

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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FEB 09 2011

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS)
 LISA MADIGAN, Attorney General)
 State of Illinois,)
)
 Complainant,)
)
 vs.)
)
 SMITHFIELD PROPERTIES, L.L.C.)
 an Illinois limited liability)
 company, WOOTON CONSTRUCTION,)
 LTD., an Illinois corporation, and)
 CHICAGO SUN-TIMES, INC., a Delaware)
 corporation,)
)
 Respondents.)

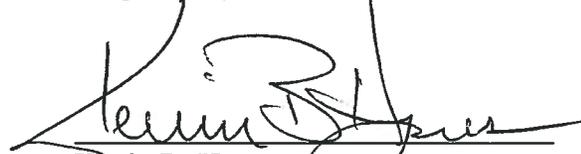
No. PCB No. 04-192
(Enforcement – Land &
Water)

NOTICE OF FILING

TAKE NOTICE that today I filed with the Clerk of the Illinois Pollution Control Board the attached Motion to Dismiss or for Summary Judgment, a copy of which is hereby served upon you.

Dated: February 9, 2011

Respectfully submitted,

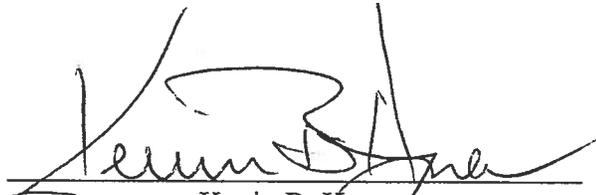


Kevin B. Hynes
O'KEEFE, LYONS & HYNES, LLC
30 N. LaSalle Street, Suite 4100
Chicago, Illinois 60602
(312) 621-0400

CERTIFICATE OF SERVICE

I, Kevin B. Hynes, an attorney, certify that on February 9, 2011, I caused the foregoing Notice of Filing and Motion to be served by First Class, postage prepaid, U.S. Mail on the following:

Zemeheret Bereket-Ab
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-2347



Kevin B. Hynes

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 LISA MADIGAN, Attorney General)
 State of Illinois,)
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RESPONDENT WOOTON'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT
AS TO COUNTS I-VI AND COUNT VIII

The Respondent, Wooton Construction, Ltd. ("Wooton"), by its attorneys, requests that the Pollution Control Board dismiss or issue an order granting summary judgment as to Counts I-VI and Count VIII. In support of this motion, the Respondent states the following:

1. The Plaintiff filed a multi-count complaint against the Respondents, including Wooton.
2. Counts I-VI and Count VIII specifically reference a 1999 removal of an underground storage tank. *See Stipulation of Fact*, ¶23 (Exhibit A).
3. In Counts I-VI and Count VIII, the Plaintiff alleges that Wooton was the owner and/or operator of the underground storage tank. *See, Complaint* at Count I, ¶31; Count II, ¶¶28-30; Count III, ¶¶28-30; Count IV, ¶¶28-30; Count V, ¶¶28-30; Count VI, ¶¶28-30; Count VIII, ¶¶28-30.

4. There is no allegation in the Complaint that Wooton owned or operated the Site at which the tank was located.

5. In Counts I-VI and Count VIII liability can only be found if the Respondent was the “owner” or “operator” of the underground storage tank at issue. The terms “owner” and “operator” are defined in the Complaint. *See, Complaint* at Count I, ¶24.

6. On December 14, 2010, the parties deposed the Plaintiff’s expert witness, Illinois EPA employee Carol Hawbaker. Exhibit B.

7. Ms. Hawbaker testified that: (1) she is familiar with the Complaint in this matter; (2) she is the Illinois EPA employee the most familiar with this case; and (3) she testified at her deposition on the Illinois EPA’s behalf. *Id.* at p. 7, LL. 5-11; p. 11, LL. 9-12; p. 21, LL. 17-20.

8. Ms. Hawbaker testified that in her opinion Wooton was not the owner of the underground storage tank at issue in this case. *Id.* at p. 17, LL. 16-23.

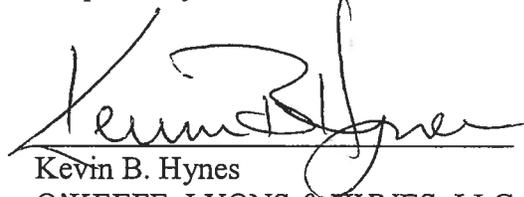
9. Ms. Hawbaker also testified that Wooton was not the operator of the underground storage tank at issue in this case. *Id.* at pp. 23, LL. 22-24; p. 24, LL. 1-2.

10. Ms. Hawbaker is the only Illinois EPA employee or other expert identified by the Plaintiff for purposes of trial.

11. Based on Ms. Hawbaker’s testimony, which is the Illinois EPA’s testimony, the Plaintiff cannot prove its case against Wooton in Counts I-VI or Count VIII.

WHEREFORE, the Respondent, Wooton Construction, Ltd., respectfully requests that the Board dismiss with prejudice or enter an order granting summary judgment as to Counts I-VI and Count VIII in favor of Wooton and grant such other relief as the Board deems appropriate and just.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin B. Hynes", written over a horizontal line.

Kevin B. Hynes
O'KEEFE, LYONS & HYNES, LLC
30 N. LaSalle Street, Suite 4100
Chicago, Illinois 60602
(312) 621-0400
Attorney for the Respondent

EXHIBIT

A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)

Complainant,)

vs.)

No. PCB No. 04-192
(Enforcement – Land & Water)

SMITHFIELD PROPERTIES, L.L.C.,)
an Illinois Limited Liability company,)
WOOTON CONSTRUCTION, LTD.,)
an Illinois corporation, and CHICAGO)
SUN-TIMES, INC., a Delaware)
corporation)

Respondents.)

NOTICE OF FILING

TO: See attached service list

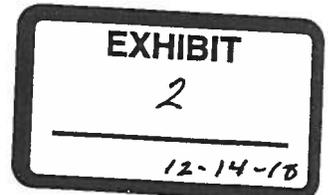
Please take notice that I have today, December 13, 2010, have filed with the Office of the Clerk of the Illinois Pollution Control Board via electronic filing the Parties' Stipulation of Fact, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
of the State of Illinois

BY: 

STEPHEN J. SYLVESTER
Assistant Attorney General
Environmental Bureau North
69 W. Washington St., Ste. 1800
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Tel: (312) 814-2087
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SERVICE LIST

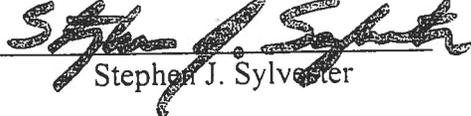
John Therriault
Illinois Pollution Control Board
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Chicago, Illinois 60601

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Bradley P. Halloran
Hearing Officer
James R. Thompson Center
100 W. Randolph Street - Suite 11-500
Chicago, Illinois 60601

CERTIFICATE OF SERVICE

I, Stephen J. Sylvester, do hereby certify that I served the Parties' Stipulation of Fact, on the persons on the service list by depositing the same in the U.S. Mail, postage prepaid, on December 13, 2010 at 100 W. Randolph, Chicago, Illinois.


Stephen J. Sylvester

Stephen J. Sylvester
Assistant Attorney General
Environmental Bureau
Office of the Attorney General
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312-814-2087
ssylvester@atg.state.il.us

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)

Complainant,)

vs.)

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SUN-TIMES, INC., a Delaware)
corporation)

Respondents.)

STIPULATION OF FACT

The Complainant and the Respondents, Smithfield Properties, LLC and Wooton Construction, Ltd., stipulate to the following facts for purposes of expediting these proceeding and narrowing the issues that will be presented at hearing in this matter.

SITE OWNERSHIP

1. The Site is located at 222 South Racine, Chicago, Illinois.
2. From 1917 until December 1998, the Chicago Sun-Times, Inc. or its predecessor(s) in interest owned the Site.
3. In December 1998, the Sun-Times entered into an agreement with Kenard Investments, Inc. for the purchase of the Site.
4. In January 1999, Kenard assigned its interest in the Site to The Clare Group, Ltd.
5. In October 1999, The Clare Group, Ltd. assigned its interest in the Site to Smithfield Properties, LLC (“Smithfield”).

6. Smithfield acquired the Site and contracted with Wooton for purposes of building residential townhomes and condominiums.

SITE OPERATIONS

7. Until the Site was sold in 1998, the Sun-Times utilized the Site for its fleet maintenance garage.

8. As a result of its operations, the Sun-Times left-in place soil contaminated with gasoline and/or diesel fuel from either leaking underground storage tanks, piping and/or surface spills.

9. During the time the Sun-Times operated the Site, the Sun-Times owned and operated 12 underground storage tanks identified in documents produced in discovery by Smithfield as Tanks 1-12. There are OSFM registration records only for tanks 1-8. Tanks 9-12 are too old to have been registered. Tanks 9-12 appear on Old Sanborne Fire Insurance Maps.

