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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KATHLEEN MCHUGH AND DEANNA SCHNEIDER,
Individually and on behalf of all
person similarly situated,
Plaintiffs,

v. Case No. 11-CV-724

MADISON-KIPP CORPORATION, CONTINENTAL
CASUALTY COMPANY, UNITED STATES FIRE INSURANCE
COMPANY and ABC INSURANCE COMPANIES 1 - 50,
Defendants,

and
MADISON-KIPP CORPORATION,
Cross-Claimant,

vs.
CONTINENTAL CASUALTY COMPANY, COLUMBIA
CASUALTY COMPANY, and UNITED STATES
FIRE INSURANCE COMPANY,
Cross-Claim Defendants,

and
CONTINENTAL CASUALTY COMPANY and
COLUMBIA CASUALTY COMPANY,
Cross-Claim Defendants,

and
LUMBERMANS MUTUAL CASUALTY COMPANY, AMERICAN
MOTORISTS INSURANCE COMPANY, and JOHN DOE
INSURANCE COMPANIES 1 - 20,
Third-Party Defendants.

CONTINUED DEPOSITION OF

R. MICHAEL SCHMOLLER

Madison, Wisconsin
October 11, 2012
10:00 a.m. to 11:54 a.m.
Kim M. Peterson

Registered Professional Reporter

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1 APPEARANCES
 2 THE COLLINS LAW FIRM, P.C., 1770 North
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 4 smc@collinslaw.com, by MR. SHAWN COLLINS, appeared on
 5 behalf of the Plaintiffs.
 6 VARGA, BERGER, LEDSKY, HAYES & CASEY,
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 9 appeared on behalf of the Plaintiffs.
 10 MICHAEL, BEST & FRIEDRICH, LLP, Two
 11 Riverwood Place, N19 W24133 Riverwood, Suite 200,
 12 Waukesha, Wisconsin, 53188-1174, lmseese@michaelbest.com,
 13 by MR. LEE M. SEESE, appeared on behalf of the
 14 Madison-Kipp Corporation.
 15 MICHAEL, BEST & FRIEDRICH, LLP, 100
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 18 DAVID A. CRASS, appeared on behalf of the Madison-Kipp
 19 Corporation.
 20 TROUTMAN SANDERS, LLP, 55 West Monroe
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 22 becky.ross@troutmansanders.com, by MS. REBECCA L. ROSS,
 23 appeared on behalf of the Continental Casualty Company.
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1 Wisconsin, 53202-6622, mjc@mtfn.com, by MR. MICHAEL J.
 2 COHEN, appeared on behalf of the United States Fire
 3 Insurance Company.
 4 MR. STEVE TINKER, Assistant Attorney
 5 General, P.O. Box 7857, Madison, Wisconsin, 53707,
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 7 Wisconsin Department of Natural Resources.
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 18 30 - Remedial requirements - 9/12/12 243 243
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 20 32 - Letter dated 6/30/99 MKDNR002096-97 289 289
 21 33 - Letter dated 9/28/06 289 291
 22 34 - Memo dated 8/31/06 MKDNR001893 292 292
 23 (The original exhibits were attached to the original
 24 transcript.)
 25 (The original transcript was sent to Mr. Collins.)

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1 PROCEEDINGS
 2 (Exhibit No. 29 was marked for
 3 identification.)
 4 R. MICHAEL SCHMOLLER, called as a
 5 witness herein by the Plaintiffs, after having
 6 been first duly sworn, was examined and testified
 7 as follows:
 8 EXAMINATION
 9 BY MR. COLLINS:
 10 **Q Hello again, Mr. Schmoller. Thank you for coming.**
 11 **You realize you're still under oath.**
 12 **A Yes.**
 13 **Q Okay. So we -- Last session of your deposition**
 14 **was exactly a month ago. If you recall, you and I**
 15 **talked a little bit about some things that might**
 16 **be happening within 30 days or so from when you**
 17 **were last deposed.**
 18 **Among the categories of things, and**
 19 **let me kind of tick them off, at least the ones**
 20 **I'm interested in. Then I want to ask you if**
 21 **there's been any progress on these fronts, okay?**
 22 **A Okay.**
 23 **Q One of the things we talked about in your last**
 24 **deposition session was that the administration of**
 25 **DNR was going to sit down and talk about how much**

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1 **more, if any more, vapor sampling would be done.**
 2 **Do you recall that discussion between**
 3 **you and I?**
 4 **A Yes.**
 5 **Q Okay. Has there been any such meeting in the last**
 6 **30 days?**
 7 **A Yes.**
 8 **Q Okay. Tell me about that, please.**
 9 **A Okay. The decision we've made is that -- We have**
 10 **sampled homes on the both sides of Waubesa Street,**
 11 **both sides of Marquette Street, on Dixon Street,**
 12 **and a single home on Corry Street at this point.**
 13 **At this point we've -- the decision's**
 14 **been made not to sample any new homes. We're**
 15 **filling in on the west side of Marquette Street.**
 16 **There are some homes that we've not yet sampled**
 17 **that we'll be filling in on, but on the east side**
 18 **of Marquette Street, on Dixon Street, on -- on the**
 19 **west side of Waubesa Street and on Corry Street**
 20 **we're not taking in any new sample locations.**
 21 **Q Okay. Can I pause you for a second there? So**
 22 **what I'm hearing you say, and tell me if I've got**
 23 **you right, is the only new sampling is going to be**
 24 **on the west side of Marquette?**
 25 **A Yes.**

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1 Q Okay.

2 A On the north end of Marquette Street there are a

3 number of homes where the consultant for Kipp had

4 taken a sample.

5 Q Okay.

6 A And we wanted to get a second sample from those

7 locations. There's about nine or 10 of them.

8 Q Okay.

9 A So we could make a decision, based on our

10 decision-making protocol, whether or not to offer

11 those homes mitigation systems.

12 Q So those -- that -- that sampling for those nine

13 homes will be done by DNR's consultant; is that

14 right?

15 A Yes. And that's -- it's going on now. We've --

16 We sent letters to those homeowners offering to

17 collect the samples. We've heard back from some,

18 not all. Some of those samples have been

19 collected.

20 Q You sent those letters a couple of weeks or more

21 ago, didn't you?

22 A Several weeks now, yeah.

23 Q Okay. But beyond that, beyond what you just

24 mentioned, on the west side of Marquette Street no

25 new sampling, right?

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1 A No new sampling.

2 Q And that's a decision that the -- that the DNR as

3 a department has made, right?

4 A Yes.

5 Q Why?

6 A When we first got into -- When we first started

7 the vapor sampling, we -- we didn't have a very

8 good understanding of where the sources of

9 contamination -- where the source of the vapor

10 contamination were and how big of a problem we

11 had. So we were, I guess, aggressive in selecting

12 homes on both sides of Marquette Street and going

13 out to Dixon Street and Corry Street to try to

14 figure out how big of a vapor issue we had.

15 Now, at this point in time, and we've

16 got numbers from approximately -- concentrations

17 from approximately 40 homes, we feel we have a

18 pretty good understanding of where the vapor

19 problems that we think are associated with that

20 past activities at Kipp are and where there are

21 not vapor problems. And so we feel that we don't

22 need to do any new sample locations to define the

23 extent of the problem.

24 Q Okay. So, you just used the term vapor problems

25 associated with the past activities of Kipp,

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1 right?

2 A Yes.

3 Q Okay. All right. I want to -- I want to use that

4 phrase here just so we can have a conversation

5 about it.

6 So do you feel you have a good

7 understanding of the boundaries of the geographic

8 area which have vapor problems associated with the

9 past activities of Kipp?

10 A Yes. We think we have a pretty good understanding

11 of that at this point.

12 Q All right. Would you describe that geographic

13 area for me, using streets or using whatever is

14 easiest for you.

15 A Sure. It's our -- We've had this discussion both

16 with DNR and with the City and State health

17 agencies because they have some people with

18 expertise in vapor also, so it's kind of a joint

19 kind of decision.

20 It's -- To us, we seem -- we're

21 confident that what we see on the properties

22 directly adjacent to the Kipp property, the

23 homes -- again, the homes would be on the west

24 side of Marquette Street or the east side of

25 Waubesa Street, those homes that are directly

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1 adjacent to Kipp, we feel that whatever vapors we

2 find in the sub-slab or in the backyards of those

3 homes are associated with past activities at Kipp.

