those comparisons show?

2 A Well, none of the dates where effluent flow
3 values exceeded the permit limits correspond with
4 any of the dates where there were excursions of BOD
5 or TSS.

6 Q What does that indicate? What does that
7 mean?

8 A It means, as we talked about yesterday,
9 that high hydraulic loading to a lagoon system
10 typically does not have a significant adverse effect
11 on the treatment. Therefore, the excursions of
12 concentrations of BOD and TSS are not related to the
13 high flows.

14 Q On any of the figures that you looked at,
15 were there any BOD or TSS violations that occurred
16 at the same time -- on the same date?

17 A No, there weren't.

18 Q Were you able to make a determination based
19 upon your inspection of all of these records as to
20 whether or not any of the excursions had a
21 detrimental effect on the receiving stream or on the
22 environment?

23 MR. LARSON: I will object, lack of foundation.

24 HEARING OFFICER KNITTLE: Mr. Greene?

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1 MR. GREENE: I think there was a sufficient
2 foundation laid yesterday as to his qualifications
3 and even some testimony in this regard yesterday.

4 MR. LARSON: We haven't had any discussion as to
5 what detrimental effect means. We haven't had any
6 discussions or testimony concerning the capacity or
7 other nature of the receiving stream. As a matter
8 of fact, the environmental impact of discharges is
9 not a matter pertinent or pertaining to this case at
10 this time. There is no objection -- there is no
11 infraction alleged with regard to the quality of the
12 water in the receiving stream.

13 MR. GREENE: Well, I believe whether or not
14 there would be any detrimental effect on the
15 receiving stream or on the environment would
16 certainly go towards the question that is to be
17 arrived at as a result of these hearings; and that
18 is what penalties or restrictions are to be imposed
19 because of violations.

20 HEARING OFFICER KNITTLE: I agree with
21 Mr. Greene, but I am going to sustain the objection
22 on a limited basis.

23 I think you should ask a couple more
24 questions and lay some appropriate foundation to get

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1 to that question.

2 BY MR. GREENE:

3 Q Mr. Toerber, as a result of the educational

4 qualifications that you already stated that you have
5 and your experience, are you qualified to make a
6 determination regarding the effect of excursions in
7 sanitary sewer systems on receiving streams?

8 A Yes.

9 Q Are you able to -- do you have an opinion
10 as to what effect, if any, the excursions that you
11 have investigated in this case have had on this
12 receiving stream?

13 A Yes. And I need to qualify that by saying
14 that it is an opinion and we did not do any physical
15 measurements of, for example, dissolved oxygen
16 concentration or aquatic organism impacts. It is
17 only based on my knowledge of the magnitude of the
18 excursions and my understanding of what that impact
19 has on a receiving stream and also based on the fact
20 that one of the documents we prepared in the whole
21 scenario of the treatment plant permit process was a
22 request for a lagoon exemption, which required us to
23 evaluate oxygen -- the impact of BOD discharges on
24 the oxygen level in the stream. And so I did do

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1 that.

2 Based on this, I don't believe that these
3 excursions particularly -- the suspended solids
4 typically would not have a detrimental impact. The
5 BOD numbers probably did not have any significant
6 impact on oxygen levels. That is an opinion. That
7 is not a measured activity that I did.

8 MR. LARSON: Same objection. I am going to ask
9 that his testimony with regard to this issue be
10 stricken. I understand your ruling with regard to
11 letting this testimony in, but I think under the
12 circumstances and given the qualifications that the
13 witness himself has placed on the value of his
14 opinion that it is of no weight whatever and should
15 be stricken.

16 HEARING OFFICER KNITTLE: I am going to overrule
17 your objection and deny your motion to strike. But
18 it is noted for the record.

19 MR. LARSON: I would ask leave to make a comment
20 for the record that in the absence of -- I guess
21 this gets into argument, that the admissibility has
22 been determined but the weight of the opinion, given
23 the qualifications placed on it --

24 HEARING OFFICER KNITTLE: I understand. I think
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1 it is up to the Board to decide the weight of this
2 evidence. However, the reason I am letting it in is
3 I think he is qualified in this area and I think he
4 has done some research and is familiar with the area
5 and the facility that we are talking about, at least
6 on a peripheral level.

7 MR. LARSON: Given that, we will do some limited
8 cross-examination in this area without -- and would
9 ask that we be allowed to do that without waiving
10 our objection.

11 HEARING OFFICER KNITTLE: That will be allowed.

12 MR. GREENE: I, just for the record, Judge --
13 your Honor, wish to make an observation that there
14 is no other evidence other than this testimony so
15 far regarding detrimental effect.

16 BY MR. GREENE:

17 Q With regard to the violations that are
18 listed by the Respondent in their answers to the
19 Complainant's discovery request, do you have any
20 observations as to the quantity of the violations?

21 A I am not -- I guess I am not quite clear
22 what you are asking me.

23 Q Did you put together any figures indicating
24 what the amounts of the violations were that

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1 correlated with the dates of violations that are
2 listed in Paragraph 8?

3 A You are referring to BOD and TSS
4 violations?

5 Q Both that and the flow violations.

6 A The only observation that comes to mind
7 based on this question is I did look at the
8 magnitude of the violations -- and I am referring to
9 those that are listed in No. 9, Response No. 9, to
10 the answers to discovery of the Village where each
11 one is listed. Several of these are in the range of
12 being over -- that is, higher than the permit limit
13 by one part per million, three parts per million,
14 five -- those kinds of numbers in that range are
15 within the accuracy of the test.

16 The actual analytical procedure has a
17 variability range. Not to -- there is a permit
18 limit and the tests are run. And when the test
19 comes out and it has been run properly and it is
20 over the limit, that is a technical violation.

21 My only point is that several of these are,
22 you know, within the accuracy of -- the limits of
23 accuracy of the test.

24 Q With regard to the answers to question

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1 No. 9, there are six excursions; is that correct?

2 A Actually, 7.

3 Q I'm sorry, 7.

4 A Seven, yes.

5 Q Did you -- were you able to determine the
6 exact date of each of the excursions?

7 A Yes.

8 Q With regard to the first four excursions,
9 were they prior to or after the completion of the
10 1997 sewer project?

11 A The first four through September 1997 were
12 before the completion of the 1997 construction
13 project.

14 Q With regard to the last three excursions,
15 the first one is December of '97; is that correct?

16 A Yes, that's correct.

17 Q The exact date that that occurred on was

18 what?
19 A December 11, 1997.
20 Q And the magnitude of the excursion, how
21 much was it over the allowable limit?
22 A Five.
23 Q As to the last one, June of '99, on what
24 date did that occur?
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1 A That was June 23, 1999.
2 Q The amount that the excursion exceeded the
3 limit is how much?
4 A That exceeded it by 15 milligrams per
5 liter.
6 Q The middle one, June of '98, the exact date
7 that that occurred on was what?
8 A The test was -- the sample was taken on
9 June 13, 1998.
10 Q The amount that that excursion exceeded the
11 maximum was what?
12 A That was 35 milligrams per liter.
13 Q Do you have any observations with regard to
14 what, if any, impact those excursions would have?
15 A Well, my response would be the same as I
16 gave before with regard to excursions of this
17 magnitude on the receiving stream.
18 MR. WILLIAMS: My objection continues.
19 HEARING OFFICER KNITTLE: That is noted.
20 BY MR. GREENE:
21 Q Am I correct that you are familiar with the
22 pumps that exist in the sanitary sewer system?
23 A Yes.
24 Q There was some testimony yesterday, a
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1 hypothetical question something to the effect that
2 if the amount of water that was coming towards the
3 pumps was in excess of the pumps' capacity, what the
4 effect would be?
5 A Yes.
6 Q And your answer to that hypothetical was
7 what?
8 A My answer was that the theoretical carrying
9 capacity of all the lines coming into the pumps was
10 greater than the pumping capacity.
11 Q What would the effect be?
12 A That the lines would begin to surcharge and
13 back up.
14 Q It could result in backup in basements; is
15 that correct?
16 A Yes, that's correct.
17 Q With regard to the pumping capacity, how
18 does it compare with the recorded effluent flow
19 since 1997?
20 A Again, I looked at all the data that was
21 included in the answers to discovery by the Village,
22 and the main plant pumping capacity, as we have
23 stated before, is a total of 1,800 gallons per
24 minute, which is equivalent to 2.59 million gallons

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1 per day. My observations is that this is more than
2 double any recorded effluent flow since 1997.

3 Q How, if you know, does the pumping capacity
4 compare to any reported daily influent flow rate?

5 A It is greater than any reported flow rates
6 that I observed.

7 Q So would it be fair to say that the
8 testimony yesterday regarding the possibility of a
9 backup because of the flow exceeding the capacity of
10 the pumps is based on a hypothetical, as opposed to
11 any realistic expectations?

12 A That would be my opinion, yes.

13 Q Going back to the answers to question
14 No. 8, with regard to the last three excursions --
15 the December of '97 and the June of '98 and June of
16 99 -- with regard to all three of those dates, did
17 they occur during a time that the flows were above
18 or below the maximum I/I?

19 A They were below the -- well, they were
20 below the permit limits.

21 Q Are there explanations for why there would
22 be violations of the permitted BOD and TSS limits on
23 dates when the flows were below the permit maximums?

24 A Well, there are several things that can
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1 cause that. One of the more typical ones is algae
2 bloom, which typically occurs in warmer weather and
3 when the sun is bright. The other thing is that
4 Durand's rock filter sometimes -- any kind of a rock
5 filter is an accepted type of tertiary treatment
6 following a lagoon system, but it can allow some
7 material to slough off and cause an excursion. It
8 is just the nature of a treatment system.

9 Q Have you had occasion to examine the NPDES
10 compliance inspection report dated December 2, '98?

11 A Yes.

12 (Respondent's Exhibit
13 No. 7 marked for identification.)

14 BY MR. GREENE:

15 Q Let me show you what I have marked as
16 Respondent's Exhibit 7 and ask you, is that the
17 report that I just asked you about that you have had
18 a chance to examine?

19 A Yes, it is.

20 Q Do you agree with the findings and
21 conclusions that are made in that report as they
22 existed on December 2, '98?

23 MR. LARSON: Object to any testimony concerning
24 the report without foundation.

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1 HEARING OFFICER KNITTLE: Mr. Greene?