10. Based on information produced in discovery, by Smithfield, at the time of the sale to Kenard in 1998, the tanks were described as follows in the following chart:

Tank	Year Installed	Capacity (gal)	Product Stored	Tank Status
1	1968	1,000	motor oil	abandoned in place 1994
2	1968	1,000	motor oil	abandoned in place 1994
3	1968	1,000	used oil	abandoned in place 1994
4	1968	2,000	ethylene glycol	abandoned in place 1992
5	1986	10,000	diesel	in use
6	1980	10,000	gasoline	in use
7	1966	8,000	gasoline	abandoned in place 1988
8	1968	10,000	gasoline	abandoned in place 1988
9	before 1917	250	gasoline	unknown
10	before 1917	1,000	gasoline	unknown
11	before 1950	unknown	gasoline	unknown
12	before 1950	unknown	gasoline	unknown

11. According to OSFM registration records, tanks 6, 7, and 8 were registered as gasoline tanks. Tank 5 is the only tank registered as diesel tank.

1999 TANK REMOVALS

12. In 1999, Tanks 5 and 6 were removed from the Site.

13. In April 1999, the Sun-Times removed Tank 6, a 10,000-gallon gasoline UST.

14. The removal of Tank 6 was done pursuant to removal permit 104558 issued by the City of Chicago.

15. During the tank removal, which was conducted under the direction and supervision of City of Chicago Department of the Environment and pursuant to 41 Illinois Administrative Code, Part 170, the Sun-Times confirmed a release of gasoline from Tank 6 and reported the release to the Illinois Emergency Management Agency ("IEMA"). IEMA assigned the release Incident No. 99-1013.

16. Sun-Times excavated 30 cubic yards of impacted soil from the tank excavation and manifested it for disposal. Soil samples taken by the Sun-Times confirmed the presence of benzene, toluene, ethyl benzene, and total xylene ("BTEX") in the soil surrounding Tank 6.

17. The Sun-Times was not required by law to and did not analyze the soil for any other constituents.

18. The Sun-Times did not analyze groundwater at the Site or confirm the presence of groundwater at the Site.

19. The Sun-Times removed the soil immediately surrounding Tank 6 and was issued a No Further Remediation Letter for the gasoline release that was reported to IEMA in 1999.

20. In approximately November 1999, Wooton contracted with Speedway Wrecking Co. to remove Tank 5, a 10,000-gallon diesel fuel tank.

21. Tank 5 was located adjacent to Tank 6 at the Site.

22. Speedway subcontracted the tank removal to Omega Environmental Services, Inc. (“Omega”).

23. On November 29, 1999, Omega removed Tank 5 and disposed of the tank off-site.

24. Omega prepared a report of the tank removal and submitted the report to Speedway.

25. If called to testify, the City of Chicago would testify that a permit to remove Tank 5 was not applied for nor issued and there were no representatives from the City of Chicago present for the removal of Tank 5.

26. If called to testify, the Illinois State Fire Marshal would testify that Omega did not receive the Fire Marshal’s approval to remove Tank 5.

27. Sometime after the removal of Tank 5, Smithfield and Wooton constructed the townhomes and condominiums at the Site.

2001 RELEASE REPORT

28. On or about March 12, 2001, a resident of one of the townhomes within the Site noticed an odor in his drinking water. If called to testify, the resident would testify consistent with this statement.

29. Drinking water samples were taken on April 3, 2001. Sample results indicated that the water was fit for human consumption with the exception of sample number SLI #06B, which was noted in the Project Specific comments as, “PNAs test not run due to contamination.”

30. On March 30, 2001, Smithfield and Wooton’s consultant, Patrick Engineering, Inc., reported to the Site and found that:

- a. a plumbing contractor may have ruptured a water line at the Site;

- b. in order to uncover the water main and service line, the contractor excavated the area surrounding the line to a depth of 5 feet;
- c. the plumbing contractor noticed what he believed was a diesel odor in the excavation;
- d. perched water filled the excavation;
- e. a petroleum sheen was observed on the water;
- f. the contractor dewatered the excavation and pumped the water into a nearby storm sewer; and
- g. a City of Chicago inspector on-site to inspect the repairs observed the sheen and instructed the contractor to report a release to IEMA.

31. On March 30, 2001, Wooton reported a 5-gallon release of diesel fuel to IEMA, which issued Incident No. H2001-0544. The incident report states that the incident occurred at an unknown time on March 28, 2001.

32. Prior to March 30, 2001, Smithfield and Wooton did not report any release(s) to IEMA or Illinois EPA at the Site.

33. On April 16, 2001, Patrick Engineering submitted to the Illinois EPA Patrick's *Report of Environmental Investigation*, which detailed Patrick's April 5, 2001 on-site sampling activities.

34. On May 18, 2001, Patrick Engineering submitted to Illinois EPA various documents and information requested by Illinois EPA.

35. On May 24, 2001, Patrick Engineering submitted to the Illinois EPA its *Remedial Action Completion Report* ("RACR") for the Site.

36. The RACR stated, among other things, that Patrick removed 425 tons of soil from the Site between what are known as Units 23-42.

37. On July 27, 2001, the Illinois EPA rejected the RACR.

38. On July 13, 2001, Patrick Engineering submitted to the Illinois EPA Patrick's *Report of Additional Environmental Investigations*.

39. On September 11, 2001, Patrick Engineering submitted to the Illinois EPA an *Addendum to Remedial Action Completion Report*, in response to the Illinois EPA's July 27, 2001 rejection of the RACR.

40. The *Addendum to Remedial Action Completion Report* states, among other things, that Wooton intends to utilize the clean soil barrier, the building foundations, and the concrete pavements as engineered barriers.

41. The *Addendum to Remedial Action Completion Report* contains an Illinois EPA Property Owner Summary form signed by Joe Oshinski as agent for Smithfield Properties, dated September 11, 2001.

42. In January 2002, Patrick submitted to the Illinois EPA a *Groundwater Classification Study and Tier 2 Evaluation*.

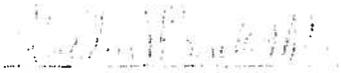
43. On March 20, 2002, the Illinois EPA rejected the *Groundwater Classification Study and Tier 2 Evaluation*.

44. On August 2, 2006, Patrick prepared a report for Smithfield documenting additional soil sampling conducted in the former location of the Sun-Times Section B building on July 12, 2006.

45. Petroleum-related constituents remain in the soil at the Site, including under the residences.

4c. Groundwater has been identified at the Site.

For the Complainant:


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Assistant Attorney General
Environmental Bureau
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For the Respondents:


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(312) 621-0400

EXHIBIT

B

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PEOPLE OF THE STATE OF ILLINOIS,)
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 SMITHFIELD PROPERTIES, L.L.C.,) Land & Water)
 an Illinois Limited Liability)
 Company, WOOTON CONSTRUCTION,)
 LTD., an Illinois Corporation,)
 and CHICAGO SUN-TIMES, INC., a)
 Delaware Corporation,)
)
 Respondents.)

Discovery Deposition of CAROL HAWBAKER taken at
 the instance of the Respondents, on the 14th day of
 December, 2010, at 11:00 a.m. at 1 West Old State
 Capitol Plaza, Suite 600, Springfield, Illinois,
 pursuant to notice.

SANDRA K. HAINES, CSR
 2601 South Sperser Street
 Taylorville, Illinois 62568
 Phone (217)824-8558

Reported by:
 Carla J. Boehl, Reporter
 CSR No. 084-002710

Page 1

1 APPEARANCES:
 2 OFFICE OF THE ATTORNEY GENERAL
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 3 69 West Washington Street
 Suite 1800
 4 Chicago, Illinois 60602
 Ph. (312) 814-2087

5 BY: MR. STEPHEN J. SYLVESTER
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 Environmental Bureau North
 8 69 West Washington Street
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 9 Chicago, Illinois 60602
 Ph. (312) 814-3816

10 BY: MR. ZEMEHERET BERKET-AB
 11 Appearing on behalf of the Complainant
 12 O'KEEFE, LYONS & HYNES, LLC
 Attorneys at Law
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15 BY: MR. KEVIN B. HYNES
 16 Appearing on behalf of the Respondents
 17
 18
 19
 20
 21
 22
 23
 24

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I N D E X

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Page 3

(Whereupon the witness was duly
 sworn by the Notary Public.)
 CAROL HAWBAKER
 having been first duly sworn, was examined and
 testified as follows:
 EXAMINATION
 BY MR. HYNES: This is the deposition of
 Carol Hawlbaker... Am I pronouncing that correct?
 THE DEPONENT: Hawbaker.
 BY MR. HYNES: Excuse me. ..pursuant to
 agreement and pursuant to the rules of the Illinois
 Supreme Court.
 Q. Would you state your first name and spell
 your last for the record.
 A. Carol, C-A-R-O-L. Last name is Hawbaker,
 H-A-W-B-A-K-E-R.
 Q. Where are you currently employed?
 A. The Illinois EPA.
 Q. And what is your title?
 A. Environmental Protection Specialist
 Number III.
 Q. And are you in a particular division
 within the EPA?
 A. Leaking Underground Storage Tank Bureau

Page 4

1 of Lands.
 2 Q. How long have you been with the Illinois
 3 EPA?
 4 A. Ten years.
 5 Q. How long have you been in the Leaking
 6 Underground Storage Tank program?
 7 A. The full time, ten years.
 8 Q. In 2001 what was your title?
 9 A. Environmental Protection Specialist.
 10 Q. Is there a three grade or --
 11 A. Yeah, at that point I may have been a one
 12 because I think that was my first year.
 13 Q. Is a designation of three just a
 14 seniority pay grade type issue?
 15 A. Yes.
 16 Q. Have you ever been deposed before?
 17 A. Yes.
 18 Q. How many times?
 19 A. Three.
 20 Q. In what type of cases?
 21 A. All appeals.
 22 Q. Appeals of what?
 23 A. Leaking underground storage tank
 24 decisions.

