7/5/90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

US EPA RECORDS CENTER REGION 5
518514

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.; MIDWEST INDUSTRIAL WASTE DISPOSAL COMPANY, INC.; INDUSTRIAL TECTONICS, INC.; V & E CORPORATION; ERNEST DE HART; EDWARD D. CONLEY; HELGA C. CONLEY; LOVIE DE HART; CHARLES A. LICHT; DAVID E. LICHT; DELORES LICHT; EUGENE KLISIAK; JEANETTE KLISIAK; EUTHER G. BLOOMBERG; ROBERT J. DAWSON, JR.; JOHN MILETICH; MARY MILETICH; PENN CENTRAL CORPORATION; INSILCO CORPORATION; RUST-OLEUM, INC.; ZENITH RADIO CORPORATION; STANDARD T CHEMICAL COMPANY, INC.; AMERICAN CAN COMPANY, INC.; PRE FINISH METALS, INC.; PREMIER COATINGS, INC.; MOTOROLA, INC.; and DESOTO, INC.;

Defendants.

Civil Action No. H-79-556
Third-Party Complaint

AMERICAN CAN COMPANY, INC., DESOTO, INC., INSILCO CORPORATION, MOTOROLA, INC., PRE FINISH METALS, INC., PREMIER COATINGS, INC., RUST-OLEUM, INC., STANDARD T CHEMICAL COMPANY, INC., ZENITH RADIO CORPORATION, JOHN MILETICH, MARY MILETICH and THE PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP, AMERICAN NAMEPLATE & DECORATING CO.,

90-7-1-1

DEPARTMENT OF JUSTICE
JUL 30 1990
LANDS DIVISION
ENFORCEMENT RECORD

1 AMERICAN PRINTER & LITHOGRAPHER CO.,)
AMERICAN RIVET COMPANY, APECO,)
2 APPROVED INDUSTRIAL REMOVAL, INC.,)
ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3 PRINTS, ASHLAND CHEMICAL CO.,)
AVENUE TOWING COMPANY, BARR &)
4 MILES, INC., BELDEN ELECTRICAL)
PRODUCTS DIV. OF COOPER INDUSTRIES,)
5 INC., BRETFORD MANUFACTURING, INC.,)
BUTLER SPECIALTY COMPANY, INC.,)
6 BY PRODUCTS MANAGEMENT, CALUMET)
CONTAINER, CARGILL, INC.,)
7 CHEMALLOY DIVISION OF FISHER- CALO)
CHEMICAL CO., CHICAGO ETCHING CORP.,)
8 CHICAGO NAMEPLATE COMPANY,)
CHICAGO ROTOPRINT CO.,)
9 C & C INDUSTRIAL MAINTENANCE CORP.,)
CITY OF GARY, INDIANA, C.P. CLARE)
10 DIVISION OF GENERAL INSTRUMENTS)
CORP., C.P. HALL CO.,)
11 C.P. INORGANICS, COMMANDER PACKAGING,)
CONNOR FOREST INDUSTRIES, CONSERVA-)
12 TION CHEMICAL, CONSUMERS PAINT)
FACTORY, INC., CONTINENTAL)
13 WHITE CAP DIVISION OF CONTINENTAL)
CAN COMPANY, CONVERSIONS BY GERRING,)
14 COUNTY OF DU PAGE, ILLINOIS,)
CRONAME, INC., CROWN CORK & SEAL)
15 CO., INC., CULLIGAN INTERNATIONAL)
COMPANY, CULLIGAN WATER CON-)
16 DITIONING, INC., FRANK J. CURRAN,)
CUSTOM METALS PROCESSING,)
17 DAP, INC. OF BEECHAM COSMETICS,)
DAUBERT CHEMICAL COMPANY,)
18 DEUBLIN COMPANY, DOBSON CONSTRUCTION)
INC., DUO FAST CORPORATION, DU-TONE)
19 CORP., HAROLD EGAN, EKCO HOUSEWARE)
CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
20 PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21 FLINT INK CORP., FURNAS ELECTRIC)
CO., GEARMASTER DIVISION, EMERSON)
22 ELECTRIC, THE GILBERT & BENNETT)
MFG. CO., GLD LIQUID DISPOSAL,)
23 HENRY PRATT COMPANY, J.M. HUBER)
CORPORATION, HYDRITE CHEMICAL CO.,)
24 INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
PRODUCTS, KNAACK MFG. CO., LANSING)
2 SERVICE CORPORATION, LAUTTER)
CHEMICAL, LIQUID DYNAMICS,)
3 LIQUID WASTE, INCORPORATED,)
STEVE MARTEL, MASONITE CORPO-)
4 RATION, McWHARTER CHEMICAL CO.,)
METAL RECLAIMING CORPORATION,)
5 METROPOLITAN CIRCUITS,)
MIDWEST RECYCLING COMPANY, MONTGOMERY)
6 TANK LINES, MORTON THIOKOL INC.,)
MR. FRANK, INC., NAMSCO, INC.,)
7 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
NUCLEAR DATA, INC., PPG INDUSTRIES,)
8 INC., PASLODE COMPANY, PIERCE & STEVENS)
CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
R-LITE, REFLECTOR HARDWARE CORP.,)
10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
RICHARDSON GRAPHICS, JOHN ROSCO,)
11 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
MANUFACTURING, SCHOLLE CORPORATION,)
12 SCRAP HAULERS, SHERWIN WILLIAMS)
COMPANY, SHELD COATINGS, INC.,)
13 SIZE CONTROL COMPANY, SKIL CORPORA-)
TION, SPECIAL COATINGS CO.,)
14 SOUTHERN CALIFORNIA CHEMICAL,)
SPECIALTY COATINGS, INC.,)
15 SPOTNAILS, INC., STAR TRUCKING, STERN)
ELECTRONICS, INC., JOE STRAUSNICK,)
16 STUART CHEMICAL & PLAINT, INC.,)
SUMMER & MACE, SUN CHEMICAL,)
17 SYNTECH WASTE TREATMENT CENTER,)
T.R.C., TEEPACK, INC., ALFRED TENNY,)
18 THIELE-ENGDAHL, INC., THOMPSON)
CHEMICALS, TIFFT CHEMICALS,)
19 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
UNIROYAL, INC., UNITED RESIN AD-)
20 HESIVES, INC., U.S. ENVELOPE, U.S.)
SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
21 VERSAL RESEARCH LABORATORIES, INC.,)
UNIVERSAL TOOL & STAMPING COMPANY,)
22 VANDER MOULEN DISPOSAL, VELSICOL)
CHEMICAL CORP., VICTOR GASKET)
23 DIVISION OF DANA CORPORATION,)
WARNER ELECTRIC BRAKE & CLUCH CO.,)
24 WARWICK CHEMICAL, WASTE RESEARCH &)

RECYCLING, XEROX CORPORATION, and other unidentified persons,)
)
)
Third-Party Defendants.)

DEPOSITION OF

RICHARD E. BOICE

July 5, 1990

The continued deposition of RICHARD EDWIN BOICE, called for examination by the Defendants, pursuant to notice and pursuant to the provisions of the Federal Rules of Civil Procedure of the United States District Courts, pertaining to the taking of depositions for the purpose of discovery, taken before Arnold N. Goldstine, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, at 227 West Monroe Street, on July 5, 1990, commencing at the hour of 1:00 o'clock p.m.

APPEARANCES:

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-and-

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-and-

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Region V
Office of Regional Counsel
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appeared on behalf of Plaintiff,
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appeared on behalf of
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Sidley & Austin
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Pre Finish Metals, Inc.;

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Ms. Lisa Anderson
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appeared on behalf of
Desoto, Inc.;

Mr. Joseph V. Karaganis,
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appeared on behalf of
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APPEARANCES (CONTINUED):

Mr. James T. J. Keating
Mr. Dennis A. Berg
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appeared on behalf of
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appeared on behalf of
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Mr. Richard S. VanRheenen
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appeared on behalf of
J & S Tin Mill Products Company,
Inc., et al.;

1 APPEARANCES (CONTINUED):

2

3

4 Mr. John R. Adams
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7 appeared on behalf of Third-
Party Plaintiffs Desoto, et al.;

8

9

10

Mr. Roy L. Bernstein
11 Gottlieb and Schwartz
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12 Chicago, Illinois 60601

13 appeared on behalf of Third-party
Defendant By Products Management;

14

15

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Mr. Blanton
17 Ice, Miller, Donadio & Ryan
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18 Box 82001
Indianapolis, Indiana 46282

19

appeared on behalf of
20 Indiana Department of Highways.

21

22

23

24

1 I N D E X

2 WITNESS:

3 Richard Roice

4 Direct Examination

5 By Mr. Keating: 614

6

7

8 E X H I B I T S

9

10

11 Deposition Exhibits:

12

1	615
2	633
3	680
4	685
5	690
6	709
7	718
8 and 9	772
10 thru 13	773

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1 MR. KEATING: Let the record reflect that
2 this is the continued deposition of Mr. Richard
3 Boice, and Mr. Boice is still under oath.
4 RICHARD BOICE,
5 having been previously duly sworn,
6 was examined and testified further as follows:
7 DIRECT EXAMINATION
8 BY MR. KEATING:
9 Q. Did you bring the entire record on
10 decision with you today, Mr. Boice?
11 A. Yes.
12 Q. Now, I understand it has been
13 certified.
14 Are there any present plans to add any
15 additional record or documents to the R.O.D.?
16 MR. TENENBAUM: To the R.O.D. record?
17 MR. KEATING: To the R.O.D. record.
18 MR. TENENBAUM: Let me state this. This
19 would be a good opportunity.
20 First, I will object to the question on
21 the same grounds as at the last deposition.
22 But, in response to the questions, the
23 technical questions which were raised last time
24 about the administrative records, and in

1 response to those very minor technical issues
2 that were raised, the Agency did go back and
3 review the record and certified indices.
4 And I am going to at this time provide
5 you with a short document which makes
6 preliminary arrangements for some minor
7 corrections to be made to the record indices.
8 I do want to emphasize, as is clear
9 from the memorandum, that there are no
10 additional documents or new documents to the
11 certified administrative record indices through
12 this memorandum.
13 I have copies here for most people that
14 want them.
15 MR. REATING: Counsel has just given me a
16 document -- what are we up to last time for
17 marking exhibits?
18 Let's put Boice Deposition No. 1 for
19 identification of July 5.
20 (The document above-referred to
21 was marked Deposition
22 Exhibit No. 1 for identification.)
23 And counsel indicates that this is work
24 that had been done regarding as best I can

1 understand it the organization of the R.O.D.
2 Is that correct?, sir?
3 MR. TENENBAUM: Well, I think that I
4 indicated what the memorandum was.
5 It requests that certain technical
6 corrections be made to the physical record and
7 the indices. It does not add any additional
8 documents to any of the records.
9 MR. KEATING: My point is it a correction.
10 MR. TENENBAUM: Let me rephrase that. It
11 does not add any additional documents to the
12 certified record index.
13 MR. KEATING: Okay.
14 My question is, this is corrections
15 then?
16 MR. TENENBAUM: These are minor technical
17 corrections such as the number of pages was 31
18 rather than 29, during the process of copying
19 two pages got reversed. Technical corrections
20 like that, when people asked for copies of
21 documents and so on.
22 MR. KEATING: Thank you.
23 My original question was, sir, is there
24 any plan at the present to add any additional

1 record or documents to the R.O.D.?

2 MR. TENENBAUM: Objection.

3 As we have indicated in our legal

4 memoranda to the court, the Agency does not

5 presently intend to add any additional documents

6 to the certified record indices.

7 However, we have indicated our

8 willingness to work with any and all of the

9 defendants. And if they feel that there is a

10 document that was inadvertently omitted from the

11 certified record indices, we will be glad to

12 discuss that with them.

13 And if we agree with your position on

14 that, then we would agree that it should be

15 added. But, we are not presently aware of any

16 such documents.

17 Of course, we have not received any

18 letter from any of the defendants indicating

19 that there is an omitted document.

20 MR. KEATING: Do we want to allow him to

21 answer no, then?

22 MR. TENENBAUM: I think that the papers may

23 clear that.

24 MR. KEATING: I understand.

1 But I am asking, that's why I was going
2 to ask. I was going to do it different than the
3 other guys. I was going to like ask the witness
4 and get an answer, and ask him another question.
5 Silly old way.
6 MR. TENENBAUM: That would be taking
7 discovery into the compilation of the record.
8 That issue is before the court.
9 MR. KEATING: The record is not before the
10 court, if something is going to be added.
11 That's my point.
12 I am asking a simple question, if
13 anything is going to be added. I understand
14 what your answer is. I am not arguing with it.
15 All I want to know is if this is the
16 record that you are contending that we are going
17 to have to review, is there any present plan to
18 have anything added?
19 If there is not --
20 MR. TENENBAUM: I think I answered that.
21 MR. KEATING: Yes, you did. And next I will
22 take your dep.
23 But, right now I am just waiting for a
24 no, if he is going to say that, he probably

1 will, just to get an answer, so that we have
2 some place to start.
3 MR. TENENBAUM: As we have indicated in our
4 papers, we don't believe you have made the
5 necessary showing to take discovery on the
6 compilation of the record.
7 MR. KEATING: I am asking something
8 different, counsel.
9 What I am asking is, you say it is a
10 record-review. I am saying all right, if that
11 is what your position is.
12 I am saying is there anything else to
13 add to the record, because if it is a
14 record-review, I get a chance to know what is
15 going to be in the record.
16 MR. TENENBAUM: Well, if you want to ask, I
17 would not object to a question to the witness
18 asking him whether the indices he has certified
19 to the court as being the administrative record,
20 whether those indexes, subject to these minor
21 technical corrections, are true and correct to
22 the best of his knowledge today.
23 He can answer that.
24 MR. KEATING: Okay.

1 Q. Are these indexes true and correct to
2 the best of your knowledge today?
3 A. With those corrections made in the
4 memo.
5 Q. In Exhibit No. 1?
6 A. Yes.
7 Q. Do you have any plans to add any
8 additional records to it?
9 MR. TENENBAUM: Same objection.
10 A. I think we already discussed that.
11 BY MR. KEATING:
12 Q. I am just asking. And your counsel
13 indicated he didn't. I was just asking if you
14 did.
15 A. As Alan Tenenbaum said, we don't
16 anticipate adding anything to the record.
17 But, if the defendants feel that some
18 other documents need to be in the record, we can
19 review that.
20 Q. Okay.
21 Now, Exhibit No. 1 for identification,
22 do you have it in front of you, sir, of today's
23 date.
24 MR. TENENBAUM: We have got one.

1 A. Okay.
2 BY MR. KEATING:
3 Q. Can you tell me, sir, what you did to
4 prepare this document?
5 A. What I did?
6 Q. Yes, sir.
7 MR. TENENBAUM: Same objection.
8 A. I spent about five hours going through
9 the record, document by document.
10 BY MR. KEATING:
11 Q. And did anyone assist you going through
12 the record for those five hours, sir?
13 A. No.
14 Q. So, Exhibit No. 1 are the corrections
15 based upon your review alone?
16 MR. TENENBAUM: Same continuing objection.
17 A. No. We also used a contractor to help
18 review it.
19 BY MR. KEATING:
20 Q. And what was the name of the contractor
21 that assisted you during the five hours of going
22 through the record to prepare Exhibit No. 1?
23 MR. TENENBAUM: Same continuing objection.
24 A. He didn't accompany me during the five

1 hours of going through. He prepared his own
2 separate review.
3 BY MR. KEATING:
4 Q. All right.
5 What is the name of the contractor that
6 did the separate review then, sir?
7 A. Development Planning Research
8 Corporation.
9 Q. And what is Development -- what is the
10 last name -- Planning located, sir?
11 A. They have an office in the Transunion
12 Building, 111 West Jackson.
13 Q. Okay.
14 What was the name of the individual at
15 Development Planning that did the review for
16 you, sir?
17 MR. TENENBAUM: Same continuing objection.
18 A. Michael Sobczak.
19 Q. Do you know how to spell the last name,
20 sir?
21 A. S-o-b-z-e-c -- S-o-b-c-z-a-k, I think.
22 Q. Mr. Sobczak, has he helped in any other
23 portions of the compilation of the R.O.D?
24 MR. TENENBAUM: I am going to object.

1 And at this point I think I have tried
2 to have bend over backwards in giving you some
3 information, even though it is objectionable.
4 At this point I think we are deep into the
5 process of probing the compilation of the
6 record.
7 I am going to have to instruct the
8 witness not to answer.
9 MR. KEATING: All right, counsel.
10 Our response would be that we believe
11 that it is relevant information as to what is
12 contained in the record and how it was prepared.
13 And we do not believe that your
14 position as to record-review for this matter is
15 correct.
16 Q. In Exhibit No. 1 for identification,
17 sir, did you find any documents that were
18 missing from the R.O.D?
19 It is not a great question.
20 Did you find any documents that you
21 thought should belong in the R.O.D. that were
22 not there and have now been put in, even though
23 they might have been listed before?
24 MR. TENENBAUM: Same continuing objection.

1 In addition, there is an ambiguity in
2 your question as to whether you are referring
3 to, you said the R.O.D. You probably mean the
4 R.O.D. index or the physical record, I don't
5 know which.
6 MR. KEATING: All right, the physical
7 record.
8 MR. TENENBAUM: As I have indicated at the
9 beginning, this speaks for itself, that no
10 additional documents were added to the certified
11 administrative record index that were not
12 already identified.
13 MR. KEATING: I am not saying that, counsel.
14 I understand that is your position.
15 My question goes to was a document
16 identified, for example, in the index and not in
17 the physical record or R.O.D. itself.
18 MR. TENENBAUM: Well, if it was in the
19 index, then it was in the R.O.D.
20 There are a number of copies of the --
21 I used the word R.O.D., which is your word, if
22 it was in the certified index, then by
23 definition that means that it is in the record.
24 There are a number of physical copies of the

1 record.

2 I don't really know what you mean. If

3 one particular copy that was located in EPA's

4 office, and in the copying of documents it might

5 have been put out of order, or removed, or

6 whatever. I think that your question was

7 ambiguous.

8 MR. KEATING: That was my question, yes.

9 MR. TENENBAUM: That is made clear in this

10 document.

11 MR. KEATING: I haven't had the chance to

12 read it. That is why I was asking.

13 Was there -- we are going to use your

14 terms, counsel -- something listed in the

15 certified index that was not in the record, a

16 document itself?

17 MR. TENENBAUM: As I said, if it is in the

18 certified index, by definition it is in the

19 record, whether it is in the physical record.

20 MR. KEATING: That's what I thought you

21 meant.

22 MR. TENENBAUM: At what time, you know, what

23 time, what physical record, what location. And

24 I don't think you are entitled to take discovery

1 into all of that.

2 But, if you want to ask if the witness

3 knows, I will object, but I have to hear the

4 question before I decide to instruct him not to

5 answer.

6 BY MR. KEATING:

7 Q. Do you know, sir?

8 MR. TENENBAUM: What was the last question?

9 BY MR. KEATING:

10 Q. My question again, was there anything

11 in the certified index, a document that was not

12 physically in the record, do you know?

13 MR. TENENBAUM: Same objection. And also

14 vague and ambiguous.

15 If you know, you can answer.

16 A. Okay.

17 Well, as it states in the memo itself,

18 that there were a few documents that were not in

19 the administrative record file that were

20 identified in the administrative record index.

21 BY MR. KEATING:

22 Q. Do you know what these records were,

23 sir?

24 A. It is right in this memo.

1 Q. Yes.

2 Can you tell me what page you are on or

3 something like that? We will know where to

4 look.

5 A. The first two items list the documents

6 that need to be inserted into the administrative

7 record file.

8 MR. TENENBAUM: Counsel, if you look at the

9 document, it is divided into part 1 and part 2.

10 Part 1 involves technical corrections to the

11 physical record. Everything in part 1 might fit

12 within the category you are asking about.

13 MR. KEATING: Counsel, if you want to

14 explain to me the difference, part 2 is

15 technical corrections to the administrative

16 record index?

17 MR. TENENBAUM: Yes.

18 As I indicated before, that is, the

19 record index had a number of columns and

20 sometimes there are very minor errors in the

21 number of columns; it might say the document

22 contains 24 pages, when upon recounting it

23 turned out to be 26. Something like that.

24 A. Also on page 2, it identifies two

1 documents that need to be inserted.
2 Under Midco II update 1, documents 38
3 to 49. I think we should note that these
4 documents which were not present in one index
5 were all present in the other. I mean, if not
6 in one file, administrative record file, they
7 were present in the other administrative record
8 file.
9 And also a lot of them were already
10 sent to the defendants during the RIPS process
11 or were generated by the defendants.
12 MR. KEATING: Thank you.
13 Q. Then from your answer I understand that
14 you have the record here today with all the
15 documents in it, is that correct, you brought
16 that today?
17 MR. TENENBAUM: These changes have not been
18 made to the physical record. They have not yet
19 been made.
20 This is a memorandum requesting the
21 changes to be made.
22 MR. KEATING: All right.
23 Q. You indicated that there are two sets
24 of the physical record; is that correct, sir?