4 When you get across Waubesa Street and

5 you get across Marquette Street to the homes on

6 the east side of Marquette or the west side of

7 Waubesa, we think it's -- there's -- there's still

8 a likelihood that those concentrations may be from

9 Kipp, but now you're getting across the road and

10 you're getting across what could be vapor barriers

11 in terms of sub-surface utilities underneath the

12 streets.

13 We think that those concentrations may

14 be related to activities at Kipp, but there's --

15 there's a chance they're not. Our confidence

16 level is not as high with those homes as they are

17 with the homes directly adjacent to the property.

18 And we believe when we get out to

19 Dixon and Corry Streets, the concentrations we see

20 there are -- are so low in the sub-slab that we're

21 not convinced that -- necessarily that those

22 readings are associated with activity -- past

23 activities at Kipp.

24 And -- And just to follow up on that a

25 little bit, what we've decided to do, we -- the

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1 exhibit that you've got there has the
 2 decision-making protocol that we were using for
 3 mitigation systems, we are -- we will continue to
 4 apply that decision-making protocol to homes on
 5 Marquette and Waubesa Street. We will not be
 6 offering mitigation systems to homes on Dixon or
 7 Corry Street using that protocol because the
 8 levels that we see out there and the distances,
 9 we've made a decision that we're not at all
 10 certain that those homes are associated with
 11 activities from Kipp. They could be some other
 12 source. And so we've made the decision to -- to
 13 limit the mitigation offer area to those areas.
 14 Q Okay. So, let me just go over some of that, make
 15 sure I understand it.
 16 For homes on the west side of
 17 Marquette and the east side of Waubesa which are
 18 immediately adjacent to the Kipp industrial
 19 property, the DNR is -- is confident that the --
 20 that the vapor detected in that area, the PCE
 21 vapors and other vapors detected in that area,
 22 are from Kipp; is that right?
 23 A Yes. We believe that -- We believe that to be so.
 24 Q Okay. And do you believe that all of those homes
 25 should have a vapor mitigation system?

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1 A Based on the protocol that we put in place, which
 2 is a very protective protocol, we are -- we are
 3 offering mitigation systems to those homes where
 4 we find the detects that fit that decision-making
 5 protocol.
 6 Q Well, I understand that, and we'll get to that in
 7 just a second, but for the approximately 34 homes
 8 which immediately border the Kipp facility and are
 9 either on the west side of Marquette or the east
 10 side of Waubesa, some of those homes have not been
 11 tested yet for one reason or another. And it may
 12 be, although I'm unaware of any examples of this,
 13 but it may be that some of the homes have been
 14 tested and haven't met the protocol yet for being
 15 offered a mitigation system.
 16 So with that as backdrop to my
 17 question, my question is this. For those 34
 18 homes, west side of -- of Marquette, east side of
 19 Waubesa immediately adjacent to the Kipp property,
 20 can you identify any one of those homes that you
 21 don't believe is at risk of the same level or kind
 22 of vapor contamination as the other homes in that
 23 same area are?
 24 MR. SEESE: Object to the form of
 25 that.

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1 THE WITNESS: Okay.
 2 BY MR. COLLINS:
 3 Q Is there any one of those homes that you believe
 4 is different than the others so that you can say
 5 as to that one home, or two or three homes, I
 6 don't believe that PCE vapors can get to
 7 Kipp's -- can get from Kipp's property to those
 8 homes?
 9 A No. No. I think our belief is that anyone
 10 adjacent to the property -- There -- There --
 11 Certainly there are varying levels of risk even
 12 for homes on -- directly adjacent to the plant
 13 because of closeness to known source areas.
 14 So as you get way furthest to the,
 15 say, the south end of Marquette Street, you know,
 16 those homes, they're directly adjacent to the
 17 plant, but they're not close to what we -- at
 18 least any known source areas at this point, but if
 19 they -- if they were to develop a vapor issue, and
 20 we've sampled some of those and we have detected
 21 vapors down there, it's our belief that those
 22 vapors are associated with past activities at
 23 Kipp.
 24 So while there may be varying levels
 25 of risk up and down those streets because of

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1 distance, we think that all of those homes are at
 2 some level of risk from past activities there.
 3 Q Okay. Therefore, don't you believe that each one
 4 of those homes should have a vapor mitigation
 5 system?
 6 A For all the homes that we've sampled that have met
 7 the protocol, we have offered mitigation systems
 8 to. If they have not been sampled, they haven't
 9 been offered a system. We won't offer a system to
 10 someone without data.
 11 Q Okay.
 12 A We've decided that.
 13 Q I'm asking -- Thank you. I'm asking you a
 14 different question, okay. Whether or not they've
 15 been sampled, whether or not anyone has offered
 16 the family a vapor mitigation system, whether or
 17 not the family wants one, don't you believe that
 18 for any of these 34 homes we're talking about now,
 19 that home should have a vapor mitigation system in
 20 order to adequately protect the people who live in
 21 that home?
 22 A I would say absent specific data to that home, I
 23 wouldn't make that blanket statement, I don't
 24 think. I think we would want data. I mean,
 25 that's kind of how we did it.

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1 **Q** Let me -- What I've got here is a copy of the
 2 transcript of the last session of your deposition
 3 and the exhibits, okay. And the reason I'm about
 4 to show this to you is because I want you to look
 5 at one of the exhibits. I'm sorry, I don't have
 6 copies for everybody else, but this was -- what
 7 we're going to look at here is Exhibit -- what was
 8 marked as Exhibit No. 5 to your previous
 9 deposition, if I could show that to you, okay.
 10 MR. COLLINS: And Steve, if you don't
 11 mind, can I go behind Mr. Schmoller so he and I
 12 can look at the same piece of paper?
 13 MR. TINKER: Sure.
 14 BY MR. COLLINS:
 15 **Q** Okay. Mind if I look over your shoulder here?
 16 **A** No, no problem.
 17 **Q** All right. So -- Now, what we've been talking
 18 about are -- are the homes on the west side of
 19 South Marquette and the east side of Waubesa
 20 Street, right?
 21 **A** Correct.
 22 **Q** That's what you and I have been talking about for
 23 the last few minutes. And if you'll just accept
 24 my math, that comprises 30 -- 34 homes.
 25 **A** Okay.

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1 **Q** Now, can you identify any one of those 34 homes
 2 for me that you think is at significantly less
 3 risk of vapor contamination from the Kipp property
 4 than any of those other 34 homes?
 5 MR. SEESE: Object to the form of
 6 that.
 7 THE WITNESS: Okay. Based on our
 8 understanding of the vapor, you know, because we
 9 have data for a number of these homes now, clearly
 10 the -- the highest vapor readings were in the
 11 segment of homes from 142 to 154 South Marquette
 12 Street.
 13 If you get down to the south end of
 14 Marquette Street, let's say 222, 226, 230, we have
 15 detections down there in the sub-slab, but they
 16 are considerably less than the detections we saw
 17 in these other homes closer. Again, 142, 146,
 18 150, 154. So while they -- I would say that those
 19 homes are at less risk. They're not at zero risk,
 20 but they are at less risk.
 21 BY MR. COLLINS:
 22 **Q** Okay. If I could -- Now, some of the homes that
 23 you've just identified as being at less risk you
 24 have offered vapor mitigation systems to, correct?
 25 **A** Correct.

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1 **Q** Okay. Do you believe that there's any one of
 2 these 34 homes in the area we're talking about
 3 that does not need a vapor mitigation system?
 4 MR. SEESE: Are we still looking at
 5 Exhibit 5? Is that what you're directing the
 6 witness to, counsel?
 7 MR. COLLINS: Yes.
 8 THE WITNESS: I would say that if we
 9 were to sample -- I believe that if we were to
 10 sample the sub-slab and/or indoor air at any of
 11 those homes that we're discussing on Figure 5
 12 here, that we would find detectable concentrations
 13 of PCE that would fit our criteria for a
 14 mitigation system. So we would offer mitigation
 15 system.
 16 So I would think -- I guess I would
 17 say all of these homes likely would qualify for a
 18 mitigation system.
 19 BY MR. COLLINS:
 20 **Q** And by all of these homes you mean the -- what
 21 I've described to you as 34 homes on the west side
 22 of South Marquette and the east side of Waubesa,
 23 correct?
 24 **A** Yes.
 25 **Q** Okay. Why don't you keep that in front of you in