Page 5

1 Q. So you are familiar with the process; I
 2 am sure your attorneys have explained all the rules
 3 and you understand?
 4 A. Right.
 5 Q. I apologize for the cold. If you can't
 6 understand a question, just ask me to repeat it. I
 7 am going to have marked as Exhibit 1 the complaint
 8 that has been filed in this matter. We are going to
 9 get the clean one later.
 10 Have you ever read the complaint?
 11 A. I have. It's been some time, years.
 12 Q. I am going to give you a copy. Did you
 13 participate in the drafting of the complaint at all?
 14 A. I don't recall if I participated actively
 15 or if it was given to me. I believe what I did was I
 16 set the requirements that were violated on a
 17 worksheet, which is our standard procedure, and then
 18 a complaint was drafted from that.
 19 (Whereupon Exhibit 1 was
 20 presented for purposes of
 21 identification as of this date.)
 22 Q. And you are familiar with the document
 23 that's in front of you?
 24 A. I haven't seen it. Is this the

Page 6

1 complaint?
 2 Q. Yes, it is.
 3 A. It's been awhile since I have seen it,
 4 but I have seen it before.
 5 Q. At the time the complaint was filed were
 6 you familiar with the terms of the complaint?
 7 A. Yes.
 8 Q. Did you agree with the allegations in the
 9 complaint?
 10 A. Yes, they were based on the violation
 11 notice.
 12 Q. Which violation notice?
 13 A. I would have to take a look and see what
 14 the violation notice number was.
 15 Q. But it was the violation notice to the
 16 parties in this case?
 17 A. Yes.
 18 Q. Today we are really only here to talk
 19 about what we are identifying as the Smithfield site
 20 or 222 South Racine. What is your understanding of
 21 the history of the site prior to the time Smithfield
 22 purchased the property?
 23 A. The Chicago Sun-Times operated it as a
 24 fleet maintenance garage.

Page 7

1 Q. Do you recall for how long?
 2 A. Many years, as early as possibly 1917.
 3 Q. Do you recall when Smithfield purchased
 4 the property?
 5 A. I believe it was in October of 1999.
 6 MR. HYNES: I am going to have this marked as
 7 Exhibit 2. This is the stipulation that was filed in
 8 the case.
 9 (Whereupon Exhibit 2 was
 10 presented for purposes of
 11 identification as of this date.)
 12 Q. There you go. You just keep that with
 13 you. As we discussed earlier, Exhibit 2 is a
 14 stipulation of the facts that the parties have agreed
 15 to in this matter. So I am going to read from this
 16 periodically just to have the statements in the
 17 record. Paragraph 2 from the stipulation says, "From
 18 1917 until December 1998 the Chicago Sun-Times, Inc.
 19 or its predecessors in interest owned this site."
 20 Paragraph 3, "In December 1998 the
 21 Sun-Times entered into an agreement with Kenard
 22 Investments, Inc., for the purchase of the site."
 23 Four, "In January 1999 Kenard assigned
 24 its interest in the site to The Clare Group,"

Page 8

1 C-L-A-R-E, Ltd.
 2 And, five, "In October 1999 The Clare
 3 Group, Ltd., assigned its interest in the site to
 4 Smithfield Properties, LLC (Smithfield)."
 5 Is there any statements that I have
 6 read that you disagree with?
 7 A. Not to my knowledge.
 8 Q. Are you familiar with who Kenard
 9 Investments, Inc., is?
 10 A. No, I am not.
 11 Q. Are you familiar with The Clare Group?
 12 A. No, I am not, but I believe The Clare
 13 Group and Smithfield had the same principal which
 14 would be William Harris Smith. But I do not know
 15 their association.
 16 Q. What do you base that statement on?
 17 A. There were purchase agreements that were
 18 submitted for review.
 19 Q. Your conclusion is based on your review
 20 or did somebody else --
 21 A. They were both signed by William Harris
 22 Smith, one as a principal for The Clare Group, one as
 23 a principal for Smithfield.
 24 Q. I am going to ask you to turn to page 4
 Page 9

1 of the complaint, paragraph 13.
 2 A. Page 4?
 3 Q. Yes, paragraph 13 at the top. Would you
 4 read that out loud?
 5 A. "Prior to the sale of the site, Sun-Times
 6 did not remediate the soil at the site, with the
 7 exception of the small area impacted with gasoline
 8 under LUST Incident Number 991013. Sun-Times left in
 9 place soil contaminated with either gasoline or
 10 diesel fuel from either leaking USTs or surface
 11 spills when the Sun-Times was using the site for a
 12 number of years as a fleet vehicle maintenance and
 13 refueling facility."
 14 Q. At the time the complaint was filed did
 15 you agree with that statement?
 16 A. At the time the complaint was filed, I
 17 believe we were still trying to determine whose
 18 responsibility it was.
 19 Q. By responsibility, you mean
 20 responsibility for the clean-up or who was
 21 responsible left the contamination there?
 22 A. Who was responsible for the clean-up.
 23 Q. But do you still agree with the statement
 24 that the Sun-Times, prior to the sale of the site,
 Page 10

1 the Sun-Times left in place soil contaminated with
 2 either gasoline and/or diesel fuel from either
 3 leaking USTs and/or surface spills?
 4 A. That is what Patrick Engineering told me.
 5 Q. I am asking what your opinion is.
 6 A. What my opinion is, at the time this was
 7 drafted, I was basing it on Patrick Engineering's
 8 basis that that was what the Sun-Times left in place.
 9 Q. Based on your experience with this case,
 10 are you the employee at the IEPA most familiar with
 11 this case?
 12 A. Yes, I believe so.
 13 Q. Now, this is an allegation and complaint
 14 being made by the People of the State of Illinois.
 15 Is it still the State of Illinois's position in
 16 paragraph 13 that the Sun-Times left in place
 17 contamination?
 18 A. The Sun-Times may have left in place
 19 contamination.
 20 Q. But you don't know either way?
 21 A. I don't know either way.
 22 Q. If we back up, Smithfield -- and, again,
 23 we have stipulated to other facts; the entity that
 24 owns the property we will continuously refer to as
 Page 11

1 Smithfield, which Smithfield entity, that's another
 2 matter.
 3 Smithfield took title to the property in
 4 October of 1999. Based on your understanding of the
 5 case, was the soil contaminated with diesel fuel
 6 prior to 1999?
 7 A. I don't know.
 8 Q. Do you have any knowledge of when the
 9 soil became contaminated with diesel fuel?
 10 A. No, I don't.
 11 Q. Based on your understanding of this case,
 12 is the soil contaminated with anything other than
 13 diesel fuel?
 14 A. It may be contaminated with gasoline as
 15 well.
 16 Q. And what do you make that statement --
 17 what is your statement based on?
 18 A. A 2000 report that was done in discovery
 19 that was submitted that indicated that there was also
 20 benzene contamination in another area of the property
 21 which is not the result of the violation notice.
 22 Q. I am going to ask you to turn to page 5
 23 of the complaint, paragraph 18. Would you read that
 24 statement out loud?
 Page 12

1 A. "Complainant alleges that the source of
 2 the soil contamination in the area where the water
 3 main ruptured was from one or more USTs owned and
 4 operated by Sun-Times and/or surface spills of
 5 petroleum products over a number of years when the
 6 Sun-Times used the site as a fleet vehicle
 7 maintenance and refueling facility."
 8 Q. Based on your understanding of the case
 9 today, do you agree with that statement?
 10 A. Based on my understanding of the case
 11 today, I am not sure.
 12 Q. Is it fair to say that the Illinois EPA
 13 has no evidence of when the soil became contaminated?
 14 A. No. It may have been in the past. It
 15 may have been the rupture during the tank removal.
 16 Q. But there is no evidence to indicate
 17 either way?
 18 A. There is no evidence one way or the
 19 other.
 20 Q. So then I think I may have already asked
 21 this. In October 1999 when Smithfield took title to
 22 the property, you have no idea whether the property
 23 was already contaminated with gasoline or diesel?
 24 A. I know in 1999 they reported a release

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1 worked on similar types of sites.
 2 A. Yes.
 3 Q. Would you agree with that?
 4 A. Yes.
 5 Q. Is it your experience that sites of this
 6 type which are contaminated are contaminated over the
 7 course of their operation or a single incident?
 8 A. It is hard to say. It is really hard to
 9 say. It depends on -- each site is different.
 10 Q. But you would need evidence to establish
 11 when the release actually occurred?
 12 A. I don't know what evidence -- it would
 13 depend on the evidence. What sort of evidence would
 14 you be referring to?
 15 Q. Well, I am asking you. I mean, what type
 16 of evidence would you need, to establish when a
 17 release occurred?
 18 A. I don't know if you can establish when a
 19 release occurred unless you -- I guess there is
 20 something called fingerprint analysis of
 21 contaminants.
 22 Q. Has the Illinois EPA performed
 23 fingerprint analysis?
 24 A. No, we don't. We don't perform any