A. What do you mean, you mean one for Midco I and one for Midco II?

Q. No.

As I understood it, sir, you have a record here today and that there was another record that you found the documents in, they were either in one or the other?

A. A lot of the documents, if not all, I think almost all the documents listed, for instance, that weren't present in the administrative record file for Midco I located at our regional office was present in the administrative record file for Midco II.

Q. Okay.

When you talk about two records, there is one record for Midco I and one record for Midco II?

A. Correct. One record file, right.

Q. Record file. All right.

I see on page 2 that on the fifth I guess you can call it paragraph it says:

"Midco II, update number 1, document number 78. This document is no

1 longer considered
2 confidential."
3 Are you the one who has decertified it?
4 MR. TENENBAUM: Objection. Instruct the
5 witness not to answer.
6 This document was produced at the last
7 day of his deposition. Everybody was given a
8 copy of this.
9 A. That is another document that was
10 present in the Midco I record file.
11 MR. TENENBAUM: Wait. Maybe I am confusing
12 the documents.
13 I am sorry. There was a confidential
14 document that was given out at the last
15 deposition. I would have to check and see if it
16 is this one or not.
17 MR. KEATING: My question, counsel, was as
18 to his capacity to be able to certify it
19 confidential or make it unconfidential.
20 MR. TENENBAUM: That would be discovery into
21 the record process. I don't think that I will
22 accept that.
23 MR. KEATING: It has been presented as part
24 of the record now. And it used to be

1 confidential and now it is not confidential. I
2 am asking him how it arrived at its present
3 status.
4 MR. TENENBAUM: Well, subject to my
5 continuing objection and also the additional
6 objection to the extent that there was any
7 attorney-client communications with respect to
8 this document, if any, I don't know, you may
9 answer.
10 Do not reveal any attorney-client
11 communications, if there were any.
12 You can answer if you know. The answer
13 is subject to my objection.
14 A. I think the record itself said it
15 was -- no, it didn't, maybe.
16 It was determined to be attorney-client
17 privilege at that time.
18 BY MR. KEATING:
19 Q. Okay.
20 Then it was later determined not to be
21 an attorney-client privilege?
22 A. Correct.
23 Q. All right.
24 MR. KARAGANIS: Just for clarification.

1 What is document number 78 that we are referring
2 to?
3 (Conference between the witness
4 and his counsel.)
5 Mr. Tenenbaum, can we get a statement
6 on the record as to what document number 78 is,
7 please?
8 BY MR. KEATING:
9 Q. Do you know what document number 78 is?
10 A. I'll get it.
11 A. This is present in the Midco I record
12 file. It identifies it as listing hazardous
13 waste disposal at Midco I and Midco II. Also a
14 tabulation of whether national notice letters
15 were sent and responded to. Summary of waste
16 disposal information on Midco PRP's, and that is
17 everything.
18 MR. KEATING: Mr. Karaganis, does that
19 answer your question?
20 MR. KARAGANIS: Yes, thank you.
21 MR. KEATING: Maybe our host would be
22 gracious enough to make a copy of that during
23 the break, if we have one, and we will make that
24 Exhibit No. 2 for identification of today's

1 date, Boice Deposition.
2 (The document above-referred to
3 was marked Deposition
4 Exhibit No. 2 for identification.)
5 Are you ready, counsel?
6 MR. TENENBAUM: I'm ready.
7 BY MR. KEATING:
8 Q. Okay.
9 Besides Development Planning, have you
10 contacted any other outside company or agency
11 regarding the preparation of this document that
12 we have described as Exhibit No. 1 for
13 identification?
14 MR. TENENBAUM: Same continuing objection.
15 A. Any other department or agency or
16 private company you mean?
17 BY MR. KEATING:
18 Q. Yes, sir.
19 A. I don't remember.
20 There might have been a different
21 contractor prior to PRC. And also the
22 Department of Justice reviewed the record.
23 Q. And the Department of Justice?
24 MR. TENENBAUM: You are talking about

1 Exhibit No. 1, that is not the record?
2 MR. KEATING: Yes, Exhibit No. 1, sir.
3 A. Oh, that. No.
4 Q. So the only one --
5 A. What do you mean now?
6 Q. Well, the document that has been
7 produced today as changes.
8 A. Oh, no. I thought you meant the
9 compilation of the administrative record.
10 Q. All right.
11 A. But, as far as that memo, no.
12 Q. Thank you.
13 MR. TENENBAUM: Can you read back the
14 question?
15 (The record was read.)
16 I just want to for the record place my
17 objection to the question as somewhat vague and
18 ambiguous.
19 The question was regarding the
20 preparation of the document. I don't know what
21 the question means by that. So let me just
22 state my objection.
23 MR. KEATING: I was talking about Exhibit
24 No. 1 for identification of today's date.

1 MR. TENENBAUM: Even with respect to Exhibit
2 No. 1, I don't know what you mean by regarding
3 the preparation of that document.
4 BY MR. KEATING:
5 Q. You have in front of you Exhibit No. 1
6 for identification, sir, with today's date,
7 Boice Deposition.
8 You indicated to us that you talked to
9 Development Planning in preparation for these
10 changes; is that correct?
11 MR. TENENBAUM: Same objection.
12 MR. KEATING: That is a preliminary
13 question.
14 MR. TENENBAUM: Continuing objection to this
15 line of questioning is what I mean to be saying.
16 MR. KEATING: There is no use objecting to
17 that, that has already been answered. That is a
18 preliminary question.
19 MR. TENENBAUM: I objected to it when you
20 first stated that question.
21 BY MR. KEATING:
22 Q. You have to say "yes" to that one. I
23 just asked you that a few seconds ago. Then I
24 get a next question.

1 A. You are saying I discussed this with
2 him?
3 Q. You discussed it with Development
4 Planning, Mr. Sobczak?
5 A. I wouldn't say I discussed it. I used
6 their review in completing this, in conducting
7 my own review of the record.
8 Q. And have you contacted or received any
9 other guidance from any other outside company or
10 administrative agency in the preparation of this
11 Exhibit No. 1 for identification of today's
12 date, Boice Deposition?
13 MR. TENENBAUM: I need it read back, sorry.
14 (The record was read.)
15 I am going to object to the question to
16 the extent it is seeking any testimony regarding
17 attorney-client communication.
18 MR. KEATING: That's why I phrased it that
19 way. It wouldn't have to do with attorneys.
20 MR. TENENBAUM: Apart from attorneys?
21 MR. KEATING: Yes.
22 MR. TENENBAUM: Okay.
23 Subject to my continuing objection, you
24 can answer.

1 A. What does administrative agency mean?
2 MR. TENENBAUM: Was anyone else involved
3 with your work on this other than the one
4 contractor you identified and other than
5 attorneys?
6 A. No.
7 MR. KEATING: Okay, thank you.
8 Q. As being the one who has overall
9 responsibility for the development and
10 investigation of any remedial measures to be
11 done at the site, have you relied on --
12 Is that correct, would that be a
13 correct description so far of your job?
14 A. Yes.
15 Q. Okay.
16 Have you relied on any other reports
17 other than the remedial investigation done by
18 the companies hired by the defendants in this
19 case?
20 MR. TENENBAUM: Objection, seeks to take
21 discovery on remedy selection.
22 MR. KEATING: I don't care about selection.
23 MR. TENENBAUM: You may answer to the extent
24 it is relevant to the cost issue.

1 You may answer as to anyone whose costs
2 we are seeking to recover. You may give a
3 general description of what costs you are
4 seeking to recover.
5 A. I think the records and the information
6 is in the administrative record for the site.
7 BY MR. KEATING:
8 Q. And other than the remedial
9 investigation feasibility studies done by the
10 companies hired by the defendants, is there
11 anything that you are relying on as to what
12 types of wastes were found at the sites?
13 MR. TENENBAUM: Relying on in what
14 connection?
15 MR. KEATING: As to a necessity to clean it
16 up.
17 MR. TENENBAUM: As it is phrased, I will
18 have to object and instruct the witness not to
19 answer the question.
20 MR. KEATING: If there is some correction,
21 if there is some form of the question, I am
22 willing to rephrase it.
23 MR. TENENBAUM: I think that you asked him,
24 the way you phrased it, what information was he

1 relying on in selecting the remedy. And that
2 would be discovery of remedy selection.
3 MR. KEATING: I am asking him what other
4 information -- strike it.
5 Why don't you read the question back.
6 If there is a correction that should be made, I
7 will be happy to make it.
8 (The record was read.)
9 MR. TENENBAUM: To the extent, as a
10 follow-up, that your question is trying to find
11 out what information was relied on in selecting
12 the remedy, that is objectionable, in our view,
13 I instruct the witness not to answer.
14 To the extent that you want to ask a
15 question about someone else's liability, under
16 Section 107 A, it might be --
17 MR. KEATING: I have some questions on that,
18 too.
19 My purpose in this, counsel, is to
20 determine -- and I am not asking right now as to
21 what he relied on -- to determine, to make any
22 determinations. I am asking what he relied on
23 to determine what wastes were at the site.
24 MR. TENENBAUM: That is why I asked you for

1 what purpose. If it is for the purpose of
2 selecting the remedy, that would be
3 objectionable.
4 MR. KEATING: I am not asking that. I might
5 later and we can go back and forth, and stuff.
6 Right now I just want to find out how
7 they determined what waste were found at the
8 site.
9 MR. TENENBAUM: Well, that is an allowable
10 question, to the extent he wants to know the
11 Agency's processes for determining the waste at
12 the site in order to decide what parties might
13 be liable.
14 So why don't you -- is that all right
15 if he answers that question?
16 MR. KEATING: Yes.
17 A. Generally the information is in the
18 administrative record.
19 Although, it is possible that we could
20 use other information to evaluate that that
21 isn't presently in the record. For example,
22 information on the removal at Midco II. The OSC
23 report isn't done that --
24 Q. The what report, sir?

1 A. OSC report.

2 There might be some more information in

3 the OSC report on what wastes were present at

4 the site.

5 And also there is a study being done

6 now by the Indiana Department of Public Health

7 using Gerrity and Miller, where they want to

8 take a few more samples of the ground water.

9 That might provide additional information on

10 wastes disposed of at the site, I mean wastes

11 that were present at the site.

12 Q. Anything else?

13 A. No. Not that I can think of.

14 Q. I didn't get the first name Miller.

15 A. Gerrity and Miller.

16 Q. Gerrity?

17 A. Gerrity.

18 Q. At the last deposition, you indicated

19 some differences with the opinion of Mr. Ball as

20 to the -- was it the type of wastes that were

21 found at the site?

22 A. I don't remember anything about that.

23 Q. Okay.

24 What was your differentiation -- excuse

1 me.

2 What were your differences with Mr.

3 Ball regarding his report?

4 MR. TENENBAUM: Same objection as the last

5 time.

6 A. You mean with his final report?

7 BY MR. KEATING:

8 Q. All right.

9 There was an interim report first,

10 wasn't there?

11 A. There were a number of drafts. Yes.

12 Q. There were a number of drafts. All

13 right.

14 Do you know how many drafts there were?

15 A. I think there were about four drafts

16 for Midco I remedial investigation. Two or

17 three for Midco II remedial investigation. And

18 three or four for the feasibility study.

19 Q. Feasibility study, for both sites?

20 A. That is my guess, yes, about that.

21 Q. I am sorry.

22 How many were for feasibility, two or

23 three?

24 A. I think there were three or four.

1 Q. About three or four, all right.
2 If we could go to the first one, the
3 Midco I site. What was your difference of
4 opinion with Mr. Ball as regarding the first
5 three drafts and finally the final drafts?
6 MR. TENENBAUM: Same continuing objection.
7 A. Well, we accepted the final draft of
8 the report. But, in previous drafts, first of
9 all, the first draft was prepared by Geosciences
10 Research Associates.
11 Q. All right.
12 A. Then the Midco trustees procured ERM,
13 Environmental Resources Management, to take over
14 the completion of the remedial investigation.
15 And they used -- they deleted or
16 eliminated some important data from use in the
17 risk assessment that Geosciences was using.
18 They changed a number of the assumptions that
19 Geosciences was using in their risk assessment.
20 And they eliminated a lot of the graphs and
21 tables that Geosciences was using that made the
22 information easier to understand.
23 And so we objected to that. We had
24 wanted that to be corrected.

1 Q. You wanted that --

2 A. As a result, basically the second draft

3 presented by -- prepared by ERM had to be

4 reviewed in as much detail or even more than the

5 first draft, even though we had a lot of

6 comments on the first draft also.

7 Then they prepared ground water models.

8 And just in general for the ground water models,

9 as well as their risk assessments, it was very

10 difficult.

11 In the first draft they gave almost no

12 documentation on the assumptions they used in

13 their model or in their risk assessment.

14 So in the first set we had to ask them

15 what are your assumptions, how did you get this

16 information.

17 Then once they gave it to us, then

18 there were a number of other assumptions that we

19 felt were either unrealistic or not sufficiently

20 conservative.

21 Then we had to provide comments saying

22 revise your assumptions. So we had to go

23 through that process to get an acceptable

24 report.

1 Then when it came to the feasibility
2 study --
3 Q. They did four of these, right?
4 A. Who did four?
5 Q. ERM.
6 A. Four of the feasibility studies.
7 Q. Are we talking about the final
8 feasibility study?
9 A. I don't understand your question.
10 Q. Okay.
11 You indicated there were four feasible
12 studies that were done?
13 A. No. I said there were three or four
14 drafts.
15 Q. Drafts, I am sorry, you are right.
16 Were you talking about the final
17 feasibility study?
18 A. I beg your pardon?
19 Q. Are you talking about the final
20 feasibility study now?
21 A. No. I am talking about the draft
22 feasible study. The draft feasibility -- the
23 feasibility study in general was prepared by
24 Dames & Moore, with oversight by ERM. Except,

1 ERM did some of the risk assessment and ground
2 water modeling work. And they did the cleanup
3 action levels.
4 We had to go through the same process
5 on the ground water modeling and cleanup action
6 levels. We didn't understand, they didn't put
7 in their assumptions.
8 When we got their assumptions, we felt
9 they were unacceptable. Then they had to revise
10 it.
11 As far as Dames & Moore, they said
12 solidification basically could treat everything.
13 We went back to our consultants or to our R&D
14 people who said well, in general, solidification
15 doesn't treat organics, especially volatile
16 organics.
17 So we had to go back and see what they
18 were going to do about the volatile organics.
19 ERM came up with the idea of in-situ vapor
20 extraction followed by solidification.
21 Q. That is in the final report?
22 A. The final came up with that.
23 Then we wanted to add, the previous
24 drafts didn't include treating -- the

1 alternative of treating the ground water to
2 drinking water standard prior to deep-well
3 injection. And it didn't include the
4 incineration alternative, which we felt wasn't
5 properly -- we thought we needed a detailed
6 evaluation of that alternative, in order to make
7 our decision.
8 Q. Is that it?
9 A. I think as to all I can think of right
10 now.
11 Q. You say the difference from the
12 Geosciences' report from the first ERM draft was
13 that important data was deleted.
14 Do you remember what that was, sir?
15 MR. TENENBAUM: Same continuing objection.
16 A. The data included data on methylene
17 chloride, I think methyl ethyl ketone and a few
18 other parameters.
19 BY MR. KEATING:
20 Q. Okay.
21 Was that corrected in the second draft?
22 MR. TENENBAUM: Same continuing objection.
23 A. In the second draft I don't think it
24 was fully corrected, no.

1 BY MR. KEATING:
2 Q. Okay.
3 Was it corrected in the final one that
4 you accepted?
5 A. Well, yes.
6 We told them they didn't follow the
7 procedures in their own quality assurance
8 project plan, which said that Geosciences would
9 do the data validation.
10 So they had to go through Geosciences
11 and satisfy them with EPA's oversight as far as
12 how the data should be treated.
13 Q. Anything else you can think of about
14 the data, sir?
15 MR. TENENBAUM: Same continuing objection.
16 A. Offhand, I can't think of anything
17 else.
18 BY MR. KEATING:
19 Q. All right.
20 You said there were certain important
21 assumptions that was left out from the
22 Geosciences' report and the first ERM draft.
23 Do you know what they were, sir?
24 MR. TENENBAUM: Same continuing objection.

1 A. They included the assumption that there
2 would be exposure to the soil on-site and
3 ingestion of the ground water on-site.
4 Q. Okay.
5 Geosciences indicated that there would
6 be consumption of the ground and water on-site?
7 A. Right.
8 Q. And ERM did not do that in its first
9 draft?
10 A. Right.
11 Q. And that was part of their final
12 accepted draft, was it not, sir?
13 MR. TENENBAUM: Same continuing objection.
14 A. That's correct.
15 BY MR. KEATING:
16 Q. You said there were important graphs
17 and/or tables that were eliminated from the
18 first report, and to shortcut it just for a
19 second.
20 Were those graphs ever added again?
21 MR. TENENBAUM: Same objection.
22 A. Not all of them. Some of them were.
23 BY MR. KEATING:
24 Q. Okay.

1 The drafts that weren't added, the
2 report was still accepted without them?
3 A. Yes. We thought it was acceptable
4 without them.
5 Q. All right.
6 Basically I was asking you about Midco
7 I. Is there any difference in the changes from
8 the Geosciences report to the ERM report at the
9 Midco II site?
10 MR. TENENBAUM: Same objection.
11 A. There was a little difference, in that
12 instead of doing both of them, they just
13 submitted Midco I in the second draft. Then
14 they used the ones that were generated on Midco
15 I also to correct Midco II.
16 BY MR. KEATING:
17 Q. You objected to that?
18 A. Objected to what?
19 Q. To the fact that they were using the
20 same criteria for Midco I and Midco II?
21 A. No. I mean their second draft was
22 basically only for Midco I.
23 Q. I see. All right.
24 A. We gave them comments on Midco I, then

1 they used those to work on Midco II.
2 I think maybe they had two drafts just
3 on Midco I before they gave another draft on
4 Midco II.
5 Q. All right.
6 And there was a final draft from ERM
7 that was accepted?
8 MR. TENENBAUM: Can I have accounting
9 objection to this?
10 MR. KEATING: Yes.
11 MR. TENENBAUM: Thank you.
12 A. That's correct.
13 BY MR. KEATING:
14 Q. Now, the feasibility study, Dames &
15 Moore indicated that solidification would treat
16 all of -- I want to see if I can articulate
17 it -- all of the problems regarding the
18 different wastes in the soil?
19 A. That is what they indicated in their
20 first draft. Yes.
21 Q. And would that also include the ground
22 water also?
23 A. No. Just soil.
24 Q. Okay.

1 ERM, did they disagree with that?
2 A. Well, I presume ERM, this was being
3 submitted, or the report was being prepared by
4 Dames & Moore. But, I understood that ERM had
5 oversight of the report. They were transmitting
6 it. So I presume that they agreed with it at
7 the time.
8 Q. Your contractor indicated that this
9 solidification would not treat volatile
10 organics; is that correct?
11 MR. TENENBAUM: Wait a second.
12 Let me object to the foundation. I
13 don't know that you characterized what he said
14 correctly.
15 MR. KEATING: I am sorry.
16 A. Oh.
17 Well, really, it was mainly our -- the
18 key personnel in our office, research and
19 development, indicated that volatile organics
20 would probably largely be driven off during that
21 process, and not treated.
22 Q. Did they indicate which ones?
23 A. Who?
24 Q. The people in your department. I just

1 got research and development.

2 Is that the research and development

3 department, did they indicate which volatile

4 organics would not be properly treated by

5 solidification?

6 MR. TENENBAUM: Same objection.

7 A. They suggested that all volatile

8 organics would basically be driven off, most

9 likely.

10 BY MR. KEATING:

11 Q. Then is it correct to say they were

12 agreeing with the Dames & Moore position?

13 A. No.

14 Dames & Moore's position is that it

15 would be incorporated into the solidified mass

16 and essentially immobilized.

17 Q. Oh.

18 You mean driven off into the ground

19 water?

20 A. No, driven off into the air.

21 Q. Okay.

22 Q. You said that ERM, that you did not

23 understand their assumptions in the final FS?

24 A. No, I didn't say that.

1 Q. Okay. Go ahead. You are probably
2 right. I got it written down wrong.
3 ERM's assumption in the FS, did that
4 cause any problems for you?
5 MR. TENENBAUM: In the draft or the final?
6 MR. KEATING: We are talking about the draft
7 right now. I am sorry, the draft.
8 A. You said Dames & Moore's assumptions?
9 Q. You said that ERM is supervising Dames
10 & Moore as regarding solidification, if I
11 understand it correctly?
12 A. That was my understanding of the
13 arrangement, yes.
14 Q. Okay.
15 And so ERM had some assumptions in the
16 draft FS that caused you some problems, is that
17 correct?
18 MR. TENENBAUM: Assumptions or lack thereof.
19 MR. KEATING: I have got "not understand
20 their assumptions." That is the note I wrote of
21 what he testified to.
22 MR. TENENBAUM: At some point he said
23 something like they didn't provide their
24 assumptions.