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1 case we need it again. So we've marked as
 2 Schmoller 29 the -- the protocol that I think
 3 you -- you were just making reference to, but --
 4 Why don't you take a minute and have a look at it.
 5 It's a document that -- that we got from your
 6 files very recently. Let me know when you're
 7 ready to talk about it.
 8 **A** Okay. I'm familiar with this, yes.
 9 **Q** Okay. Who wrote this?
 10 **A** I did.
 11 **Q** Okay. And approximately when?
 12 **A** There was a rough draft of this written when we
 13 first started our vapor -- when we were doing our
 14 state-sponsored vapor sampling. And actually, it
 15 was not in final form until just after my first
 16 deposition, because you had asked for the
 17 decision-making criteria.
 18 **Q** Right.
 19 **A** And I went back and looked and realized that the
 20 only document that I had on my computer that
 21 related to that was this one, and it was in a
 22 rough draft form. And so I basically cleaned up
 23 the -- the first paragraph. I think the last two
 24 paragraphs read as they were. There were some
 25 errors and some changes I made in the first

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1 paragraph to be consistent with what we were
 2 doing.
 3 Q All right. So -- So in the form we're looking at
 4 now, Schmoller 29, how old is this document?
 5 A One month.
 6 Q Okay. And there were previous drafts of it?
 7 A Yes.
 8 Q Okay. Are there any significant differences
 9 between what we're looking at here, Schmoller 29,
 10 and the previous drafts?
 11 A No.
 12 Q Okay. Is this protocol, Schmoller 29, still in
 13 force?
 14 A For the homes on Marquette and Waubesa Street,
 15 yes. For the homes on Dixon and Corry Street, no.
 16 Q Okay. Does this protocol still apply then for the
 17 homes on both sides of South Marquette and both
 18 sides of Waubesa?
 19 A Yes. If they've been sampled, yes.
 20 Q Okay. Okay. Do you believe that if the
 21 Department were to sample all of the homes on the
 22 east side of Marquette and the west side of
 23 Waubesa, that those homes would qualify for a
 24 vapor mitigation system under this protocol?
 25 MR. SEESE: Object to form. Calls for

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1 speculation.
 2 THE WITNESS: I don't think they
 3 would.
 4 BY MR. COLLINS:
 5 Q Why is that?
 6 A I think the further south you get on South
 7 Marquette Street, if you get south of Fairview,
 8 the homes on the east side of Marquette, I'm not
 9 certain that all those homes -- when you get down
 10 south of Fairview, north of Atwood and east of
 11 Marquette, I'm not certain all of those homes
 12 would have concentrations that fit the
 13 decision-making criteria.
 14 Q Have you -- Have you gotten any vapor detections
 15 south of Fairview on the east side of Marquette?
 16 A Yes, there have been some.
 17 Q And you have offered vapor mitigation systems,
 18 right?
 19 A Yes.
 20 Q Okay. So what makes you say that if you go south
 21 of Fairview you may find homes that wouldn't
 22 qualify for a vapor mitigation system?
 23 A The further south you get, the further away you
 24 get from at least our known, or what we believe to
 25 be the known source vapor -- vapor source areas.

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1 So you may get to a distance where you just -- we
 2 would have nondetectable concentrations.
 3 Q All right. Isn't it true that every home that has
 4 been tested on the west side of Waubesa and the
 5 east side of Marquette has met the criteria for a
 6 vapor mitigation system?
 7 A No. I believe there was -- there was a home on
 8 the east side of Marquette Street that did not --
 9 that had nondetectable readings in it, if I
 10 remember right. It was only a single home. Most
 11 of the other homes we did -- I think almost all
 12 the other homes we did did meet the criteria.
 13 Q And the one home you're talking about was north of
 14 Fairview, right?
 15 A Yes. I think there was one there.
 16 Q Okay. If we look to your protocol, Schmoller 29,
 17 the middle paragraph has a sentence -- has a
 18 couple sentences. Let me read them to you.
 19 The primary reason for this is the
 20 lack of an adequate site model. At this time we
 21 do not know all the possible vapor source areas
 22 and therefore, we do not know all the possible
 23 vapor migration pathways.
 24 Do you see that?
 25 A Yes.

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1 Q Now, there's not an adequate site model today, is
 2 there?
 3 A I think we're in a much better position today for
 4 making decisions on where there may or may not be
 5 vapor problems. And I think that's what allowed
 6 us to make the decisions we did on the Dixon and
 7 Corry Street addresses.
 8 We -- So I think we -- we have a
 9 large -- a fairly large database for vapor results
 10 now, and so I think we know where our problems are
 11 or are not. So while we don't have a complete
 12 site model, we have a much -- a much better site
 13 model.
 14 Q Well, thank you, but my question is is there an
 15 adequate site model existing today? And then if
 16 you tell me yes, my next question is where can I
 17 go to see it. So, is there an adequate site
 18 model? And I'm using your term intentionally
 19 there. That's what you've written.
 20 A Right.
 21 Q Is there an adequate site model?
 22 A Yes, in terms that I think we have an adequate
 23 understanding of what's going on. There is not a
 24 written site model, okay.
 25 Q It's in your head?

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1 A Yeah, it's in my head.
 2 Q I don't mean to be facetious. I'm just wondering
 3 where it is.
 4 A I think that's true. You're correct, it is.
 5 It's -- Well, it's in my head and it's also in
 6 several others'. We are in a position --
 7 Q Several other heads?
 8 A Yes.
 9 Q What other heads is it in?
 10 A Some other staff members of the DNR. I mean,
 11 it's -- we've arrived at this decision jointly.
 12 We have some people in the Department that know
 13 more about vapor than I do, and I've been relying
 14 on them.
 15 So I think when we sat down to have
 16 the discussion of how big of a vapor problem do we
 17 have, where do we offer mitigation systems, where
 18 don't we offer mitigation systems, I think the --
 19 the concept of -- of how the site was acting, or
 20 site model, was -- was common to all of us in that
 21 room.
 22 Q Okay. This -- This decision that you're telling
 23 me about that the Department has made, is it -- is
 24 it documented anywhere in writing?
 25 A It's being documented now. There's a staff person

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1 assigned to write -- write it up, and then it
 2 would go out on our web page for the citizens to
 3 see.
 4 Q Okay. So there was a meeting held that led to the
 5 decision?
 6 A Yes.
 7 Q When was the meeting?
 8 A It would have been within the last two weeks.
 9 Q Were there any written submissions made on these
 10 topics we're talking about now prior to the
 11 meeting?
 12 A No.
 13 Q Okay. So you -- for example, you, Mike Schmoller,
 14 you didn't write a position paper, for lack of a
 15 better term, or write down for your colleagues at
 16 DNR what your position was on these issues?
 17 A There is a -- There was a single document that I
 18 wrote, right. It was one of these pieces where I
 19 was trying to gather my thoughts, and I kept it on
 20 my computer and I think I titled it remediation
 21 ideas, and it dealt with soil and soil vapor, I
 22 believe. So I may have some writings there.
 23 Q When did you write it?
 24 A Within the last month to six weeks.
 25 Q I'm going to show you a document. I'm just going

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1 to ask you if -- if this is the document you're
 2 talking about. Just yes or no, if you would,
 3 please.
 4 A Yes.
 5 Q Okay. Let's mark it then. If you wouldn't mind
 6 handing it back to the court reporter. We'll ask
 7 her, please, to mark that as Schmoller 30.
 8 (Exhibit No. 30 was marked for
 9 identification.)
 10 BY MR. COLLINS:
 11 Q When you're ready, I want you to tell me what
 12 Schmoller 30 is, please.
 13 A These are my thoughts as to what I think -- Well,
 14 one, there's a summary of -- of -- of soil and
 15 soil vapor detections and what concentrations we
 16 found where. And then it's my thoughts as to what
 17 the Department may want to do in terms of remedial
 18 actions to address that contamination.
 19 Q Okay. Is Schmoller 30 still accurate, with regard
 20 to your thinking?
 21 A As of today, right now, the soils one is still
 22 accurate and so is the soil vapor one. In terms
 23 of looking at -- I mean, the statistics, in terms
 24 of detects, have probably changed since September
 25 12th, but in terms of the contaminant source,

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1 remedial action discussion, that's consistent.
 2 That's the same.
 3 Q So the contaminant source discussion at the bottom
 4 of the first page of Schmoller 30, and the
 5 remediation action section which is at the top of
 6 the second page of Schmoller 30, that's still what
 7 you think, true?
 8 A That reflects my thoughts, yes.
 9 Q And still true as of today, correct?
 10 A Yes.
 11 Q All right. Let's go back to Schmoller 29, please.
 12 Okay. So this is our protocol we're back on,
 13 okay. I directed your attention to a couple of
 14 sentences. We were talking about the adequate
 15 site model. Now let's go to the next sentence,
 16 please.
 17 The protocol says at this time we do
 18 not know all the possible vapor source areas, and
 19 then the sentence goes on.
 20 Isn't it true that as of today DNR
 21 does still not know all of the possible vapor
 22 source areas?
 23 A All of them? That's a true statement. I don't
 24 think we know all the vapor source areas. We
 25 still have -- I think we have a much better handle