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1 from their gasoline tank and they remediated their
 2 gasoline release. In 1999 prior to that I believe
 3 that was the only sampling that was ever done on the
 4 property.
 5 Q. It is your position that they reported a
 6 release in 1999?
 7 A. Chicago Sun-Times from the gasoline tank
 8 removal.
 9 Q. Okay. You said Smithfield.
 10 A. Oh, I am sorry, Chicago Sun-Times.
 11 Q. Okay. The history of this property, it
 12 was a maintenance facility for the Sun-Times and
 13 whoever owned it prior to them?
 14 A. Yes.
 15 Q. How many sites like this have you worked
 16 on?
 17 A. I am not sure what the question is. What
 18 kind of site are you referring to?
 19 Q. Maintenance facilities, garages.
 20 A. I have worked on bus facilities, gas
 21 stations with maintenance type activities going on,
 22 things like that. Again, I am not quite sure what
 23 you are asking.
 24 Q. I just wanted to know that you have

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1 analysis.
 2 Q. As you sit here -- just for the purpose
 3 of going forward, the tank we are talking about is
 4 Tank Number 5?
 5 A. Yes.
 6 MR. SYLVESTER: I will stipulate to that.
 7 Q. At the time the complaint was filed, was
 8 it the Illinois EPA's position that Smithfield was
 9 the owner of Tank Number 5?
 10 A. It was the Illinois EPA's position that
 11 Smithfield removed Tank Number 5.
 12 Q. Okay. Was it the Illinois EPA's position
 13 that the defendant Wooton, W-O-O-T-O-N, Construction
 14 owned the tank, owned Tank Number 5?
 15 A. We were told that Wooton was the owner of
 16 the tank.
 17 Q. Who told you that?
 18 A. Jerry Bowden from Patrick Engineering
 19 when he called into the IEMA.
 20 Q. Who is Jerry Bowden, again?
 21 A. He is the project manager with Patrick
 22 Engineering.
 23 Q. It's B-O-W-D-E-N?
 24 A. D-E-N.

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1 Q. So if there is an allegation in the
 2 complaint that states that Smithfield was the owner
 3 of the tank, you wouldn't agree with that?
 4 A. We learned at a later time that Wooton
 5 actually was contracted by Smithfield. And when we
 6 determined that Smithfield was the owner of the
 7 property and Smithfield was the one who had
 8 contracted to remove the tank, then that was when the
 9 question came up as to whether Smithfield owned the
 10 tank.
 11 Q. Okay. So as you sit here today, what is
 12 your opinion who owned the tank in 2001?
 13 A. It would be Smithfield. They were the
 14 ones who requested that Wooton procure all the proper
 15 permits.
 16 Q. So Wooton was not the owner of the tank?
 17 A. No, it should not, no.
 18 Q. So if there was an allegation in this
 19 complaint that Wooton owned the tank, you would
 20 disagree with that?
 21 A. Yeah. At the time we were still trying
 22 to figure out what the relationship was between
 23 Wooton and Smithfield.
 24 Q. I am going to ask you to turn to page 7

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1 A. I am still not clear. It would be
 2 recycled; it would no longer be a tank.
 3 Q. Does anybody own that tank at that point?
 4 A. I don't think so because it is not a tank
 5 any more. Perhaps the scrap yard.
 6 Q. So it is your testimony that when
 7 Smithfield removed the tank, Tank 5, that's when they
 8 became the owner?
 9 A. Smithfield was required in order to
 10 remove the tank to obtain permits to remove the tank.
 11 By submitting -- had they followed the procedures by
 12 submitting an application for removal, they would
 13 have had to be the owner because they were the
 14 persons removing the tank. The application to remove
 15 can only be submitted and requested by the owner.
 16 Because they simply did not follow that
 17 rule does not mean that they are no longer the owner.
 18 Had they submitted all their permits and
 19 applications, then they would have been the owner of
 20 the tank. By them simply not following that
 21 procedure does not negate them from being responsible
 22 for the release.
 23 Q. Okay. I don't know if you answered my
 24 question, though. But at the time the tank was

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1 of the complaint. And in the middle in parentheses,
 2 and this is a quote from the complaint in the
 3 Definitions, it is 35 Illinois Administrative Code
 4 732.103. Would you read the definition of "Owner" on
 5 page 7?
 6 A. "OWNER, in the case of an underground
 7 storage tank in use on November 8, 1984, or brought
 8 into use after that date, any person who owns an
 9 underground storage tank used for the storage, use or
 10 dispensing of regulated substances."
 11 Q. And it is the Illinois EPA's position
 12 that Smithfield owned Tank Number 5?
 13 A. Smithfield took ownership of the tank
 14 when they removed it.
 15 Q. If the tank is removed, disposed of and
 16 is no longer on the site, who owns it at that point?
 17 A. Who owns it at that point. When is the
 18 tank removed?
 19 Q. When a tank is removed from a site, cut
 20 up and disposed of, taken off the site and put
 21 somewhere else, who owns the tank at that point?
 22 MR. SYLVESTER: I am going to object to that.
 23 It calls for a legal conclusion. If you are
 24 comfortable answering it, you can.

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1 removed, it is the EPA's position that Smithfield
 2 owned Tank 5?
 3 MR. SYLVESTER: Once again I am going to
 4 object to that because it calls for a legal
 5 conclusion. The whole line of question whether
 6 Smithfield was an owner of the tank is a legal
 7 conclusion, issue, in this case.
 8 Q. She has testified already. It is your
 9 opinion that Smithfield owned the tank?
 10 A. Yes.
 11 Q. Prior to Smithfield's ownership of the
 12 property who owned the tank?
 13 A. Chicago Sun-Times.
 14 Q. Did the Kenard group at any time own the
 15 tank?
 16 A. The Kenard group did not apply to remove
 17 the tank.
 18 Q. But neither did the Sun-Times?
 19 A. No, but Smithfield did not -- Smithfield
 20 did remove the tank.
 21 Q. Okay. But why is the Sun-Times the owner
 22 of the tank; they didn't seek permission to remove
 23 it?
 24 A. Because it was registered by them.

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1 Q. So ownership isn't determined merely by
 2 owning a piece of property where a tank is located?
 3 A. No, it is by owning the tank.
 4 Q. But ownership occurs either by
 5 registration or removal?
 6 A. Yes.
 7 Q. Thank you. Just above the word "Owner"
 8 is the word "Operator." Would you read that
 9 definition?
 10 A. "OPERATOR, means any person in control of
 11 or having responsibility for the daily operation of
 12 the underground storage tank, 42 U.S.C. Section 6991,
 13 parentheses, sorry.
 14 Q. Was Smithfield the operator of the tank?
 15 MR. SYLVESTER: I object to that. It calls
 16 for a legal conclusion.
 17 Q. Well, let's just get something clear.
 18 Are you here testifying on behalf of the Illinois
 19 EPA?
 20 A. Yes.
 21 MR. HYNES: She can answer those questions.
 22 These are allegations made by the Illinois EPA. They
 23 should answer the questions, without objection.
 24 MR. SYLVESTER: I'm making the objection to
 Page 21

1 A. I'm not quite sure, but for some reason I
 2 believe it may be 30 days.
 3 Q. Thirty days from what?
 4 A. From the date the tank was last used.
 5 Q. Do you have any idea when this tank was
 6 last used?
 7 A. No, I don't. According to Omega
 8 Environmental Report it was last used eight weeks
 9 prior to removal. Then again, nothing has been filed
 10 officially with the State Fire Marshal as to when it
 11 was taken out of use.
 12 Q. So we have no idea?
 13 A. No. In fact, it is still considered
 14 active and in use as we speak.
 15 MR. HYNES: I am going to object to her legal
 16 conclusions now.
 17 A. I am simply stating what the registration
 18 states.
 19 Q. I am just playing with him.
 20 A. Yes. I am simply stating what the
 21 registration states at this time.
 22 Q. As we sit here today, was Wooton an
 23 operator of the tank?
 24 A. Wooton I do not believe probably was an
 Page 23

1 preserve the record.
 2 MR. HYNES: Okay. No problem.
 3 MR. SYLVESTER: If she can answer the
 4 question, so be it.
 5 BY MR. HYNES: No problem.
 6 Q. Do you believe -- does the EPA maintain
 7 that Smithfield was the operator of the tank?
 8 A. I believe Chicago Sun-Times would have
 9 been considered the operator.
 10 Q. At all times?
 11 A. To the best of my knowledge. It is hard
 12 to say what sort of activities went on after the
 13 Sun-Times sold the property. It was still considered
 14 in use.
 15 Q. Why was it still considered in use?
 16 A. Because no one had taken it out of use
 17 pursuant to the State Fire Marshal, and they require
 18 that.
 19 Q. And how is it that they would have taken
 20 it out of use?
 21 A. They need to amend their tank
 22 registration information and state that their tank is
 23 taken out of use.
 24 Q. When do they have to do that?
 Page 22