2 MR. GREENE: It is an official report that I
3 think this tribunal should take judicial notice of.

4 HEARING OFFICER KNITTLE: I will sustain the

5 objection unless you lay some foundation as to
6 whether he is familiar with this report or not and
7 what it contains.
8 BY MR. GREENE:
9 Q Are you familiar with this report or these
10 reports, generally?
11 A Yes.
12 Q Can you describe, what is it?
13 A It is a written document that is a result
14 of an annual inspection by the Rockford Regional
15 Office EPA inspector. They do this for every
16 municipal waste water treatment facility. Our firm
17 is involved with 15 to 20 different communities.
18 All these communities receive these reports on an
19 annual basis, and most of them ask us to look them
20 over and let them know if there are any significant
21 items that they need to deal with. So I am used to
22 looking at them. I understand the format, and I
23 understand the content of it.
24 Q Does this appear to be the report that you
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1 just testified about?
2 A Yes.
3 Q Does it purport to contain the signature of
4 a Mr. Jack M. Adam?
5 A Yes, it does.
6 Q Do you know who Mr. Adam is?
7 A Yes, I do.
8 Q Who is he?
9 A He is the engineer from the Rockford
10 regional office who has responsibility for
11 monitoring the Durand waste water treatment facility
12 and collection system.
13 Q Is he with the IEPA?
14 A Yes.
15 Q It also purports to contain the signature
16 of a Harris J. C-h-i-e-n. Are familiar with who he
17 is?
18 A Yes.
19 Q Who is he?
20 A He is the manager of the Rockford regional
21 office of the Illinois Environmental Protection
22 Agency.
23 Q Does this document purport to be dated and
24 having been signed by Mr. Adam on December 2 of '98?
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1 A Yes.
2 Q Does it purport to having been signed by
3 Mr. -- how do you pronounce his name?
4 A Chin.
5 Q -- on December 4 of '98?
6 A Yes.
7 Q Do you recall if this document is one of
8 the documents that was sent to you for your comments
9 on or about the time that it was prepared and dated?
10 A Yes. You provided me with a copy of this,
11 yes.

12 Q Well, you indicated that typically they
13 send copies to you for your comments?
14 A Yes. I did not -- I am not testifying that
15 the Village gave me a copy of this immediately when
16 they received it. I am saying that typically we --
17 quite often we do get -- the villages do ask us to
18 review them.
19 Q I see. Okay. Have you, prior to today's
20 date, had a chance to review findings and
21 conclusions that are contained in this report?
22 A Yes. I did look through it.
23 Q Your testimony is that you agree with those
24 findings and conclusions?
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1 MR. LARSON: Continue my objection. Move to
2 strike the testimony. The testimony shows that the
3 gentleman who is testifying did not perform the
4 inspection. He is not the record keeper of the
5 inspection. He does not have any direct information
6 concerning its preparation nor any responsibility to
7 oversee its preparation.
8 It is clear that he did not see it at the
9 time that it was prepared. He had no input into its
10 preparation. His qualification, other than a
11 general familiarity with the individuals to verify
12 the signatures and the authenticity of the document,
13 has not been established. I think that the
14 foundation is lacking. This document can't be
15 testified to.
16 HEARING OFFICER KNITTLE: Mr. Greene?
17 MR. GREENE: I don't think that he needs to know
18 who prepared or whether -- how it was prepared. His
19 testimony has been throughout yesterday and today
20 that he is familiar with the Durand project and the
21 Durand sanitary system. I think he can be permitted
22 to state whether or not he agrees with those
23 conclusions and those findings of fact that are
24 contained in there, regardless of how they were
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1 established.
2 HEARING OFFICER KNITTLE: Anything further,
3 Mr. Larson?
4 MR. LARSON: The authentication of this document
5 has not been addressed by the response made by
6 Mr. Greene. I continue my objection. I think that
7 as a business record or any other official document,
8 the foundation is lacking.
9 MR. GREENE: I don't believe that the
10 authentication of the document is important. It is
11 whether or not this witness agrees with the findings
12 and the conclusions that are contained in the
13 document.
14 HEARING OFFICER KNITTLE: The objection is
15 overruled. I am going to allow him to answer the
16 question.
17 BY MR. GREENE:
18 Q And the question is do you agree with the

19 findings and conclusions?
20 A Yes, I do.
21 Q You have heard the testimony of Mr. Mitch
22 Miller, the employee from the sanitary sewer
23 department, regarding the complaint of the Wells
24 regarding the sewer problem that he had in his
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1 residence?
2 A Yes.
3 Q From the testimony that you have heard, are
4 you able to form an opinion as to whether or not the
5 problem that existed had anything to do with
6 Rockford Blacktop pumping from one sewer to another
7 in front of his residence?
8 MR. LARSON: I will object based on the
9 witness's knowledge.
10 HEARING OFFICER KNITTLE: Mr. Greene?
11 MR. GREENE: I stand by the question, Judge.
12 HEARING OFFICER KNITTLE: Let me remind both of
13 you again that, as much as I like "Judge,"
14 "Mr. Knittle" or "Mr. Hearing Officer" is fine.
15 MR. GREENE: I'm sorry.
16 HEARING OFFICER KNITTLE: I just should note it
17 so the Board doesn't think that I am putting on
18 airs.
19 I am going to overrule the objection.
20 A Well, since it occurred coincident with the
21 construction that was occurring directly adjacent to
22 that home and the contractor was, throughout the
23 project, pumping around from manhole to manhole and
24 those pumps pump at a rate that is higher than the
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1 normal sewer flow -- they simply turn on and off to
2 keep the section they are working on dewatered -- it
3 is very likely that that was the cause of it.
4 BY MR. GREENE:
5 Q Now that the repairs as to both the '97 and
6 '99 sewer projects are completed, how does the
7 Durand sanitary sewer system compare to the average
8 sanitary sewer system in other communities using a
9 lagoon system?
10 MR. LARSON: Objection, lack of foundation.
11 HEARING OFFICER KNITTLE: Mr. Greene?
12 MR. GREENE: I still stand by the question,
13 Judge. I'm sorry. I apologize.
14 HEARING OFFICER KNITTLE: That's okay.
15 This objection is sustained unless some
16 additional foundation is laid.
17 BY MR. GREENE:
18 Q Are you familiar with lagoon systems,
19 generally?
20 A Yes.
21 Q How long have you been involved with
22 engineering projects concerning lagoon systems?
23 A Twenty-six years.
24 Q Any other communities that are
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1 substantially similar in size regarding the Village
2 of Durand?

3 A Yes.

4 Q Are there similarities from lagoon system
5 to lagoon system?

6 A Sure.

7 Q Are you able to form some sort of an ideas
8 as to what an average lagoon system is?

9 A Yes.

10 Q Are you able to form an opinion as to the
11 quality of the Durand sanitary system now that the
12 repairs have been completed?

13 A I feel comfortable to do that, yes.

14 Q How would Durand's compare with an average
15 lagoon system?

16 A Okay. Let me be sure that I understand
17 what is being asked here. My response is this --
18 and I think it is similar to what we talked about,
19 what I testified to yesterday.

20 All of the work, construction work, that
21 has been done has been on the collection system with
22 the exception of some pump modifications at the
23 influent to the lagoon. So I would like to
24 differentiate between condition of the lagoon system

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1 and the collection system and say that the
2 collection system with the final -- I shouldn't say
3 final -- with the latest improvements, the 1999
4 improvements, I think Durand now has a collection
5 system that is light years ahead of what it was when
6 we started and is now comparable, if not better,
7 than many of the similar sized communities in the
8 area. The lagoon system still has some things that
9 I think should be addressed, though it is performing
10 adequately at this point.

11 Q Do you have an opinion as to whether or not
12 the excursions that have occurred after the
13 completion of the '97 sewer project warrant a
14 finding levied against the Village?

15 MR. LARSON: Objection, asks for a legal
16 conclusion.

17 HEARING OFFICER KNITTLE: Sustained.

18 BY MR. GREENE:

19 Q Do you have an opinion as to whether or not
20 the excursions that have occurred since the
21 completion of the '97 sewer project warrant any
22 restrictions being placed on the Village for
23 additional hookups?

24 MR. LARSON: Objection. Without reference to a

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1 standard, I think that the question can't be
2 answered.

3 HEARING OFFICER KNITTLE: Overruled.

4 You can ask the question again.

5 MR. GREENE: Would you read it back, please?

6 (Question read.)
7 A No, I don't think they do.
8 BY MR. GREENE:
9 Q So the answer would be yes, you have an
10 opinion?
11 A The answer is yes, I have an opinion.
12 Q Your opinion is?
13 A I don't believe that those excursions
14 should have an impact on potential additional
15 connections.
16 Q Do you have an opinion as to whether or not
17 the excursions that have existed subsequent to the
18 '97 sewer project warrant having the Village placed
19 on critical review?
20 A No. I don't think they should be placed on
21 critical review.
22 MR. LARSON: Objection. Same objection. Calls
23 for a conclusion with regard to the enforcement
24 procedure of the Illinois Environmental Protection
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1 Agency. We haven't established Mr. Toerber's
2 ability to predict what action might be taken by the
3 enforcement arms of the IEPA.
4 HEARING OFFICER KNITTLE: Mr. Greene?
5 MR. GREENE: I am not asking for his prediction.
6 I am asking for his opinion as to whether or not
7 that ought to occur.
8 HEARING OFFICER KNITTLE: Overruled.
9 BY MR. GREENE:
10 Q Do you have an opinion, Mr. Toerber, as to
11 whether or not the excursions that have occurred
12 since the completion of the '97 sewer project
13 warrant any other sanctions to be placed against the
14 Village of Durand?
15 MR. LARSON: Same objection. I assume that you
16 will rule the same way, but I will remake my
17 objection.
18 HEARING OFFICER KNITTLE: I think I would
19 sustain that one. At least -- I don't know what you
20 mean by sanctions, Mr. Greene. Sanctions by whom?
21 MR. GREENE: The Pollution Control Board.
22 HEARING OFFICER KNITTLE: I will sustain that
23 objection as asking for a legal conclusion by this
24 witness.
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1 MR. GREENE: No further questions.
2 HEARING OFFICER KNITTLE: Do we have a
3 cross-examination?
4 MR. LARSON: Yes, sir.
5 EXAMINATION
6 BY MR. LARSON:
7 Q Directing your attention to testimony given
8 by Mike Sweet yesterday, you were present during his
9 testimony, weren't you?
10 A Yes.
11 Q Didn't he testify that the highest flow in
12 a single day in the year 1999 was 1,993,000 gallons;

13 and isn't that in excess of the 1.8 million gallon
14 capacity of the pumps per day in Durand?
15 A No. I think the confusion are the units.
16 The capacity -- the pumping capacity in million
17 gallons per day is 2.59. That is a conversion from
18 1,800 gallons per minute to 2.59 million gallons per
19 day.
20 Q Didn't you testify before that the pumping
21 capacity was 1.8 million gallons per day?
22 A No.
23 Q What is the pumping capacity?
24 A 2.59 million gallons per day.
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1 Q Your previous testimony was that no day had
2 approached one half of that level?
3 A That's correct, based on effluent record,
4 yes, effluent flow values. The highest one that I
5 saw was 1- -- I believe 1.13, something like that.
6 Q Okay. If Mr. Sweet's testimony that there
7 was flow to the system of 1.9 million gallons on
8 4-24-99, that would be more than one-half, wouldn't
9 it?
10 A That would be more than one-half, but I
11 think that was an influent flow number and not an
12 effluent number.
13 Q Okay. Is the flow of the -- the capacity
14 of the pumps 2,576 gallons per minute, to your
15 knowledge?
16 A No.
17 Q What is it?
18 A Well, the two lift stations combined -- the
19 primary lift station, the main lift station has a
20 capacity with both pumps running of 600 gallons per
21 minute. That is the theoretical capacity. The
22 backup lift station has a capacity of 1,200 gallons
23 per minute. That is a total of 1,800 gallons per
24 minute. And that is equivalent to 2.59 million
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1 gallons per day. That is just a conversion from
2 flow per minute to flow per day.
3 Q There is a document in front of you that
4 you have referred to several times in refreshing
5 your memory today. Could you tell me what that is?
6 A Yes. Those are my notes, review notes, of
7 the answers to discovery question of the Complainant
8 by the Village of Durand.
9 Q When did you prepare those?
10 A In two meetings that I had with Attorney
11 Greene.
12 Q What were the dates of those meetings?
13 A I don't recall exactly. They were in the
14 three weeks preceding this hearing. And I should
15 say some of this I did, not in the meeting but based
16 on our discussions and based on my review of the
17 information.
18 Q Did you ever provide a copy of the document
19 that you are referring to to the Village of Durand?