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1 on the Marquette Street area because we've done a
 2 number of soil samples through that northern end
 3 of the property.
 4 For the source of the vapor detects on
 5 Waubesa Street, we need to do an investigation
 6 beneath the building on the southwest portion of
 7 the building there. That work will be coming up
 8 in the next month or so. I think that will
 9 answer -- because that's a very difficult area to
 10 investigate given there's sewer lines and a number
 11 of issues.
 12 I think once we do the investigation
 13 beneath the building there, that will help us
 14 answer the vapor source question in that area.
 15 Q Can you give me a date by which you expect to know
 16 all of the possible vapor source areas?
 17 A The only reason I'm hesitating is all.
 18 Q I'm using your term, right?
 19 A Yeah.
 20 Q Okay. That's why I asked it the way I did.
 21 A Yeah, yeah.
 22 Q So --
 23 A I think by the end of this calendar year we should
 24 know all the significant sources of vapor at the
 25 site. I mean, it's an industrial facility that's

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1 been there for decades, you know. You're never
 2 going to find all the little nooks and crannies of
 3 contamination, but I think by the end of this
 4 calendar year we should have a handle on the --
 5 the vapor sources that we need to know about to
 6 deal with the issue.
 7 Q Okay. And you think that the -- the most
 8 significant uninvestigated potential source area
 9 is on the Waubesa Street side; is that right?
 10 A I'd probably generalize it a little more and say
 11 underneath the building as a whole.
 12 Q Okay. What are you going to do to investigate
 13 that possible source area?
 14 A We just last Friday walked the site with
 15 representatives from Kipp and their consultant,
 16 walked the interior of the building, and they had
 17 proposed approximately 40, I think 42, borings
 18 through the concrete, through the floor. And that
 19 work will start, I believe, next week. We -- I
 20 gave approval for it, and that work will start
 21 next week for soil sampling underneath the
 22 building.
 23 And that should take us a long ways
 24 towards understanding the subsurface conditions
 25 beneath the building.

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1 Q Okay. So the kind of sampling that's going to be
 2 done is sampling of the soil underneath the
 3 building?
 4 A Yes. There will be soil sampling, and depending
 5 on what we see in the soil there are contingencies
 6 in the work plan for putting in two groundwater
 7 monitoring points, also.
 8 Q How about vapor underneath the building?
 9 A Not at this point. At this point we're just doing
 10 soils.
 11 Q Okay. You said you agreed with the proposed 42
 12 sampling locations?
 13 A Yes.
 14 Q Tell me how those locations are organized, please.
 15 Where -- Are they evenly spread throughout the
 16 building? Are they concentrated in certain areas?
 17 How were those locations chosen, if you know?
 18 A They're concentrated in select areas based on
 19 known past uses of the building. We know there
 20 were areas where solvents were stored.
 21 Q Storage tank areas, for example?
 22 A Yes. We know where the degreasing activities took
 23 place inside the building. Those were areas of
 24 focus.
 25 We know that in the southwest portion

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1 of the site the building was built over a parking
 2 lot, and we believe that parking lot's an area
 3 where -- where solvents and waste fluids had been
 4 spread for dust control. So we've identified some
 5 probes down at that end of the building, and --
 6 and a variety of other locations throughout. And
 7 I can't remember the exact reasoning behind each
 8 location, but as we walked it we talked about the
 9 use of the site, what took place there, the number
 10 of borings we were putting there and why.
 11 And it seems like, based on the
 12 locations we have, that we're going to get a
 13 pretty comprehensive look at underneath the
 14 building.
 15 Q Let's go back to the meeting approximately a
 16 couple weeks ago, the Department meeting. Who was
 17 at it besides yourself?
 18 A Yeah. That would have been Mark Giesfeldt, Terry
 19 Evanson, myself. Linda Hanefeld was on the phone.
 20 John Hausbeck was on the phone, if I remember
 21 right. And I think that's it.
 22 Q Okay. Did you take notes of that meeting?
 23 A I probably did. I may have scribbled a few things
 24 down. I'm not -- I don't often take notes that I
 25 keep and that. So I may have written a few notes

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1 down.

2 MR. COLLINS: I'm just going to ask,

3 Mr. Tinker, if he still has notes, we'd like to

4 see copies of them, please.

5 MR. TINKER: Okay. We'll check.

6 BY MR. COLLINS:

7 Q Do you know if anybody else took notes at the

8 meeting?

9 A If anyone did, it would have been Linda. She's

10 pretty conscientious about that. I don't think

11 Terry or Mark did.

12 Q Was there anything discussed at the meeting beyond

13 what we've talked about so far in this deposition?

14 A Yes. I think the -- if I'm remembering correctly,

15 the initial part of the meeting was a conference

16 call where EPA was also involved.

17 Q US EPA?

18 A US EPA, because we talked about the PCB work that

19 had been done to date; investigation and proposed

20 remediation action.

21 Q Okay. So that's at the beginning of the call,

22 right?

23 A Yes, that was at the beginning.

24 Q And that's when some folks from Region 5 on the

25 phone?

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1 A Yeah. There's an individual down there who is

2 their PCB person responsible.

3 Q Okay. Was the discussion with EPA involved, was

4 that exclusively about PCBs, or did it also, for

5 example, concern their -- their notice of

6 violation in connection with air emissions that

7 they recently issued?

8 A Specific to PCBs.

9 Q Exclusive to PCBs in terms of the US EPA

10 involvement on the meeting?

11 A Yes.

12 Q Okay. What was the -- What was the bottom line of

13 that part of the discussion?

14 A We -- There's pretty much general -- In the

15 remedial -- Okay. We did the PCB investigation,

16 and their satisfaction with the degree to which

17 the PCBs were investigated on site and off site to

18 describe the extent of soil contamination.

19 There was -- There's two areas

20 proposed for excavation. There was agreement that

21 those areas seemed to make sense and the general

22 configuration of them was acceptable.

23 The -- The EPA individual wanted to

24 see some more specifics on the actual outline of

25 the excavation to see where it was and wasn't, he

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1 wanted a more detailed work plan related to that,

2 but in general, the area that was chosen for

3 investigation was the area that we had kind of

4 centered on based on the known data. So there

5 was -- there was an understanding that made sense.

6 Q What area is that, please?

7 A There are two. There's a -- a long

8 rectangular-shaped excavation plan for the east

9 side that runs right along the east property line

10 of -- of -- between Kipp and the residents on the

11 west side of Marquette Street. Not the entire

12 length of that property line, but a hundred and

13 some feet in length and some dozens of feet in

14 width.

15 Q Can you go to Schmoller 5 again, which is part of

16 the -- Yeah. See, you got that in front of you.

17 Now, can you take me from address to address on

18 South Marquette?

19 In other words, you're describing an

20 excavation area that would run some but not all of

21 the length of the -- of the property adjacent to

22 the homes on South Marquette Street, right?

23 A Yes.

24 Q From approximately what address to what address on

25 South Marquette? How about at the north end?

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1 A Yeah.

2 Q Start with that.

3 A I think the -- the long -- for the long

4 rectangular excavation, I think the north end of

5 that will be somewhere probably close to 128 or

6 130 South Marquette Street.

7 Q Okay.

8 A And would extend south from there to maybe 150

9 South Marquette Street.

10 Q I recognize you're just approximating.

11 A Right.

12 Q But that's your best --

13 A It's in that area because that's the area where we

14 found some of the highest readings.

15 Q Okay. All right. And that -- the western

16 boundary of the excavation area, would it be the

17 property line? The property line between Kipp

18 and --

19 A No. No. The eastern -- The eastern boundary of

20 the excavation would be the property line, or --

21 Q I'm sorry.

22 A -- close to the property line.

23 Q That's what I meant. It would be at or close to

24 the property line.