1 operator because they were acting under the direction
 2 of Smithfield.
 3 Q. A lot of this case stems from a release
 4 that was identified in March of 2001?
 5 A. Yes.
 6 Q. At that point you would agree that Tank 5
 7 was no longer at the site?
 8 A. No, it had been removed prior to that,
 9 but we don't know when because there were no permits.
 10 Q. My question is simply the tank wasn't on
 11 the site in March of 2001?
 12 A. No.
 13 Q. Based on your testimony earlier,
 14 Smithfield wouldn't be considered an owner at that
 15 point because the tank was gone?
 16 A. Yes, that is correct.
 17 Q. Thank you. And neither would Wooton?
 18 A. No.
 19 Q. I am going to ask you to look at page 20
 20 -- or, excuse me, 31. It is paragraph 29. It says,
 21 "In November 1999 when Smithfield and Wooton removed
 22 the active 10,000 gallon diesel UST from the site,
 23 Sun-Times was still the registered owner of the UST."
 24 Is that just some semantics issue that they were the
 Page 24

1 registered owner?
 2 A. Yes, Smithfield would have been required
 3 to register the UST in their name had they gotten the
 4 permit to remove it.
 5 Q. So in November 1999 who was the legal
 6 owner of the tank, the Sun-Times or Smithfield?
 7 A. According to the OSFM records, the
 8 Sun-Times.
 9 Q. Sun-Times. In the EPA's opinion who was
 10 the owner?
 11 MR. SYLVESTER: Asked and answered.
 12 Objection.
 13 Q. You can still answer the question.
 14 A. I can still answer the question?
 15 MR. SYLVESTER: Yeah.
 16 A. Okay. Well, Smithfield was because they
 17 were the ones who removed it.
 18 MR. HYNES: Okay. I am going to have these
 19 -- and I am just trying to clear up my own confusion.
 20 These are Exhibits 3 and 4.
 21 (Whereupon Exhibits 3 and 4 were
 22 presented for purposes of
 23 identification as of this date.)
 24 Q. I am going to have you look at Exhibits 3

1 and 4. Do you recognize those documents?
 2 A. Yes.
 3 Q. What are they?
 4 A. Exhibit 3 is a memorandum that I wrote to
 5 Doug Clay which was the section manager at the time.
 6 Exhibit 4 are my own technical review notes from July
 7 of 2001.
 8 Q. There has been a lot of discussion of how
 9 many diesel tanks were at this property.
 10 A. Yes.
 11 Q. If you look on -- it's the first page of
 12 the June 15 memorandum, SFP 328, Exhibit 3. The
 13 second paragraph, it discusses two tanks that were
 14 abandoned in place between 1988 and 1994. First of
 15 all, what does "abandoned in place" mean?
 16 A. That means they were -- "abandoned in
 17 place" is a Chicago regulation that they allow for
 18 tanks to be abandoned in place. If there is a
 19 structural issue with their removal, then they can be
 20 cleaned, cut and have procedures placed where they
 21 are not actually removed from the ground.
 22 Q. In that same paragraph you note that one
 23 of those tanks that was abandoned in place was a
 24 diesel tank?

1 A. Yes. I was told that actually by Patrick
 2 Engineering at that time. They are the ones who gave
 3 me the list of the tanks. Unfortunately, the OSFM
 4 records, once I determined them, they did not
 5 correspond with what Patrick Engineering told me.
 6 Q. And then I am going to ask you to look at
 7 Exhibit 4 on page SFP 351. There is an asterisk note
 8 and it says, "Permit Number 694934 in 1989 abandons
 9 in place one 10,000 gallon diesel and one 10,000
 10 gallon gasoline tank."
 11 A. Yeah, that was information again that
 12 Patrick gave me. There was nothing in the OSFM
 13 registration information that stated that that was a
 14 diesel tank.
 15 Q. Is the OSFM registration the only source
 16 of information that would have indicated that the
 17 tank was either diesel or gasoline?
 18 A. Yes, they are required to report them.
 19 Q. Is it possible they made a mistake on the
 20 registration?
 21 A. I guess it is possible. They should know
 22 what they have in their tanks.
 23 MR. HYNES: I am going to have this marked as
 24 Exhibit 5.

1 (Whereupon Exhibit 5 was
 2 presented for purposes of
 3 identification as of this date.)
 4 Q. Showing you what's been marked as Exhibit
 5 5. Are you familiar with that document?
 6 A. Yes, it was my Request Form to the State
 7 Fire Marshal.
 8 Q. I am going to ask you to look at page SFP
 9 142.
 10 A. 142.
 11 Q. And 143.
 12 A. Okay.
 13 Q. Is this a State Fire Marshal record?
 14 A. This is a City of Chicago record.
 15 Q. Did you submit a FOIA request to the City
 16 of Chicago as well?
 17 A. I believe they sent it to me. Eric
 18 Soriano from the City of Chicago sent it to me.
 19 Q. I am sorry, would you look at SFP 141?
 20 A. SFP 141?
 21 Q. It's the prior page.
 22 A. Yeah, that's the City of Chicago.
 23 Q. Would that be the cover page?
 24 A. Yeah.

1 Q. If you look at SFP 143, it says, "The
 2 following lists are old building department permits
 3 issued for underground storage tank work prior to
 4 1/1/1993, at 222 South Racine." 222 South Racine is
 5 the site we are talking about?
 6 A. Yes.
 7 Q. If you would look under the entry of
 8 April 20, 1989?
 9 A. Yes.
 10 Q. Does this indicate that there was a
 11 10,000 gallon diesel tank filled in with pea gravel?
 12 A. It indicates that there may have been.
 13 However, that's not how they registered their tank.
 14 Q. But I just want your testimony. That's
 15 what this thing means here, though?
 16 A. That's what it states.
 17 MR. HYNES: Okay. You can put that aside.
 18 May I have this marked as Exhibit 6?
 19 (Whereupon Exhibit 6 was
 20 presented for purposes of
 21 identification as of this date.)
 22 Q. It is your opinion today that there was
 23 only one diesel tank?
 24 A. I only have information supporting one

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1 diesel tank that was registered.
 2 Q. And the basis of that is strictly the
 3 State Fire Marshal registration records?
 4 A. Yes.
 5 Q. I am going to have you look at Exhibit 6.
 6 Are you familiar with that document?
 7 A. Yes, this is the Expert Witness
 8 Disclosure.
 9 Q. Did you draft this?
 10 A. Yes.
 11 Q. Did anybody assist you in drafting it?
 12 A. My attorneys did.
 13 Q. Do you have any drafts of this document
 14 in your files?
 15 A. I am not sure. In my files with me? In
 16 my files at the office?
 17 Q. Anywhere.
 18 A. I probably submitted drafts prior to
 19 this. I am sure I have submitted drafts to you prior
 20 to this.
 21 MR. HYNES: What do you want to do about
 22 those? Go off the record.
 23 (Whereupon there was then had an
 24 off-the-record discussion.)

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1 BY MR. HYNES:
 2 Q. All right. So this is your expert
 3 opinion report, is that correct?
 4 A. That is correct.
 5 Q. And you reviewed a host of documents that
 6 have been produced in this matter?
 7 A. Yes, the administrative record and I
 8 believe information from the discovery.
 9 Q. Okay. On page 4, Footnotes 30, 31 and
 10 32.
 11 A. Page 4, I am missing page 4.
 12 Q. Interesting.
 13 A. Oh, wait, here it is in the back. What
 14 footnotes?
 15 Q. 30, 31 and 32.
 16 A. 30, 31 and 32. The Phase I?
 17 Q. Yes. Do you recall reviewing that Phase
 18 I?
 19 A. Yes, I do.
 20 Q. And that was a Phase I prepared in 1994?
 21 A. Yes.
 22 Q. And do you recall in that Phase I a
 23 discussion of two tanks being abandoned in place at
 24 the site in the late '80s because they were leaking?