20 A No.
21 Q Did anybody ever ask you if you had
22 documents relating to the capacity and other matters
23 that are contained on that sheet?
24 A No.
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1 Q Now, with regard to a hammer tap, why is a
2 hammer tap bad?
3 A Well, it is not the best way to make a
4 service connection because there is always the
5 potential that -- particularly with -- most of
6 Durand's old lines are clay, and when you make the
7 connection in that manner, by breaking a hole in it,
8 it tends to -- it can certainly -- has the potential
9 of cracking the pipe laterally. And that is bad
10 because then it creates an opening that allows --
11 could allow infiltration.
12 Q What about the fit of the pipe that is
13 going into a hole that has bashed in the pipe by a
14 hammer?
15 A It is not good, and it is sealed by putting
16 mortar around it. So the quality of that
17 workmanship is totally dependent upon the person
18 doing the work.
19 Q Are there occasions when a hammer tap like
20 the one that you have described could be a source of
21 infiltration and inflow?
22 A Sure.
23 Q As a matter of fact, isn't it common for
24 mortar to deteriorate over time, especially when it
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1 is under water in a damp -- under ground in a damp
2 environment?
3 A That is potentially true, yes.
4 Q Isn't that why hammer taps, if you know,
5 were identified as a problem in the televising
6 report?
7 A That and if the -- sometimes the pipe
8 protrudes much further in. Then it can cause an
9 obstruction. So those two things are the criteria,
10 yes.
11 Q Is there any way to tell what percentage of
12 infiltration and inflow would come via the large
13 number of hammer taps that are identified in
14 Exhibit 8, as opposed to any other source?
15 A Well, the visual observation of the
16 tapes -- I mean, we looked at those, and so did the
17 TV contractor when he was preparing his notes. If
18 there is visual dripping or even flowing around the
19 joint, that would be an indication that that is a
20 problem. To specifically quantify that there is
21 X number of hammer taps and that will cause Y amount
22 of infiltration, that would be very difficult to do.
23 I don't know how you would do that.
24 Q You testified yesterday, didn't you, if you
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1 recall, that the high priority items on Exhibit 8
 2 had been dealt with by the repairs that have been
 3 made. And you have changed your testimony today;
 4 isn't that true?

5 A I don't believe so.

6 Q Is it your testimony, then, that the
 7 repairs that have been made in 1997 and 1999 would
 8 eliminate I/I into the system?

9 A Not entirely.

10 Q Okay. Are you changing your testimony
 11 today concerning your testimony yesterday that there
 12 may be a source of storm water drainage directly
 13 into the sanitary system that hasn't been
 14 identified?

15 A (No verbal response.)

16 HEARING OFFICER KNITTLE: Sir, please verbalize
 17 your answer.

18 THE WITNESS: No. I'm sorry.

19 HEARING OFFICER KNITTLE: Thank you.

20 BY MR. LARSON:

21 Q Now, with regard to the gravel, you have
 22 testified that compaction is at 95 percent of
 23 optimum density or was at the time that the
 24 compaction levels were tested when you had done the

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1 construction in Durand; is that correct?

2 A Yes.

3 Q Okay. Now, what is the effect of running
 4 water on gravel that is either compacted -- that has
 5 been compacted?

6 A The material that we are using is -- the
 7 term is trench backfill. It is a graded, granular
 8 material. Gravel is more of a generic term. It has
 9 the gradation from -- in the range of three-quarters
 10 to half inch, down to very fine material. And
 11 compaction causes -- that could create a solid,
 12 compacted material, and there would have to be some
 13 conduit or some void in there for water to run at
 14 any rate through it.

15 Q Did you check for voids?

16 A We inspected as it was compacted all along
 17 the -- we had an inspector on-site all the time
 18 watching them compact it. There were some areas
 19 where, in fact, they did not compact to the level
 20 that we wished; and we required them to come back
 21 and re-excavate that.

22 We called in a testing company, Testing
 23 Engineers, Incorporated, which did tests and
 24 determined those areas were not compacted

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1 adequately. We required them to recompact those.
 2 So again, we tried very carefully to monitor that
 3 process and be sure that it was compacted according
 4 to the specifications.

5 Q Now, in the trench in which the sewer is
 6 located, will water travel laterally in those
 7 trenches?

8 A Well, there may be some migration, but I
9 would respond again that there is compaction in the
10 excavated area above the trench; and there is also
11 compaction of the bedding material around the pipe.
12 And both of those things tend to restrict the flow
13 of water along the exterior of the pipe.
14 Q Just as an aside, the material that is in
15 the trench is different than the material above?
16 A They are two different gradations.
17 Q How is the stuff in the trench different?
18 A The material that goes around the pipe has
19 a narrower gradation, and it is specified by EPA.
20 Its primary purpose is to create a structural
21 support for that pipe because it is a flexible pipe;
22 it is a PVC pipe. And unless it is properly bedded
23 and well-compacted so that it can't move with the
24 weight of the soil or weight of the backfill above
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1 it, it will deflect.
2 Q Now, I/I occurs primarily when it rains,
3 doesn't it?
4 A Well, by definition, inflow is related to
5 surface waters and to rainfall. Infiltration can
6 occur when it is not raining if the water table is
7 high.
8 Q So in situations where it is dry, there
9 wouldn't be much -- as much infiltration and inflow;
10 is that correct?
11 A Yes. If it is not raining and if the water
12 table is below the level of the sewer, then there
13 should be minimal I/I.
14 Q So when sewage reaches the lagoon, as you
15 testified yesterday, the evaporation factor is
16 higher when it is not raining; isn't that right?
17 A Oh, yes, sure. Well, it is not evaporating
18 when it is raining.
19 Q So the percentage of BOD and TSS in the
20 effluent discharge from the lagoon, it stands to
21 reason, then, is going to be more concentrated when
22 there is less water going through the system; isn't
23 that true?
24 A No, not necessarily. If the lagoon is
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1 operating properly -- again, as we talked about
2 yesterday, the biological breakdown of the BOD and
3 the TSS -- because some of the solids do break down.
4 They serve as food for -- there is a symbiotic
5 relationship between the bacteria and the algae in a
6 lagoon system. The aeration provides the oxygen.
7 So these are living organisms that use oxygen to
8 breathe, if you will; and they feed upon the waste.
9 So in a low-flow time period is when the
10 lagoon should be working the best. It is also
11 related to temperature. And the warmer the water,
12 the better those organisms perform. So it is not
13 necessarily true that the lowest effluent values
14 would occur when the flows were the highest.

15 Q Now, I am confused, then, because you
16 indicated earlier that there was a direct relation
17 between the BOD and TSS excursions in this plant
18 when the flow was low. Now --
19 A No. I said there is no correlation. There
20 is no direct correlation between high flows and
21 excursions.
22 Q Okay. Okay. So in each of the occasions
23 when excursions were identified -- and today,
24 certainly, you have testified that you went into
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1 great detail in examining these -- the flow was low,
2 wasn't it?
3 A Yes.
4 Q Okay. And according to the testimony you
5 just gave, when the flow is low, the effluent should
6 be cleaner, shouldn't it?
7 A Generally, it is. We are looking over,
8 what, a three-year time period that we had seven
9 times when we had an excursion from the effluent
10 limits? That is pretty good. If you ask any -- for
11 example, if you ask Jack Adam from Illinois EPA --
12 Q I am going to ask you not to testify about
13 what Mr. Adam might say under any circumstances.
14 A Well, if you ask --
15 Q Let's move on to another question.
16 A If you ask me --
17 Q Excuse me. I am asking you the questions
18 here, sir.
19 MR. GREENE: I would object to the --
20 MR. LARSON: Excuse me. I have a question to
21 ask.
22 MR. GREENE: Well, he has asked the question and
23 has not allowed an answer.
24 HEARING OFFICER KNITTLE: I don't know that the
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1 response was in response to a question that
2 Mr. Larson asked. So I am going to overrule your
3 objection.
4 BY MR. LARSON:
5 Q Now, in situations of high flow --
6 A Yes.
7 Q -- there is dilution of the effluent in the
8 plant; is that correct?
9 A Yes, sir.
10 Q The dilution occurs both with sanitary
11 waste that comes into the plant and sanitary waste
12 that is in the plant at the time the high flows take
13 place, doesn't it?
14 A True.
15 Q So when you have a high flow, a lot of
16 material goes through the rock filter at the end of
17 the lagoon; isn't that true?
18 A The rock filter is susceptible to hydraulic
19 loading, and it can cause -- if material has been
20 caught on there, it can cause it to slough off, yes,
21 sir.

22 Q So can it also cause material to collect on
23 the rock filter?
24 A You mean the high flow?
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1 Q During periods of high flow, sure.
2 A Well, the high flow would not directly
3 cause things to collect better on the rock filter.
4 It is a physical and a biological filtering device.
5 Materials are trapped on there physically, and they
6 are also attached because of biological growth. The
7 hydraulics are -- it is just not a direct
8 relationship.
9 Q Let me make this very basic.
10 A Okay.
11 Q High flow comes into the plant and it has
12 got sewer in it -- it has got sanitary waste in it.
13 There is sanitary waste in the plant. It goes
14 through a rock filter at the end, having spent less
15 time in the detention ponds going through the
16 system.
17 Will any of the suspended solids, if you
18 know, in the waste water during periods of high flow
19 collect on the rocks in the rock filter?
20 A Some of them will, yes.
21 Q Then as flow continues in areas -- in times
22 when flow is low, is it possible, then, that some of
23 that previous collected waste might be washed off
24 and carried out by effluent in other times?
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1 A It is possible.
2 Q Now, you have testified yesterday and today
3 as to the possibility of surcharging and backing up
4 in the system, resulting in sewer backup. Now,
5 yesterday your testimony was, if I understand it,
6 that it would be possible for the system to
7 surcharge and back up.
8 A It is possible, yes.
9 Q Your testimony today was different in --
10 only to the extent that you stated that the
11 likelihood of such a backup would be low?
12 A That is true.
13 Q Okay. But you are not ruling out the
14 possibility of this; is that correct?
15 A No.
16 Q Now that you have testified that you are
17 familiar with the NPDES compliance report and that
18 you are satisfied that the contents of the report
19 are accurate -- that was your testimony, wasn't it?
20 A Yes.
21 Q I am going to direct your attention, then,
22 to the third page of the report.
23 A Let's see. Okay.
24 Q There is a paragraph labeled "Restricted
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1 Status Critical Review"?