25 A Right. There's a very large utility line that

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1 runs through there, which hinders us.
 2 Q Yeah.
 3 A And so we'll be set back some distance from the
 4 property line there.
 5 Q And then how far east would the excavation area --
 6 A West.
 7 Q Excuse me. How far west would it run?
 8 A It's somewhere in the area of 30 or 40 feet.
 9 Q And to what depth?
 10 A I believe top two feet we're talking.
 11 Q Okay. Was there any discussion about whether the
 12 PCB excavation area should include residential
 13 properties on Marquette Street?
 14 A That issue has been discussed and has not been
 15 decided yet at this point.
 16 Q Why not?
 17 A The residences on Marquette Street have -- a
 18 number of them have PCBs, a number of them have
 19 PCE in the backyard, and a number of them have
 20 PAHs in the backyard.
 21 The -- To date, the detected PCB
 22 concentrations and PCE concentrations in the soils
 23 do not exceed our decision-making guidelines, our
 24 public health decision-making guidelines.
 25 The PAH numbers, the concentrations we

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1 see do exceed the -- our health guidelines, but
 2 there's a question of of the PAHs that we find
 3 there, are those PAHs attributed to the past
 4 activities at Kipp, or are they attributed to
 5 backyard barbecues or other non-Kipp-related
 6 sources.
 7 So before we make a decision on what
 8 soils we may or may not remediate off site, we
 9 need to determine -- try to allocate those PCB
 10 concentrations to a source.
 11 Q All right. You and I started this discussion, the
 12 discussion of the excavation area, by talking
 13 about PCBs, right?
 14 A Yes.
 15 Q This is a PCB excavation area on the Kipp
 16 property, right?
 17 A Correct.
 18 Q Was there any certain PCB concentration that had
 19 to be exceeded in order for excavation to take
 20 place in that area on the Kipp property?
 21 A The -- The excavations are targeted on those PCB
 22 concentrations that exceed 50 parts per billion, I
 23 believe.
 24 Once the excavation is completed, I
 25 don't know what the residual concentrations will

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1 be, but 50 was an area that we were targeting
 2 excavation to because those numbers were higher.
 3 Other areas will be capped.
 4 Q Isn't it true that whatever the decision criteria
 5 was that drove the proposed excavation on the Kipp
 6 property, if you applied that same decision
 7 criteria on Marquette Street you would find some
 8 properties with exceedances, wouldn't you, PCB
 9 exceedances?
 10 A No, I don't think that's true. The -- For
 11 residential -- For this site, for residential
 12 properties, we're using a soil criteria of .22
 13 parts per million. And we -- we do not have any
 14 off-site PCB concentrations that exceed .22.
 15 And so based on PCB concentrations
 16 alone, there are not any off-site areas that we
 17 would say need a remedial action; whether that
 18 remedial action be excavation, capping, whatever.
 19 Q When will the excavation take place on the Kipp
 20 property? So far we just talked about the one
 21 area, and I want to talk about the other, but
 22 this -- this -- this, you know, area from
 23 approximately 128, 130 Marquette to 150, when will
 24 that take place?
 25 A The timing is somewhat dependent on EPA's final

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1 review. We have not heard back from them, but we
 2 would like to complete it this fall yet.
 3 Q This fall?
 4 A Yes.
 5 Q Okay. What's the other PCB excavation area?
 6 A If you were to go directly west of 138 South
 7 Marquette Street --
 8 Q Okay.
 9 A -- to what essentially is the center, it would be
 10 the south central region of that parking lot,
 11 there's -- there's a square area that's been
 12 identified for excavation. There was -- We -- Our
 13 sample results showed a hot spot for PCB
 14 concentrations, and it's very close to where
 15 Monitoring Well Nest 3 currently exists. Close to
 16 where the temporary SVE building sits on site.
 17 There's a square area there that is proposed for
 18 excavation. Again, to a two-foot depth.
 19 Q Is any of the Department's rationale or thinking
 20 associated with these PCB excavation areas written
 21 down anywhere?
 22 A No.
 23 Q Well, why not? Doesn't it seem like the kind of
 24 thing that ought to be written down?
 25 A When we give final approval to the work plan for

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1 the excavation, that will be our written
 2 documentation of our decision.
 3 Typically, when we -- at least when I
 4 project manage a site, if I've got something in
 5 and we make a decision to approve, I don't write a
 6 particular memo to the file that says we approved
 7 this activity. Usually the approval letters, in
 8 the way I do things, serves that purpose.
 9 Q But is my understanding correct that DNR and EPA
 10 have agreed on -- on PCB excavation areas, and
 11 none of the rationale for that decision, as of
 12 today, is in writing? Is that true?
 13 A Correct.
 14 Q Okay. Okay. All right. So let's go back to this
 15 meeting. And the first part of it, I gather,
 16 involved a discussion with EPA about PCBs, right?
 17 A Correct.
 18 Q Okay. And then what, they got off the phone and
 19 then it was DNR personnel, plus Hausbeck, the ones
 20 you identified?
 21 A Yes.
 22 Q Okay. And did you guys talk about anything other
 23 than things we've talked about in this deposition
 24 so far today?
 25 A Just to step back, when EPA was still on the

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1 phone --
 2 Q Yeah.
 3 A -- there will be additional PCB investigation work
 4 taking place off site in the backyards of a number
 5 of the homes on the east side of Waubesa Street.
 6 Because it's so difficult to sample on the Kipp
 7 property in that area, there will be -- we'll be
 8 going off site and sampling a number of the
 9 backyards for PCBs on Waubesa Street. That we
 10 approved that activity. It's subject to access
 11 and timing and such.
 12 Q Sure.
 13 A But that work will also take place. So that
 14 conversation took place when -- when EPA was still
 15 on the phone.
 16 When -- Then when we were done with
 17 the PCB conversation we talked vapor. We may have
 18 had some discussion on soils. In fact, yes, we
 19 did. We discussed soils, also. And we concluded
 20 on that call that we were going to make a request
 21 of Kipp to take some additional background PAH
 22 soil samples in the area near the plant in areas
 23 we think would have a low likelihood of being
 24 impacted from activities at Kipp, but to give us
 25 some feel for what background PAH concentrations

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1 were in the area so we can compare those to the
 2 concentrations we see in the backyards of the
 3 properties adjacent to Kipp, try to make some
 4 decisions. Do these PAH concentrations show
 5 impacts or not.
 6 Q This is testing of residential soils for PAH?
 7 A Yes.
 8 Q Okay. And has Kipp agreed to do this testing, or
 9 is it only proposed at this point?
 10 A It's only proposed at this point. There's no
 11 agreement.
 12 Q Okay. When -- When do you expect an answer from
 13 Kipp?
 14 A We discussed it yesterday, and they would like to
 15 see something in writing from us as to the number
 16 and rationale for the number of samples and how
 17 the data would be used. And so over the course of
 18 the next week or so I'll be putting something
 19 together on that.
 20 Q Now, the PCB testing which is going to take place
 21 on the east side of Waubesa, when do you expect
 22 that testing will take place?
 23 A Within the next 30 days or so.
 24 Q Okay. And have you identified specific properties
 25 on that side of Waubesa that will be tested for

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1 PCBs?
 2 A Yes. There was a map that was included in a work
 3 plan to us that showed addresses and sample
 4 locations.
 5 Q Do you know right now which addresses? What to
 6 what?
 7 A I believe it's most all of the addresses between
 8 233 and 269 Waubesa Street. There's a proposal to
 9 do two samples in the backyards of each of those
 10 residences, subject to access. We've not been
 11 successful getting access to several of the
 12 parcels over there, so it --
 13 MS. ROSS: Could I ask that you keep
 14 your voice up just a little bit more.
 15 THE WITNESS: Oh, yeah. We have
 16 not -- We -- In the past we have not been able to
 17 get access to some of the parcels there. So it
 18 will probably be some subset of that list of
 19 addresses.
 20 BY MR. COLLINS:
 21 Q Okay. Couple more questions about this meeting
 22 that you had. Was there any significant
 23 disagreement among the participants to the meeting
 24 over any issues discussed at the meeting?
 25 A No. There -- The -- On the vapor -- On the vapor

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1 agreement we reached -- On the vapor discussion we
 2 reached agreement rather quickly and everyone
 3 agreed with that.
 4 On the -- On soils we have not -- we
 5 were not discussing soil remedial actions. We
 6 were just discussing what information we need to
 7 make decisions, and so there was agreement on
 8 that. And I think there's general agreement
 9 between the Department and EPA on the PCB work at
 10 this point.
 11 Q Was there any discussion at the meeting about
 12 money? And specifically, how much the
 13 investigation and/or provision of mitigation
 14 systems is costing the DNR?
 15 A The cost of putting mitigation systems in may have
 16 been part of the discussion on vapor when we were
 17 deciding -- when we were reaching the conclusion
 18 that it didn't make sense to offer mitigation
 19 systems to the homes on Dixon and Corry Street.
 20 It was not the prime decision-making criteria in
 21 that. It was rather looking at the data and what
 22 we thought the data was telling us. So cost
 23 probably came into the conversation, but in a
 24 minor way.
 25 Q Okay. So is it fair to say that one of the