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1 A. I believe there was a discussion.
 2 However, there was no supporting documentation.
 3 MR. HYNES: May I have this marked as Exhibit
 4 7?
 5 (Whereupon Exhibit 7 was
 6 presented for purposes of
 7 identification as of this date.)
 8 Q. Is that the Phase I report you were just
 9 discussing?
 10 A. It looks like it. For some reason I
 11 thought it may have been larger, but it could be
 12 that.
 13 Q. Are these the pages you identify in your
 14 expert report? This is pages SO582 to SO814.
 15 A. Yeah, I assume that's it then.
 16 Q. And you relied on this document in
 17 forming your opinions in this expert report?
 18 A. Yes.
 19 Q. And you believe that document to be true?
 20 A. I don't know.
 21 Q. So if the document is false or incorrect,
 22 then your opinions are incorrect?
 23 A. If the document is false, yes, my
 24 opinions would be incorrect for some of the items

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1 that I relied on.
 2 Q. But you don't know the truth or the
 3 veracity of the document?
 4 A. No, it was submitted by Smithfield, so I
 5 am assuming it is a true document.
 6 Q. Okay, thank you. You can put that aside.
 7 Let's just skip right to Opinion 2. Would you read
 8 that for the record?
 9 A. Can I get a copy that doesn't have the
 10 pages backwards? Is that okay?
 11 Q. Yeah, why don't we just take the staple
 12 off, fix it.
 13 A. Yeah, this one is okay. Opinion 2.
 14 MR. HYNES: Wait, let's go off the record.
 15 (Whereupon there was then had an
 16 off-the-record discussion.)
 17 BY MR. HYNES:
 18 Q. Could you read Opinion 2?
 19 A. Opinion 2. "Smithfield is responsible
 20 for addressing the contamination found at the site in
 21 2001, as it was caused by a release of diesel fuel
 22 from a 10,000 gallon diesel UST that was registered
 23 with the OSFM as Tank 5."
 24 Q. In your own words why is Smithfield

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1 responsible for addressing the contamination?
 2 A. The contamination that was caused by the
 3 release of diesel fuel is what it is responsible for
 4 addressing. And the reason why is because the most
 5 likely culprit of diesel fuel at the site is the tank
 6 that they removed.
 7 Q. Why wasn't the Sun-Times responsible for
 8 it?
 9 A. Because the Sun-Times, had they removed
 10 the tank, they would have been responsible for it.
 11 Q. Would they have been responsible for it
 12 regardless of the tank removal if the EPA was aware
 13 of the contamination?
 14 A. If the EPA was aware of the
 15 contamination. It is the onus of the owner to report
 16 it.
 17 Q. The release was reported in 2001,
 18 correct?
 19 A. That is correct.
 20 Q. And in 2001 what is the EPA's position as
 21 to who owned the site?
 22 A. Who owned the site, the property?
 23 Q. Uh-huh.
 24 A. That would be Smithfield.

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1 Q. Wooton did not own the property?
 2 A. In 2001?
 3 Q. Correct.
 4 A. Well, at first, I guess at the time --
 5 oh, I am sorry, could you ask that question again?
 6 Q. In 2001 is it the EPA's position that
 7 Wooton owned the property?
 8 A. No, no, Wooton we discovered was a
 9 contractor who was working for Smithfield.
 10 Q. In 2001 when the release was reported is
 11 it your position that the owner of the tank is
 12 responsible for addressing the contamination or the
 13 owner of the property?
 14 A. It's the owner of the tank.
 15 Q. Okay. The second bullet under Opinion 2,
 16 it says, "During the Sun-Times' ownership of the
 17 site, all UST activities were conducted in accordance
 18 with the applicable regulations." What is the basis
 19 of that statement?
 20 A. I have no information that indicates that
 21 they were not.
 22 Q. But you have no information to indicate
 23 that they were, do you?
 24 A. No, I have not indication one way or the

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1 other.
 2 Q. So then really that statement is not
 3 true?
 4 A. Well, according to the OSFM and the
 5 Illinois EPA, they were.
 6 Q. That's identified in Footnote 13?
 7 A. Yes.
 8 Q. So based on that information alone you
 9 concluded over the course of 80 years the Sun-Times
 10 didn't violate any UST regulations?
 11 A. I have no information one way or the
 12 other.
 13 Q. Okay. If it was determined that the
 14 contamination existed prior to Smithfield purchasing
 15 the property, would that statement still be true?
 16 A. What statement?
 17 Q. The one you just made regarding the
 18 Sun-Times' UST activities.
 19 A. I haven't been presented with any
 20 information indicating that the contamination was
 21 present. Essentially, the way the Illinois EPA works
 22 with releases is the person who is the owner of the
 23 tank is the person responsible for the contamination
 24 resulting from the release. This answer -- this

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1 whole issue could have been resolved had they had the
 2 inspector on site to determine there was no release.
 3 Q. But you don't know that there was a
 4 release during Smithfield's ownership?
 5 A. I don't know. I just know that they
 6 pulled a tank illegally, and this seems to be a
 7 diesel fuel release.
 8 Q. I am going to ask you to turn to page 5
 9 of your expert report, the first bullet. Would you
 10 read that?
 11 A. "The pattern of the soil contamination at
 12 the site identified in several report figures
 13 submitted to the Illinois EPA on behalf of the
 14 respondents is consistent with a release of diesel
 15 fuel from piping lines that led from the 10,000
 16 gallon diesel fuel UST registered as Tank 5 to the
 17 location of the former fuel dispenser inside the
 18 Section A building."
 19 MR. HYNES: I am going to have this marked as
 20 Exhibit 8.
 21 (Whereupon Exhibit 8 was
 22 presented for purposes of
 23 identification as of this date.)
 24 Q. Are you familiar what what we have marked

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1 A. I was told that the piping line attached
 2 this tank to this building.
 3 Q. Was it a direct route?
 4 A. I assume it would be.
 5 Q. Okay. What is the pattern of
 6 contamination that you have identified at the site?
 7 Of diesel contamination, excuse me.
 8 A. The pattern of contamination, it stems
 9 from the tank to the underground storage or, yeah, to
 10 Section A, I should say, the former Section A. And
 11 the contamination is running all along this whole
 12 area and migrating outward from the piping.
 13 Q. Do you recall what was done in the
 14 Section A building?
 15 A. I think they used it for maintenance.
 16 Q. Okay. Based on your experience would the
 17 pattern of contamination from the piping line, would
 18 that be a one-time event or would that occur over
 19 time?
 20 A. It's hard to say.
 21 Q. What information would you need to make a
 22 decision either way?
 23 A. At this point I am not sure a decision
 24 could be made either way. A fingerprint analysis,

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1 as Exhibit 8?
 2 A. Yes.
 3 Q. Now, we are going to all stipulate
 4 tank -- which one was Tank 5, E or F?
 5 A. E.
 6 Q. Would you put your initials on that?
 7 (Witness marked exhibit.)
 8 Now, based on what I understand in that
 9 bullet you just read on page 5 of your statement, the
 10 contamination is consistent with the release of
 11 diesel fuel from the piping lines, not the tank but
 12 the piping lines that led from Tank 5 inside the
 13 Section A building.
 14 A. Uh-huh.
 15 Q. Which is the Section A building?
 16 A. The existing six-story loft.
 17 Q. Could you right your initials there and
 18 put the letter A?
 19 (Witness marked exhibit.)
 20 Is that an A?
 21 A. Yeah, I am sorry.
 22 Q. Thanks. So based on your understanding
 23 of the property, in which direction do the piping
 24 lines go?

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1 perhaps, to demonstrate that it is old contamination.
 2 Q. But as we sit here today you have no idea
 3 whether the contamination occurred over a period of
 4 time or a one-time event?
 5 A. No, I can't say.
 6 Q. Okay. Thanks.
 7 MR. SYLVESTER: Could we go off the record a
 8 second?
 9 (Whereupon there was then had an
 10 off-the-record discussion.)
 11 MR. SYLVESTER: Back on the record.
 12 BY MR. HYNES:
 13 Q. Okay. The third bullet on page 5 of your
 14 statement says, "OSFM." That's the Office of State
 15 Fire Marshal?
 16 A. Oh, the third -- I'm sorry, go ahead.
 17 Q. OSFM is the Office of State Fire Marshal,
 18 correct?
 19 A. Uh-huh.
 20 Q. "Regulations require that when there is
 21 any change in information, including removal,
 22 abandonment-in-place, temporary out-of-service status
 23 of a UST or change in ownership of a UST, the owner
 24 or the operator of the UST must notify the OSFM

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1 within 30 days of the change." Who was required --
 2 are you saying that somebody in this case was
 3 required to make that notification?
 4 A. Yes.
 5 Q. Who?
 6 A. Actually, it is the new owner of the tank
 7 is required to do so. So it would have been
 8 Smithfield.
 9 Q. The Sun-Times in October or late 1998
 10 sold the property to Kenard. Shouldn't have Kenard
 11 made that notification as well?
 12 A. I guess it is possible maybe they should
 13 have.
 14 Q. They were the owner of the site until
 15 October of 1999. Shouldn't have Kenard made the
 16 notification?
 17 A. It is possible maybe they should have.
 18 Did they intend to utilize or pull the tank?
 19 Q. I am not here to testify.
 20 A. Well, then I can't state one way or the
 21 other.
 22 Q. But they may have?
 23 A. They may have, had they intended to
 24 utilize or pull the tank.

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1 A. Operated?
 2 Q. Operated.
 3 A. No.
 4 Q. Okay, thank you. Is an out-of-service
 5 status required if the tank is going to be pulled?
 6 A. No, a request for removal is required.
 7 Q. Okay. Smithfield took title to the
 8 property in late October of '99, correct?
 9 A. Yes.
 10 Q. They pulled the tank in November of 1999,
 11 correct?
 12 A. Yes.
 13 Q. Back up. They didn't pull the tank; they
 14 contracted to have the tank pulled, correct?
 15 A. Yes. They contracted with someone.
 16 Q. So do you believe they should have filed
 17 an out-of-service status in that time period, knowing
 18 that they were going to pull the tank anyway?
 19 A. I don't know if they would have needed to
 20 have done an out-of-service, but they should have
 21 done a change of ownership in order to have a permit
 22 issued to them.
 23 Q. Then why is it you cite this
 24 out-of-service status issue in your report?