2 A On page 3?
3 Q I'm sorry. I guess it is page 3 of the
4 document that I have because there is a cover sheet.
5 It looks like it is identified as page 2.
6 A Okay. Okay, yes.
7 Q You agreed with the conclusion of the
8 report that for 1998 the plant should not be placed
9 on critical review; is that correct?
10 A Yes.
11 Q Directing your attention to that paragraph
12 that I just identified, I am going to read you a
13 sentence and ask you if it appears in the report
14 that you have. This is the third sentence of the
15 paragraph entitled, "Restricted Status Critical
16 Review:
17 "However, in 1998 flows were down 100,000
18 gallons per day and there were few, if any, sewage
19 backups. Therefore, it would appear that the Agency
20 should no longer consider placing the Village on
21 critical review status due to sanitary sewer
22 overflow in the basements."
23 Do you agree with that statement?
24 A No. The statement about flows being down
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1 100,000 gallons per day is based on my review of the
2 records and is of -- is not totally accurate.
3 Q So then there are parts of this report that
4 you are willing to adopt and other parts that you are
5 not willing to adopt?
6 A I simply did not catch that statement.
7 Q Well, I guess you testified, Mr. Toerber,
8 that you were familiar with your report and its
9 conclusions; and I guess now what your testimony is
10 is that testimony is not accurate; is that correct?
11 A Well, I am testifying that this particular
12 statement is not totally clear. When it says down
13 100,000, that is -- my interpretation would be that
14 he was saying the average for the year was
15 100,000 gallons per day lower, and that is not true.
16 I would agree with that.
17 Q Now, it was your testimony yesterday, I
18 believe, that an increase in the number of hookups
19 to the sanitary system in Durand would not affect
20 the loading, the hydraulic loading, and also the BOD
21 and TSS content of the effluent discharged from the
22 plant so as to cause it to exceed 190,000 gallons
23 per day. Is that still your testimony?
24 A I don't believe that that is what I
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1 testified. You said that -- if I can ask you
2 what --
3 Q Please clarify. If I misstated your
4 testimony, I am inviting you at this time to
5 clarify.
6 A My understanding, you are saying that
7 additional connections would not result in
8 additional loading to the system?

9 Q Specifically, that the additional loading
10 to the system from 1,600 or so population
11 equivalents would not cause the average flow per day
12 to exceed 190,000 gallons.
13 A What I testified was that it is possible
14 for additional connections to be made and that the
15 three-month low flow number, in addition to those
16 connects, that combination, could possibly not
17 exceed the 190,000 gallons.
18 Q Then is it your testimony -- and again, I
19 am asking you specifically to correct me if I am not
20 stating this accurately, please. Is it your
21 testimony, then, that there could be situations in
22 which additional hookups that have been testified to
23 in this hearing -- and by that I mean generally
24 assuming that Otter Creek Phase III and Twin Creeks
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1 were built out completely, okay?
2 A Okay.
3 Q Is it your testimony, then, that there
4 could be occasions during, for example, high flow
5 months when the loading of the system would exceed
6 190,000 gallons per day?
7 A There could be, certainly.
8 Q And that in flows -- in months when we are
9 not dealing with the low three months of the year,
10 there might be also occasions -- excluding now the
11 high flow months and excluding the low flow months.
12 In dealing with the months in between -- again,
13 assuming that Phase III is built out and Twin Creeks
14 is built out -- that there might be occasions when
15 the additional flow through the sewer system would
16 exceed 190,000 gallons per day?
17 A That is certainly possible.
18 MR. LARSON: I have nothing further of this
19 witness.
20 HEARING OFFICER KNITTLE: Do you have redirect?
21 MR. GREENE: No redirect.
22 HEARING OFFICER KNITTLE: Thank you very much,
23 sir. You can step down.
24 Let's go off the record for a second.
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1 (Discussion off the record.)
2 HEARING OFFICER KNITTLE: We are back on the
3 record.
4 Mr. Greene, I didn't mean to cut you off.
5 MR. GREENE: That is fine.
6 HEARING OFFICER KNITTLE: I think you have an
7 exhibit you want to offer?
8 MR. GREENE: Yes, Exhibit 7; Respondent's
9 Exhibit 7.
10 HEARING OFFICER KNITTLE: Is there an objection
11 to that, Mr. Larson?
12 MR. LARSON: Based on the testimony of
13 Mr. Toerber concerning his willingness to accept
14 parts of the report, his unwillingness to accept
15 other parts of the report, his lack of familiarity

16 with the report, and its lack of authentication, I
17 think that the exhibit should not be admitted.
18 HEARING OFFICER KNITTLE: Mr. Greene, do you
19 have anything?
20 MR. GREENE: Yes. I believe that it should be
21 admitted, Judge. The fact there was one exception
22 that he made to it does not disqualify it.
23 HEARING OFFICER KNITTLE: How has this report
24 been properly qualified?
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1 MR. GREENE: I don't know that it has been
2 properly qualified as an official report. It is the
3 information that is contained in it that Mr. Toerber
4 has testified to, with one exception, that he agrees
5 with. It was just an abbreviated way of -- instead
6 of going through item by item in the entire report
7 of having him say that this is the condition that
8 existed with the sanitary sewer system as of
9 December 2, 1998.
10 HEARING OFFICER KNITTLE: And you don't have an
11 affidavit from the EPA about that report to qualify
12 it as a public record?
13 MR. GREENE: No. It is a photocopy that was
14 faxed and contains purported signatures of officials
15 of the IEPA. In fact, it was attached by the
16 Complainant to his motion for summary judgment,
17 which was denied.
18 MR. LARSON: We filed a motion for summary
19 judgment that was denied. We had a motion for
20 summary judgment that was granted in part and was
21 remanded here for post-1997 hearings and input on
22 remedies.
23 MR. GREENE: So it is the Complainant that
24 obtained that document.
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1 HEARING OFFICER KNITTLE: Well, in light of the
2 fact that this was attached to the motion for
3 summary judgment, I do not think it has been
4 properly qualified as a public record, nor do I
5 think the appropriate foundation has been laid.
6 However, the evidentiary standards before the Board
7 and before any administrative agency, as you know,
8 are less than they are before the Court.
9 So I am going to admit this; but I do think
10 that if you want to make some arguments in your
11 brief, there are definitely arguments to be made to
12 this document.
13 MR. LARSON: Thank you.
14 MR. GREENE: Thank you.
15 HEARING OFFICER KNITTLE: Anything else,
16 Mr. Greene?
17 MR. GREENE: Nothing further.
18 HEARING OFFICER KNITTLE: Okay. You have closed
19 your case in chief. We now proceed with
20 Complainant's rebuttal case.
21 MR. LARSON: We call David Mulvain.
22 HEARING OFFICER KNITTLE: Mr. Mulvain, can you

23 please have a seat. I will remind you -- actually I
24 will wait until you get seated before I --
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1 Mr. Mulvain, are you aware that you have
2 been sworn in previously?
3 THE WITNESS: Yes, I am.
4 HEARING OFFICER KNITTLE: Let me remind you that
5 you are still under oath.
6 You can proceed.
7 (Witness previously sworn.)
8 DAVID MULVAIN,
9 having been previously sworn, was examined and
10 testified as follows:

EXAMINATION

11 BY MR. LARSON:

12 Q Mr. Mulvain, you heard the testimony today
13 of Mr. Mike Sweet concerning conversations you had
14 with him relating to your sewage backup in June of
15 1998 and April of 1999 and June of 1999.

16 Q Based on your knowledge and your presence
17 on those days, was his testimony accurate?

18 A No.

19 Q How was it inaccurate?

20 A I did tell him that -- in fact, that I had
21 sewer backup and I did ask him to look at sewer
22 backups on all three occasions.

23 Q Okay. What did he do on those occasions?

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1 A Well, he pretty much testified on the '98
2 occasion that I asked him to look at it and that he
3 was busy doing other things --

4 Q What did he do on those days?

5 A He did not look at them.

6 Q Okay.

7 A But he did make a statement regarding the
8 cause of flow, which -- in previous testimony in
9 regards to the backup on the 27th.

10 Q Now, you made responses to discovery in
11 this case, did you not?

12 A Yes.

13 Q Okay. And based on your knowledge and the
14 responses that you made at the time that you made
15 them, were those accurate responses in every
16 respect?

17 A Yes.

18 Q Now, do you have with you today photographs
19 that pertain to sewer overflow on your residence
20 during April of 1999?

21 A Yes, I do.

22 Q Did you provide those in response to a
23 discovery request previously made by the Village of
24 Durand?

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1 A No.

2 Q Okay. Was there any request, to your
3 knowledge, in the discovery request of the Village

4 of Durand for the production of photographs?
5 A No.
6 Q Now, would you tell me what photographs you
7 have and what they are of?
8 A The first photograph I am looking at is
9 looking down the basement steps into the house I own
10 next door. It is very dark. You can't see much
11 except the reflection of light, which pretty much
12 indicates it was not a concrete floor.
13 Q Now, with regard to that photograph, did
14 you take that photograph?
15 A Yes, I did.
16 Q On what day did you take it?
17 A I took it either -- I took it April 23rd --
18 or it could be that if the rain occurred at night --
19 and I don't recall -- I could have taken it the next
20 morning or the next day. But I took it while the
21 flows were obviously high.
22 Q Now, on that photograph is there anything
23 to indicate a date of any kind?
24 A Yes. The place where I have my photographs
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1 processed identifies their business name, and it
2 dates the date of processing.
3 Q Does that photograph have a date of
4 processing on it?
5 A April 30, 1999.
6 Q The film that you have testified that you
7 used to take these photographs, did you take it to
8 be processed on that day or shortly before?
9 A I took it before.
10 Q What is the next photograph that you have?
11 A The next photograph is a little bit closer.
12 I have gone -- I have actually gone down the steps a
13 little bit. It shows an area -- I couldn't get down
14 into the basement, but it shows an area of the
15 basement that is flooded. It shows the furnace
16 sticking out above the flooded water somewhat. Part
17 of it is under water. It shows -- you can see the
18 step underneath the sewer backup, and you can see
19 all kinds of crud floating around.
20 Q Did you take that photograph?
21 A I did.
22 Q What day did you take it on?
23 A I took it -- it was taken during the high
24 flow of the event we identified as the April 23rd
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1 rain event.
2 Q Does that photograph have a date on it?
3 A It does.
4 Q Could you tell me what that is?
5 A April 30, 1999.
6 Q Is that part of the same roll as the
7 picture you just testified to a moment ago?
8 A Yes.
9 Q Do you have any other pictures?