1 MR. KEATING: They didn't provide.

2 MR. TENENBAUM: At some point. I don't

3 know.

4 MR. KEATING: Okay.

5 MR. TENENBAUM: Somebody did.

6 BY MR. KEATING:

7 Q. ERM did not provide assumptions for the

8 draft FS; is that correct?

9 A. What I meant to indicate is that ERM

10 conducted the risk assessments and the ground

11 water modeling for the feasibility study. And

12 in general -- well, not the -- the cleanup

13 action level.

14 And in general it was difficult to

15 determine, based on their first draft what

16 assumptions they were using in this document to

17 reach their conclusions.

18 Q. In the final draft, did they provide

19 the assumptions that you found necessary?

20 A. They provided enough documentation for

21 us to accept the draft, yes, the document.

22 Q. The problem with the draft FS as far as

23 you were concerned regarding the ground water,

24 the treatment of the ground water, was what,

1 sir?

2 MR. TENENBAUM: Same objection.

3 A. Their assumptions were unrealistic,

4 were not adequately conservative.

5 BY MR. KEATING:

6 Q. This is where we get down to the

7 percentages.

8 Can you explain to me why they weren't

9 conservative enough and how conservative -- how

10 much more conservative you wanted them?

11 A. I would have to look at the documents

12 and look at the review comments and response to

13 that. All of that is in the administrative

14 record.

15 MR. TENENBAUM: We have gone really far

16 afield into the remedy selection. I will allow

17 you some leeway.

18 MR. KEATING: I am going down to the final

19 one and asking.

20 Q. The other one you talked about was

21 incineration alternative, you needed that in the

22 final FS to your assumptions on; is that

23 correct?

24 A. We needed the incineration option to

1 make our final decision on the remedial action.
2 Q. Why is that?
3 A. Well, incineration was chosen as the
4 best demonstrated available technology for a
5 number of hazardous wastes, including a lot of
6 the hazardous constituents, a lot of hazardous
7 wastes that contained the same hazardous
8 constituents as detected on the site.
9 Also, there was the impression we got
10 from talking to people in the Midco or the
11 representatives on the Midco Steering Committee
12 that in situ vitrification wasn't going to be
13 seriously considered as an alternative.
14 And, therefore, it was more important
15 to have some type of thermal treatment
16 alternative that would be seriously considered
17 at the site.
18 Q. Okay.
19 So you were going to give them an
20 alternative on the Steering Committee that could
21 be seriously considered?
22 A. Yes.
23 Q. Okay.
24 That was corrected in the final draft

1 also, wasn't it?

2 I am sorry. Did I cut you off?

3 A. No. No.

4 Q. Okay.

5 That is a cardinal rule.

6 A. That's correct. Incineration was used

7 in the final feasibility study, was evaluated.

8 Q. Okay.

9 And the final draft was acceptable?

10 A. Yes.

11 Q. Okay.

12 You indicated that you worked out these

13 problems on the drafts for the investigation and

14 the feasibility studies with ERM, corrected them

15 or straightened them out, or whatever words you

16 used.

17 Who did you talk to at ERM?

18 A. Our contact was Roy Ball.

19 Q. Okay.

20 And each time that you talked to ERM,

21 it was with Roy Ball; is that correct?

22 A. No. Sometimes I talked to Elsie

23 Millano. Dr. Elsie Millano.

24 Q. That was less frequent than Mr. Ball?

1 A. Toward the end, it was actually with
2 Elsie and not with Roy Ball.
3 Q. Then when you are talking about the
4 end, then, would it be that the PS final draft
5 would be basically agreements that you reached
6 with Elsie Millano?
7 A. I don't know what you mean by an
8 agreement.
9 Q. When you asked them to do something and
10 they did it. How is that?
11 A. Right.
12 Q. That's not an agreement to me, but it
13 is something.
14 Was that basically with Elsie Millano?
15 MR. TENENBAUM: Same objection.
16 A. I don't know really.
17 Elsie Millano was involved in the
18 project throughout ERM's involvement and Roy
19 Ball was always the main contact and Elsie was
20 under him.
21 Q. And when we talked about the
22 investigation of Midco I, the changes from the
23 Geosciences to the final accepted document, you
24 talked to Roy Ball about those changes

1 necessary, such as the data changes and the
2 tables and graphs that were deleted?
3 A. Yes. I think throughout the -- it was
4 usually Roy Ball was the main contact.
5 Q. Did he ever tell you why they were
6 willing to change the things that you requested?
7 MR. TENENBAUM: Same objection.
8 A. I think as a general rule he never made
9 any explanation on that, provided any
10 explanation.
11 BY MR. KEATING:
12 Q. All right.
13 Did he ever write to you or you receive
14 any correspondence from ERM explaining why they
15 were making these changes pursuant to your
16 request?
17 MR. TENENBAUM: Same objection.
18 You can answer to the extent you
19 remember.
20 A. As a general rule, I don't remember him
21 providing any written explanations as to why he
22 was making the changes, as far as I can
23 remember.
24 BY MR. KEATING:

1 Q. All right, sir.
2 Then final question then. Sitting here
3 today, you have no objection to the final FS as
4 it was presented; is that correct?
5 A. Well, we accepted it.
6 Q. Okay.
7 That means no objection to it?
8 A. I don't think we think -- I mean, I
9 think it could be improved.
10 Q. But you have accepted it?
11 A. Yes.
12 Q. Okay.
13 Were you part of the group of
14 individuals or did you singly determine what
15 companies or entities would have a 106 order,
16 administrative order, issued against it?
17 MR. TENENBAUM: Can I ask for a
18 clarification.
19 Are you asking whether he participated
20 in the Agency's exercise of its prosecutorial
21 discretion to include, or are you asking whether
22 he was involved in a determination of whether
23 they were liable under the 107 Act?
24 MR. KEATING: No. Neither of those

1 questions.

2 I am asking if he by himself or with

3 anyone else was part of a group that determined

4 that a 106 order should be entered against

5 whatever defendants the 106 order was entered.

6 I am not asking how it is done.

7 MR. TENENBAUM: I will let you answer

8 subject to my objection.

9 To the extent the question is

10 attempting to seek any attorney work product or

11 deliberative-process privilege information --

12 MR. KEATING: I am not asking that, whether

13 his attorneys decided.

14 MR. TENENBAUM: It is a deliberative process

15 privilege as well. I am not sure what it is you

16 are asking.

17 If you understand the question, though,

18 you can answer it as long as you don't give away

19 any of the attorney-client communications or

20 those of Agency deliberative processes.

21 A. Basil Constantelos made the decision to

22 issue the order. I was involved in the process.

23 MR. FINCH: Before the next question is

24 asked, we want to state for the record that we

1 wish to exercise our right to ask follow-up
2 questions or supplemental questions on the
3 subject matter areas that have been addressed
4 thus far today.
5 This is a new subject matter area, I
6 think, so my statement relates to everything up
7 to this point, and I will reiterate it when we
8 get into another area as well, if appropriate.
9 MR. KEATING: This is one of my harder
10 questions.
11 Q. Do you know how the spell Constantelos'
12 name for the court reporter?
13 A. C-o-n-s-t-a-n-t-e-l-o-s.
14 Q. Was this the same group that decided to
15 issue a lawsuit against those defendants, do you
16 know, sir?
17 A. I don't understand your question.
18 Q. Okay.
19 There was a lawsuit issued against
20 certain defendants --
21 MR. TENENBAUM: Objection.
22 This is going into attorney-client work
23 product matters. I am going to object.
24 MR. KEATING: I don't want to ask about the

1 attorneys. I will just ask about whether he was
2 part of the group. I am sorry, I will rephrase
3 the question.
4 Q. Were you part of the group that decided
5 as to whether to issue or file a lawsuit against
6 the same defendants that had the 106 order
7 issued against them?
8 A. You mean the lawsuit filed in 1979?
9 Q. No, in 1989. I believe it was, wasn't
10 it?
11 MR. TENENBAUM: Are you talking about the
12 second amended complaint?
13 MR. KEATING: Second amended complaint.
14 MR. TENENBAUM: I can't imagine that --
15 I can't see where your question is
16 leading other than into attorney-client work
17 product matters.
18 MR. KEATING: I won't ask about the
19 attorney. I am just asking about him.
20 I am not asking about what he said to
21 attorneys or anything like that. I have a right
22 to know whether he was part of the group, so I
23 have an idea of what his capacity is as overall
24 guy, overall responsibility for development.

1 Why don't you read it back.
2 (The record was read.)
3 The question was the one before that.
4 Why don't to read the question back.
5 (The record was read.)
6 MR. TENENBAUM: The question presumes that,
7 imbedded in the question is a presumption of
8 attorney-client communications between this
9 witness with attorneys. As well as --
10 MR. KEATING: I am not asking if he
11 communicated with you at all.
12 MR. TENENBAUM: It is built into your
13 question. You presume that there was a group.
14 MR. KEATING: Anyone could communicate with
15 an attorney. Mr. Constanteles could do it.
16 That is an objectionable question, so I
17 won't ask it. I won't ask about what he
18 communicated to you, that is improper.
19 I am just asking if he was part of a
20 group or did he do it individually. It is just
21 a basic tenant that the defendants should be
22 allowed to know who is suing them.
23 MR. TENENBAUM: The United States is the
24 named plaintiff.

1 MR. KEATING: That's true. Now we have that
2 amorphous mass, but we have to decide who in the
3 United States is the one who decided to sue
4 them.
5 MR. TENENBAUM: That's is a different
6 question.
7 He wants to know who, if you know. He
8 wants to know who in the Agency has authority to
9 or at the Department of Justice has authority to
10 make a decision to file suit. Is that your
11 question?
12 MR. KEATING: I like that one. It is not
13 exactly, I mean, but I will let him answer that
14 one.
15 MR. TENENBAUM: Well, if it calls for a
16 legal conclusion, I will object.
17 MR. KEATING: Wait a minute. No, no.
18 You can't give me a question and then
19 say this is your question then say you are
20 objecting to your own question.
21 MR. TENENBAUM: That was my interpretation
22 of what you were asking. Is that not what you
23 were asking?
24 MR. KEATING: I was willing to go along with

1 yours.

2 MR. TENENBAUM: I thought that is what you

3 were asking.

4 BY MR. KEATING:

5 Q. Were you part of any group or did you

6 do it individually, decide to sue the same group

7 that had the 106 order entered against them,

8 sir?

9 A. What do you mean by a group? I don't

10 understand you.

11 Q. I don't know if you did it

12 individually, that is why I have to put it -- I

13 can make it into two questions, then.

14 Did you individually, sir, decide to

15 file a lawsuit against the same people, the same

16 companies that a 106 order was entered against?

17 A. No.

18 Q. Okay.

19 Did you participate in a group that

20 decided to file a lawsuit against the same

21 companies that a 106 order was entered against?

22 MR. TENENBAUM: Objection, calls for a legal

23 conclusion and seeks to obtain testimony

24 regarding attorney-client communications,

1 attorney work product and deliberative-process
2 privilege.
3 MR. KEATING: Are you going to let him
4 answer that one? I don't want to know what he
5 said. I just want to know if he is in the
6 group.
7 MR. TENENBAUM: In the group that decided to
8 sue?
9 MR. KEATING: Yes.
10 MR. TENENBAUM: That is also ambiguous as to
11 what you mean by decided to sue.
12 But, if you understand it, subject to
13 my objections, and without revealing anything of
14 those privileged matters, you can try and
15 answer.
16 A. I was involved in that process. But, I
17 don't know -- in the whole process, but I don't
18 know what you mean by group.
19 BY MR. KEATING:
20 Q. More than one person.
21 A. I was involved in the process that lead
22 to your being -- being sued.
23 Q. Had you, sir, made any independent
24 determination, I am talking about you at this

1 time, I am talking about the Agency, sir, made
2 any independent determination as to what
3 entities sent PCBs to the Midco I or Midco II
4 sites?
5 A. Independent determination?
6 Q. Do you know who did it?
7 A. All we know is what is in the
8 depositions, the request for admissions, the
9 interrogatory responses, the 104 responses, the
10 104 E responses, the shipping dockets, permits
11 and permits applications, and other information
12 we have.
13 Q. Based on all of that, sir, do you have
14 any information today as to who sent PCBs to the
15 site?
16 MR. TENENBAUM: Object. He just referenced
17 voluminous documents.
18 If he has the information on the top of
19 his head, on the tip of his tongue?
20 MR. KEATING: That's what I am asking.
21 MR. TENENBAUM: All right. We can find out
22 if he knows. But, it is not really fair to
23 expect him to be able to be familiar with all
24 that material.

1 MR. KEATING: You know, if he knows.

2 If it is in the documents, the only one

3 I have to question about is other documents. I

4 am going to ask him if those are included in the

5 record.

6 But, I am just asking what he knows and

7 then the rest of the documents that he listed is

8 where it would tell me. I understand that.

9 MR. TENENBAUM: He wants to know whether you

10 know off the top of your head without looking at

11 documents.

12 A. No.

13 BY MR. KEATING:

14 Q. No.

15 I just want to know off the top of your

16 head if you know what entities sent PCBs to the

17 site?

18 A. No, I don't.

19 Q. Okay.

20 Do you know of any entities that sent

21 arsenic to the site?

22 MR. TENENBAUM: Again, all this is without

23 looking at documents?

24 MR. KEATING: That's right.

1 Q. These would be in the same documents,
2 is that right, sir?
3 A. Yes.
4 Q. Okay.
5 A. I think we have information on arsenic
6 being sent to the site by some parties.
7 Q. By who?
8 A. I would have to review the records to
9 do that.
10 Q. Sitting here you don't know by
11 yourself?
12 You have to answer out loud. No, you
13 have -- you can't shake your head, the court
14 reporter can't take that down,
15 You said no, right?
16 A. What?
17 Q. You said no, didn't you?
18 A. That's correct.
19 Q. Okay.
20 Sitting here today, off the top of your
21 head, do you know any companies that sent
22 cyanide to the site?
23 A. We have some information that some
24 companies or PRP's sent cyanide to the site.

1 Q. Do you know the names of those right
2 now, sir?
3 A. No. I would have to look at the
4 records.
5 Q. You said that, you gave me a long list
6 of documents that you said are in the record
7 that you would rely on to make the
8 determinations as to who sent these types of
9 materials.
10 MR. TENENBAUM: Wait. I don't know if he
11 said they are in the record.
12 He gave you a long list of documents.
13 I could be wrong.
14 MR. KEATING: That's my question. He said
15 other documents.
16 Q. Are all these documents that you talked
17 about, are they in the record, sir?
18 A. Okay. Let's see, the depositions are
19 available. Right.
20 Q. All right.
21 MR. TENENBAUM: You mean the administrative
22 record?
23 The depositions wouldn't be in the
24 administrative record.

1 A. Right.
2 MR. TENENBAUM: Some of them might actually.
3 Q. Some of them probably are, right?
4 A. Yes.
5 MR. TENENBAUM: Some of them were
6 depositions in the --
7 MR. KEATING: Some depositions are in, some
8 are out. Okay.
9 A. Okay.
10 The 104 E responses are --
11 MR. TENENBAUM: Wait.
12 A. -- of the various parties.
13 BY MR. KEATING:
14 Q. They are in the record, aren't they,
15 104 E responses?
16 MR. TENENBAUM: Not of non-defendants.
17 BY MR. KEATING:
18 Q. The non-defendants' 104 E responses are
19 not in the record, all right.
20 A. The Dehart and Intec shipping documents
21 are in the record.
22 The requests for admissions are
23 available. The responses to request for
24 admissions. The response to request for

1 production of documents is available. Permit
2 and permit applications. I am not sure whether
3 those are -- I don't think those are in the
4 record.
5 Q. The applications, I didn't get the
6 first part?
7 A. Permit and permit applications.
8 Responses to interrogatories are available.
9 Q. The non-parties would not be in the
10 record, is that true again?
11 A. What?
12 Q. Are the interrogatory answers in the
13 record?
14 MR. TENENBAUM: Of parties?
15 MR. KEATING: Yes.
16 MR. TENENBAUM: He wants to know if the
17 interrogatory answers in this case are in the
18 record.
19 A. No. Not all of them, I don't think.
20 BY MR. KEATING:
21 Q. Okay.
22 A. Some of them might be. I think that is
23 about it.
24 Q. Okay.

1 That's all the documents, right?
2 A. Yes.
3 Q. And these documents?
4 A. There might be other documents that we
5 haven't --
6 Q. That are not in the record?
7 A. That we haven't organized.
8 I mean, my understanding is that in the
9 liability cases we can continue to develop
10 information.
11 Q. You don't put it in the record?
12 MR. TENENBAUM: Not necessarily.
13 BY MR. KEATING:
14 Q. Okay.
15 I want to be able to find out, I want
16 to go find the PCB guys.
17 Would I be able to go to your office
18 and get all these documents that you have just
19 told me about and look them over?
20 MR. TENENBAUM: In terms of documents that
21 are court pleadings in the case that you already
22 have, it is as easy for you to get them. You
23 must have them.
24 MR. KEATING: The problem I have is the term

1 other documents.

2 When he says other documents, I don't

3 know what other documents they are, and I can't

4 give them a name because I don't have a name for

5 them.

6 Q. I am just trying to find out other

7 documents that might be developed or continually

8 being developed.

9 Where would I get those?

10 A. I don't know. We would have to review

11 and see whether you can look at them, I'm not

12 sure. I am not sure I know everything that we

13 have at this time.

14 Q. Okay.

15 I am just asking, there is a location,

16 your office would be it, where the other

17 documents would be located; is that correct?

18 MR. TENENBAUM: There are attorney work

19 product documents as well.

20 MR. REATING: All right.

21 No. I don't want attorney work product

22 because I can't look at those anyways. Just

23 documents that I can look at.

24 MR. TENENBAUM: Documents that are in the

1 record you can look at at EPA.

2 104 E --

3 MR. KEATING: And those that aren't in the

4 record?

5 MR. TENENBAUM: 104 E responses, if they are

6 not in the record for non-defendants, those are

7 at EPA.

8 A. Yes.

9 BY MR. KEATING:

10 Q. It is the elusive other documents that

11 I am interested in.

12 Would they be at the EPA also?

13 MR. TENENBAUM: Unless they are attorney

14 work product they would be.

15 MR. KEATING: Fine. Then they would all be

16 there.

17 Q. More third party stuff.

18 Do you remember talking to a Judy

19 Becker of the Indiana-Minnesota State

20 Coordination, the Office of Regional

21 Administrator?

22 A. You mean Judy Beck. B-e-c-k?

23 Q. B-e-c-k-e-r.

24 A. Just Judy Beck. B-e-c-k.

1 Q. Oh, I am sorry.
2 MR. TENENBAUM: What did you say that was of
3 what?
4 A. She is the Illinois-Indiana State
5 Coordinator, She works in the Regional
6 Administrator's Office.
7 BY MR. KEATING:
8 Q. Okay.
9 Do you remember talking to her about
10 the Midco I salinity problem?
11 MR. TENENBAUM: Objection.
12 You may answer in terms of any
13 discussions pertaining to liability, pertaining
14 to salinity issues, but if it pertains to remedy
15 selection, then I would instruct you not to
16 answer.
17 A. Yes. I talked to her.
18 BY MR. KEATING:
19 Q. And what did you talk to her about the
20 salinity problems at Midco I?
21 A. Basically I called her just a few weeks
22 ago to help answer some of the interrogatories.
23 And asked her whether she had had conversations
24 with the State of Indiana, about whether Valdus

1 Adamkus had had discussions with the State of
2 Indiana.
3 Q. And did Mr. Adamkus and Ms. Beck say
4 that they had talked to the State of Indiana
5 regarding --
6 MR. TENENBAUM: Wait.
7 BY MR. KEATING:
8 Q. -- the salinity --
9 MR. TENENBAUM: Liability?
10 BY MR. KEATING:
11 Q. -- liability?
12 A. I only talked to Judy Beck and she said
13 that there had been some type of discussions on
14 it.
15 Q. And did she tell you what the
16 discussion entailed, sir?
17 A. No, she didn't.
18 Q. You were asked, we are still at Midco
19 I, you were asked -- strike that.
20 Mr. Bob Black of the Indiana Department
21 of Highways asked you certain questions about
22 what wastes you knew about that had been sent to
23 the Midco I site regarding the salinity issue;
24 is that correct?