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1 Q. Then the same answer would apply to The
 2 Clare Group?
 3 A. Had they intended to utilize or pull the
 4 tank.
 5 Q. The next bullet says, "The OSFM requires
 6 written request for an out-of-service status within
 7 30 days after a UST was last used." Of all the
 8 entities that have been identified in this case, who
 9 should have done that in your opinion?
 10 A. I am not sure when the tank was taken out
 11 of service.
 12 Q. So if the tank was taken out of service
 13 prior to the Sun-Times selling it to Kenard -- or,
 14 excuse me, if it was last used prior to the time the
 15 Sun-Times sold it to Kenard, the Sun-Times should
 16 have done it?
 17 A. If it was last used, yes, then they
 18 should have applied for an out-of-service status.
 19 Q. Do you have any knowledge that the tank
 20 was used between late 1998 and October 27, 1999?
 21 A. No, I don't have any information aside
 22 from the fact that it was pulled.
 23 Q. But you have no evidence suggesting that
 24 the tank was actually used?

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1 A. Because the tank is still listed as
 2 current and in use.
 3 Q. Okay. I am going to ask you to go to
 4 Opinion 3. Would you read that out loud?
 5 A. "Smithfield and Wooton, by their acts and
 6 omissions, have allowed contamination to remain at
 7 the site in such a place and manner so as to, at a
 8 minimum, threaten water pollution."
 9 Q. Which acts have allowed contamination to
 10 remain at the site?
 11 A. Which acts? At this point it is by not
 12 addressing -- not by excluding the exposure route.
 13 So their acts would be to leave that soil in place
 14 and not obtain an NFR.
 15 Q. Would that be an act or an omission?
 16 A. I believe that would be both.
 17 Q. What about Wooton?
 18 A. Wooton, again, I am not sure what their
 19 responsibility is, although I think Wooton does bear
 20 some responsibility on Opinion 3 because they are the
 21 ones who claimed that they moved the soil around and
 22 displaced it.
 23 Q. At this point in this case is it your
 24 understanding that the soil that remains at the site

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1 -- let's back up.
 2 Smithfield already removed a substantial
 3 amount of soil, correct?
 4 A. They have removed some soil, yes.
 5 Q. And it is your understanding -- the
 6 townhomes and the sidewalks at the property, in your
 7 opinion are those adequate engineered barriers?
 8 A. For which exposure route?
 9 Q. For ingestion.
 10 A. For ingestion, yes, they are. Three feet
 11 of clean soil and a concrete foundation is adequate
 12 for an engineered barrier.
 13 Q. Are they inadequate for any of these
 14 exposure routes?
 15 A. Soil component of ground water ingestion.
 16 Q. Why is that?
 17 A. Because soil component of ground water
 18 ingestion is also for leachate. And what you need to
 19 do is you need to assess the contamination that is
 20 already there so it doesn't migrate.
 21 Q. Okay. And I think we have all stipulated
 22 that the ground water is contaminated?
 23 A. The ground water is contaminated. We
 24 have one, I believe, exceedence. However, they have

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1 want to do that?
 2 A. Yes, and Smithfield has not done it.
 3 Q. Nobody is drinking this ground water?
 4 A. No.
 5 Q. Nobody is using this ground water?
 6 A. No, not that I am aware of.
 7 Q. Is the only issue remaining to bring this
 8 site to closure the ground water?
 9 A. To bring it to closure?
 10 Q. Yes.
 11 A. No.
 12 Q. What else needs to be done?
 13 A. Smithfield originally proposed the using
 14 of engineered barriers by way of the townhomes and
 15 the yards. Smithfield actually went so far as to
 16 sign a Property Owner Summary Form stating they were
 17 the owners of those properties to receive the NFR,
 18 but it was determined that we needed to get land use
 19 controls from each property owner to exclude the
 20 ingestion.
 21 Q. So they have proposed to do things; we
 22 are just at this point at a stalemate as to what to
 23 do?
 24 A. Well, the last thing they proposed was to

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1 not actually investigated the ground water impact
 2 from the source, which is the highest level of soil
 3 impact.
 4 Q. In your opinion what is it that they need
 5 to do to satisfy...
 6 A. That stipulation --
 7 Q. Let me finish. ..to satisfy the Illinois
 8 EPA?
 9 A. They need to determine -- their original
 10 plan was to conduct a ground water study to determine
 11 ground water concentration from the source, and then
 12 conduct R26 modeling to exclude the pathways in the
 13 ground water ordinance.
 14 Q. So you would be comfortable using Chicago
 15 ground water ordinances for purposes of an NFR or
 16 closing this site?
 17 A. Yes. However, we did speak with the
 18 Daily News Township -- not Township, the condominium
 19 association, and we indicated that they would need to
 20 do a notification, Smithfield would have to notify
 21 properties that there was ground water impact. And
 22 they indicated that they did not want that. So we
 23 have not done anything.
 24 Q. The homeowners have indicated they didn't

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1 sign off on other people's property, and that was
 2 denied.
 3 Q. Why was it denied?
 4 A. Because you cannot put a property control
 5 on someone else's property. If you do not own the
 6 property, you cannot place a restriction on the deed.
 7 Q. All this back and forth, that was solved
 8 during settlement negotiations, correct?
 9 A. All this back and forth?
 10 Q. Regarding what to do on the property,
 11 what was needed to be done?
 12 A. I am not sure what you are -- could you
 13 clarify? I am not sure.
 14 Q. When was that proposal made?
 15 A. That was made immediately in 2001.
 16 Q. Okay. Well, I am going to ask you to
 17 pull the complaint out again. On page 21, Count VII,
 18 Causing or Intending to Cause Water Pollution, I will
 19 read this. Paragraph 23 cites Section 12(a) of the
 20 Illinois Environmental Protection Act. It says, "No
 21 person shall cause or threaten or allow the discharge
 22 of a contaminant into the environment in any state so
 23 as to cause or tend to cause water pollution in
 24 Illinois, either alone or in combination with matter

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1 from other sources, or so as to violate regulations
 2 or standards adopted by the Pollution Control Board
 3 under this Act."
 4 Is your Opinion 3 intended to support
 5 Count VII?
 6 A. Yeah. Essentially what it is, is we
 7 cannot exclude the ground water exposure route until
 8 they rely on the ground water ordinance, and they
 9 have not done so yet.
 10 Q. I am going to go through this. I think
 11 we all agree there has been a discharge of a
 12 contaminant into the environment, correct?
 13 A. Yes.
 14 Q. And has the discharge been to the soil?
 15 A. Yes.
 16 Q. And the discharge has been to the ground
 17 water?
 18 A. Yes.
 19 Q. Does the EPA contend that Smithfield
 20 caused the discharge?
 21 A. I believe they allowed the discharge by
 22 not doing anything to address it.
 23 Q. Okay. So they didn't cause it.
 24 Smithfield, I am referring to Smithfield right now.

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1 A. I have no evidence one way or the other.
 2 Q. What about Wooton? Did they cause the
 3 discharge?
 4 A. No, because Wooton would not be
 5 responsible for the tank.
 6 Q. Did they threaten the discharge?
 7 A. Again, threaten, I am not too sure
 8 exactly what the semantic is for threaten.
 9 Q. What about allow the discharge?
 10 A. Wooton, I would say, yeah, by rearranging
 11 the soil on the site, would have allowed.
 12 Q. If it was established that the
 13 contamination existed prior to Smithfield owning the
 14 property, could Smithfield have caused, threatened or
 15 allowed the discharge?
 16 A. It is possible, because I don't know what
 17 happened with the tank removal.
 18 Q. Let me clarify. If contamination exists
 19 at a property, would you agree that a discharge has
 20 occurred?
 21 A. A release has occurred.
 22 Q. What's the difference between a discharge
 23 and a release?
 24 A. I am not sure what a discharge

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1 A. Smithfield, again, so far as the leaking
 2 underground storage tank section goes, yes, by
 3 causing it.
 4 Q. Let me just ask my questions. I just
 5 need to break this down, so when these guys file this
 6 motion, I have got your testimony clean. Smithfield
 7 didn't cause the discharge?
 8 A. I don't know if they did.
 9 Q. They didn't threaten the discharge?
 10 A. Threatening, I am not sure exactly what
 11 the semantic would be, threatening. Would
 12 threatening be allowing it or creating it? I am not
 13 sure.
 14 Q. Well, it couldn't be allowed because they
 15 are two different words.
 16 A. Right. I am not sure exactly how
 17 "threatened" is perceived in that regulation,
 18 actually.
 19 Q. Okay. But it is your opinion they may
 20 have allowed the discharge?
 21 A. Yes, and they may have caused it.
 22 Q. They may have caused it. You just don't
 23 have any evidence to prove that they caused it or
 24 not?