10 A Yes. This is a photograph taken in the
11 corner of my basement --
12 Q Now, when you say your basement --
13 A The home where I live.
14 (Continuing.) -- and it shows that the --
15 there is an area of -- I would judge it to be just
16 under 2 foot in diameter around the floor drain.
17 You can see the floor drain under the water. You
18 can see that the water or something -- either the
19 concrete or the water is inconsistently colored.
20 And what I am showing here also is that you can see
21 the sump basket and the pipe from the sump pump.
22 You can see the top of the sump pump coming up.
23 Unfortunately, what you can't see very clearly in
24 this particular photo --
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1 MR. GREENE: Objection. The question is what
2 does this photograph show.
3 MR. LARSON: He is answering the question.
4 A The photograph will --
5 HEARING OFFICER KNITTLE: Hold on, hold on,
6 Mr. Mulvain.
7 Do you have anything else, Mr. Greene?
8 MR. GREENE: It is unresponsive.
9 HEARING OFFICER KNITTLE: I will sustain. You
10 can ask him a question to get there, though.
11 MR. LARSON: Okay.
12 A The photograph shows part of the flow of
13 water running into the sump basket.
14 BY MR. LARSON:
15 Q Now, did you identify the source of that
16 water?
17 A Yes. This is the situation that I had a
18 plume of water coming up directly above the back
19 flow valve in the floor drain, although it is not
20 visible in this photograph.
21 Q Okay. Now, did you take that photograph?
22 A Yes.
23 Q Does it accurately portray what you saw at
24 that time?
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1 A No, it does not.
2 Q How does it not?
3 A Well, I had to use a flash here; and the
4 flash on water for some reason, depending on its
5 thickness over the concrete and various things,
6 doesn't show the plume and it doesn't show the full
7 width of the -- clearly show the full width of the
8 flow of water into the sump basket.
9 Q Now, what day did you take that photograph?
10 A This is -- it was taken the time -- the
11 same day as the others. I took this just a few
12 minutes before the others.
13 Q Does it have a date on the back?
14 A Yes, it does.
15 Q What date does it have on the back?
16 A April 30, 1999.

17 Q Do you have any other pictures?
18 A Yes. I have one -- this is of the sump
19 basket itself, and it shows water and -- you can see
20 the ripples in the water at the bottom of the sump
21 basket and sump pump sitting in it. And you can see
22 a fairly substantial flow down the side of the sump
23 basket, even though it doesn't look like there is a
24 flow coming in over the concrete.
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1 Q Did you take that photograph?
2 A Yes.
3 Q Does it accurately portray what it purports
4 to portray?
5 A Yes.
6 Q What date did you take that photograph on?
7 A April 30, 1999.
8 Q I'm sorry? You took the photograph on
9 April 30th?
10 A No. I took it April 23, 1999, or
11 thereabouts.
12 Q Did you have that photograph processed?
13 A Yes.
14 Q Does it bear a date?
15 A Yes; April 30, 1999.
16 Q Do you have any other photographs?
17 A I have another photograph a little bit
18 closer than the first one I described, showing part
19 of the sump basket; and it is a little closeup of
20 the floor drain area. And this time it shows -- the
21 flow shown across the area shows that there is a
22 flow. It doesn't show it clearly, but it shows it.
23 Q Did you take that photograph?
24 A Yes.
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1 Q Does it accurately portray what it purports
2 to portray?
3 A No. There is a greater flow than there
4 appears to be in the photograph and, again, the
5 plume does not show.
6 Q What day did you take the photograph on?
7 A April 23, 1999, or thereabouts.
8 Q Does that photograph bear a date?
9 A Yes, it does.
10 Q What is the date?
11 A April 30, 1999.
12 Q Okay. Do you have any other photographs?
13 A I have one more. This photograph is of the
14 hose, where it is coming out into my yard.
15 Q What is coming out of the hose into your
16 yard?
17 A The sewer backup fluid -- liquid.
18 Q Okay. What day did you take that?
19 A I took that April 23rd or thereabouts.
20 Q Does that photograph accurately portray
21 what it purports to portray?
22 A Yes, it does.
23 Q Does that photograph -- you took that

24 photograph, didn't you?
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1 A Yes.
2 Q Does it have a date on it?
3 A Yes.
4 Q What date is that?
5 A April 30, 1999.
6 MR. LARSON: I would ask that the photographs
7 testified to by Mr. Mulvain be identified as
8 Complainant's Exhibit No. 10. And at this time I am
9 going to hand them to Mr. Greene and state for the
10 record that these photographs were not produced in
11 response to any discovery response and he has not
12 seen them before today.
13 MR. GREENE: I would ask that they be
14 individually identified since there were two of them
15 that the testimony is do not accurately portray
16 what --
17 HEARING OFFICER KNITTLE: If you want to do a
18 group exhibit, we can do 10A, B, C, D, E. I would
19 like them individually identified, as well.
20 MR. LARSON: That is fine, your Honor. I
21 haven't made any notation on them. Maybe I should
22 do that now.
23 HEARING OFFICER KNITTLE: Just put it on the
24 back. How are you going to label those, Mr. Larson?
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1 MR. LARSON: 10A, 10B, 10C, 10D, 10E, 10F. And
2 unfortunately, I haven't identified them as they
3 came in with regard to the 10A through F. I can do
4 that if it would make it easier for the hearing
5 officer to follow.
6 HEARING OFFICER KNITTLE: We are going to have
7 to do it at some point because I imagine --
8 MR. LARSON: Why don't I do that now?
9 HEARING OFFICER KNITTLE: Yes. I was taking
10 notes as they came in, as well.
11 (Complainant's Exhibit
12 Nos. 10A-10F marked for
13 identification.)
14 BY MR. LARSON:
15 Q Okay. I am going to hand you documents --
16 the photographs again and ask you to look at the
17 back -- look at the sticker on the back of the
18 photograph.
19 What photograph do you have in your hand?
20 A This is the very last one I --
21 Q No, no, no. What number is on the back?
22 A This is 10A.
23 Q Could you tell the hearing officer what
24 that picture is of?
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1 A This is of the sump pump tube pumping the
2 sewage into my front yard.
3 HEARING OFFICER KNITTLE: I am going to

4 interrupt, if you don't mind.
5 That was the last one, Mr. Mulvain?
6 THE WITNESS: That was the last one, yes.
7 HEARING OFFICER KNITTLE: If you can, each time
8 you identify it, tell us which one it was, if you
9 remember.
10 THE WITNESS: It would be beneficial for me to
11 put these in some kind of order.
12 HEARING OFFICER KNITTLE: Put them in the order
13 that you initially talked about them, and then
14 identify each one.
15 THE WITNESS: I am not sure I can do that
16 exactly because I have forgotten the order. But I
17 have some --
18 The very first one I talked about was 10E,
19 and that is the photograph showing -- No. That
20 is -- I'm sorry. I retract that. The very first
21 one that I talked about was 10F, and that shows a
22 picture looking down the basement stairs.
23 MR. GREENE: Which basement?
24 THE WITNESS: In the house that I own but do not
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1 live in, 206 -- for purposes of identification, 206
2 West Main.
3 BY MR. LARSON:
4 Q The next one?
5 A The next one that I talked about was 10E.
6 That shows a picture looking down the basement
7 stairs at 206 West Main, but it is a closer shot.
8 MR. GREENE: Is that your house?
9 THE WITNESS: No. 206 West Main -- Yes. It is
10 mine and I own it. I don't live in it.
11 MR. GREENE: Is that the same house as 10F?
12 THE WITNESS: Yes.
13 A I don't know whether the next one I talked
14 about -- Oh, yes. The next one I talked about, I
15 believe, was 10D; and that shows the floor drain and
16 the sump basket and the flow between them.
17 BY MR. LARSON:
18 Q Which house?
19 A This is in my house, 410 Laona, the house I
20 live in.
21 I am not sure of the order I discussed
22 them. I think that the next one -- and I am not
23 sure -- was the closeup of the sump basket, showing
24 the flow down the side of the flow basket. And that
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1 one is 10C.
2 MR. GREENE: Which house?
3 THE WITNESS: This is also my house I live in.
4 A The next one that I talked about was -- is
5 also at my house, the house I live in, 410 Laona,
6 identified as 10B. It is a little bit closer of the
7 floor drain and the sump basket and the flow between
8 them.
9 BY MR. LARSON:
10 Q The last one?

11 A The last one I identified previously is
12 10A, and it is the sewage coming out of the pump in
13 the front yard.
14 MR. GREENE: Which house?
15 THE WITNESS: 410 Laona, the house I live in.
16 HEARING OFFICER KNITTLE: All right. I think I
17 got it. Do you want to take them one at a time,
18 Mr. Greene?
19 MR. GREENE: Well, I have some general questions
20 first.
21 EXAMINATION
22 BY MR. GREENE:
23 Q With regard to all of these photos, is it
24 your testimony that they were all taken on April 23,
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1 1999?
2 A I have a very difficult time with dates.
3 They were taken on or about April 23rd. They were
4 taken during the high water flow from the rain
5 incident identified as April 23rd.
6 Q You are as sure that these were taken on
7 April 23rd -- or on or about April 23rd as you are
8 that you notified Mr. Sweet on April 23rd that you
9 had a water backup -- sewer backup problem?
10 A Yes.
11 Q Are you as sure that these were taken on
12 April 23rd as you were that you had never made a
13 statement that the water that you had in your
14 basement on June 25, 1998, was caused only by a
15 sewer backup and you never made a statement that it
16 was caused because of rain water?
17 A No, I did not make that statement.
18 THE WITNESS: That wasn't the same question he
19 asked before.
20 MR. LARSON: Just --
21 HEARING OFFICER KNITTLE: Let me direct you,
22 Mr. Mulvain, to answer the questions that he puts to
23 you and that is it. You will have an opportunity to
24 be rehabilitated by your attorney, and hopefully he
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1 will ask the questions that you want him to ask.
2 BY MR. GREENE:
3 Q I believe your testimony yesterday
4 regarding the April 23, 1999 incident was that it
5 occurred prior to the completion of the sewer
6 project by your house; is that correct?
7 A Yes.
8 HEARING OFFICER KNITTLE: Let me jump in here.
9 Mr. Larson, were you done with your direct
10 of this?
11 MR. LARSON: Yes, I am.
12 HEARING OFFICER KNITTLE: Because I was viewing
13 this initially as voir dire on these photos; but if
14 you were done, this can be cross-examination, as
15 well, I suppose. But you do want to offer these,
16 correct?
17 MR. LARSON: Yes. I am going to offer these.