1 A. I don't think that was Don Black. One
2 of his representatives.
3 Q. You wrote back to Don Black, didn't
4 you?
5 A. You are probably right. I would have
6 to check to make sure.
7 Q. Okay. I have a letter here.
8 They asked about whether you had any
9 information about pickle liquor being sent to
10 the site, the Midco I site again, sir; is that
11 right, sir?
12 A. I think that's correct, yes.
13 Q. Okay.
14 Why don't we make this Exhibit No. 3 of
15 today's date.
16 (The document above-referred to
17 was marked Deposition
18 Exhibit No. 3 for identification.)
19 MR. KARAGANIS: Jim, would you identify the
20 letter for the record?
21 MR. KEATING: Exhibit No. 3 of today's date
22 is a letter from Mr. Boice to Mr. Don Black.
23 Q. Have you had a chance to read that,
24 sir?

A. Yes.

Q. Okay.

And you indicated that there were no records found indicating the disposal of pickle liquor on the site, right, sir?

A. Yes, that was based on reviewing the shipping documents.

Q. And that was --

A. And the 104 E response, response to EPA's 104 E request.

Q. And that inquiry was to determine whether there were any kinds of wastes that were sent that would contain chloride?

A. That's correct.

Q. Salt?

A. Yes.

Q. It was later made a determination by the USEPA that the chlorides if the water at the Midco I site had come from the IDOH site: Is that correct, sir?

A. I don't think that's correct.

I think we determined that the IDOH site likely contributed significantly to that salt contamination.

1 Q. Okay. I will rephrase my question,
2 then.
3 There was a determination made later
4 that the salt from the IDOH site contributed
5 significantly -- significantly contributed to
6 the chloride in the water at the Midco I site;
7 is that right?
8 A. Correct.
9 Q. Okay.
10 And there is a way of doing that by
11 fingerprinting or determining the salt, where it
12 came from, isn't there?
13 A. It is primarily based on looking at the
14 ground water data. The data on chlorides in the
15 ground water. It appears that the highest
16 concentration is near IDOH.
17 Q. The study, there was a study asked for,
18 wasn't there, by the USEPA, to have the State of
19 Indiana do a study as to the chloride problem?
20 A. Yes.
21 USEPA conducted some sampling of IDOH
22 and some surrounding wells.
23 Q. This data is in combination with the
24 Midco I site problem of chloride and the Ninth

1 Avenue site chloride problems; is that right?
2 A. Yes.
3 Q. Did you find similar problems in the
4 water at the Ninth Avenue as well as the Midco I
5 site?
6 A. At the Ninth Avenue dump the chloride
7 levels, the chloride levels at Ninth Avenue dump
8 were considerably lower than at Midco in
9 general.
10 Q. Was it determined that the chloride
11 levels at the Ninth Avenue site were
12 significantly contributed to by the salt on the
13 IDOH site?
14 A. I am not sure about Ninth Avenue. I
15 know they think some of it is from IDOH. I'm
16 not sure whether you could call it significant
17 or not.
18 Q. Does the salt in the water at the Midco
19 I site have any distinguishing characteristics
20 that you remember, sir?
21 A. All we did, we analyzed for sodium and
22 chloride, and they were both high. We really
23 didn't go into any distinguishing
24 characteristics.

1 Q. Any potassium?
2 A. There was some potassium. But, there
3 was more potassium at Midco II than at Midco I.
4 Q. The chlorides that were found at the
5 Midco I site, I have here 29,000 milligrams per
6 liter.
7 Is that about right, sir?
8 A. That sounds reasonable, at least in
9 part of the site.
10 Q. Okay.
11 The sodium, 27,600 milligrams per
12 liter. Does that sound about right, sir?
13 A. That is probably right, at least on
14 part of the site.
15 Q. And it was found that this
16 concentration would significantly increase the
17 cost of disposing of the water off-site, is that
18 correct, sir?
19 MR. TENENBAUM: Wait. Hold it a second.
20 Can you read that back, please?
21 (The record was read.)
22 Okay.
23 A. I wouldn't say that particular
24 concentration, but the overall concentration,

1 which would be the average amount pulled in by
2 the --
3 (Discussion had off the record.)
4 Overall, the high concentrations of
5 salt or loading of salt would make it more
6 expensive to dispose of the ground water, yes,
7 at Midco I.
8 Q. I will show you, sir, Exhibit No. 4,
9 which appears to be a May 4, 1987 certified mail
10 letter to Donald Lucas, Deputy Director of
11 Highways, Department Operations, Indiana
12 Department of Highways, and it asks for
13 responses to be sent to you.
14 I will show you the letter, sir.
15 Can we have that as a group exhibit,
16 please.
17 (The document above-referred to
18 was marked Deposition Group
19 Exhibit No. 4 for identification.)
20 A. Yes.
21 Q. For the record, we have got 15 pages.
22 And they start, what is the term that you use
23 when you mark the numbers?
24 MR. TENENBAUM: Bates.

1 MR. KEATING: Starting with Bates stamp
2 2000517 to 2000531. The letter is basically a
3 104 E request.
4 Q. Would you describe it like that, sir?
5 A. That's correct.
6 Q. Okay.
7 And it was sent to the Indiana
8 Department of Highways?
9 A. That's correct.
10 Q. Okay.
11 Do you know if you have ever received a
12 response to this 104 E request?
13 A. Yes, we have.
14 Q. And is that part of the record?
15 A. No, it is not. Not the administrative
16 record for the unilateral order or the record of
17 decision.
18 Q. Okay.
19 And that is something that is in your
20 office, if we ask to look at we could see, too?
21 A. That's correct. It has been produced
22 for some of the respondents already.
23 Q. Which ones?
24 A. I don't know. I would have to look.

1 Q. Do you remember the response from the
2 Indiana Department of Highways?
3 A. Generally I think I remember. Yes.
4 Q. What did it say?
5 A. They had sent this information on their
6 salt, bidding document for their salt, that is
7 all I can remember.
8 And later --
9 Q. I am sorry. Later, something happen
10 later?
11 A. Later ERM sent the information on
12 cyanides being present in salts.
13 So we sent them a follow-up letter
14 asking for information on additives they put in
15 their salt.
16 Q. Is it your understanding sitting here
17 today, sir, that one of the additives that they
18 had in their salt at the IDOH site contained
19 cyanide?
20 A. That's correct. I guess that is fairly
21 common additive.
22 Q. The letter refers to a belief that
23 there was a run-off from the salt piles at the
24 IDOH facility on to the Midco I site and then

1 seeped into the ground.

2 Do you remember that, sir?

3 A. That's correct.

4 Q. Sitting here today, is that your belief

5 as to where the salt -- a significant portion of

6 the salt in the ground water at the Midco I site

7 came from?

8 A. That's my believe, yes.

9 Q. Then the cyanide would just flow along

10 with it, wouldn't it?

11 A. Yes.

12 Q. Okay.

13 Did you look at all the pages on this,

14 sir?

15 I am not going to ask you specific

16 questions. I couldn't read some of the pages

17 and I was wondering if the copy that you might

18 have at your offices was more legible?

19 A. Yes, we have got a legible copy of

20 that. Yes.

21 Q. Thank you.

22 The letter said that you decided not to

23 negotiate an agreement to have the IDOH conduct

24 a study at that time, May 4, 1987.

1 Are you indicating that later you did
2 have them do a study or that you did a study in
3 their stead?
4 A. We just did our own study. Later they
5 have done studies on their own.
6 Q. That is the Heritage study, is that
7 right?
8 A. There was an engineering company called
9 Heritage Remediation Service that conducted some
10 study for them.
11 Q. Did you ever read that?
12 A. Yes, I read it over.
13 Q. Do you have any disagreements with that
14 study, sir?
15 MR. TENENBAUM: I am going to object unless
16 he has a chance to review it.
17 MR. KEATING: Okay.
18 Do you want to do that at a break?
19 Maybe he could look it over. I will go to the
20 bathroom and he has to read it. Do you want to
21 take a break?
22 MR. TENENBAUM: Yes.
23 (Whereupon a short recess was had.)
24

1 (The document above-referred to
2 was marked Deposition
3 Exhibit No. 5 for identification.)
4 (The record was read.)
5 BY MR. KEATING:
6 Q. We are talk about Exhibit No. 5 for
7 identification, the Heritage report.
8 A. Yes.
9 I have read it over, and mainly issues
10 related to the salt discharge or release.
11 And I haven't had a chance, of course,
12 to evaluate the analytical results in the
13 document. And this hasn't gone through our
14 quality assurance review. So we are really not
15 addressing those issues.
16 But, on page 2, second paragraph, the
17 last sentence I found a statement I disagreed
18 with, where it says:
19 "Both the recent
20 study and the prior site
21 investigations, (RIs) failed
22 to clearly define the
23 contaminant transport
24 mechanism that has caused

1 dissolved salt contaminants
2 (e.g., chlorides) to migrate
3 from the IDOH Subdistrict
4 site, against the prevailing
5 northerly ground water flow
6 direction and hydraulic
7 gradient, and be deposited
8 in the ground water
9 underlying Midco I site."
10 I think that the RI clearly indicated
11 what that mechanism was, which is we thought
12 that there was a salt pile stored next to the
13 Midco site, and that rainwater probably ran off
14 the pile on to the Midco site in the northern
15 part of the Midco site, which at that time was a
16 swale, which has since been filled in.
17 So it would have contaminated that
18 swale, and the swale would have recharged the
19 ground water. That is what we think.
20 Q. And that is based on your estimate of a
21 probability of what happened?
22 A. Yes. That is not the only one.
23 Do you want to know all of them?
24 Q. I am sorry. Yes.

1 A. Some various statements related to that
2 same issue I disagree with also.
3 Q. Is there any specific page that that is
4 on, sir?
5 A. Based on that I would question
6 statements like on page 3, first paragraph. The
7 second to the last sentence saying:
8 "Assuming that bulk
9 contaminant transport is in
10 the direction of the
11 prevailing northerly
12 component of the ground
13 water flow, the elevated
14 dissolved chloride levels
15 detected in samples from
16 wells located in the
17 northcentral portion...and
18 along the eastern boundary
19 of the Midco I site do not
20 appear to be attributable or
21 related to IDOH's storage or
22 handling operations."
23 Q. You disagree with that?
24 A. I don't know that we disagree, but we

1 think there is a contaminant transport mechanism
2 on to the Midco sites which probably could have
3 affected even those portions of the site.
4 The same statement made on page 25, the
5 first paragraph, the second to the last
6 sentence, regarding the contaminant transport
7 mechanism.
8 On page 32, under section 4.6, the
9 first paragraph, the second to the last -- well,
10 the last sentence.
11 I don't have the personal knowledge
12 that this is incorrect, but it appears to be
13 incorrect. That is, it says:
14 "Contaminant levels
15 and mass loadings in the
16 pretreated ground water
17 should not exceed those
18 present in many industrial
19 discharges;..."
20 I think that is incorrect. Although I
21 haven't looked at the actual data.
22 And the second part of that sentence
23 after the semicolon, I don't think is correct
24 either, although I really don't understand what

it says.

Q. All right.

Anything else, sir?

A. No.

Q. Does the salt at the Midco I site have any distinguishing characteristics regarding calcium content that you know of, sir?

A. Not that I know of.

Q. Okay.

How about potassium content that you know of, sir?

A. You mean what is in the ground water?

Q. What is in the ground water. Yes, sir.

A. I think the RI report theorized that the potassium was relatively higher at Midco II, which said it was from that aluminum wastes that were deposited at Midco site.

Q. Is that the slag at Midco II?

A. Yes, what has been called the slag.

Q. And that was from a dumping or --

A. Filling of the area with the aluminum, secondary aluminum waste.

Q. Secondary aluminun wastes?

A. Which as opposed to Midco I, potassium

1 was lower. So there was some distinguishing
2 characteristics.
3 Q. That slag at the Midco II site, did you
4 make any determination as to whether that
5 postdated -- or strike that -- predated the
6 operation of Midco at that location?
7 A. I think we think it predated the Midco
8 operations, yes.
9 Q. Did you ever have any indication where
10 that slag may have come from --
11 A. Yes.
12 Q. -- US Reduction?
13 A. Yes. Based on --
14 Q. Right. Okay. Go ahead, sir. Sorry.
15 How did you make a determination it
16 came from US Reduction.
17 A. There is two ways I know of. One is
18 there is information in the recent deposition of
19 Robinson, I believe it was Marin Robinson, that
20 indicated that US Reduction, someone was
21 disposing of US Reduction's wastes around Midco
22 II at that time.
23 And also just the fact that US
24 Reduction is the only secondary aluminum

1 smelting facility in the area.
2 Q. And did the indication of a higher
3 potassium level in the salt or in the water,
4 excuse me, at the Midco II site indicate to you
5 that it came from the slag from the secondary
6 aluminum operation?
7 A. To tell you the truth, I'm not familiar
8 with that relationship. That was a theory
9 promoted by I think it was Geosciences.
10 Q. What was it that indicated to you that
11 the slag from the secondary aluminum operations
12 could have caused a chloride problem at the
13 Midco II site?
14 A. Would you repeat the question?
15 Q. Yes.
16 What makes you think that the slag at
17 the Midco II site caused the chloride problem
18 with the water?
19 A. Okay.
20 Well, to go chronologically as far as
21 my awareness. It was theorized by I think it
22 was Geosciences that the waste was from a
23 secondary aluminun smelting operation.
24 And we got information from our records

1 that showed that that was -- that waste was high
2 in salt.
3 We also sent an information request to
4 US Reduction. They sent us information that I
5 believe indicated it had elevated salt
6 concentrations. And then most recently the
7 Robinson deposition.
8 Also I think, yes, there was a plot in
9 the remedial investigation that showed the
10 distribution of the aluminum on the site, the
11 high aluminum waste, and it appeared to agree
12 with the distribution of chlorides in the
13 aquifer below the site.
14 Q. Is it your opinion that the high
15 chloride content in the water would create a
16 higher difficulty with its disposal off-site?
17 A. Yes, the situation is the same as at
18 Midco II.
19 Q. At Midco I do you know of any tests
20 that indicated that an anticaking agent called
21 potasium blue was found in the water?
22 A. No. We didn't test for that. I
23 understand that that is one of the things
24 Gerrity and Miller wants to test for.

1 Q. And do you know what that would --
2 where that would come from?
3 A. Where the -- what was it?
4 Q. Potasium blue, I guess it is. Excuse
5 me. Is it Prussian blue. Anyone can join in
6 right now.
7 Anticaking agent, it is from the salt
8 at the IDOH. A tricky item.
9 Do you have any indication that it
10 comes from the salt from the IDOH?
11 A. Yes.
12 I think their information request,
13 response stated that they used it in their salt.
14 And also we ran -- I think Geosciences ran total
15 cyanide tests and they detected total cyanide in
16 the waste, which presumably would have come from
17 there.
18 Q. From the --
19 A. Prussian blue.
20 Q. Prussian blue.
21 And was the cyanide that was found
22 consistent -- strike that.
23 Was the cyanide that was found in the
24 water consistent with the type of cyanide that

1 would come from the Prussian blue?
2 A. We didn't test for that, anything that
3 would differentiate that.
4 Well, that's right, we did total, one
5 round of total cyanide and cyanide amenable to
6 chlorination, but I didn't note any
7 relationship.
8 None of the reports pointed out any
9 relationship based on those results.
10 Q. Sitting here today, sir, do you have an
11 opinion as to whether any of the cyanide that
12 was found in the water in the Midco I site was
13 related to the salt from the IDOH facility?
14 A. I think some of it came from IDOH.
15 Yes.
16 Q. Okay.
17 Do you want to tell me what your
18 opinion is based upon?
19 A. Well, first of all, that their 104 E,
20 the 104 E response from IDOH stated that salt
21 contains the cyanide containing anticaking
22 agent.
23 And that besides contamination of salt,
24 high salt contamination due to storage on the

1 site, naturally the cyanide would have also run
2 off. I presume it would have run off with the
3 salt.
4 And, third, there was one monitoring
5 well on the westside that had some cyanide in
6 it. And that would be a fairly unlikely to be
7 affected by Midco I.
8 Q. All right.
9 Do you know if there is any
10 negotiations now with the State of Indiana, IDEM
11 or IDOH regarding the discharge of any water off
12 of the Midco I or IDOH facility?
13 A. What do you mean by negotiation?
14 Q. Are you negotiating with them to have
15 this water discharged?
16 MR. TENENBAUM: I am not sure. Are you
17 asking is there currently a negotiation?
18 MR. KEATING: Yes.
19 MR. TENENBAUM: What subject of negotiations
20 are you asking about?
21 MR. KEATING: Getting the water out of the
22 Midco I and IDOH facility to a point where it
23 can be discharged or it can be deep welled. It
24 can be anything.

1 MR. TENENBAUM: All right.

2 A. We are not negotiating with the State

3 of Indiana.

4

5 BY MR. KEATING:

6 Q. Okay.

7 Now, there are new regulations, state

8 regulations, I understand, for the discharge of

9 waters that are contaminated -- or, strike that.

10 There are new regulations regarding the

11 discharge of waters from contaminated sites or

12 from industrial plants, I understand, in the

13 State of Indiana.

14 Do you know anything about them, sir?

15 MR. TENENBAUM: How would that be relevant

16 to an issue in this case?

17 MR. KEATING: If he knows, watch. We are

18 going to ask him about if this type of

19 wastewater can be discharged.

20 MR. TENENBAUM: If what?

21 MR. KEATING: If this type of waste can be

22 discharged.

23 MR. TENENBAUM: I will object. I don't see

24 how it is relevant to --

1 MR. KEATING: I am just asking if he knows
2 about it.
3 MR. TENENBAUM: Let me state my objection.
4 MR. KEATING: All right.
5 MR. TENENBAUM: You are asking after EPA
6 made its selection of remedy and issued its
7 administrative orders, you are asking for facts
8 that occurred after that? Is that what you are
9 asking?
10 MR. KEATING: No.
11 I am asking if he knows about any new
12 standards from the State of Indiana as to the
13 treatment of ground water. A better way of
14 saying it is ground water after it has been
15 treated.
16 MR. TENENBAUM: Well, I will let him answer
17 subject to my objection.
18 But, as I said, it sounds like you are
19 asking for information that is not calculated to
20 lead to the discovery of admissible evidence.
21 Subject to my objection, if you know,
22 you can answer.
23 Also I am not sure, maybe you are
24 asking for a legal conclusion, too. I will

1 object on that ground, too.
2 You are asking him for what the
3 applicable legal standards are.
4 MR. KEATING: I am asking if he knows about
5 the standard that has been changed.
6 MR. TENENBAUM: That calls for a legal
7 conclusion, what the applicable legal standards
8 are.
9 MR. KEATING: No. I am asking if he knows
10 about any changes.
11 MR. TENENBAUM: How would he know if there
12 was a change in the legal standard, without
13 making a legal conclusion as to whether there
14 was such a change.
15 MR. OLIAN: He could read the Indiana
16 Register. He probably looks all the stuff that
17 Indiana sends the EPA.
18 MR. TENENBAUM: Subject to my objection, if
19 you know the answer, you can answer.
20 A. I am aware that the State of Indiana
21 amended their water quality standards.
22 BY MR. KEATING:
23 Q. That is a better way of phrasing it.
24 All right.

1 A. I don't know whether that is going to
2 affect any discharge.
3 Q. Okay.
4 But let me just ask a question, then
5 you can give me that answer.
6 Do you know if those changes in the
7 water quality standard by the State of Indiana
8 would affect any discharge of ground water after
9 it has been treated from the Midco I site?
10 MR. TENENBAUM: Same objection.
11 A. I don't know.
12 BY MR. KEATING:
13 Q. Okay.
14 Would there be anyone at the USEPA who
15 would have that type of information?
16 MR. TENENBAUM: Same objection.
17 A. I'm not sure.
18 BY MR. KEATING:
19 Q. Do you know of any objection by the
20 USEPA to the discharge of ground water after it
21 has been treated into one of the POTW's or the
22 Calumet what is it River?
23 MR. TENENBAUM: Objection, that one I will
24 have to instruct the witness not to answer.