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1 necessarily is. Leaking Underground Storage Tank
 2 addresses releases.
 3 Q. Can we stipulate discharge means release?
 4 A. In our text it doesn't.
 5 MR. SYLVESTER: Hold on a second. Discharge
 6 means release? I would stipulate that a release
 7 could be a discharge, yeah.
 8 Q. Okay. What's your definition of
 9 discharge?
 10 A. Again, I am not sure what a definition of
 11 a discharge necessarily would be. So far as Leaking
 12 Underground Storage Tanks go, it is releases and
 13 that's moving of contaminants in the environment as a
 14 result of something happening with the tank.
 15 Q. If the contamination that we have been
 16 talking about existed at the time Smithfield took
 17 title to the property, would a release have occurred
 18 prior to the time they took title?
 19 A. I don't have any evidence that that
 20 happened.
 21 Q. I am asking you to assume. If the
 22 contamination -- assume the contamination existed at
 23 the time Smithfield took title.
 24 A. Okay.

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1 Q. Did the release occur prior to the time
2 they took title?
3 A. One of the releases could have. However,
4 Smithfield, whoever pulled that tank, would be
5 responsible.
6 Q. That's not the question I asked you.
7 A. Then I am not understanding.
8 Q. My question is simply, did the release
9 occur prior to the time -- assuming that information,
10 assuming that a contamination was in existence at the
11 time they took title, did the release occur prior? I
12 am not asking you about who is responsible. Did the
13 release occur?
14 A. If contamination was there prior to
15 Smithfield purchasing the property, then possibly it
16 would not be Smithfield's responsibility.
17 Q. I am not asking you about responsibility.
18 I am asking you did the release occur. When in your
19 opinion did the release occur?
20 A. I don't know when the release occurred.
21 Q. But if it was determined that the
22 contamination was there just prior to Smithfield
23 taking title to the property, I want to know who is
24 responsible for it. Would that suggest to you the

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1 A. Depending on what happened when the tank
2 was removed, I don't know.
3 Q. So you have no evidence either way?
4 A. No, because there was no one there to
5 report.
6 Q. Did Smithfield tend to cause water
7 pollution?
8 A. Well, they haven't addressed the
9 contamination, so it is still out there.
10 Q. What does "tend to cause" mean in your
11 opinion?
12 A. "Tend to cause" means having the basis of
13 allowing it to cause. "Tend to cause" to me would be
14 not addressing it.
15 Q. "Tend to cause" means simply not
16 addressing it?
17 A. Again, "tend to cause" would be, I think,
18 by allowing it to happen. I am not sure if "allowed
19 to cause" would be the same thing.
20 Q. In your opinion did Wooton cause water
21 pollution at the site?
22 A. It is hard to say. I believe they may
23 have by moving the soil around.
24 Q. What soil?

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1 release had occurred already?
2 A. Had previously occurred prior to
3 Smithfield purchasing?
4 Q. Yeah.
5 A. Again, there is no evidence that supports
6 that one way or the other. You are asking me to make
7 an assumption.
8 Q. I am asking you to assume. I am giving
9 you a hypothetical.
10 A. Yeah, it is so hard to say. I mean,
11 there are so many different factors that it could be.
12 I have no evidence that a release of PNAs has
13 occurred any time prior.
14 Q. This isn't that difficult of a question.
15 If you show up at a piece of property and you take a
16 soil sample the day before Smithfield purchased the
17 property and you find diesel, has there been a
18 release of diesel in the soil?
19 A. Yes.
20 Q. Thank you. Okay. It says, "No person
21 shall cause or threaten or allow the discharge of a
22 contaminant into the environment in any state so as
23 to cause or tend to cause water pollution." Did
24 Smithfield cause water pollution?

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1 A. The contaminated soil.
2 Q. But you don't know when the water
3 pollution occurred?
4 A. No, I don't.
5 Q. Do you believe -- is it your opinion that
6 Wooton tended to cause or has tended to cause water
7 pollution at the site?
8 A. There is water pollution at the site that
9 I believe is the result of this underground storage
10 tank and it has not been addressed. I don't know if
11 it would be Wooton's responsibility, although Wooton
12 has submitted that they moved contamination around at
13 the site.
14 Q. Let me back up. Your testimony earlier
15 is it is your opinion that the contamination came
16 from the piping?
17 A. The underground storage tank system.
18 Q. But you don't know -- can you establish
19 that it came from the tank?
20 A. We refer to it as an underground storage
21 tank system.
22 Q. I understand what the definition of an
23 underground storage tank system is. Can the EPA
24 establish that it came from the tank?

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1 A. We don't make any differentiation between
2 tank and piping.
3 Q. So the answer is no?
4 A. No.
5 Q. And you can't make any determination that
6 it came from the piping?
7 A. No, because the system, the entire
8 system, is what's covered.
9 Q. Okay. There has been some discussion
10 over the years of indicated parameters for diesel
11 versus gasoline. How do you differentiate -- what
12 indicator parameters would indicate diesel
13 contamination?
14 A. Diesel gasoline -- or, I am sorry, diesel
15 indicator contaminants are BTEX and PNAs. Gasoline
16 indicator contaminants are BTEX and MTBE.
17 Q. Say that again, MTBE?
18 A. Yes.
19 Q. In 2001 was MTBE an indicator parameter
20 for gasoline?
21 A. Oh, in 2001 it would not have been. It
22 was added.
23 Q. So it would only have been BTEX?
24 A. Yes, it was added in 2002.

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1 would be the most significant issue?
2 A. Well, what they have to do is they have
3 to exclude their exposure routes. That's how they
4 get an NFR. And the last thing that was proposed was
5 using the engineered barriers and obtaining a ground
6 water ordinance and utilizing the ground water
7 ordinance.
8 Q. So really the ground water ordinance or
9 the ground water issue is really the one that remains
10 open?
11 A. Well, yes, except for the fact that they
12 have to have environmental land use controls if they
13 want to use those properties as engineered barriers.
14 They have to have the property owners agree to that.
15 Q. Is it your opinion that the only source
16 of contamination at the site was Tank 5 and its
17 piping?
18 A. I don't have any information indicating
19 there was anything else.
20 MR. HYNES: Okay. Just give me a minute. I
21 think I am done.
22 (Pause.)
23 Q. Oh. Were you involved at all when the
24 Sun-Times was in the case?

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1 Q. And it is your opinion that what you
2 found out there at the site today is BTEX and PNAs?
3 A. Well, it is PNAs primarily which is one
4 of the components of diesel fuel.
5 Q. But you have found BTEX as well?
6 A. Yeah, there was a little bit of BTEX
7 there.
8 Q. But not exceedences of the TACO Tier 1
9 Residential Standards?
10 A. Not in exceedence of the Tier 1
11 inhalation standards.
12 Q. But in soil injection?
13 A. Yeah, well, soil component.
14 Q. That suggests that there is gasoline
15 contamination up there as well?
16 A. There may be. Again, it is an indicator
17 contaminate for both the BTEX. Having the PNAs there
18 eliminates the gasoline so far as we are going, so
19 far as the Illinois EPA is concerned.
20 Q. The Illinois EPA is focusing on diesel?
21 A. Yeah, because that's what we were told
22 the release was.
23 Q. If we had to prioritize the issues that
24 remain at the site in terms of remediation, what

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1 A. Yes, I was the project manager at that
2 time.
3 Q. So your opinion is Sun-Times has no
4 responsibility for doing any of the remediation at
5 this property?
6 A. The Sun-Times was not the owner when the
7 tank was pulled. I have no evidence that indicates a
8 release occurred prior to the pulling of the tank.
9 Q. But you have no evidence that it occurred
10 after the tank was pulled or as a result of the tank
11 pull, do you?
12 A. No, I do not.
13 MR. HYNES: Okay. That's all I have got.
14 You guys have any?
15 MR. SYLVESTER: No.
16 MR. HYNES: Do you want to waive signature?
17 MR. SYLVESTER: Reserve.
18 DEPOSITION CONCLUDED
19
20
21
22
23
24

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1 ERRATA SHEET
 2 I, Carol Hawbaker, do hereby certify that I have
 3 read the foregoing deposition and that it is a true
 4 and accurate translation of the questions asked of me
 5 and the answers given by me, with the following
 6 change(s):
 7 Page Line Should Be Reason
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
 15 _____
 16 _____
 17 _____
 18 _____
 19 CAROL HAWBAKER
 20
 21 Subscribed and sworn to before me
 22 this day of , 2011.
 23
 24 Notary Public

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1 STATE OF ILLINOIS)
) SS
 2 COUNTY OF MACOUPIN)
 3 CERTIFICATE
 4 I, Carla J. Boehl, a Notary Public and Certified
 5 Shorthand Reporter, do hereby certify that prior to
 6 the taking of the deposition herein, and on the 14th
 7 day of December, 2010, the Deponent CAROL HAWBAKER
 8 was, by me, sworn to testify to the truth in relation
 9 to the matter in controversy herein. That on said
 10 date the foregoing deposition was taken down in
 11 shorthand by me and afterwards reduced to typewritten
 12 form by me, and that the foregoing transcript
 13 contains a true and accurate translation of all such
 14 shorthand notes.
 15 Given under my hand and seal this 28th day of
 16 December, 2010, at Springfield, Illinois.
 17 My commission expires April 13, 2011.
 18
 19 _____
 20 Notary Public
 21 Certified Shorthand Reporter
 22 Lic. #084-002710
 23
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