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1 reasons that mitigation systems will not be
 2 offered to the families on Dixon and Corry is the
 3 cost to the DNR of those mitigation systems?
 4 A I'm going to say no --
 5 Q Okay.
 6 A -- because I think -- I think the strong
 7 determining factor in why we were not offering
 8 mitigation systems to Dixon and Corry Street
 9 addresses is the data and what we think the data
 10 tells us about the risk and where the sources of
 11 that PCE may be.
 12 Cost, only in -- I think cost would
 13 only come in when we say it -- it doesn't -- it's
 14 not cost effective to put in mitigation systems in
 15 homes where we think may not be related to Kipp.
 16 Q Where is DNR getting the money for this vapor
 17 sampling and mitigation system provision?
 18 A The Remediation and Redevelopment Program has a
 19 fund, and I don't know all the tax dollars that go
 20 into it, but we have a fund that we can use to
 21 carry on investigations at sites that don't have
 22 responsible parties where we have disagreements
 23 with responsible parties, and that's how this
 24 work's being funded.
 25 Q Okay. Well, the monies that DNR has spent in that

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1 regard, does it plan to seek recovery of those
 2 from Kipp?
 3 A Yes. Cost recovery has always been part of the
 4 thought.
 5 Q Okay. To your knowledge, is that part of what's
 6 being sought in the lawsuit that the State
 7 recently filed against Kipp?
 8 A I don't know. I know there's some -- in that
 9 there is discussions of costs, but I don't know if
 10 our past costs are specifically included in there.
 11 I don't know.
 12 Q Okay. We started out the deposition by talking
 13 about, you know, what -- what's happened in the
 14 last 30 days since the last deposition session.
 15 And you told me about the meeting and the
 16 decisions regarding vapor sampling, et cetera.
 17 Has there been anything else which, in
 18 your mind, is of significance relating to this
 19 site that's transpired in the last 30 days?
 20 A Yeah.
 21 Q Tell me.
 22 A Yes. We have started the deep groundwater
 23 investigation. At this point we are -- we are
 24 working on the third on-site deep well to
 25 determine groundwater contamination at depth and

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1 groundwater flow direction at depth.
 2 There are two other locations yet to
 3 be drilled, but that work has started. It's been
 4 ongoing for a couple weeks now. And we have an
 5 approved work plan for them to do that work.
 6 Q Okay. So when you say you have started the deep
 7 groundwater investigation, what does that mean?
 8 You've got this third well on site now?
 9 A There are five planned drilling locations, and we
 10 are on the third one of those locations now.
 11 They're -- They're jumping back and forth between
 12 them because it -- just in the way you drill wells
 13 and the way you have to complete wells it makes
 14 sense to kind of go back and forth. So we have
 15 one location completed, two that are in the
 16 process of being completed kind of simultaneously.
 17 Q Has the third well generated any data yet?
 18 A No.
 19 Q Okay. All right. And these wells will help
 20 determine you said what? Flow and direction?
 21 Rate of flow you mean, and direction?
 22 A Direction -- Primarily direction of flow at this
 23 point. And also the vertical distribution and
 24 horizontal distribution of contamination at depth.
 25 Q Okay.

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1 A The concern being if this stuff is going off site
 2 at depth, which direction is it going.
 3 Q So until this time, until the last few weeks, has
 4 any effort ever been made by anybody at the Kipp
 5 site to determine the direction of groundwater
 6 flow?
 7 A Yes. Over the years there have been a number of
 8 groundwater flow maps drawn based on the --
 9 whatever well nest was existing -- monitoring well
 10 nest that was existing at that time. We've been
 11 limited in how well we can draw some of those maps
 12 because so many of our wells are so close to each
 13 other. The closer they are, the harder it is to
 14 do things.
 15 Q So it's fair to say that whatever was done in the
 16 past was not, at least in your mind, an adequate
 17 effort to determine the direction of groundwater
 18 flow in the deep aquifer?
 19 A In the deep aquifer --
 20 MR. SEESE: I object to the form. You
 21 can answer.
 22 THE WITNESS: Oh. For the deep
 23 groundwater, the -- the well nest network has not
 24 been adequate to determine that. For shallow
 25 groundwater, I think we have a pretty good handle

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1 on it.
 2 BY MR. COLLINS:
 3 Q Since when?
 4 A Within this last year.
 5 Q Okay. For shallow.
 6 A For shallow.
 7 Q For deep you still don't know. You're trying to
 8 find out.
 9 A We're still determining that.
 10 Q Okay. Okay. And the -- another reason for
 11 drilling these additional wells is to determine,
 12 as you say, the vertical and horizontal
 13 distribution of the contamination in the deep
 14 groundwater, right?
 15 A Correct.
 16 Q Which today you don't know, true?
 17 A True.
 18 Q You're trying to find out.
 19 A Yes.
 20 Q Okay. Okay. All right. So let's continue with
 21 what else of significance has happened in the last
 22 30 days out at the site, if anything else?
 23 A We've been continuing to address the PCB issue,
 24 the off-site soils, off-site groundwater.
 25 The -- I guess the other significant

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1 thing that has occurred, and we got a briefing on
 2 this yesterday, is that the consultants to Kipp
 3 are formulating a pilot test for a remedial
 4 action -- that could lead to a remedial action for
 5 the groundwater at the site.
 6 Q What -- What depth of groundwater? Shallow, deep,
 7 both, do you know?
 8 A Both. If -- If the pilot test were successful, I
 9 think we would be applying it to groundwater from
 10 the water table down to a depth of probably maybe
 11 170 feet or so.
 12 Q What's the pilot test?
 13 A The first part of the pilot test involves -- Once
 14 these -- all these deeper wells are installed that
 15 we're discussing, the first part of the pilot test
 16 would involve injecting tracers into the
 17 groundwater to try to come up with rates of flow,
 18 directions -- you know, confirmed directions of
 19 flow, rates of flow, probably some type of
 20 conservative tracer.
 21 Once that work is completed we'd be
 22 injecting a chemical oxidant, and I don't know if
 23 that's been finally determined yet what that
 24 oxidant would be, to see one, how well it works,
 25 in terms of breaking down the contamination, and

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1 two, how big of an area of influence you can get.
 2 You know, how much do you have to put down to
 3 clean up a certain volume of aquifer.
 4 Q You said you don't know if that's been determined
 5 yet, relating to the chemical oxidant. If you
 6 don't know, is there somebody else at DNR that
 7 would?
 8 A No. We have not seen the written work plan yet.
 9 We just discussed it yesterday. And there was
 10 some discussion of potassium permanganate, I
 11 believe, as the oxidant, but I'm not sure -- I
 12 guess from the discussion that we had yesterday I
 13 don't have a complete picture of all what's going
 14 on. That could be the oxidant they're looking at.
 15 Q Why do you care about rates of flow of
 16 groundwater?
 17 A It affects how successful you can be. You know,
 18 one, how far away your oxidant can -- can affect
 19 groundwater contamination. And in some cases if
 20 you have too fast of flow you might dilute your
 21 oxidant down to a point where it's not effective.
 22 So, you know, how fast and far. And
 23 also, it relates to, you know, where do you
 24 monitor to see whether or not you're having an
 25 effect. If you're monitoring beyond the distance

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1 your -- your reactant could have traveled and
 2 you're not seeing anything, you may falsely
 3 determine that your remediation is not working.
 4 So you need to have some idea of where these
 5 reactions are taking place in the subsurface. So
 6 flow rate is important to know.
 7 Q Okay. Anything else of -- that you would describe
 8 as being of significance as having occurred in the
 9 last 30 days? Anything you haven't told me about
 10 so far in this deposition?
 11 A Not that I can recall. I think -- I think that's
 12 a pretty complete listing.
 13 Q Let's go back to the 42 borings that are going to
 14 be drilled through the concrete floor of the Kipp
 15 property. When's that going to happen?
 16 A In the next 30 days, I believe, we want to get
 17 that completed.
 18 Q Okay. And you approved those locations, right?
 19 A Yes.
 20 Q And you approved them because you think they
 21 accurately encompass the -- the -- the places
 22 where PCE was stored or spilled or leaked?
 23 A Yes, where -- just basically, in many cases, where
 24 just chemicals were handled or were -- there was
 25 some underground trenching that ran through the