1 You are asking a question about remedy
2 selection.
3 MR. FORT: Excuse me. Could I have that
4 question read back, the one that the instruction
5 not to answer was based on.
6 (The record was read.)
7 MR. TENENBAUM: Wasn't that one of the
8 issues in the remedy selection?
9 MR. KEATING: I don't know, because I don't
10 know if there has been a change because of the
11 changing of the water quality standards from the
12 state.
13 I am just trying to make a
14 determination because there has been a change in
15 the water quality standards of the state, and if
16 the state would accept the discharge of the
17 ground water after it has been treated in a POTW
18 or the Calumet River, whether there is an
19 objection to that from the USEPA.
20 There has been a change. I understand
21 they have a remedy selection, but something has
22 happened in the interim and I just wondered if
23 that has changed the position of the USEPA.
24 MR. TENENBAUM: Changed the position of the

1 USEPA on the selection of remedy, is that the
2 question?
3 MR. KEATING: No. As to whether it is an
4 objection.
5 You are not going to change as a
6 remedy, I understand that. But, there may be an
7 objection before that there is not an objection
8 for now.
9 That may be a basis, could be a basis
10 for changing the remedy, but I am not asking
11 about changing the remedy, because I understand
12 your position is I cannot ask about changing the
13 remedy. So I am asking about is there just any
14 objection.
15 MR. TENENBAUM: I am going to object on the
16 ground that it calls for speculation.
17 You have a premise -- and it is
18 hypothetical, speculation and hypothetical. You
19 have a premise in there which has a lot of facts
20 in it that there is no foundation for and
21 speculation as to certain facts. Also in part
22 calls for a legal conclusion.
23 MR. KEATING: I am not asking for any legal
24 conclusion. I don't know how he could give me

1 one on that.

2 He is not the one that's making -- he

3 said he doesn't have -- he doesn't know of this

4 change.

5 I am asking if he knows of an

6 objection, that is all.

7 If somebody is saying, well, we are

8 going to object based on these new water quality

9 standards anyways. I understand you have your

10 remedy all picked out.

11 MR. TENENBAUM: I think you are asking,

12 aren't you asking a legal question as to when

13 the remedy is selected, if there is some change,

14 what is the effect of that? Isn't that what

15 your question is?

16 MR. KEATING: I am not asking about the

17 change. I am asking if he knows if there is

18 still an objection. I am not asking for a

19 change.

20 MR. TENENBAUM: What is the difference? I

21 don't understand it.

22 MR. KEATING: The difference is you have

23 already selected your remedy. I am not asking

24 him to change the remedy. I am not asking you

1 to change the remedy.
2 All I am asking for is if there is an
3 objection based upon these changes.
4 Now, you know, if there is no
5 objection, then at some future date there might
6 be a request for a change. If there is an
7 objection, there still might be a request for a
8 change. But, I would like to know if there is
9 an objection.
10 MR. TENENBAUM: I am going to have to object
11 again on numerous grounds.
12 It is hypothetical, speculative,
13 assumes facts not in evidence. Asks for a legal
14 conclusion, and I think it may be -- I am not
15 sure, but I think it sounds like it is asking
16 for the witness to right here exercise the
17 Agency's deliberative process with respect to
18 some future hypothetical request to change the
19 remedy.
20 I don't think we are going to do that
21 here at a deposition.
22 MR. KEATING: I didn't imagine you would.
23 MR. TENENBAUM: Sounds like that is what you
24 are asking.

1 MR. KEATING: If you have more facts that I
2 should add to the hypothetical, I am willing to
3 do that. If you know of any fact you want me to
4 add to the question.
5 MR. TENENBAUM: It would still be
6 hypothetical if we added more hypothetical
7 facts.
8 MR. KEATING: You are objecting that there
9 are facts not in evidence. I am willing to put
10 any facts into the evidence that you want. I am
11 willing to build up any foundation you think is
12 necessary.
13 MR. TENENBAUM: Those would be all
14 speculative, hypothetical. We don't know what
15 the facts are going to be.
16 MR. KEATING: All right.
17 Then we have exhibit number, are we on
18 6. Exhibit No. 6 of Boice Deposition of today's
19 date.
20 (The document above-referred to
21 was marked Deposition
22 Exhibit No. 6 for identification.)
23 I show you what I have marked Exhibit
24 No. 6 of Boice's deposition which is a water

1 quality criteria for specific standards, final
2 rules from the State of Indiana.
3 MR. TENENBAUM: What is the question?
4 MR. KEATING: Do you want to read it back.
5 I think I just marked an exhibit. I don't think
6 there is a pending question.
7 MR. TENENBAUM: I am sorry,
8 BY MR. KEATING:
9 Q. Would that document assist you in
10 foundation or adding additional facts into the
11 record to answer the question?
12 I was trying to remedy the objection.
13 MR. TENENBAUM: I don't see anything on here
14 about the POTW's or the Calumet River.
15 MR. KARAGANIS: Mr. Tenenbaum, those are
16 stream water quality standards for the State of
17 Indiana. They would obviously affect both
18 POTW's and going to the river, because those are
19 the water quality standards that would govern
20 both the river and the discharge by the POTW's.
21 MR. TENENBAUM: I know they might affect it.
22 But, I don't see any specific references to the
23 ones that would apply there by name.
24 MR. FORT: Mr. Tenenbaum.

A. I think the answer is that it doesn't help.

MR. KARAGANIS: I think the question is have you got any objection to water that meets those chloride standards being turned loose in the State of Indiana's waters. Is that what we are trying to get at?

MR. KEATING: Yes.

A. I think it is an Agency determination, and it is it going to take someone sitting here saying yes or no.

Q. Okay.

My question went to that. Sitting here you don't know of any new objections based upon the new water quality standards, do you?

MR. TENENBAUM: Again, I am going to have to object.

It seems to me that the entire thrust of your questioning is asking for a deliberative-process decision right here in front of everybody as to a position that the Agency would take on a matter pertaining to remedy selection.

MR. KEATING: No.

1 What I am asking, if he sees a document
2 and someone says: 'Well, did you see that new
3 standard that just came out from Indiana. Boy,
4 oh boy, that's garbage. We are not going to
5 ever go along with that." That is the kind of
6 thing.
7 Then you would indicate to me, he would
8 said yes, I have heard some objections based
9 upon that.
10 MR. TENENBAUM: How would that be relevant
11 to any issue here?
12 MR. KEATING: It would lead to relevant
13 material if at a later time, through the grace
14 of God, the remedy selection was changed because
15 there is a new happening here, the State of
16 Indiana has changed their water quality
17 standards.
18 MR. TENENBAUM: Anything issues pertaining
19 to remedy selection are decided on the
20 administrative record. This is not deposition
21 testimony.
22 MR. KEATING: I will bet he is going to say
23 no.
24 MR. KARAGANIS: Is the change by the State

1 of Indiana to their water quality standards in
2 this administrative record?
3 If it is not in the administrative
4 record, you can't say that he can't inquire
5 about it, because it is limited to the
6 administrative record. The document is a
7 document that he can ask about.
8 MR. TENENBAUM: It is not relevant to any
9 issue that is presently pending in the case, is
10 it?
11 MR. KEATING: It could lead to relevant
12 material as to where the water goes.
13 MR. TENENBAUM: Well --
14 MR. KEATING: I am not asking him to change
15 the administrative record.
16 I am not asking him to make a decision.
17 I am not asking him to make any decision
18 process.
19 All I am asking does he know of any new
20 objections based upon this.
21 MR. TENENBAUM: Any new objections?
22 MR. KEATING: Any new objections either
23 based upon this or in the face of this new
24 change to the water quality standards in the

1 State of Indiana.

2 MR. TENENBAUM: Wouldn't that presume that

3 the Agency has studied this?

4 MR. KEATING: He can look at me and say we

5 never saw it before. That is a quick end to

6 this line of questioning, I will tell you that.

7 MR. FORT: Mr. Keating, let me make sure Mr.

8 Tenenbaum is aware of what is in the

9 administrative record, although I am sure he is

10 familiar with it.

11 It is that the United States

12 Environmental Protection Agency after the record

13 of decision took the position that there was a

14 state regulation that was governing the

15 discharge of treated water, either to a POTW or

16 to a surface water, such as the Grand Calumet

17 River, and it was the state regulations that

18 were at issue here.

19 The state regulations were undergoing

20 review, that issue was discussed with USEPA, and

21 now we have a new standard.

22 This new standard is not in the

23 administrative record that you have compiled.

24 I think Mr. Keating is trying to get at

1 the question of whether or not USEPA would look
2 to the state standards for guidance and
3 considering alternate remedy suggestions.
4 MR. TENENBAUM: I don't think that is a
5 proper basis for discovery.
6 A decision was made on the
7 administrative record as it exists, and that
8 decision can be judged on the basis of that
9 record.
10 MR. FORT: Mr. Tenenbaum, it goes directly
11 to the responses that the defendants, many of
12 the defendants made, that we wanted to
13 investigate this issue as part of going forward
14 under the administrative order.
15 So, I don't see how it is not relevant
16 to all of the issues that Mr. Sheldon detailed
17 the last time that we were here, as to all the
18 issues that are related to this general question
19 of discharge point. You call it remedy
20 selection.
21 There are many, many variations on that
22 issue that this is certainly legitimate grist
23 for discovery.
24 MR. KARAGANIS: Let me just add, penalties

1 are being sought from us on the basis of our
2 refusal to obey a 106 order which says you shall
3 not discharge into a POTW or the Calumet River.
4 The basis of that "shall not" is presumably a
5 state regulation.
6 There is now evidence in this
7 deposition that there is a state regulation that
8 has changed the rules. And if we are entitled
9 under state rules to discharge to the river,
10 that affects our sufficient cause with respect
11 to our defense under 106.
12 So we are entitled to raise this and
13 inquire about it, to see whether or not we have
14 sufficient cause.
15 MR. TENENBAUM: This regulation was not in
16 existence at the time that you violated it.
17 MR. KARAGANIS: You are saying we are
18 violating it today. You are saying we are
19 violating EPA's order today.
20 We saying we aren't because, among
21 other things, we should be entitled under state
22 law to discharge into the river. We are
23 entitled to discharge to the river.
24 And we are entitled to inquire about

1 that under our sufficient cause defense, at a
2 minimum.
3 MR. TENENBAUM: Well, as you know, the issue
4 of the effect of the sufficient cause issue has
5 been briefed pertaining to discovery before the
6 court.
7 I don't really see that that issue
8 provides you with any additional rights to
9 discovery in this connection.
10 MR. KARAGANIS: Mr. Tenenbaum, if it is
11 legal under state law for us to discharge to
12 state waters, we cannot be in violation of an
13 EPA order that says discharge in a accordance
14 with state law.
15 And one of our areas of inquiry here
16 since, you are seeking penalties from us, is can
17 we be in compliance with state law by
18 discharging to state waters.
19 If you are seeking to preclude us from
20 that inquiry, you are preventing us from
21 complying with the law.
22 MR. TENENBAUM: Again, I am going to have to
23 object to the question. The water quality
24 standard by itself really doesn't have any

1 meaning without an allocation.

2 (The document above-referred to

3 was marked Deposition

4 Exhibit No. 7 for identification.)

5 BY MR. KEATING:

6 Q. I will show you what I have got marked

7 as Exhibit No. 7 for identification, July 5,

8 Boice deposition. It is a memo from a Mr.

9 Sutfin, Charles Sutfin.

10 Do you know Mr. Sutfin, director water

11 division? S-u-t-f-i-n.

12 You have to answer for him.

13 A. Yes.

14 Q. Okay.

15 And it goes to Mr. Basil Constantelos.

16 And the question asked is can these

17 waters, treated waters -- I am going to show it

18 to you in a second -- be put into the -- put in

19 the POTW's. And it says that even if they are

20 treated, it cannot be put in the POTW's, due to

21 the high chloride and total dissolved solids

22 remaining in the water.

23 Here, I will show you that, sir.

24 MR. TENENBAUM: What is the question?

1 MR. KEATING: I just want him to look at it
2 for a second.
3 Q. That's going to be Group Exhibit No. 7
4 containing 3 pages, I believe.
5 Have you seen the document, sir?
6 A. Yes, I see it.
7 Q. Do you believe based upon your
8 experience and knowledge of the area, that there
9 can be a change in the opinion of Mr. Sutfin
10 based upon the new standard promulgated and
11 accepted in the State of Indiana?
12 MR. TENENBAUM: What was that?
13 BY MR. KEATING:
14 Q. -- for the discharge of treated ground
15 water?
16 MR. TENENBAUM: What was the question?
17 (The record was read.)
18 Object, speculation, hypothetical.
19 This whole line of questioning.
20 MR. KEATING: I will withdraw the question.
21 It calls for speculation.
22 Q. Based upon your experience, sir, would
23 you believe that there can be a change based
24 upon the new criteria of water standards in the

1 State of Indiana?

2 MR. TENENBAUM: Object. Seeks premature

3 deposition testimony and/or judicial review of a

4 matter that has not been decided or presented to

5 the Agency and is not present in the case in the

6 form asked.

7 MR. KEATING: We will certify that question.

8 Q. Would you be able to answer that

9 question if your counsel allowed you to do so,

10 sir?

11 MR. TENENBAUM: Subject to the objection,

12 you can answer whether you would be able to

13 answer on your own.

14 A. No.

15 BY MR. KEATING:

16 Q. You couldn't answer it, then I don't

17 need it certified. Okay.

18 One of the reasons that treated water

19 could not be discharged into POTW's was because

20 of the high chlorine content, is that right,

21 sir?

22 MR. TENENBAUM: Objection. Direct you not

23 to answer, seeks testimony on selection of

24 remedy.

1 MR. KEATING: It says so in the document.
2 MR. TENENBAUM: Well --
3 MR. KEATING: He already answered that from
4 before. This is like a preliminary question.
5 He said that one of the reasons that you have a
6 problem discharging is because of the high salt
7 in the water.
8 MR. TENENBAUM: I think what he answered
9 before was a question about cost, not selection
10 of remedy.
11 MR. KEATING: Oh.
12 I think the cost was that it could not
13 be discharged into a POTW or the Calumet River
14 and the cost was that it would have to go
15 someplace else.
16 I mean, this just a preliminary
17 question. I presume that he already answered
18 it.
19 Q. My question is whose standard was used
20 as to the amount of chloride that would be
21 discharged, or could be discharged?
22 MR. TENENBAUM: Same objection and
23 instruction.
24 The only thing he can answer in this

1 area I think is questions about how much more it
2 would cost, or something like that.
3 MR. KEATING: I am asking him what standard
4 is used. Not the administrative way that they
5 apply the standard, but what standard is used.
6 Is it the USEPA standard, the State of Indiana
7 standard?
8 MR. TENENBAUM: You have to take as a given
9 the decision for purposes of discovery and you
10 are --
11 MR. KEATING: I am doing that, I am saying
12 when they use this standard, what standard is
13 used?
14 MR. TENENBAUM: You are asking what standard
15 did they use in making their decision?
16 MR. KEATING: No.
17 What standard is used to make a
18 determination that it is not dischargeable into
19 the POTW because of high chlorine content of the
20 water, as listed in Exhibit No. 7, mentioned in
21 Exhibit No. 7.
22 MR. TENENBAUM: I am sorry.
23 I am going to have to instruct him not
24 to answer that one because there is no way, that

is nothing other than asking him what the basis for the Agency's decision was.

MR. KEATING: That's right, I understand that. And your objection is you are not going to allow us to know about how the decisions are made.

I thought you were going to allow us to know what --

MR. TENENBAUM: The decisions are explained in the record.

MR. KEATING: Okay.

Q. Do you know how the decision was explained in the record, sir, as to the dischargeability of the treated water into the POTW?

MR. TENENBAUM: You have to look in the record for that.

MR. KEATING: No. I can get to ask him if he knows.

MR. TENENBAUM: No.

MR. KEATING: I am testing his credibility.

MR. TENENBAUM: Testing his credibility on what issue?

MR. KEATING: Credibility, remembrance.

1 MR. TENENBAUM: The question is does he know
2 what standard was used?
3 MR. KEATING: Right.
4 MR. TENENBAUM: Well, subject to my
5 objections, you can tell him whether you know.
6 But, I am not going to allow you to
7 have him explain the basis for the Agency's
8 decision.
9 MR. KEATING: I don't want him to do that.
10 BY THE WITNESS:
11 A. Generally, yes.
12 Q. Was part of the standard the State of
13 Indiana water quality standard?
14 MR. TENENBAUM: Objection, instruct you not
15 to answer.
16 BY MR. KEATING:
17 Q. Can you answer that question if your
18 attorney allowed you to do so?
19 MR. TENENBAUM: Same objection, but you can
20 answer if you have the answer.
21 A. What was the question again?
22 BY MR. KEATING:
23 Q. Would you be able to answer that
24 question if your attorney allowed you to do so?

1 A. And what was the previous question?
2 Q. Why don't you read it back, both of
3 them.
4 (The record was read.)
5 MR. TENENBAUM: What would your answer if I
6 allowed you to answer, subject to my objection.
7 A. Probably partially.
8 BY MR. KEATING:
9 Q. Now, you refuse to answer that
10 question based upon your attorney's
11 instructions, sir?
12 A. What?
13 Q. Are you refusing?
14 A. I did answer it.
15 MR. TENENBAUM: The previous question.
16 MR. KEATING: The first one. This is the
17 way you got to do it. Otherwise I asked, like
18 the last one you said I couldn't answer it
19 anyways. Then we don't certify it.
20 A. Yes.
21 Q. Certify that question outside the
22 record.
23 You have talked about run-off before
24 when we talked about salt.

1 Is run-off in your mind when the area
2 floods because of rain and that water and soil
3 will, therefore, run off the site; is that what
4 it means to you?
5 A. Run-off could be just water running off
6 a pile and running off the site over the surface
7 of the ground, or through water, streams.
8 Q. Would there be a difference in water
9 that stands upon the site as opposed to water
10 that runs off the site in your mind regarding
11 its potential hazard?
12 A. Probably, yes.
13 Q. Okay.
14 What would the distinction be, sir, in
15 your mind?
16 A. Water that runs off the site would be a
17 hazard to certain water bodies, and ones that
18 stay on the site would probably recharge into
19 the ground water and be a hazard due to ground
20 water ingestion and also possibly due to
21 recharging the same surface water bodies, but it
22 would be a little less direct.
23 MR. TENENBAUM: I have a continuing
24 objection to any questions going to

1 record-review issues.

2 MR. KEATING: I didn't think that was a

3 record-review question.

4 Q. Did the USEPA do any studies or reports

5 regarding the affect of surface run-off from the

6 Midco I or Midco II sites?

7 MR. TENENBAUM: Is this somehow relevant to

8 the salt liability issue?

9 MR. KEATING: Yes. Salt and any other kind

10 of contaminant.

11 I take it by the first answer that the

12 water didn't contain any soil or anything, I

13 thought he was going to say it was going to

14 contain some portions of the soil. But, I am

15 willing to live with his answer as to run-off.

16 I am asking if they have done any

17 studies or reports to determine the affects of

18 run-off from the Midco I or Midco II sites.

19 MR. TENENBAUM: How is that relevant to an

20 issue other than remedy selection, or

21 substantial endangerment?

22 MR. KEATING: It could go to imminent

23 substantial endangerment, if there is a study

24 saying it is imminent and substantial.

1 MR. TENENBAUM: How does it go to some other
2 issue like salt?
3 MR. KEATING: It goes to issues as to what
4 generators we can determine gave the kinds of
5 wastes at the site that he believes will -- or
6 that anyone in the Agency or any studies or
7 reports believe could have caused an imminent
8 and substantial problem or a future problem
9 because of the waste that they had running off
10 the site.
11 MR. TENENBAUM: Can you read back the
12 question?
13 (The record was read.)
14 To the extent the question is seeking
15 to probe the Agency's decision-making processes
16 and remedy selection, endangerment assessment,
17 limited substantial endangerment finding and so
18 on, I will object and instruct the witness not
19 to answer.
20 To the extent the question seeks the
21 identification of particular substances that may
22 have had a special problem in connection with
23 run-off, then if there is such a thing, I will
24 allow you to answer, if there is any particular

1 substances responsive to his question, if you
2 know.
3 A. I should correct what I said before was
4 a little simplicity regarding that run-off.
5 First of all, there can be soil eroded off with
6 the run-off.
7 BY MR. KEATING:
8 Q. Now I feel better.
9 A. Or other materials, waste materials.
10 But, at Midco I especially it is
11 almost -- it could still affect either media.
12 It could run off to the surface water and
13 recharge the ground water, or it could stay
14 on-site and recharge the ground water, and that
15 groundwater could recharge the surface water.
16 MR. TENENBAUM: Again, in our view the only
17 legitimate question here is as to whether there
18 are particular substances involved that can be
19 singled out as having some sort of a different
20 effect than other substances in connection with
21 the run-off issue.
22 Otherwise, I don't think there are any
23 legitimate grounds of questioning here. I will
24 instruct you not to answer.

1 So if you could confine your answer
2 to --
3 MR. KEATING: If he answers this one, I will
4 give you some objectionable ones in a minute.
5 Okay.
6 MR. TENENBAUM: Again, if you could confine
7 your answer, if there are any particular
8 substances as he suggested there might be -- I
9 don't know if there are -- in which the run-off
10 issue is different from other substances, or
11 whether it is all the same for everything.
12 If it is all the same for everything,
13 then it is entirely objectionable, it sounds
14 like to me.
15 A. As far as I can tell right now, all the
16 hazardous substances would be -- have about the
17 same risk, probably, although there is different
18 exposure.
19 MR. TENENBAUM: If you want to ask about an
20 exposure scenario of some particular substance,
21 you can.
22 MR. KEATING: I asked about the substances
23 before and he indicated he didn't know where
24 they specifically came from.