18 HEARING OFFICER KNITTLE: So maybe we should
19 just limit these to the photos for now.
20 MR. GREENE: Actually, those are the only
21 questions I have left now.
22 HEARING OFFICER KNITTLE: Oh, okay.
23 BY MR. GREENE:
24 Q Is it 10D that you stated did not
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1 accurately depict what you saw?
2 A That is correct.
3 Q Was it 10B, as in boy, that you also
4 testified did not accurately depict what you saw?
5 A That is correct.
6 MR. GREENE: No further questions.
7 HEARING OFFICER KNITTLE: Let's go over these
8 now.
9 10A was a picture of the yard -- hose
10 pumping out of the yard. Do you have an objection
11 to that exhibit, Mr. Greene?
12 MR. GREENE: I don't have any objection to 10A,
13 C, E, or F.
14 HEARING OFFICER KNITTLE: All right. I will
15 admit A, C, E, and F with no objection.
16 MR. LARSON: So B and D?
17 HEARING OFFICER KNITTLE: Right.
18 Let's go to 10B, which is a picture of the
19 floor drain and the sump. Do you have an objection
20 to that?
21 MR. GREENE: Yes. Based on the testimony of the
22 Complainant, it does not accurately depict what he
23 observed.
24 HEARING OFFICER KNITTLE: Mr. Larson?
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1 MR. LARSON: He amended his response to identify
2 the specific particulars in which the photograph did
3 not reflect what he saw at the time that he took the
4 photograph. He specifically identified those and
5 his testimony accompanying the exhibit identified
6 the discrepancies that he made mention of.
7 HEARING OFFICER KNITTLE: Same response to 10B,
8 as well?
9 MR. LARSON: Yes, sir.
10 HEARING OFFICER KNITTLE: Mr. Greene?
11 MR. GREENE: I don't believe that that is
12 correct, your Honor.
13 HEARING OFFICER KNITTLE: I have got to agree
14 with Mr. Greene on this. He stated that they didn't
15 fairly and accurately depict what he saw at that
16 point in time; and I can't admit these unless the
17 basic foundation has been laid for these photos, and
18 it doesn't appear that it has been. So those will
19 be denied.
20 We will, of course, take those -- you know,
21 I will offer the exhibits I take, as I am sure you
22 both know. And if you think that his testimony
23 shows differently than I recall, you can make that
24 argument to the Board.

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1 MR. LARSON: We are going to at this point ask
2 leave to, I guess, redirect -- a limited redirect
3 with regard to one specific statement, the objection
4 that Mr. Mulvain raised with the question that he
5 was asked. I don't want to go into redirect in more
6 detail than that except to say that I would ask
7 leave to expand the foundation for the two pictures
8 that you have denied admission to.

9 HEARING OFFICER KNITTLE: I would allow that
10 unless -- probably I would like to know if there is
11 an objection from Mr. Greene.

12 MR. GREENE: I object, don't care to argue it.

13 HEARING OFFICER KNITTLE: I will allow you to
14 lay additional foundation.

15 MR. LARSON: Let me just grab those two
16 photographs back from you.

17 EXAMINATION

18 BY MR. LARSON:

19 Q Now, Mr. Mulvain, during your testimony on
20 cross-examination a moment ago, you raised an
21 objection to a question asked by Mr. Greene.

22 Could you specify your objection to that
23 question?

24 A Yes. When he asked at the latter time, he

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1 asked me if there was water in my basement due to
2 rain. Indirectly, that is true; but the -- because
3 the rain becomes ground water, which in turn
4 infiltrates into the sewer system, which in turn
5 backs up through my sewer along with some particles
6 of sewage. So from some extended technical point of
7 view, I answered the question wrongly. But the fact
8 of the matter is that what I testified to previously
9 was that I do not have surface water running
10 directly into my basement.

11 Q Did you at any time make the statement that
12 there was sewage backup in your basement only and
13 that there was no rain water and then on the
14 videotaped interview that you gave and that was
15 shown in this matter, did you say in that interview
16 that part of the water in your basement might be due
17 to ground water?

18 A The whole cause -- yes. The vast
19 majority --

20 Q Just answer the question, please.

21 A Most of the water in my basement is ground
22 water, again through the same explanation. Rain
23 water goes into the ground, infiltrates into the

24 sewer system. And whether it is ground water or raw

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1 sewage, it is mixed; and it comes up mostly as
2 ground water but not entirely as ground water as a
3 sewer backup.

4 Q When you used the term ground water in the
5 televised interview that was shown in this case, is
6 that what you meant?
7 A Yes.
8 Q Now, directing your attention to the
9 photograph previously identified as 10D, you
10 testified that this photograph does not accurately
11 show what it purports to show.
12 Now, is there anything in that photograph
13 that is an artifact or that does not reflect what
14 your camera, if you know, picked up from that scene
15 as you took the picture?
16 A Yes. I had a flash on the camera; and
17 where the water has more depth and has been running
18 for a longer period of time on the concrete -- in
19 fact, I have different types -- this is made of
20 concrete and mortar. This basement floor is a
21 conglomerate of materials.
22 But at any rate the material for part of
23 the area between the floor drain and the sump basket
24 appears not to have picked up -- absorbed moisture
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1 and therefore hasn't darkened. And so what we see
2 is dark water on one side; and if you look very
3 closely, you can see the light reflection off the
4 water going into the sump basket. But there is a
5 light area in between. And what one would expect to
6 see is dark all the way across. Instead, what you
7 see is a lighter area; and you have to look very
8 close to see that that area is lighter than the
9 surrounding concrete, that that is where the water
10 is flowing.
11 Q Mr. Mulvain, it appears to me, then, that
12 what you are saying is that there might be an
13 appearance on the surface of the photograph that
14 might be deceiving but the photograph itself
15 accurately portrays what is there?
16 A Yes. In terms of the plume, too. You can
17 look very closely, and you can see --
18 MR. GREENE: Objection. There is no question
19 pending.
20 HEARING OFFICER KNITTLE: Sustained.
21 BY MR. LARSON:
22 Q Do you have any comment concerning the
23 plume?
24 A Yes. This photograph doesn't show the
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1 extent of the plume. All it shows -- in fact, there
2 is -- this water was turbulent and active; and the
3 ripples and turbulence do not -- the water shows,
4 but the turbulence does not show and the plume
5 doesn't actually show, although there is a darker
6 area in the upper right-hand corner of the floor
7 drain area where the plume was. And the same --
8 MR. LARSON: Let the record show --
9 MR. GREENE: Let me interrupt you one moment.
10 Mr. Knittle, maybe I can simplify this. I

11 will withdraw my objection to the two sub exhibits.
12 MR. LARSON: In that case, then, we will stop
13 this if the objection is withdrawn.
14 HEARING OFFICER KNITTLE: Okay. The objection
15 will be withdrawn on both of those. And if there is
16 no objection --
17 You have no objection to the admitting of
18 these into evidence?
19 MR. GREENE: Correct, all of 10.
20 HEARING OFFICER KNITTLE: 10B and 10D
21 specifically?
22 MR. GREENE: Correct.
23 HEARING OFFICER KNITTLE: All right. I will,
24 then, admit those.
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1 MR. LARSON: I have nothing further of this
2 witness.
3 HEARING OFFICER KNITTLE: Do you have any
4 recross?
5 MR. GREENE: Yes, I do.
6 HEARING OFFICER KNITTLE: You have the ability
7 to recross this witness.
8 EXAMINATION
9 BY MR. GREENE:
10 Q Mr. Mulvain, you stated that the answers to
11 the Village's interrogatories, when answered, were
12 answered accurately; is that what --
13 A We had a discussion about that. I didn't
14 say that -- there were qualifications to that
15 answer. I didn't recall that -- whether or not I
16 had mentioned the last backups which do not
17 appear --
18 MR. LARSON: Objection. We are going beyond the
19 scope of the rebuttal testimony and the redirect.
20 HEARING OFFICER KNITTLE: Mr. Greene?
21 MR. GREENE: Wasn't the first question that he
22 was asked, "Were the answers that you gave to the
23 Respondent's interrogatories accurate at the time
24 you gave them?"
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1 MR. LARSON: No, not on the redirect. I didn't
2 ask that question on redirect.
3 MR. GREENE: Well, then I would ask if I could
4 again ask those questions since Counsel was given
5 leave to ask some additional questions and to reopen
6 his redirect.
7 HEARING OFFICER KNITTLE: I can't recall what
8 redirect -- what was the redirect testimony,
9 Mr. Larson.
10 MR. LARSON: The redirect testimony --
11 HEARING OFFICER KNITTLE: I understand most of
12 it was regarding the photographs, but there were a
13 couple questions before that.
14 MR. LARSON: The only other question I asked was
15 with regard to the videotaped interview. I asked
16 two questions with regard to the ground water on the
17 videotaped interview.
18 HEARING OFFICER KNITTLE: Did you ask any