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1 floor of the building at one time that could have
 2 handled a waste material. We're looking at that
 3 trench area.
 4 So, yeah. Where -- Where it was
 5 handled, where it was stored, where it may have
 6 been transported, where it may have been spread.
 7 Q Okay. So what I'm getting at is how -- how do you
 8 know where PCE was used, stored, spilled, leaked,
 9 et cetera, within the plant?
 10 A Where it was used or stored, that information
 11 comes to us from Kipp based on discussions on
 12 Phase I reports.
 13 You know, where it was -- where it's
 14 been spilled, you know, I don't know if, you
 15 know -- I suppose all those areas are not known,
 16 you know. If there was -- If there was some
 17 spillage or mishandling of it someplace, you know,
 18 you may not know all of those spots, but --
 19 Q Well -- Go ahead. I'm sorry.
 20 A Okay. But I think if you look at not only where
 21 we're sampling inside the building, but if you
 22 look at the extent of soil sampling we've done
 23 outside the building in all directions, if there
 24 were areas of significant spillage or mishandling,
 25 the number of borings we've placed and the number

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1 of samplings we've taken, we should have seen it.
 2 Q Have you or anybody at DNR, to your knowledge,
 3 interviewed any current or past employees in an
 4 effort to determine where PCE might have been
 5 spilled or leaked within the plant?
 6 A No.
 7 Q Why not?
 8 A At this point we've relied on the Phase I and
 9 the -- just kind of the comprehensiveness of our
 10 investigation.
 11 Q Well, okay. I don't mean to be rude, but how can
 12 it be comprehensive if you haven't talked to
 13 current or former employees about how PCE may have
 14 been spilled or leaked at the plant?
 15 A Well, I guess I would argue if you look at where
 16 we have sampled around the building --
 17 Q Outside the building.
 18 A Yes, around the existing building, there's only so
 19 many locations to look. And if you look at the
 20 distribution of soil borings, I believe we've
 21 captured all those areas in north, south, and east
 22 to west directions.
 23 Q But outside the building.
 24 A Outside the building.
 25 Q Now we're talking about inside the building.

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1 A Right. And again, if you just -- and I guess I
 2 would say if you look at the square footage of the
 3 building and you look at the distribution of our
 4 42 or so sample locations, again, if there are
 5 significant sources underneath the building, those
 6 borings should hit it, you know.
 7 If there is a small area of soil
 8 contamination beneath the building the size of
 9 this room, you know, you may not ever -- even if
 10 you know the area to look for, you may not find it
 11 in that. So -- but I think the level of effort
 12 that's being placed to look inside the building,
 13 if there are sources there that are significant
 14 for us to affect our discrimination making, in
 15 terms of remedial actions, I think we have a good
 16 chance of finding it.
 17 Q Well, you told me that the 42 drilling locations
 18 were concentrated, correct?
 19 A They're focused, yeah. They extend north, south,
 20 east, west throughout the building, but they
 21 are concentrated in -- It's not a grid pattern.
 22 They are concentrated close to specific past
 23 activities.
 24 Q So you think they're concentrated in the correct
 25 areas because of what you learned in Kipp's

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1 Phase I reports; is that right?

2 A And in walking the site with them on Friday,

3 listening to their explanation. When we got the

4 site investigation work plan, one of the things I

5 wanted to do was walk the building and have them

6 explain to me the rationale for those locations.

7 Once we did that, I was satisfied that

8 the locations we identified captures, you know,

9 the important areas, you know, the areas of -- of

10 concern.

11 Q Who's the them? You said you walked with them.

12 Who's them?

13 A It was Mark Meunier from Madison-Kipp and Tony

14 Schoen from ARCADIS.

15 Q Okay. Neither of whom was there in the '70's and

16 '80's, right? I mean, ARCADIS certainly --

17 A I don't know when Mark joined the firm, but yeah.

18 I don't think he was there in the '70's.

19 Q Okay. So have you ever asked anybody whether any,

20 you know, any maintenance employees still -- you

21 know, from -- who worked there in the '70's and

22 '80's still work at the plant, or any retired such

23 maintenance employees are still reachable? Did

24 you ever pursue that line of thinking?

25 A No.

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1 Q Okay. So you -- the Department made no effort to

2 talk to anybody who worked at the plant back in

3 the '60's, '70's or '80's who might have been

4 eyewitnesses to PCE spilling or leaking inside or

5 outside of the plant during that time; is that

6 right?

7 MR. SEESE: Object to the form of

8 that. You can answer.

9 THE WITNESS: I did not.

10 BY MR. COLLINS:

11 Q Okay. Are you aware of anybody at DNR who did

12 that kind of investigation?

13 A I don't believe there are any. In the last

14 deposition we talked about the previous project

15 manager, Constantine Tsoris. I don't know if Dino

16 ever spoke with past employees or not. If he did,

17 I'm not aware of it.

18 Q Well, did you ever ask Dino if he did?

19 A No.

20 Q So when you boil it all down, is it accurate to

21 say that DNR's information, at least as much of it

22 as you know about, about where PCE may have been

23 spilled and leaked inside or outside the building,

24 comes from Mark Meunier and consultants paid by

25 Kipp?

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1 MR. SEESE: Object to the form of

2 that. Go ahead and answer.

3 THE WITNESS: That's correct.

4 BY MR. COLLINS:

5 Q And that's enough for you? That feels adequate to

6 you?

7 A Given the level of physical investigation we've

8 carried on, again, both outside and now coming up

9 on inside the building, yes.

10 Q Okay. Did you ever talk to a guy named Jim Lenz

11 who worked for 30-plus years at Kipp?

12 A No.

13 Q Used to be their environmental manager. You never

14 spoke to him?

15 A I have -- Not that I know of. I never -- No. I

16 don't think I ever have, no.

17 Q Did you ever hear of him?

18 A Yes. I think his name appears in the file on some

19 memos and such, but I've never spoken with him.

20 Q Do you know if Dino or anybody at DNR ever

21 interviewed Lenz to find out what he might know

22 about where inside and outside the building PCE

23 might have been spilled or dumped or leaked?

24 A Not that I know of.

25 Q Okay. Do you know he was deposed in this case

Page 276

1 recently? Do you know that?

2 A Yes.

3 Q Okay. I would commend his deposition to you on

4 that score. For anybody who's trying to do a

5 thorough investigation of these matters, I'd

6 commend that deposition to you.

7 MR. SEESE: Yeah. I move to strike

8 the narrative of counsel.

9 MR. COLLINS: Okay. Well, you heard

10 it, so -- stricken or not. This is next.

11 (Exhibit No. 31 was marked for

12 identification.)

13 BY MR. COLLINS:

14 Q Okay. Let me know when I can ask you about 31,

15 please.

16 A Just one second, okay.

17 (Discussion off the record.)

18 THE WITNESS: Okay.

19 BY MR. COLLINS:

20 Q Okay. By the way, anytime you want to take a

21 break, you know, just -- you say so, right?

22 A I'm fine.

23 MR. TINKER: We got a break request

24 over here.

25 MR. COHEN: When you have time for a

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1 bathroom break, let's --
 2 MR. COLLINS: All right. Let's do it.
 3 Let's do it now.
 4 (Recess taken.)
 5 BY MR. COLLINS:
 6 Q All right. So Mr. Schmoller, Schmoller 31 is a
 7 copy of the State's complaint against
 8 Madison-Kipp. Do you have that there?
 9 A Yes.
 10 Q You've seen that before today, right?
 11 A Yes.
 12 Q All right. Could we turn to paragraph 4 on page
 13 2, please?
 14 A (Witness complies.)
 15 Q And there it says that Madison-Kipp used PCE as a
 16 degreasing solvent from the late 1940's until
 17 1987. Do you see that?
 18 A Yes.
 19 Q Do you know what the factual basis for that
 20 allegation is?
 21 A To 1987 date comes to us from a statement that
 22 Kipp has told us that's when they ceased using
 23 PCE.
 24 Q Okay.
 25 A I'm not sure what the source of the starting date