1 Q. Is there any problem with PCBs going
2 off the site?
3 A. Yes.
4 Q. And where was that located at?
5 A. You mean through the surface water?
6 Q. All right, fine. Yes.
7 Is that what we are talking about?
8 First of all, I asked a broad general
9 question and you answered it to my surprise.
10 Are we talking about PCBs going off the site
11 through surface water?
12 MR. TENENBAUM: I don't understand the
13 question.
14 BY MR. KEATING:
15 Q. How do PCBs get off the site?
16 A. How could PCBs go off the site?
17 Q. Right.
18 A. Generally they are not very mobile. So
19 they would be more likely to go off as a surface
20 run-off.
21 Q. Do we have any knowledge now that any
22 of the PCBs have gone off-site as surface
23 run-off?
24 A. Yes, especially at Midco II in the

1 ditch in back of Midco II.
2 Q. The ditch in back.
3 Is that the Penn Central?
4 A. I don't know who owns the ditch.
5 Q. Do you have any indication as to where
6 the PCBs originated from?
7 A. I think we know it was -- there was a
8 sludge pit there and it was fairly high. It
9 seemed to be fairly high in that sludge pit.
10 And maybe that over flowed into the
11 creek.
12 Q. Any other problems with PCBs?
13 A. It is present on the site in a few
14 places, yes.
15 Q. But not off-site?
16 MR. TENENBAUM: What?
17 MR. KEATING: Not off-site. Other than what
18 he has already told us.
19 A. It might be in a couple places off-site
20 at Midco I also, I'm not sure.
21 Q. All right.
22 You don't know what location that would
23 be?
24 A. No.

I know it was detected at least once on-site, but I am not sure off-site.

Q. Do you know where PCBs came from at Midco I?

A. Offhand I don't know where it came from.

Q. Any problem with arsenic going off-site at Midco I?

A. I would have to look at the data.

Q. How about Midco II?

A. Yes.

Q. Do you know where that is a problem at Midco II?

A. It is in the ground water. Also in the on-site soils.

Q. Is there any run-off that you know of?

A. You mean in the ditch in the back of the site?

Q. Is that what we are talking about?

A. That's the same.

Q. That is the main location?

A. Location where it might have run off, other than infiltrating back into the site.

Q. Do you have any opinion as to where the

1 arsenic came from that's on the Midco II site?
2 A. An opinion?
3 Q. Yes.
4 MR. TENENBAUM: Without reviewing documents
5 do you have an opinion, without reviewing
6 documents?
7 A. Arsenic seemed to be associated with
8 the aluminum, high arsenic.
9 BY MR. KEATING:
10 Q. The salt contains arsenic in both the
11 Midco I and the Midco II sites?
12 A. I don't know that arsenic is elevated
13 at Midco I. I would have to look at the papers.
14 At Midco II, I don't know. There
15 really wasn't salt disposed of on the site.
16 You mean the secondary aluminum slag?
17 Q. Yes. I thought that is what you were
18 talking about?
19 A. Yes. That appears to be -- there seems
20 to be a relationship between high aluminum and
21 high arsenic, but I don't know whether that
22 indicates it was in the slag or not.
23 Q. Do you know of any report that would
24 lead us to any studies on the arsenic at Midco I

1 and the relationship to the salt?

2 I am not asking for your own knowledge.

3 I am asking if there are any reports that would

4 indicate that?

5 A. Remedial investigation, you could look

6 at that and see if there is a relationship

7 between the high chloride or high TDS, the

8 sodium and the arsenic.

9 Q. Any reports from the same area for

10 Midco II as to the relationship between the

11 arsenic and the salts from the slag?

12 A. Just the remedial investigation,

13 which you could look at and see if there is a

14 relationship between the high salt in the ground

15 water and the arsenic.

16 And also the on-site soils, whether

17 there is an association between the aluminun and

18 the arsenic or other salt materials and the

19 arsenic.

20 Q. Were you part of the group that made a

21 determination in 1978 that there was imminent

22 and substantial endangerment at the Midco I and

23 Midco II sites?

24 MR. TENENBAUM: Objection. Instruct the

1 witness not to answer other than providing the
2 decisional document and date and so on of the
3 person who made that determination, the person
4 who made that determination on behalf of the
5 EPA.
6 BY MR. KEATING:
7 Q. All right. That is the first question.
8 Do you know what the process was that
9 went -- this is a terrible question. Strike it.
10 Do you know what process was gone
11 through to make a determination that the Midco I
12 and Midco II sites were imminently and
13 substantially endangered? Why don't we strike
14 that one.
15 Do you know what process was gone
16 through to make a determination that the Midco I
17 and Midco II sites presented an imminent and
18 substantial endangerment in 1989?
19 Thank you. I am glad someone helped.
20 MR. TENENBAUM: You can answer to the extent
21 that we are seeking costs from people who
22 participated in that process, and you can
23 provide a general description of what they did.
24 Other than that, that is a

1 record-review issue.

2 A. I don't understand the question.

3 MR. TENENBAUM: If we are seeking to recover

4 the costs for the work that any people did

5 connected with this process, then you may

6 indicate their names and in very general terms

7 what their jobs were.

8 A. Just people in the Agency you mean, or

9 everyone?

10 MR. TENENBAUM: Anyone who you are seeking

11 to recover costs.

12 A. PRC conducted the short study of the

13 effect of one-time exposure to hazardous wastes

14 on the site, due to one-time acute exposure to

15 wastes on the site.

16 I prepared the document itself, the

17 unilateral order. It was reviewed by counsel.

18 It was reviewed by my supervisors, including

19 Melinda Gould, James Mayka, Norm Niedergang,

20 Mary Gade, and Basil Constantelos signed it.

21 BY MR. KEATING:

22 Q. The document that you are referring to,

23 do you have a name for that?

24 A. Unilateral administrative order issued

1 November 15, 1989, for both Midco I and Midco II
2 sites.
3 Q. So you prepared the unilateral
4 administrative order?
5 A. I prepared the documents, yes.
6 Q. And you based those documents on the
7 records -- the record, the R.O.D., the
8 administrative record; is that correct?
9 A. The remedy is based on the R.O.D.
10 MR. TENENBAUM: Wait a second. You are
11 confusing the two. Administrative records.
12 But, why don't you restate the
13 question?
14 BY MR. KEATING:
15 Q. Okay. It will sound good when he types
16 it up. I will withdraw that question.
17 You based the issuance of the
18 unilateral order on the administrative record
19 for that order?
20 MR. TENENBAUM: That question I have to
21 object to.
22 First of all, it presumes incorrectly
23 that he himself was issuing the orders. I think
24 it does.

1 MR. KEATING: I don't think he is issuing
2 it. He said he prepared it.
3 MR. TENENBAUM: He said he prepared the
4 written document.
5 A. Yes.
6 MR. TENENBAUM: So --
7 MR. KEATING: He prepared it based upon the
8 administrative record for that order.
9 MR. TENENBAUM: I am not going to allow --
10 I am going to have to object and
11 instruct him not answer that. He was the person
12 who certified the record for the AO, unilateral
13 order. You can ask him whether the certified
14 record index is the genuine record that supports
15 the AO.
16 MR. KEATING: Certified record index is a
17 genuine index that supports the AO?
18 MR. TENENBAUM: As supplemented by this
19 memorandum.
20 MR. KEATING: As supplemented by Deposition
21 Exhibit 1 for identification today?
22 A. Yes.
23 Q. That's all the documents you relied on.
24 MR. TENENBAUM: Wait, wait, wait.

1 Is your question now, you are asking is
2 that all the documents that the Agency relied on
3 in issuing the AO, is that correct?
4 MR. KEATING: No.
5 He prepared the document. I am asking
6 him, he prepared it on the administrative record
7 for the AO. And this question is that is all
8 the documents relied on.
9 MR. TENENBAUM: I am going to object to the
10 question, instruct him --
11 I am not going to instruct him not to
12 answer. I am just going to object to the
13 question.
14 I will allow you to answer whether in
15 preparing the documents you relied on any
16 documents that are not in the -- well, hold it a
17 second.
18 You want to know whether he in
19 preparing the documents, whether he relied on --
20 MR. KEATING: He said he relied on the
21 administrative record for the AO.
22 MR. TENENBAUM: Wait.
23 There is a difference of sorts in --
24 the physical preparation from the making of a

1 decision is two different things. He could have
2 theoretically had a draft order from another
3 case or, you know.
4 MR. KEATING: I don't care about that.
5 MR. TENENBAUM: You don't mean the
6 preparation. You mean the decision, right?
7 MR. KEATING: The decision.
8 MR. TENENBAUM: The decision is what was
9 made by the Agency, not just by him, right?
10 MR. KEATING: I don't know if the decision
11 was made by the Agency or him, because the
12 Agency again -- he told us that he after he
13 prepared it, he sent it to Constantelos and he
14 okayed it.
15 So I mean he has given me a chronology
16 of where it went.
17 MR. TENENBAUM: That is your interpretation
18 of what he said.
19 I can't allow him to answer any
20 question other than -- subject to my objections,
21 I will allow him to answer whether he is aware
22 of any documents that the Agency relied on in
23 issuing an AO, other than the documents
24 contained in the certified administrative record

1 index.

2 He can answer that, subject to my

3 objection.

4 A. As far as I know, there aren't any

5 documents.

6 BY MR. KEATING:

7 Q. Okay.

8 And there was no certified

9 administrative record before you put them

10 together, right?

11 You have to put them together and then

12 they get certified.

13 MR. TENENBAUM: Objection, ambiguous. Seeks-

14 discovery on the compilation of the record.

15 Instruct the witness not to answer.

16 MR. KEATING: I mean it doesn't make any

17 sense to me otherwise.

18 Do they start off with a certified

19 record and then he looks at it, or what he is

20 saying, there are no documents yet that he

21 hasn't put together?

22 MR. TENENBAUM: No.

23 I think you are putting, mixing apples

24 and oranges in suggesting that he was relying on

1 a yet to be constructed record in the record
2 index. You are mixing apples and oranges.
3 The question I thought you were asking
4 is whether the Agency relied on any documents
5 that are not mentioned in the certified record
6 index.
7 MR. KEATING: He said no.
8 MR. TENENBAUM: Subject to my objection he
9 said no, right.
10 What is the next question?
11 MR. KEATING: Then I asked, the documents
12 that he did rely on are the certified record in
13 the AO, now the certified record for the AO.
14 MR. TENENBAUM: Those are the documents that
15 the Agency relied on.
16 The question is are the documents that
17 the Agency relied on in the certified
18 administrative record index?
19 MR. KEATING: Are they now in the
20 administrative certified record.
21 MR. TENENBAUM: Are they in there or are
22 they in the index?
23 MR. KEATING: Not the index.
24 MR. TENENBAUM: There may be documents in

1 there that the Agency considered but it didn't
2 rely on.
3 MR. KEATING: In the certified
4 administrative record?
5 MR. TENENBAUM: There could be a document
6 such as your comment that there were things that
7 they disagreed with that were considered but not
8 relied on.
9 MR. FORT: Excuse me, that are not in the
10 record?
11 MR. TENENBAUM: No, that are in the record.
12 MR. FORT: Oh.
13 MR. TENENBAUM: It depends upon what you
14 mean by relied on, I guess, too.
15 MR. KEATING: Everything in there was not
16 relied on, necessarily.
17 MR. TENENBAUM: Depends what you mean by
18 relied on.
19 Assuming you are drawing a distinction
20 between relied on and considered. But we are
21 getting into discovery of compilation of the
22 record.
23 I think the witness has already
24 testified that he certified the index.

1 BY MR. KEATING:
2 Q. Was there any standard that you used
3 that a person or child eating the soil would
4 cause this to be an imminent and substantial
5 endangerment at the site?
6 MR. TENENBAUM: Objection, instruct the
7 witness not to answer. Seeking discovery on a
8 record-review issue.
9 MR. KEATING: I am asking him about a
10 document, any kind of documents or any kind of
11 statement he used.
12 MR. TENENBAUM: Then it either seeks
13 discovery --
14 MR. KEATING: A child's dietary habits or
15 something like that.
16 MR. TENENBAUM: It seeks discovery on a
17 record-review issue, or it seeks discovery into
18 compilation of the record, or both.
19 MR. KEATING: We will certify that question
20 outside the record also.
21 Q. Would you be able to answer that
22 question if your attorney allowed you to answer
23 it?
24 Do you know the answer to that

1 question, could you answer it?
2 MR. TENENBAUM: Subject to my objection, you
3 can tell him if you know the answer.
4 A. I think it was too ambiguous to answer.
5 BY MR. KEATING:
6 Q. Okay.
7 Do you know what was relied upon to
8 make a determination that a child eating the
9 soil could cause the site to be an imminent and
10 substantial endangerment to the area?
11 MR. TENENBAUM: Same objection and
12 instruction.
13 A. Would you repeat the question?
14 MR. KEATING: Why don't you read it back.
15 (The record was read.)
16 A. Yes.
17 Q. You know what was relied on?
18 MR. TENENBAUM: Hold it.
19 There is an objection and instruction
20 not to answer.
21 MR. FORT: He answered it.
22 MR. TENENBAUM: There is an objection and
23 instruction not to answer.
24 I think what the witness was answering

1 was the follow-up question as to whether he
2 would know the answer.
3 MR. KEATING: I am not going to complain
4 about it. Okay. He knows the question now.
5 Q. And then my question was could you
6 answer that question?
7 A. Yes.
8 Q. Okay.
9 Are you refusing to answer it based
10 upon your attorney's instruction?
11 A. Yes.
12 Q. Okay. I will certify that question.
13 Do you know if there was any other
14 criteria that was used, other than the child
15 eating the dirt, to determine that this site
16 posed an imminent and substantial endangerment
17 to the area?
18 MR. TENENBAUM: Same objection and
19 instruction not to answer. You can indicate
20 whether you know the answer subject to my
21 objection.
22 MR. KEATING: Are you instructing him not to
23 answer?
24 MR. TENENBAUM: Yes.

1 BY MR. KEATING:
2 Q. Okay. Excuse me.
3 Do you know the answer to that
4 question?
5 MR. TENENBAUM: Subjects to my objection you
6 can answer that.
7 A. Yes.
8 BY MR. KEATING:
9 Q. Are you refusing to answer that
10 question based upon your attorney's
11 instructions?
12 A. Yes.
13 Q. Okay. Certify the question. We will
14 certify that outside the deposition.
15 Do you know if the USEPA used any
16 additional record -- strike that.
17 Were you part of a group that made the
18 determination that solidification should be one
19 of the remedies used at this site?
20 MR. TENENBAUM: Objection and instruction
21 not to answer, to the extent the question is
22 seeking testimony on remedy selection or
23 record-review issues.
24 You may in very general terms indicate

1 whether we are seeking costs for your work
2 relating to soil solidification.
3 MR. KEATING: You are seeking some costs for
4 solidification.
5 MR. TENENBAUM: As I said, he can answer to
6 that limited extent, as to a cost issue. And
7 please limit your answer to a general
8 description of the costs that we are seeking to
9 recover.
10 A. Yes.
11 I participated in a review of the
12 feasibility study, and preparation of the record
13 of decision.
14 BY MR. KEATING:
15 Q. As far as the costs go for the
16 solidification, do you know why solidification
17 was selected over other remedies that would be
18 of less cost?
19 MR. TENENBAUM: Objection, seeks discovery
20 on record-review issues, instruct the witness
21 not to answer.
22 MR. KEATING: I thought I could ask him
23 about the costs.
24 MR. TENENBAUM: That was the cost of

1 implementing the remedy. That was the cost,
2 response cost in the oversight and so on.
3 MR. KEATING: Okay.
4 Are you going to refuse to have him
5 answer that question?
6 MR. TENENBAUM: Yes.
7 BY MR. KEATING:
8 Q. Are you able to answer that question,
9 do you know the answer to that question?
10 MR. TENENBAUM: Subject to my objection, you
11 can tell him whether you would know the answer.
12 A. Yes.
13 BY MR. KEATING:
14 Q. And are you refusing to answer that
15 question based upon your attorney's instruction?
16 A. Yes.
17 Q. There is a substantial difference in
18 the cost for solidification and capping of the
19 site, isn't there, sir?
20 MR. TENENBAUM: Same objection and
21 instruction.
22 MR. KEATING: Are you instructing him not to
23 answer?
24 MR. TENENBAUM: Yes.

1 BY MR. KEATING:

2 Q. Do you know why solidification was

3 selected as opposed to capping the site and

4 treating the ground water?

5 MR. TENENBAUM: Same instruction and

6 objection.

7 BY MR. KEATING:

8 Q. Do you know the answer to that

9 question, sir?

10 MR. TENENBAUM: You can indicate subject to

11 my objection if you know the answer.

12 A. Yes.

13 And all this information is in the

14 record, the administrative record.

15 BY MR. KEATING:

16 Q. So all the information regarding

17 whether the site could be capped instead of the

18 site being solidified would be found in the

19 record?

20 MR. TENENBAUM: Same objection.

21 BY MR. KEATING:

22 Q. Is that correct, sir?

23 MR. TENENBAUM: Instruction not to answer.

24 Indicate whether or not you would be able to

1 answer the question.
2 BY MR. KEATING:
3 Q. The determination as to whether to
4 cap -- strike that.
5 The determination as to whether the
6 site could be capped and the ground water
7 treated as opposed to having the area
8 solidified, was that made by you, sir?
9 MR. TENENBAUM: Same objection and
10 instruction.
11 You can indicate the decision document,
12 and whoever was the person who made that or
13 authorized the decision document.
14 BY MR. KEATING:
15 Q. Do you understand that question?
16 MR. TENENBAUM: Do you want him to answer it
17 on that limited basis?
18 MR. KEATING: I didn't hear your limited
19 basis.
20 MR. TENENBAUM: He can indicate the decision
21 document involved and the date of it if he knows
22 it, and the person signing that.
23 BY MR. KEATING:
24 Q. I will be happy to have him answer

1 that.

2 A. The record of decision was signed by

3 Valdus Adamkus on June 30, 1989 for both Midco I

4 and Midco II.

5 Q. Did you participate?

6 A. There are separate records of decision

7 for each site.

8 Q. Did you participate in the decision or

9 in the preparation of the document?

10 MR. TENENBAUM: Same objections as before.

11 You may answer in just very general

12 terms with a yes or no, basically, if we are

13 seeking costs for your participation.

14 A. Yes.

15 MR. KARAGANIS: Previously when he was

16 dealing with the 106 order, you allowed him to

17 testify that he had prepared the document which

18 was the 106 order.

19 Did he also prepare the document which

20 is the R.O.D. on Midco I or the R.O.D. on Midco

21 II?

22 MR. TENENBAUM: Subject to my objections, I

23 will let you answer whether you were seeking

24 costs for your time in helping to prepare either

1 document.

2 A. Yes. I prepared the documents, the

3 Midco I and Midco II R.O.D.'s.

4 BY MR. KEATING:

5 Q. As far as the costs are concerned, are

6 are other Agency employees asking for their

7 costs?

8 MR. TENENBAUM: Is the Agency seeking costs

9 of other Agency employees?

10 MR. KEATING: Yes.

11 A. A number of Agency employees reviewed

12 the record of decision and we are seeking

13 recovery of their costs, costs for their work.

14 Q. Who?

15 MR. TENENBAUM: I don't know if counsel for

16 Insilco is here. Is there any counsel for

17 Insilco here?

18 They are the only defendant I am aware

19 of that requested cost documents and they are

20 available.

21 MR. FORT: Excuse me, counsel.

22 MR. KARAGANIS: At the last deposition I

23 requested cost documents.

24 MR. FORT: I did as well specifically, and

1 it was included in our 30 (b) 6 notice and I am
2 sure that of others.
3 MR. TENENBAUM: Those documents are here, as
4 well as the cost summaries are here. There are
5 more than two boxes of them.
6 A. Two cases.
7 MR. TENENBAUM: We only have one copy of
8 them.
9 MR. FORT: So I understand, there are two
10 boxes full of cost documentation?
11 MR. TENENBAUM: Right over there.
12 MR. FORT: That you happen to have brought
13 in?
14 MR. TENENBAUM: As we indicated at the last
15 deposition, they were actively looking for --
16 MR. KEATING: We take a short break and just
17 look at those.
18 MR. TENENBAUM: We were collecting those
19 documents.
20 (A short recess was taken.)
21 MR. KARAGANIS: Joe Karaganis for American
22 National Can.
23 With respect to the continuation of the
24 deposition of Mr. Boice, I have been advised by

1 several counsel for other defendants that they
2 expect to take all day tomorrow on some of their
3 examination.
4 We have just received about a four-inch
5 thick stack of so-called summary of cost data
6 with respect to EPA documents. One of the
7 summaries is dated July 5, 1990.
8 I have told Mr. Tenenbaum that
9 literally any day next week, but preferably the
10 11th and 12th I am available to resume Mr.
11 Boice's deposition.
12 I cannot conduct my questioning
13 tomorrow, among other things, because of just
14 receiving these cost data. But, I have a family
15 medical problem that I have got to deal with.
16 So I am available on either the 11th or
17 the 12th, or if there is another date, fine. I
18 expect that Mr. Boice will be here.
19 You have indicated that you have a
20 subsequently noticed 30 (b) 6 witness for
21 American Can Company. I have already told you
22 the information that I will be happy to provide
23 you. I do not have any witnesses beyond the
24 information we will be happy to provide you.