19 questions about the interrogatory response?
20 MR. LARSON: No.
21 HEARING OFFICER KNITTLE: I am going to sustain
22 his objection, then -- sustain Mr. Larson's
23 objection.
24 MR. GREENE: Mr. Larson is stating that he did
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1 not ask a question concerning the accuracy of
2 Mr. Mulvain's response to the answers to the
3 interrogatories?
4 MR. LARSON: Not on redirect.
5 MR. GREENE: Just prior to this -- whatever you
6 want to call what we are now doing. The redirect
7 redirect? You reopened redirect, did you not, so
8 that you could ask some questions --
9 MR. LARSON: I don't recall asking any questions
10 other than about the televised interview.
11 HEARING OFFICER KNITTLE: Well, let's do this.
12 I think there was some confusion that existed about
13 whether you were voir direing those exhibits or
14 whether he was conducting his cross-exam. And on
15 this basis I would let you ask the question. But I
16 don't want to go too far afield here. I don't know
17 how many questions you are going to have regarding
18 this, Mr. Greene; but I will allow you to ask some
19 limited questions.
20 MR. GREENE: In fact, this is the only question
21 that I have.
22 HEARING OFFICER KNITTLE: Even better.
23 BY MR. GREENE:
24 Q Correct me if I am wrong. Moments ago, am
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1 I correct, that there was a question asked of you as
2 to whether or not the answers that you gave to the
3 Respondent's request for discovery were accurate at
4 the time that you gave them and that your answer was
5 yes. Is that a correct statement?
6 A It is true that I made -- that I answered
7 yes to your question. If you are asking me if it is
8 true that I didn't make an error, I can't answer
9 that. I don't know. I may have left some things
10 off. I don't have those records with me.
11 Q Was the question just asked of you recently
12 by your attorney as to whether or not your responses
13 to the interrogatories were accurate -- and did you
14 say yes?
15 A I may have. I don't recall.
16 Q Is it correct that they are not accurate?
17 A The interrogatories do not show some of the
18 sewer backups that I experienced; that's correct.
19 MR. GREENE: No further questions.
20 HEARING OFFICER KNITTLE: Do you have anything
21 else from this witness?
22 MR. LARSON: No, sir.
23 HEARING OFFICER KNITTLE: Mr. Mulvain, now you
24 can step down. I appreciate your patience.
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1 MR. LARSON: I have no further rebuttal. I
2 would move the admission of the photographs. I
3 believe we have already addressed that.
4 HEARING OFFICER KNITTLE: Yes. I have admitted
5 all of the photographs.
6 MR. LARSON: So I have nothing further at this
7 time. It is my understanding there is going to be
8 some public comment and then you will take final
9 argument?
10 HEARING OFFICER KNITTLE: Yes, that's correct.
11 We can save closing arguments until after the public
12 comment.
13 Let's take a one-hour lunch -- let's go off
14 the record.
15 (Discussion off the record.)
16 HEARING OFFICER KNITTLE: We are back on the
17 record. We are going to take a one-hour lunch
18 break. That will take us to 1:30. Mr. Greene
19 indicates that there are a couple of citizens who
20 wish to give comment.
21 Is that correct, Mr. Greene?
22 MR. GREENE: That's correct.
23 HEARING OFFICER KNITTLE: I have informed
24 Mr. Greene that if they are not here by 1:30, we
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1 will wait until 2:00. And then at 2:00 we are going
2 to do the closing statements.
3 Is that sufficient, Mr. Greene, for your
4 purposes?
5 MR. GREENE: That is fine.
6 HEARING OFFICER KNITTLE: Mr. Larson?
7 MR. LARSON: Yes, sir.
8 HEARING OFFICER KNITTLE: Let's do that, and I
9 will leave a note on the door that we will be back.
10 Thank you.
11 (Lunch recess taken.)
12 HEARING OFFICER KNITTLE: We are back on the
13 record after a lunch recess, and we have finished
14 with all of the cases in chief; that being
15 Complainant's, Respondent's, and then Complainant's
16 case in rebuttal.
17 At this point I am going to allow
18 statements from interested citizens. Do we have any
19 citizens wishing to provide a statement here today?
20 You can raise your hand.
21 Ma'am, did you want to speak at all?
22 INTERESTED CITIZEN: Not at this time, no.
23 HEARING OFFICER KNITTLE: Okay. There is no
24 pressure. It is totally up to you.
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1 Whichever one of you wants to come first, I
2 am going to ask that you sit down in this chair,
3 give your name, and identify yourself. And then I
4 am going to ask that you be sworn in by the court
5 reporter. You guys can flip for it, if you want.
6 HEARING OFFICER KNITTLE: Your name, ma'am?
7 INTERESTED CITIZEN: Charlotte Miller.

8 HEARING OFFICER KNITTLE: Could you swear her
9 in, please?
10 (Witness sworn.)
11 HEARING OFFICER KNITTLE: Ma'am, just for the
12 record, you will be able to say whatever you want;
13 but if either one of the attorneys wants to ask you
14 questions afterwards about what you said, they are
15 going to be able to.
16 INTERESTED CITIZEN: Okay.
17 HEARING OFFICER KNITTLE: With that, whatever
18 you want.
19 CHARLOTTE MILLER,
20 having been first duly sworn, stated the following:
21 INTERESTED CITIZEN: When I first started
22 working --
23 Do I need to say what I do or whatever?
24 HEARING OFFICER KNITTLE: It is totally up to
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1 you. That might be helpful, though.
2 INTERESTED CITIZEN: I have been a resident of
3 Durand for 22 years, and I have worked for the
4 Village of Durand since 1984. When I first started
5 working for the Village, we had very little cash.
6 All repairs to the water and sewer system were done
7 on an as-needed basis. We prayed that there would
8 be no major breaks or other problems.
9 The administration at that time began a 10-
10 to 15-year plan to improve the sewer system by
11 setting aside monies for a major renovation project.
12 In 1995 we engaged Fehr-Graham to do a facility plan
13 for both sewer plant expansion and to make much
14 needed improvements to the treatment system.
15 We applied for an EPA loan to make these
16 improvements and to replace the sewer line on
17 Mulvain Street. At the same time, we also applied
18 for a DCCA grant to make repairs to existing
19 problems with the sewer lines in various locations
20 throughout the village.
21 In order to procure the IEPA loan, it
22 became necessary to put it on the ballot for
23 referendum. Mr. Mulvain, both publicly and
24 privately, encouraged people to vote against the
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1 referendum with what I feel to be highly
2 questionable methods.
3 I find great irony in the fact that we are
4 here today because Mr. Mulvain says that we do not
5 have the capacity to add more sewer hookups to the
6 village without causing more backups. The passage
7 of the referendum would have gone a long way to
8 solve many of the existing problems to our system.
9 The Village of Durand has always tried to
10 do the best job it can do to comply with all the
11 IEPA requirements and requests. We have tried to
12 improve our system to the best of our budgetary
13 allowances. We have tried to create a plan for our
14 present needs as well as those in the future. With
15 the repairs that have been made to the system, we

16 have made great improvements.
17 While I respect Mr. Mulvain's
18 constitutional right to bring this suit, I take
19 great umbrage as a citizen of Durand that as a board
20 member of the Village of Durand he has used his
21 office to further his own personal agenda.
22 HEARING OFFICER KNITTLE: Anything else, ma'am?
23 INTERESTED CITIZEN: No.
24 HEARING OFFICER KNITTLE: Thank you very much.
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1 Mr. Larson?
2 MR. LARSON: No questions.
3 HEARING OFFICER KNITTLE: Mr. Greene?
4 MR. GREENE: No questions.
5 HEARING OFFICER KNITTLE: Thank you for the
6 time.
7 Sir, if you would.
8 Swear him in, please.
9 (Witness sworn.)
10 KENNETH GIBLER,
11 having been first duly sworn, stated the following:
12 HEARING OFFICER KNITTLE: Sir, just for the
13 record can you identify yourself?
14 INTERESTED CITIZEN: My name is Kenneth Gibler.
15 I live at 409 East North Street, Durand, Illinois.
16 I moved to the community approximately 28 years ago.
17 In 1977 I was a member of the zoning board of
18 appeals until 1991. In 1991 I was elected to the
19 village board until 1997. I served -- I'm sorry.
20 Until 1998. I served -- correct that again, 1999.
21 Eight years, 1999. I just got off the board.
22 In those eight years I served six years as
23 a chairman of the water and sewer committee. My
24 reason for running for the board was to look at many
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1 of the sewer improvements that are currently being
2 done and that have been done in the past.
3 I also feel that by Mr. Mulvain's actions
4 in 1997 to discourage the residents of the Village
5 of Durand to vote against a referendum, that much
6 needed improvement to the plant and expansion would
7 have gone a long ways to help the citizens of Durand
8 against backup.
9 I currently feel that the system is in --
10 the system itself is in much better repair than it
11 was eight years ago and that the Village of Durand,
12 through their fiscal responsibility, will continue
13 to improve on the treatment plant for the Village of
14 Durand and also without burdening the taxpayers of
15 the village.
16 I would like to see the Illinois Pollution
17 Control Board rule in favor of the Village of Durand
18 because I feel that they have done what they need
19 necessary to do and will continue to do that. That
20 is all I have to say.
21 HEARING OFFICER KNITTLE: Is that it, sir?
22 Do you have any questions for this witness?
23 MR. LARSON: No questions.

24 MR. GREENE: No questions.
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1 HEARING OFFICER KNITTLE: I didn't mean to say
2 witness, sir; interested citizen. Thank you very
3 much for your time.
4 I just want to note for the record, both of
5 you -- but first before I get started, is there
6 anyone else here who wishes to provide a statement?
7 Come on up, ma'am. Have a seat.
8 Can you give us your name, please.
9 INTERESTED CITIZEN: My name is Shirley Tracy,
10 resident of Durand.
11 HEARING OFFICER KNITTLE: Can you swear her in,
12 please?
13 (Witness sworn.)
14 HEARING OFFICER KNITTLE: You can proceed,
15 ma'am.
16 SHIRLEY TRACY,
17 having been first duly sworn, stated the following:
18 INTERESTED CITIZEN: I lived in Durand many
19 years ago, and I recently moved back about four
20 years ago to Durand. And since the time I came
21 back, there has been a lot of division in the town
22 of Durand which pains me quite a bit. I would like
23 to see people work together on doing everything they
24 can to help the town.
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1 And from what I have seen, Mr. Mulvain is
2 trying to do that. I have known him and worked with
3 him for some time now, and I think he is a very
4 honest person. I think what he -- he is very
5 sincere in thinking that he is helping the town,
6 contrary to what other people think and what other
7 people say. I think that Mr. Mulvain is doing a
8 very good job.
9 HEARING OFFICER KNITTLE: Anything else, ma'am?
10 INTERESTED CITIZEN: That is it.
11 HEARING OFFICER KNITTLE: Thank you.
12 MR. LARSON: Thank you.
13 HEARING OFFICER KNITTLE: Do we have any
14 comments?
15 MR. LARSON: No questions.
16 MR. GREENE: No questions.
17 HEARING OFFICER KNITTLE: Ma'am, thank you very
18 much for your time.
19 Now I can state for the record that I want
20 to thank all three of you for your comments and let
21 everybody know that the Board -- the Illinois
22 Pollution Control Board, that is -- is always
23 interested to hear from citizens who are affected by
24 the instant action. Thank you very much.
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1 Do we have opening -- excuse me, closing
2 arguments?
3 MR. LARSON: More in the form of a closing
4 statement, I guess.

5 HEARING OFFICER KNITTLE: Okay. You can
6 proceed, Mr. Larson.

7 CLOSING STATEMENT

8 MR. LARSON: In bringing this matter to a close,
9 there were two components to the complaint brought
10 by Mr. Mulvain on this action. One was an
11 allegation of the existence of excess infiltration
12 and inflow; and the second had to do with sewer
13 backup in the Village of Durand.

14 Pursuant to an order entered after a motion
15 for summary judgment, this hearing's area of
16 interest was also expanded to include the
17 possibility of future violations and also what
18 actions have been taken by the Village to remedy
19 situations which the Board found to constitute
20 violations in 1997.

21 With regard to inflow and infiltration, it
22 is undisputed that influent flows continue to be
23 high during the wet months of the year. In 1999,
24 despite the 1997 repairs, we have had the highest
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1 inflow total in April of 1999 than we have had since
2 the 1997 repairs were completed. It is too soon to
3 tell what effect the 1999 repairs will have. But it
4 is clear based on the televised survey that hammer
5 taps remain throughout the system; that there are --
6 there continue to be breaks. And the testimony has
7 shown that breaks in the system are sources of
8 inflow and infiltration.