1 And if I can accommodate you any further, I
2 will.
3 But, I expect to continue with Mr.
4 Boice on a date that is mutually convenient next
5 week.
6 MR. TENENBAUM: We will see how the
7 deposition proceeds today and tomorrow.
8 MR. FORT: Excuse me, Mr. Tenenbaum.
9 MR. TENENBAUM: Can I finish?
10 MR. KARAGANIS: Go ahead.
11 MR. FORT: You are going to want to say
12 something anyway after I make my remarks.
13 MR. TENENBAUM: Let me just do one of you at
14 a time
15 As has been indicated, we have a heavy
16 deposition schedule for next week and I do need
17 to find out how many of those depositions will
18 need to go forward and how many issues will be
19 able to be resolved, as is being discussed with
20 counsel for American Can and other counsel.
21 This deposition is already into its
22 third day and tomorrow will be the fourth day.
23 MR. KARAGANIS: A half day today. At your
24 request it started at one o clock.

1 MR. TENENBAUM: May I finish.

2 We are prepared to continue on today.

3 And I'm not able at this time to tell you

4 exactly what the schedule is going to be for

5 next week.

6 I think that I will be glad to discuss

7 that with you further, once we know what the

8 status of this deposition is, and the status of

9 whether you are going to be able to enter into

10 certain stipulations with us, which might

11 obviate the need to take American Can's

12 deposition next week.

13 In addition, these depositions, my

14 depositions were noticed at roughly the same

15 time as yours were. I gave you a phone call in

16 advance and told you mine were coming, and in

17 response I got a notice from you of deposition

18 for EPA. Yours was filed first, but you were

19 informed of mine before it was started.

20 MR. FINCH: That's not true of all the

21 parties, Mr. Tenenbaum.

22 MR. TENENBAUM: I am dealing with you with

23 this one at a time.

24 I will be happy to work something out

1 with you. But, I think we need to make out some
2 accommodating package for the remainder of
3 discovery.
4 MR. KARAGANIS: I will try to work with you.
5 The fact is, as to the sequencing,
6 there is no rule of sequencing under the federal
7 rules. We have an outstanding deposition going
8 on with Mr. Boice.
9 With respect to today, next week, if
10 there is any day open next week, regardless of
11 whether we enter into a stipulation with you, or
12 anybody else who may enter into a stipulation
13 with you, or if you need additional counsel, I
14 expect to continue on one day next week that is
15 convenient with you to conduct my examination of
16 Mr. Boice. So pick a day.
17 MR. TENENBAUM: We will take it up, discuss
18 it further once we know what is going on.
19 We are prepared to proceed tonight. We
20 are prepared to continue tomorrow, see where we
21 are, see what the schedule scheduling for next
22 week is and what areas haven't been covered, if
23 any, of the deposition of Mr. Boice.
24 MR. KARAGANIS: I haven't conducted any

1 examination.

2 If I have to go on further -- excuse

3 me, Mr. Tenenbaum. If I have to put on the

4 record the reasons for my medical emergency, I

5 will do so. I don't feel that it is necessary

6 as counsel that I have to proceed with a further

7 basis.

8 If I have to make a motion in front of

9 the court, and tell the court what the basis of

10 my medical emergency is, I will be happy to do

11 so.

12 Start acting a little bit more

13 professional here. I expect to take Mr. Boice

14 one day at your convenience next week. You pike

15 the day. I will be available.

16 MR. TENENBAUM: I am trying to be as

17 cooperative as I can.

18 All I am saying is that we have to take

19 into consideration not only your request, but

20 meet everyone else's needs in the case as well.

21 MR. KARAGANIS: I have a client to

22 represent.

23 I expect Mr. Boice to be made available

24 so I can ask Mr. Boice questions with regard to

1 the interests of my client.

2 MR. FORT: Mr. Tenenbaum, I would also like

3 to note for the record that the documents that

4 you have produced to us today, which consist of

5 what is called a cumulative cost summary for

6 each site, that is probably a half-inch thick

7 for each set of documents, and over in the

8 corner are three bankers box type of files

9 consisting of documents that you and your

10 co-counsel have represented to us are the EPA

11 past cost information.

12 I will note for the record that that

13 documentation, if it wasn't requested in the

14 first notices, that my colleague, Mr. Finch,

15 sent out in December and January --

16 MR. FINCH: November.

17 MR. FORT: Thank you.

18 -- clearly were included as a specific

19 item in my co-defendant's, Insilco's request for

20 documents and were included in the Desoto Rule

21 30 (b) 6 request for the deposition of the

22 appropriate person, and also include the request

23 for these documents.

24 It is now July 5, a matter of two weeks

1 before discovery cut off, and we get a
2 tremendous amount of documentation, much of
3 which has been available for an extended period
4 of time.
5 MR. TENENBAUM: Excuse me, the documentation
6 has not been available.
7 MR. FORT: Mr. Tenenbaum, maybe the stuff
8 that was generated on June 5 wasn't available
9 before March 15, but the point is that these
10 requests have been outstanding for a long period
11 of time.
12 Mr. Karaganis is offering to press
13 ahead as early as next week. And, frankly, this
14 deposition is going to take a lot longer than it
15 might have otherwise, simply because we get
16 things in drips and drabs.
17 The administrative record has been
18 supplemented two or three times since you filed
19 your administrative orders.
20 MR. TENENBAUM: Not true.
21 MR. FORT: Excuse me, sir.
22 If you are willing to swear, go under
23 oath and say that is not true, that is fine.
24 But, there are affidavits on file in this case

1 that demonstrate it, and this witness' own
2 testimony, Mr. Boice's testimony, demonstrates
3 that the index for certain documents was not
4 even prepared until 1990, some as late as May of
5 1990.
6 So for you to insist that we have to
7 press ahead and, you know, make these comments
8 about getting it done today or next week, is
9 completely inconsistent with your actions in
10 discovery here.
11 So having said that, we are going to
12 proceed. I just want to be on record, sir, that
13 we are proceeding with all due haste that we can
14 possibly muster.
15 And Mr. Keating I understand has a few
16 more questions that he would like to get in
17 tonight.
18 I am prepared to stay as long as you
19 and the witness wish to stay here tonight to
20 start on my questions, but I believe that from
21 brief discussions with co-counsel, even without
22 issues that you claim to be protected by some
23 cloak of privilege, that we are going to go
24 through all day tomorrow just to direct

1 questions to this witness.

2 MR. TENENBAUM: If you can't take a

3 deposition of this witness in four days, it is

4 an awful lengthy time.

5 I point out that we have deposition

6 requests that are outstanding that we have

7 legitimate needs to take, if we can't enter into

8 stipulations as well. We can't have that

9 stalled or delayed any further. We will just do

10 the best that we can in trying to meet

11 everybody's needs in the case.

12 MR. FORT: I appreciate that, Mr. Tenenbaum.

13 Let me assure you, that is, speaking

14 for myself at least, that is our every intent to

15 do so. But, I think we have to deal with the

16 reality of what has been produced here.

17 MR. TENENBAUM: With respect to what has

18 just been produced, I don't see any reason why

19 questions pertaining to costs certainly -- other

20 than costs certainly can be concluded by

21 sometime tomorrow.

22 MR. FORT: Mr. Tenenbaum, I think you told

23 me the last time I was asking questions that the

24 only questions I could ask were cost questions.

1 But in any event --

2 MR. FINCH: We were under the understanding

3 that tonight's deposition would stop at six

4 o'clock. And I am told that a messenger has

5 been ordered to bring the documents back from

6 wherever they came from.

7 MR. KEATING: Does that mean no dinner?

8 MR. FINCH: There is a Burger King across

9 the street.

10 But if you want to extend it, I don't

11 know where this messenger came from. I am not

12 too sure I would be able to get in touch with

13 him to hold off.

14 We certainly would be more than happy

15 to take custody of the documents overnight, if

16 the United States is willing to do that.

17 MR. TENENBAUM: We will have to end it.

18 When the messenger is no longer available, we

19 will have to end it, if that is when he is no

20 longer available.

21 MR. FINCH: I would just say, Alan, that I

22 have a whole bunch of questions to ask. I know

23 that other counsel have questions to ask.

24 None of us were really optimistic about

1 being able to finish tomorrow, before we learned
2 of the existence of the cost documents.
3 Looking at the cost documents, simply
4 to walk Mr. Boice through them, so that we can
5 fully understand them, to say nothing of seeing
6 whether there is any need to question on them,
7 is going to take more than a day.
8 MR. TENENBAUM: Why don't I suggest, then,
9 that if you are not prepared with a significant
10 part of your questioning because of the cost
11 documents, and Mr. Karaganis wants to reschedule
12 for next week sometime, anyway. Maybe we should
13 adjourn after six o'clock today and reschedule
14 when you think you will be ready.
15 MR. FINCH: We are ready to fill at least a
16 day's testimony, a day's questioning, rather.
17 We can pick up tomorrow morning and we
18 could go throughout the day and still not
19 exhaust the questions we had hoped to ask.
20 I don't know if there is much to be
21 gained by pushing the deposition back even
22 further.
23 MR. FORT: I share that view.
24 I think just delaying a day just adds

1 another day at the next week or the week
2 thereafter.
3 MR. FINCH: We ought to proceed.
4 But, I think it just should be made
5 clear that if we don't complete the deposition
6 tomorrow, it is not because of any effort on our
7 part to drag this thing out but, rather, because
8 we have to move systematically through inches of
9 documents that have just been provided us, as
10 well as to complete questioning on matters that
11 we haven't yet been able to address
12 individually.
13 MR. TENENBAUM: I don't agree with that at
14 all.
15 I think if we don't conclude, that it
16 would be a result in large part that we have had
17 questioning on record review, record compilation
18 issues for the majority of the three days of
19 depositions.
20 MR. FINCH: Which we had to ask, and you
21 gave your instructions and you entered your
22 objections, so that you could protect your
23 record, and so that we can protect ours.
24 I don't think you can consider it a

1 waste of time for each side to make their
2 record, nor do I think any court would either.
3 So, why don't we just proceed.
4 MR. TENENBAUM: I assume you have taken the
5 same position then on the deposition that I have
6 noticed for the 17th and we will be making a
7 record?
8 MR. FINCH: No.
9 As I have explained to you in
10 conversations we have had over the phone, we
11 would like to reach a stipulation if one can be
12 reached.
13 We are awaiting a response from the
14 United States on a proposal that you and I
15 discussed. It is our hope take we can
16 stipulate. If we can't, then, obviously we are
17 going to have to proceed.
18 We had hoped we can eliminate the need
19 to do so. But, as to this deposition, I do
20 think it is unfair for us to sit here and point
21 fingers at one another over how long it is going
22 to take.
23 MR. FORT: Why don't we let Mr. Keating
24 proceed. Let Mr. Keating decide whether or not

1 he needs to have the administrative record stay
2 here after the messenger gets here.
3 I don't think I am going to need to
4 have, or I can certainly work around not having
5 those stacks of boxes over there in the corner.
6 MR. KEATING: Well, I hate to get into this
7 because you guys will say I am talking too long.
8 But, I don't think I would be able to
9 prepare any questions tonight on the cost
10 records. I have some questions.
11 Q. Like one, Mr. Boice. What do we call
12 these documents?
13 Do you call them response and oversight
14 costs, the documents produced in the three
15 boxes?
16 A. Not just -- no. They are all EPA's
17 past costs that we are seeking recovery for.
18 Q. Okay.
19 A. Except what we have already been
20 reimbursed for.
21 Q. So I call them past costs.
22 And now are the past costs going to be
23 costs since 1979 when we started here or is this
24 just from 1985 onward?

1 A. No.

2 They include both the costs covered

3 under the 1985 decree and the costs that were

4 not covered under that decree.

5 There are two separate packages, one

6 for covered costs, and one for not covered

7 costs. Well, at least two separate summaries.

8 Then all the documents are in the -- are in

9 these boxes.

10 Q. All right.

11 Now, in the 1985 decree as I vaguely

12 remember it, there was a portion of it which was

13 for past costs?

14 A. Yes.

15 Q. Am I going to be able to distinguish

16 from should I call it the three boxes of past

17 costs, if I call it that, that is to describe

18 it, right?

19 A. Yes.

20 Q. Okay.

21 A. Past cost documents.

22 Q. Okay.

23 How am I going to be able to determine

24 the past cost documents that were paid for in

1985 and the ones that have not been paid for before 1985?

A. You can refer to the summary, which separates covered costs as a package in the summary for covered costs and a package of summary for costs that were not covered. So you can refer back.

Q. Is there a document called summary?

A. That is what -- yes, that is what was handed out to you.

Q. Okay.

A. I am not sure what the title is.

Q. Why don't I look at it. Does someone have it?

A. Cumulative cost summary.

Q. Why don't we make that Exhibit No. 8 for identification.

MR. FORT: There are three documents, three documents for each site. One called cumulative cost summary, one also called cumulative cost summary that has not covered costs, and then another cumulative cost summary that apparently has covered costs.

MR. KEATING: Okay.

1 MR. FINCH: Are you going to mark them all?
2 MR. KEATING: No. I didn't know there were
3 three groups.
4 We will mark one of them Exhibit 8 and
5 we will call that -- with today's date and Mr.
6 Boice, we will mark it as a Boice deposition
7 exhibit. That will be the cumulative cost
8 summary, prepared 6-27-90.
9 (The document above-referred to
10 was marked Deposition
11 Exhibit No. 8 for identification.)
12 Then we will do Exhibit No. 9.
13 A. That's for Midco I, that previous one
14 is.
15 Q. That's for Midco I. All right.
16 And then we will do Exhibit No. 9,
17 Boice Deposition with today's date.
18 (The document above-referred to
19 was marked Deposition
20 Exhibit No. 9 for identification.)
21 And that is the cumulative cost summary
22 for Midco I dated 7-3-90.
23 A. That one is for not covered costs.
24 Q. All right.

1 That is not covered costs, all right.
2 And Exhibit 10 of today's date, Boice
3 deposition, is cumulative cost summary Midco I
4 site, 7-3-90, for covered costs, all right.
5 (The document above-referred to
6 was marked Deposition
7 Exhibit No. 10 for identification.)
8 Those are all for Midco II, all right.
9 Excuse me. 8, 9 and 10 are for Midco
10 I.
11 (The documents above-referred to
12 were marked Deposition
13 Exhibit Nos. 11, 12 and 13,
14 respectively, for identification.)
15 All right.
16 I have Exhibit 11, is Boice deposition
17 with today's date, these are cumulative cost
18 summary dated 6-29-90.
19 Exhibit 12 is cumulative cost summary
20 for Midco II prepared 7-5-90.
21 And Exhibit No. 13 with today's date,
22 Boice deposition, cumulative cost summary on
23 7-5-90. That is for not covered costs.
24 Are all the costs that are being asked

1 for listed in these six documents, sir?
2 MR. TENENBAUM: Or the past costs.
3 MR. KEATING: All the costs.
4 MR. TENENBAUM: Future costs.
5 MR. KEATING: I guess future costs, all past
6 costs, that is fine.
7 Q. Were all the past costs that the Agency
8 is looking for contained in these six documents,
9 sir?
10 A. No. It doesn't include interest, and
11 it doesn't include Department of Justice costs.
12 Q. Okay.
13 Are there any documents for Department
14 of Justice costs, that is just a tiny bill,
15 isn't it?
16 A. I don't know. Is there?
17 MR. TENENBAUM: The Department of Justice
18 costs, the documents were -- some documents were
19 produced to the Defendant Insilco. Other than
20 that, I didn't handle that. I will have to look
21 into it.
22 MR. KEATING: Do you know what they amounted
23 to?
24 MR. TENENBAUM: I don't know. We can

1 produce them to you to.

2 MR. KEATING: Tomorrow?

3 MR. TENENBAUM: Not tomorrow, no.

4 MR. TENENBAUM: This witness won't be able

5 to testify as to them, anyway.

6 MR. KEATING: I just want to get the

7 documents, though, so we have them identified.

8 Q. The three boxes contain the

9 documentation for Exhibits 8 through 13, is that

10 right, sir?

11 A. Yes.

12 Q. Okay.

13 Who accumulated those costs -- strike

14 that.

15 Who collected those documents for the

16 costs?

17 A. You mean who organized them?

18 Q. That's another way of looking at it.

19 Who organized them?

20 A. Our financial management branch

21 organized them.

22 Q. Who in the financial management branch?

23 A. The people who worked on these

24 documents you mean?

1 Q. Yes.
2 A. Person named Darius Taylor.
3 D-a-r-i-u-s Taylor. And Vince -- I forgot his
4 last name. Vince worked on it.
5 Q. Vince?
6 A. Yes.
7 A. And there's a couple other people who
8 worked on these documents. I am not sure of all
9 these names.
10 Q. And they would be able to tell us what
11 they did to collect and organize these
12 documents; is that right?
13 A. Yes.
14 Q. Okay.
15 When you reviewed the RIFS with Roy
16 Weston, Inc., was there anyone there that
17 criticized the final RIFS?
18 MR. TENENBAUM: Was this a non-record issue?
19 MR. KEATING: All right.
20 MR. TENENBAUM: That was the question. I
21 was asking you.
22 MR. KEATING: I am trying to find out if the
23 final RIFS has been accepted, so I think that is
24 in the record, they have accepted it. I want to

1 know if there is any criticism of the way it was
2 put together. We went through that before with
3 Mr. Ball.
4 MR. TENENBAUM: The only reason we went
5 through that with Mr. Ball is because of the
6 questioning last time relating to the good or
7 bad faith relating to ERM.
8 MR. KEATING: This could go to good or bad
9 faith then, too.
10 MR. TENENBAUM: Of ERM.
11 MR. FORT: I don't think we are talking
12 about ERM. I didn't know they were on trial.
13 MR. TENENBAUM: That was the question that
14 was asked last time.
15 Maybe it was a good or bad faith of the
16 defendants. Excuse me.
17 MR. KEATING: ERM I understood was
18 overseeing Dames & Moore on the RIFS.
19 MR. TENENBAUM: What was the question this
20 time?
21 BY MR. KEATING:
22 Q. Was there anyone at Roy F. Weston who
23 criticized the final draft of the RIFS?
24 MR. TENENBAUM: I don't see how this is

1 relevant to anything other than record issues.
2 But, you can answer.
3 MR. KEATING: Are you instructing him not to
4 answer?
5 MR. TENENBAUM: Unless you can proffer it
6 some way that it is relevant to a non-record
7 issue, yes.
8 MR. KEATING: I want to find out if the
9 remedy is -- strike that.
10 I will go to the good faith of the
11 defendants and/or their contractors and the
12 remedies put forth prior to the final draft of
13 the RIFS.
14 MR. TENENBAUM: What is the question. Same
15 question?
16 MR. KEATING: Same question.
17 I am willing to withdraw the question
18 if any implication of bad faith against the
19 defendants and the contractors are withdrawn,
20 but I have got to fine out if there is a claim
21 that they were not in good faith in their
22 conduct. What basis, you know, they are not in
23 good faith on.
24 MR. TENENBAUM: I will object to the

1 question, on the ground that it is seeking
2 discovery into record-review issues.
3 But, on the question of good faith,
4 subject to my objection, I will let him answer,
5 if you know the answer, from your own personal
6 knowledge.
7 A. I don't understand, would you repeat
8 the question?
9 BY MR. KEATING:
10 Q. Yes.
11 The RIFS was reviewed by Roy F. Weston,
12 Inc., is that your understanding, sir?
13 A. Yes, that's correct.
14 Q. Okay.
15 Do you know if anyone at Roy F. Weston,
16 Inc. had any criticism of the RIFS prior to its
17 final drafting or issuance?
18 A. Yes. I believe all the comments are in
19 the administrative record.
20 Q. So there is nothing that you know of,
21 any criticism by Roy F. Weston, other than what
22 is in the administrative record?
23 A. That's all I know of.
24 Q. PRC Environmental Management also

1 reviewed it?
2 A. Yes.
3 Q. Was there any criticism of that company
4 prior to the final issuance of the RIFS?
5 MR. TENENBAUM: Same continuing objection.
6 A. Yes.
7 BY MR. KEATING:
8 Q. Okay.
9 Do you know what they were, sir?
10 A. All their comments are in the
11 administrative record as far as I know, except
12 maybe some minor ones.
13 Q. What minor ones are those, sir?
14 A. Some minor ones where I didn't think
15 either they weren't important or we didn't agree
16 with their comment, because they said something
17 that wasn't absolutely correct.
18 Q. Okay.
19 I understand the PRC Environmental
20 Management said something that you didn't think
21 was correct and, therefore, you did not include
22 it in the final record?
23 MR. TENENBAUM: Object, misstates the
24 testimony.

1 Same continuing objection as well.
2 MR. KEATING: I don't understand how I
3 misstated it. I thought I paraphrased it.
4 MR. TENENBAUM: He said -- you left out is
5 answer. His answer contained the statement that
6 it was not important. In other words, that the
7 Agency didn't rely on it or consider that in
8 entering into making the remedy selection.
9 You left that out of your restatement
10 completely.
11 MR. KEATING: But he could rely on it for
12 showing the bad faith.
13 MR. TENENBAUM: That wasn't part of the
14 Agency decision in selecting the remedy.
15 MR. KEATING: I know.
16 But I am not allowed to ask about the
17 remedy and how it was formed under your theory.
18 So what I am asking about is did they criticize
19 it. He says yes, they criticized it in a minor
20 way.
21 A. I didn't say that either.
22 MR. TENENBAUM: He didn't say in a minor
23 way. He said it wasn't important to the remedy
24 selection issue.

1 A. That is what I meant. It was -- there
2 was some comment.
3 MR. FORT: Excuse me.
4 All he said was it wasn't important. I
5 didn't hear the remedy selection issue, counsel,
6 until you just completed the sentence. But,
7 maybe I misheard what he said.
8 MR. TENENBAUM: Why don't we let the witness
9 testify?
10 A. That is what I meant. That it wasn't
11 that important a document to include in the
12 record, because it didn't -- we didn't rely on
13 it in the remedy selection.
14 MR. KEATING: Okay. That is what I thought
15 you were saying.
16 Q. Now, what were the documents?
17 A. They are in the administrative record.
18 Q. So they are all in the record anyways,
19 even the ones you didn't rely on?
20 A. I didn't say that. The ones that are
21 in the record are in the record.
22 Q. Okay. I got that down.
23 Are there some that are not in the
24 record that they criticized ERM?

A. I didn't say they criticized ERM.

MR. TENENBAUM: Same continuing objection.

A. The question was whether they had criticized the RIFS.

They did have some criticism sometimes, possibly, I think. There was one or two documents where they had some criticisms. I didn't put it in, because it was unimportant. It wasn't used in the remedy selection, the selection of the remedy.

BY MR. KEATING:

Q. Are there any times when they agreed with the remedy, the remedial investigation feasibility study, and you didn't, and you left that out of the record?

MR. TENENBAUM: Same continuing objection.

A. I did what?

BY MR. KEATING:

Q. You didn't rely on their recommendations agreeing with the draft of the remedial investigation feasibility study?

A. I think you better restate that. It is confusing.

Q. Okay.

1 MR. FORT: Excuse me, before you restate
2 that.
3 We have requested any documents that
4 are relevant to things that PRC did, if they are
5 not in the record. They haven't been produced
6 to us. If they are not in the record, I don't
7 see how you can say that we shouldn't be
8 entitled to see those.
9 MR. TENENBAUM: I don't know what they are,
10 but I will look at them.
11 MR. KEATING: I want to get into them, where
12 they are at.
13 Q. Do you know where they are at now?
14 Do you know where any documents or
15 indicia of criticism of the remedial
16 investigation feasibility study might be?
17 A. Repeat your question. You are still
18 confusing. I am trying to follow what you are
19 talking about.
20 Q. Okay.
21 It is easier down here.
22 PRC Environmental Management, Inc. gave
23 some criticisms or recommendations that you did
24 not believe were important and did not include

in the record.

Where are those documents now?

MR. TENENBAUM: Same continuing objection.

A. They are in our file.

BY MR. KEATING:

Q. What would I call your files?

A. That is EPA's files.

Q. Okay.

So if I asked for the USEPA files, you are going to be able to pick out those documents from PRC Environmental Management, or are people going to throw up their hands and say, "he is crazy because he asked for the USEPA files," that is calls for an objection, that is an objectionable question.

So is there a better name I could get than just the USEPA files?

A. I think you can figure that out yourself. Find the document, what he wants.

Q. Okay.

Dr. Keros, do you know who he is, sir?

A. Dr. Keros Cartwright?

Q. Yes, he has got two names. Dr. Keros Cartwright.

1 Did he also review the remedial
2 investigation feasibility study?
3 MR. TENENBAUM: Same continuing objection.
4 BY MR. KEATING:
5 Q. Is that correct, sir?
6 A. That's correct. And that is obvious
7 from reviewing the record.
8 Q. Okay.
9 Did he have any criticisms that are
10 included in the record?
11 A. Not that I know of.
12 Q. Okay.
13 Donald S-t-r-e-s-s-e-c-k?
14 A. Steffeck.
15 Q. David Hudak.
16 A. Hudak.
17 Q. Did they review the records also?
18 A. They reviewed --
19 Q. The remedial investigation feasibility
20 study also, is that correct?
21 MR. TENENBAUM: Same continuing objection.
22 BY MR. KEATING:
23 Q. Is that right, sir?
24 A. That's right.

1 Q. Do you know of any criticism that they
2 had of the draft that are not contained in the
3 record?
4 A. No, I don't.
5 Q. Do you know of any criticisms of the
6 draft that were not contained in the record that
7 were presented by the US Fish and Wildlife
8 Service?
9 A. Not that I know of.
10 MR. TENENBAUM: Same objection.
11 BY MR. KEATING:
12 Q. Dr. Kirk Brown.
13 MR. TENENBAUM: Same objection.
14 BY MR. KEATING:
15 Q. Do you know if he reviewed the record
16 of the remedial investigation feasibility study?
17 A. He reviewed portions of the remedial
18 investigation. We didn't use him with the
19 feasibility study.
20 Q. You didn't use him at all?
21 A. I don't think we used him for the
22 feasibility study, no.
23 Q. Did he generate any documents from W.K.
24 Brown & Associates?

1 MR. TENENBAUM: Same continuing objection.
2 A. Regarding what?
3
4 BY MR. KEATING:
5 Q. The remedial investigation feasibility
6 study.
7 A. Yes. He sent comments on the remedial
8 investigation feasibility study.
9 Q. And they are not included in the
10 record, I take it?
11 A. No. They are all in the record as far
12 as I know.
13 Q. They are in the record also?
14 A. Yes.
15 Q. Okay.
16 But you didn't use any of his?
17 MR. TENENBAUM: Object. Instruct the
18 witness not to answer.
19 MR. KEATING: He just said he did. That is
20 why I thought they were not in there.
21 Q. Did I.T. Corporation reviewed the draft
22 of the remedial investigation feasibility study?
23 MR. TENENBAUM: Same objection.
24 A. No, they didn't.

1 BY MR. KEATING:
2 Q. Okay.
3 Do you know sitting here today, sir,
4 whether the USEPA has contacted any individual
5 who it intends to use as an expert in the trial
6 of this matter?
7 MR. TENENBAUM: Are you asking him whether
8 he knows the witnesses we have identified, the
9 expert witnesses we have identified?
10 MR. FORT: Have the question read back. I
11 think the question was okay.
12 MR. KEATING: That's what I thought, too.
13 He took me back when he said the ones
14 he identified. From the records I have looked
15 at, he hasn't identified any.
16 MR. TENENBAUM: The witness identifying
17 expert witnesses?
18 MR. KEATING: Read the question.
19 MR. TENENBAUM: Maybe I missed the question.
20 What was the question.
21 (The record was read.)
22 The question is objectionable. The
23 Department of Justice represents the EPA in this
24 litigation and we are responsible for the

1 designation of expert witnesses.

2 MR. KEATING: That's correct.

3 Now I am asking your client whether he

4 knows, because interrogatories were propounded.

5 MR. TENENBAUM: As they were to you.

6 MR. KEATING: All right.

7 And I am asking him whether he knows if

8 an individual has been contacted that is

9 intended to be used as an expert.

10 Now, there is a multiplicity of ways

11 that he could know this. He could talk to them,

12 call them up, suggest them. He could do it any

13 number of ways, how he could know this.

14 I am asking him whether an expert has

15 been contacted. I have a right to know whether

16 an expert has presently been contacted. It

17 doesn't call for a hypothetical.

18 MR. TENENBAUM: Maybe this can help you.

19 I can tell you that we will be filing

20 some expert witness designations probably

21 tomorrow.

22 MR. KEATING: Okay.

23 MR. TENENBAUM: We are waiting for yours

24 still. I still don't know when you are filing

1 yours.

2 BY MR. KEATING:

3 Q. Do you know who the experts who are

4 going to be designated tomorrow are, Mr. Boice?

5 MR. TENENBAUM: Same objection.

6 If you know who the designated expert

7 witnesses are, you can say, but the Department

8 of Justice does.

9 MR. KEATING: I understand he doesn't have

10 to know every one of them. It is just tonight I

11 can go home and sleep, you know, knowing who the

12 experts are.

13 MR. TENENBAUM: If you know who has been

14 designated. Let me just think for a second.

15 MR. KEATING: Why should I know?

16 MR. FORT: You are going to get it tomorrow.

17 What difference does it make?

18 MR. TENENBAUM: He isn't going to know

19 anyway.

20 MR. FORT: If he doesn't know that answers

21 the question.

22 MR. KEATING: But if he do know, that

23 creates a problem.

24 MR. TENENBAUM: Off the record for a second.

1 (Discussion had off the record.)
2 MR. KEATING: Do you want to let him see he
3 if knows? He might surprise you.
4 MR. FORT: Let's go back on record.
5 MR. TENENBAUM: I would go off the record
6 and see if he knows.
7 (Discussion had off the record.)
8 BY MR. KEATING:
9 Q. As I understand, sir, you don't know of
10 any experts that presently were contacted that
11 the EPA intends to use as their experts at the
12 time of trial; is that right, sir?
13 A. No. That is correct.
14 Q. Do you know of any experts that were
15 consulted prior -- strike that.
16 Do you know of any experts that were
17 consulted prior to the 106 order being issued in
18 relation to the issuance of the 106 order?
19 MR. TENENBAUM: Will you be informing us of
20 the experts that you have consulted in the
21 course of this case, you or the other
22 defendants?
23 MR. KEATING: I don't know what they are
24 going to do. I can bearly tell you.

1 MR. TENENBAUM: Do you have any objection to
2 telling us that?
3 MR. FORT: Is there a question pending?
4 Is there a question pending or an
5 objection to the question?
6 MR. TENENBAUM: Yes.
7 If the defendants are not willing to
8 tell us the names of the experts that they have
9 consulted, I am certainly going to instruct the
10 witness not to testify as to any experts that we
11 have consulted.
12 MR. FINCH: The defendants did not issue any
13 unilateral orders to which the government was
14 bound to comply. It is sort of a different
15 situation, isn't it?
16 MR. KEATING: I think you might want to
17 rethink that objection, counsel.
18 You don't tell me, I won't tell you.
19 The court might get a good laugh at it, but I
20 don't think it is one of the recognized
21 objections.
22 MR. TENENBAUM: Why don't we handle it this
23 way.
24 Why don't you indicate if it is

1 acceptable to you, the identification of any
2 experts whose costs of which you have sought to
3 recover as past costs, your consulting experts.
4 MR. FINCH: How about if you include in that
5 experts with whom the Agency consulted in
6 relation to which the Agency is seeking past
7 costs. Perhaps there is an expert whose own
8 time is not being costed out, but the Agency is
9 seeking reimbursement for the time it spent
10 consulting with this expert. Would you expand
11 it that far?
12 A. To me that sounds the same.
13 MR. TENENBAUM: That is fine. Yes.
14 A. Okay. Dr. Keros Cartwright. Dr. Kirk
15 Brown. Dr. David Homer.
16 BY MR. KEATING:
17 Q. Homer?
18 A. Yes. H-o-m-e-r.
19 And you could consider other people
20 from PRC as being experts, such as Pinaki
21 Banerjee.
22 Q. Do you know how to spell that?
23 A. P-i-n-a-k-i, Barnerjee.
24 B-a-n-e-r-j-e-e. And also Perry Ellis, Dr.

1 Perry Ellis.

2 Q. And what did --

3 A. And also Roy F. Weston, Fred Test.

4 Kirk Stempson, S-t-e-m-p-s-o-n, Stempson. And

5 there might have been other people.

6 There were other specialists with

7 Weston that might have been involved or that

8 were involved. I can't think of their names

9 now.

10 Q. And, again, all of the work that they

11 did is reflected in the record?

12 A. Yes.

13 MR. TENENBAUM: Hold it a second.

14 All the work that they -- well, same

15 continuing objection, but you can answer. Go

16 ahead.

17 BY MR. KEATING:

18 Q. Okay.

19 You answered the interrogatory --

20 A. I should say no, not all the work is

21 reflected in the record.

22 Q. What work from whom is not reflected in

23 the record?

24 MR. TENENBAUM: Same objection.

1 A. There is project management costs for
2 most of the contracts.
3
4 BY MR. KEATING:
5 Q. Project management costs for all of the
6 contracts?
7 A. I mean, each contract would have,
8 except for some of the individual contracts, has
9 a project management cost built into it.
10 Q. Are those project management costs
11 reflected in the documents that you brought
12 today that we called the three boxes of past
13 costs?
14 A. They are included in those costs. Yes.
15 Q. You answered various interrogatories
16 from the third-party defendants, right, sir?
17 You prepared the answers for them?
18 A. That's correct.
19 Q. Was there anyone who assisted you in
20 preparing the answers to those interrogatories?
21 MR. TENENBAUM: Other than counsel?
22 MR. KEATING: Yes, other than counsel.
23 A. No.
24 Q. So we are not going to get a bill for

that?

A. Except for my time.

Q. Okay.

A. And counsel's time.

Q. Okay.

Have you reviewed any documents regarding trans-shipments between Midco I and Midco II?

A. Yes.

Q. Do you have any knowledge of what wastes were trans-shipped from Midco I to Midco II?

MR. TENENBAUM: Personal knowledge?

MR. KEATING: Well, knowledge from his review of the records.

A. Offhand I can't remember. I don't think so. I would have to review it to make sure.

Q. Okay.

Are all the records that you reviewed regarding trans-shipment from Midco I to Midco II reflected in the record?

A. They are primarily depositional documents.

1 Q. Okay.

2 Those are the depositions that we

3 talked about before, right, sir, or are there

4 additional depositions?

5 A. I know there is Marin Robinson. And

6 Charles Licht, some other ones I can't remember

7 the names.

8 Q. Are there any other documents besides

9 depositions that are not in the record that

10 reflect trans-shipments that you know of, sir?

11 A. Besides depositions?

12 Q. Yes, sir.

13 MR. TENENBAUM: In the record of this case

14 you mean?

15 I am going to object if you are asking

16 for discovery as to what people have testified

17 to in this case. I don't think that is

18 appropriate.

19 MR. KEATING: I am not asking him for that.

20 I am asking for any documents. He told me there

21 are some depositions. All right. They are not

22 in the record. I said are there any other

23 documents that are not in the record besides the

24 depositions?

1 MR. TENENBAUM: I don't know that he
2 testified one way or the other as to whether the
3 depositions are in the record. The record
4 speaks for itself.
5 MR. KEATING: Fine. I don't have any
6 problems with that. Whatever depositions are in
7 and whatever depositions are out. We all have
8 knowledge of what depositions there are, so I
9 don't have a problem with that.
10 I am trying to find out documents that
11 I don't have knowledge of. Any documents that
12 are outside of the record.
13 MR. TENENBAUM: There are the kinds of
14 documents that are produced by third parties,
15 and you are able to review them as well as the
16 Agency.
17 If he is able off the top of his head
18 to tell you anything, that is fine. But, I do
19 object to any other use of this questioning
20 because these are third-party documents.
21 MR. KEATING: If they are third-party
22 documents that are produced pursuant to
23 discovery, I have no problem with them.
24 If they are 104 requests that I don't

1 have copies of, and they are in something called
2 the USEPA file, I am going to have trouble
3 getting them, unless I know what they are or
4 what they are called.
5 MR. TENENBAUM: If the witness knows of
6 anyone 104 E responses that discuss that
7 subject. If he knows, he can tell you.
8 A. I don't know of any.
9 BY MR. KEATING:
10 Q. All the 104 E requests or responses --
11 strike that -- are in the USEPA file that we
12 talked about before; is that right?
13 A. That's correct.
14 Q. Okay.
15 Now, any other documents besides 104 E
16 requests and responses and depositions that
17 would indicate trans-shipment from Midco I to
18 Midco II?
19 A. I just stated that 104 E, that was
20 responsive, didn't indicate as far as I know any
21 trans-shipment.
22 Q. Okay.
23 Any other documents?
24 A. I believe the interviews might have,

1 there might have been interviews that indicated
2 trans-shipments.
3 Q. Which interview was that?
4 A. I don't know. I don't remember.
5 Q. Okay.
6 This is interviews with Mr. Dehart that
7 were taken prior to the time this -- any kind of
8 notice was sent out; is that right?
9 A. I don't think it was Dehart. It would
10 be somebody else.
11 Q. Okay.
12 Besides interview, the interview would
13 be in the USEPA file we talked about, right?
14 A. I think it was provided to you last
15 time we were here.
16 Q. Okay. All right.
17 MR. TENENBAUM: Is there a good time to
18 break so we can bring back the documents?
19 I don't want to -- they told us our
20 documents had to go back.
21 MR. KEATING: Just a few more I think.
22 Someone else can take over.
23 Q. Do you know of any trans-shipments from
24 the Nidco I site to any other site, are there

1 any documents to reflect that?
2 MR. TENENBAUM: Same objection.
3 MR. KEATING: Besides Midco II.
4 MR. TENENBAUM: Same objection.
5 A. I'm not aware of any offhand.
6 There might be some if I reviewed the
7 entire --
8 BY MR. KEATING:
9 Q. Would they be in the record or would
10 they be in the USEPA file that we talked about?
11 A. I don't know that any exists, so how
12 can I say where they would be.
13 Q. Fine.
14 Do you know of any shipments that were
15 made from Midco I or Midco II to the Ninth
16 Avenue site?
17 MR. TENENBAUM: Same objection.
18 A. I'm not aware of any.
19 MR. KEATING: If you want to that take a
20 break, I don't have any objection.
21 I have just some more, but --
22 MR. TENENBAUM: We have to bring the records
23 back, so we might as well adjourn at this point
24 until tomorrow morning.

1 MR. KEATING: I will probably prepare for
2 the rest of my questions for next week and let
3 someone else go tomorrow morning. They have
4 already asked me.
5 If they ask the same questions, I am
6 not going to ask them again.
7 MR. TENENBAUM: This came up last time.
8 We have a problem with this deposition
9 continuing, that every counsel passes his
10 questions before he has done. I don't want to
11 single out you.
12 MR. KEATING: I hope, you know, we get some
13 articulate guy to ask questions.
14 MR. TENENBAUM: The only thing we can do is
15 tomorrow morning, or we can do it now if you
16 want on the record or off the record, we can try
17 to establish an organized way to get everybody's
18 getting in a reasonable amount of time with some
19 end in sight to the deposition.
20 Short of, if we can't do that, then I
21 think that --
22 MR. FORT: Mr. Tenenbaum, I appreciate your
23 desire to move forward as expeditiously as
24 possible. But, that view is shared by us as

1 well.

2 Mr. Keating has said that if somebody

3 else covers his questions, he won't repeat them.

4 The same thing goes for myself, and I am sure

5 for others, that we don't intend to exercise our

6 full rights by having a notice of deposition to

7 ask all the questions that are the subject of

8 the Rule 30 (b) 6 notice. In fact, I think we

9 have had --

10 MR. TENENBAUM: We have already had some

11 repetition.

12 MR. FORT: There will be some, counsel, by

13 just the way you are producing documents. I am

14 going to have to repeat some of the things just

15 because we have new documents.

16 But, some repetition is inevitable even

17 if we had one counsel asking all of the

18 questions.

19 Do you want to resume -- at what time

20 in the morning?

21 MR. TENENBAUM: We can resume at --

22 MR. FORT: Why don't we just say, if you

23 want to move as expeditiously, let's start

24 promptly at 9, whether or not the records are

here yet.

MR. TENENBAUM: Fine.

MR. KEATING: To make it clear, Mr. Finch, you had a few questions for tomorrow.

MR. FINCH: I have some questions. Off the record.

MR. TENENBAUM: Off the record.

(Whereupon the deposition was continued to July 6, 1990 at 9:00 o'clock a.m.)