9 There wasn't any testimony from any witness
10 about the amount of reduction in infiltration and
11 inflow which would result from the repairs that were
12 done. There was testimony to the effect that there
13 would be a reduction in I/I, but there was no
14 quantification as to what that would amount to.

15 Given the fact that substantial repairs
16 were made in 1997 and inflow amounts increased after
17 those repairs were done, I don't believe that there
18 can be any confidence about the effect of the
19 repairs that have been made thus far.

20 There is some indication of a storm water
21 drainage source entering directly into the sanitary
22 sewer. That was the testimony of Mr. Toerber.
23 Certainly, that would be a serious matter. Now,
24 inflow and infiltration is a separate violation.
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1 There is a regulation that goes directly to
2 infiltration and inflow. And I think that insofar
3 as we have addressed the collection system in the
4 proceedings that we have had over the last two days,
5 it is clear that there is still a significant
6 I/I problem and violation of the relevant
7 regulation.

8 Again, moving on to the sewer backups, the
9 testimony of Mr. Sweet indicated that there were
10 four sewer backups after January 1st of 1997. In
11 addition, there were additional backups in

12 Mr. Mulvain's residence and also in his rented house
13 next door in 1999, which there was conflicting
14 testimony concerning.

15 But it is clear that sewer backups continue
16 and that the collection system repairs have resulted
17 in an increase in inflow to the plant. And the
18 possibility exists that that inflow, in
19 supercharging the system, will continue to result in
20 sewer backups in the future.

21 When asked, neither Mr. Sweet nor
22 Mr. Toerber could rule out future sewer backups.
23 There was conflicting testimony about how likely
24 those might be and what the origin of those sewer
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1 backups might be. But I think given the fact that
2 we have had continuing sewer backups after the 1997
3 repairs -- and again, it is too soon to tell what
4 the effect of the 1999 repairs will be -- that it is
5 clear that we have a continuing problem with sewer
6 backup in violation of the relevant regulations and
7 also of the statute and that those need to be
8 addressed both by the Village and the Pollution
9 Control Board.

10 With regard to future issues, one of the
11 most important things that came out in the testimony
12 today and yesterday was the testimony of Mr. Toerber
13 that it is likely that once the two subdivisions
14 that are contemplated are built out that, given the
15 system as it currently exists and given the
16 permitted level which it currently has, that the
17 ordinary flow of effluent during -- and again,
18 excluding the wet months and excluding the dry
19 months -- during months that are neither wet nor
20 dry, will continue to violate the permit levels
21 which, based on testimony, are expected to continue
22 for the next five years based on the pending renewal
23 of the NPDES permit for the Village of Durand.

24 Now, it is clear also that there can be
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1 some growth and some additions to the system that
2 will not result in violations to the operating
3 permit. So it is not accurate to say that there is
4 no growth for -- there is no room for growth in the
5 Village of Durand. Based on the capacity of the
6 sewer permit -- the sewer plant and the permitting
7 process that is going on, it is clear, however, that
8 there is not room for the entire amount of growth
9 that is contemplated.

10 In raising these issues, we have addressed
11 the order of the Board with regard to the motion for
12 summary judgment. The impact of the repairs in 1997
13 and 1999 and also the future growth that is
14 contemplated in the village make it clear that there
15 is a need for a remedy. And with regard to that
16 remedy, I think that it would be logical for the
17 Board to recommend that there be no hookups to the
18 Village of Durand that, based on the calculations

19 that have been used in projecting usage and flow in
20 this hearing today, would cause in the ordinary --
21 not wet and not dry months -- would cause the system
22 to violate its permits on a routine basis.

23 Also, with regard to I/I, I think it is
24 important that the Board address the question of
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1 remedying the inflow and infiltration situation.
2 And I think that the appropriate remedy there is
3 that the Village continue along the lines that it is
4 continuing so far but that it make continued and
5 concerted efforts to reduce the inflow to prevent
6 routine violations of the permit levels that we have
7 seen in the past years. It is clear that every year
8 there is a substantial period of time in which the
9 plant routinely violates its permits.

10 It was also interesting to note in the
11 testimony that the engineer who has most familiarity
12 with the system, Mr. Erwin Toerber, said that
13 repairs to the collection system have been
14 substantial and that they have had a significant
15 impact in reducing I/I. Well, while that remains to
16 be seen, certainly we have seen that in April of
17 1998 we had a very high flow and that that may
18 possibly continue, given the testimony concerning
19 the system. It was interesting, however, to note
20 that what he said -- that the current treatment
21 system is just adequate and the treatment system
22 needs to be addressed.

23 However, it is clear, even based on
24 Mr. Toerber's testimony, that there is some growth
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1 that can occur in the Village of Durand and that
2 that growth can occur without routinely violating
3 the permit levels and violating laws of the State of
4 Illinois. But it is also clear that the plans of
5 the village contemplate a situation where those laws
6 will be violated on a routine basis, and I think
7 that it is incumbent upon the Pollution Control
8 Board to restrict the ability of the Village of
9 Durand to undertake growth that would cause it on a
10 routine basis to violate the laws of this state.

11 That is all.

12 HEARING OFFICER KNITTLE: Thank you, sir.

13 Mr. Greene, do you have a closing argument?

14 MR. GREENE: Mine are in the nature of
15 observations, also. And I am going to limit it to
16 observations regarding sewer backups, which I
17 believe to be the more serious of the two
18 allegations.

19 CLOSING STATEMENT

20 BY MR. GREENE: We have identified four areas of
21 reports to the village and testimony, as well as
22 answers to the Complainant's request for discovery
23 of potential or alleged basement water problems.
24 Three of them existed prior to the 1997 sewer

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1 project completion. The fourth, as substantiated by
2 Mr. Toerber's testimony, was not due to any problem
3 with the sewer system but was due to pumping outside
4 the residence by Rockfor Blacktop during sewer
5 repairs.

6 The only other testimony regarding sewer
7 backups is the unsubstantiated testimony of
8 Mr. Mulvain regarding a backup on June 25, 1998,
9 which he has testified was due to a sewer backup.
10 But he testified that he never stated that it was
11 due to ground water and which, as substantiated by
12 the video, was not a true statement; that he did not
13 only state that it was due to ground water, but he
14 corrected himself by first saying that it was due to
15 a sewage backup and then corrected himself to say
16 that it was ground water instead.

17 Also, the unsubstantiated allegations that
18 he had had a sewer back up on April 23rd of 1999 and
19 April 27, 1999, both of which he stated that he
20 verbally notified Mr. Sweet of the existence of
21 those incidents. Mr. Sweet was not even in the
22 village during the time that Mr. Mulvain stated that
23 he notified Mr. Sweet on the 23rd. And Mr. Sweet
24 was very adamant about the fact that he was never
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1 notified of either of those backups.

2 It is interesting to note that all three of
3 those alleged backups that he testified to today are
4 incidents that he failed to report on his disclosure
5 statement. He reported the June 25th on our
6 disclosure statement. He failed to report even the
7 June 25th on his and, more importantly, the April
8 23, 1999 and April 27, 1999 backups, which I
9 think --

10 And as I said, it is totally
11 unsubstantiated. There are no other witnesses. His
12 wife isn't even here to substantiate it. The
13 neighbors are not here that he indicated showed
14 evidence of sewage being pumped out of their
15 basement, contrary to the testimony of Mr. Sweet,
16 who also made observations to the contrary.

17 I believe that the testimony and the
18 evidence indicates that Mr. Mulvain has an agenda
19 that is really contrary to just what he is alleging
20 in his complaint and testified to regarding his
21 being interested in there being an elimination of
22 sewer backups and I/I. I think his agenda has to do
23 with the prevention of development in Twin Creeks;
24 and he, in fact, testified in response to my
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1 question where I stated, "Is it not a fact that you
2 will take whatever steps are necessary to see that
3 Twin Creeks in never developed?" And that answer is
4 yes.

5 With that, I have no further comments at
6 this time.

7 HEARING OFFICER KNITTLE: Thank you very much,
8 Mr. Greene.

9 Pursuant to our regulations, Mr. Larson,
10 you have final say if you have anything further to
11 add.

12 MR. LARSON: I will waive it.

13 HEARING OFFICER KNITTLE: Thank you very much.
14 This closes this case.

15 I have a couple housekeeping matters I have
16 to address. First of all, let me state for the
17 record that aside from the members of the public who
18 already gave statements, there are no other members
19 of the public present except for Mrs. Greene.

20 Mrs. Greene, do you wish to give any
21 statement in this case?

22 MRS. GREENE: No.

23 HEARING OFFICER KNITTLE: I see no other members
24 of the public present who can issue statements at
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1 this time.

2 Also, I am required by our regulations to
3 issue a credibility statement about these
4 proceedings and the witnesses who testified in these
5 proceedings; and based on my legal judgment and
6 experience and my observations at this hearing, I
7 find that all witnesses were credible and I see no
8 credibility issues here insofar -- other than, I
9 should say, the apparent conflict in testimony.
10 But to the best of my knowledge, all of the
11 witnesses testified truthfully.

12 Finally, we have the matter of post-hearing
13 briefs. We have set up a post-hearing briefing
14 schedule off record. The post-hearing briefing
15 schedule is as follows:

16 The Complainants have up until September
17 24, 1999, to file their post-hearing brief. The
18 response brief is due on or before October 25, 1999.
19 Complainant's rely brief is due on or before
20 November 8, 1999. As previously stated, I will be
21 issuing an order to this effect. I will also be
22 issuing an order summarizing these proceedings,
23 itemizing the exhibits, and laying out the
24 post-hearing briefing statement.

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1 Is there anything else that we need to
2 discuss at this time?

3 Mr. Larson?

4 MR. LARSON: No, sir.

5 HEARING OFFICER KNITTLE: Mr. Greene?

6 MR. GREENE: No, sir.

7 HEARING OFFICER KNITTLE: Thank you all very
8 much. We appreciate your time, and hopefully we
9 will be getting a decision to you in the near
10 future.

11 (Which were all the proceedings had in the
12 hearing.)
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STATE OF ILLINOIS) SS.
COUNTY OF C O O K)

GABRIELLE PUDLO, being first duly sworn,
on oath says that she is a Certified Shorthand
Reporter doing business in the City of Chicago,
County of Cook and the State of Illinois; that she
reported in shorthand the proceedings had at the
foregoing hearing; and that the foregoing is a true
and correct transcript of her shorthand notes so
taken as aforesaid and contains all the proceedings
had at the said hearing.

GABRIELLE PUDLO, CSR, RPR
C.S.R. No. 084-004173

SUBSCRIBED AND SWORN to before me this _____ day
of _____, 1999.

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