Page 278

1 for that is, you know, the 1940's date. That I'm
 2 not sure of.
 3 Q Okay. The next sentence then says during this
 4 time tetrachloroethylene was released into the
 5 environment via venting, spills or leaks, and then
 6 the sentence goes on. Do you see that?
 7 A Yes.
 8 Q What's, if you know, what is the basis for the
 9 Department's allegation concerning venting, spills
 10 or leaks?
 11 A The venting was -- was -- that was discussed in a
 12 series of reports that Kipp has given to us over
 13 the years where they talk about the exhaust from
 14 their vapor degreasing facilities that were there
 15 at one time, and that that venting had vented PCB
 16 vapors outside the building that had got into
 17 soils.
 18 Q Did you -- I think you just said PCB.
 19 A Oh, PCE.
 20 Q You meant to say PCE, right?
 21 A PCE, yes.
 22 Q Okay. All right. So that's -- that concerns the
 23 venting, right?
 24 A Correct.
 25 Q All right. Now -- So do you know where on the

Page 279

1 property this venting occurred? In other words,
 2 when the PCE in vapor form was vented, do you know
 3 where it went?
 4 A Once it vented outside the building, you know,
 5 where specifically it went, no.
 6 Q Well, do you know if any of it got onto the
 7 ground?
 8 A Yes. Well, that's our belief. When we -- If you
 9 look at the elevated soil readings like you see
 10 near Monitoring Well 5, and the soil readings we
 11 see up in the northeast parking lot, you know,
 12 both those are areas where the venting of the
 13 degreasing operations occurred, based on our
 14 understanding of the site history.
 15 So, yeah. We believe that the venting
 16 from those operations would cause the soil
 17 contamination out there.
 18 Q And then the -- the vapor coming out the vent
 19 condensed --
 20 A Yeah.
 21 Q -- into a liquid and hit the ground, is that
 22 basically it?
 23 A That's the understanding, yes.
 24 Q Okay. And so what do you know about -- what does
 25 the Department know about spills and leaks?

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1 A There was an aboveground AST that stored PCE in
 2 the northeast portion of the site, and there was a
 3 leak that occurred from -- a leak or a spill that
 4 occurred from that tank, ran down along the
 5 eastern -- north along the eastern side of the
 6 building.
 7 Q Are we talking about a single event, at least
 8 according to your understanding? You said a leak
 9 or a spill. Are you talking about a single event?
 10 A I think there's a known single event. I don't
 11 know -- I don't think it's reported that it
 12 happened repeatedly.
 13 Q And this was PCE?
 14 A Yes.
 15 Q From the aboveground storage tank?
 16 A Yes.
 17 Q Which is located approximately where?
 18 A It would be towards the northern portion of the
 19 building. To best describe it, if you look at the
 20 northern extension of the building, there's an
 21 area on the east side of the building where
 22 there's an indentation.
 23 Q Yeah.
 24 A The tank was in that indentation area.
 25 Q Okay. And for this single event, when did this

Page 281

1 event occur, this PCE leak or spill from the
 2 aboveground storage tank?
 3 A That I don't recall.
 4 Q Do you know a decade?
 5 A '70's or '80's.
 6 Q Okay. What's the source of your information on
 7 that?
 8 A It's in the file. As I recall, there's discussion
 9 in the file that it may have come from one of the
 10 earlier Kipp reports that were generated from the
 11 site.
 12 Q How much was spilled or leaked, do you know?
 13 A No.
 14 Q Do you know what was reported in that regard?
 15 A No.
 16 Q All right. So concerning venting and spilling or
 17 leaking as alleged in paragraph 4, do you have any
 18 other factual basis?
 19 A No.
 20 Q Okay. Can we go to paragraph 9, please. First
 21 sentence in paragraph 9 says Madison-Kipp used oil
 22 containing PCBs at the facility from 1966 until at
 23 least 1971.
 24 Do you have any factual basis for
 25 that? I'm talking you, Mike Schmoller.

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1 A Yes.
 2 Q What is it?
 3 A There was a statement made to the Department by
 4 Kipp that there were PCB-containing hydraulic
 5 fluids used and stored on the site, and they were
 6 used on the site during that time period. That
 7 came to us in a written document.
 8 Q Okay. And then the next sentence says during this
 9 time and beyond, spent oil containing PCBs were
 10 spread on the facility's gravel parking lots as a
 11 dust suppressant.
 12 What source do you have for that
 13 statement?
 14 A That's discussed in the Phase I reports, and it
 15 also was -- been discussed in face-to-face
 16 meetings with Kipp.
 17 Q Do you know if this -- the spreading of these PCBs
 18 also involved the spreading of other chemicals in
 19 addition to PCBs?
 20 A I do not have factual information regarding that,
 21 no.
 22 Q Do you have any other kind of information?
 23 A The -- The soil contamination data that we have
 24 from the investigations that took place suggest to
 25 me that in addition to PCBs being in the fluids

Page 283

1 that were spread, that there were also PCE wastes.
 2 Q Why do you say that?
 3 A If you just look at the distribution of PCE all
 4 around the site, it makes sense that -- and you
 5 look at it in conjunction with the PCB data and
 6 the on-site PAH data, I think the three of those
 7 together give a pretty clear picture that whatever
 8 fluids were spread for dust suppressant in the
 9 northeast or southwest, had those components.
 10 Q Have you ever tried to figure out how physically
 11 these chemicals were spread on the property? I
 12 mean, I see the word spread here. I guess I'm
 13 asking what does that mean?
 14 A No. The actual mechanism, no.
 15 Q Okay. Do you understand where the chemicals came
 16 from immediately before they were spread?
 17 A From production use at the Kipp facility.
 18 Q I understand that, but, I mean, did the spreader
 19 take them directly from the machines where they
 20 were used? Was there some sort of spent oils
 21 storage container? Do you know anything along
 22 those lines?
 23 A No. I don't think we have information on that
 24 that I can recall off the top of my head.
 25 Q Okay. A little bit ago we were talking about the

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1 42 locations where they're going to be drilling
 2 through the floor, right, and testing of the soil
 3 underneath.
 4 A Yes.
 5 Q You started telling me about a trench. Do you
 6 recall that?
 7 A Yes.
 8 Q Tell me more about that. What trench are you
 9 talking about?
 10 A There is a -- There is a pipeline that ran
 11 underneath the floor that I believe carried either
 12 cooling fluids or cutting fluids from a series of
 13 machines that are aligned in the facility. And
 14 that trench runs north, south kind of through the
 15 central portion of the building that's shown on
 16 Exhibit 5.
 17 It was underneath the floor and it was
 18 a piping, actually. It ran underneath the
 19 concrete or, you know, below the concrete through
 20 that portion of the building.
 21 Q And why is this of interest to you?
 22 A If it handled cutting fluids or -- or other fluids
 23 that could have contained the contaminants we're
 24 concerned about, you know, if that pipe were to
 25 have leaked, that would be a potential source for

Page 285

1 contamination underneath the building.

2 Q Okay. Do you have a map or any other information

3 that tells you about where that pipe was or still

4 is?

5 A In the work plan for the inside the building

6 investigation, there's a schematic of the building

7 that shows the sample locations and -- and certain

8 other, you know, features with -- inside the

9 building.

10 Q And you believe that pipe carried what chemicals?

11 A It may have carried cutting fluids or other

12 coolants.

13 Q Was this pipe connected directly to machines, do

14 you know? Was it connected to vents in the floor?

15 A I think there were laterals that ran from certain

16 machines to this pipe, and then this pipe conveyed

17 it to a location that I can't recall off the top

18 of my head.

19 Q Do you believe the pipe may have carried PCE?

20 A I don't recall specifically.

21 Q Whether it did or didn't?

22 A Right.

23 Q So the -- the pipe carried whatever it carried to

24 where, do you know?

25 A I don't know where it ended up. It was -- It was

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1 a wastewater. I don't remember if it went back to

2 a location to be recycled or it went to a location

3 to be waste. I'm not sure.

4 Q Okay. So you don't know if the pipe just carried

5 it and emptied out onto the ground outside the

6 plant?

7 A I don't believe it did that. I believe it was

8 controlled in some fashion. I just don't recall

9 what. I don't think it was an empty discharge to

10 the parking lot.

11 Q Are you familiar with an open collection trench

12 that existed on the property that collected fluids

13 from various machines and other locations

14 throughout the plant?

15 A No. I've not seen or heard a discussion of that.

16 An open trench? No.

17 Q Closed trench?

18 A Other than the one we've just been discussing

19 here, which I believe had a pipe that ran through

20 it, I don't -- I'm not aware of an open trench.

21 Q Okay. Are you aware of any vats or bins or tubs

22 where spent oils and other spent chemicals were

23 collected before being disposed of outside the

24 plant somewhere?

25 A There may -- I'm trying to recall. There may have

Page 287

1 been collection in drums used solvent at the

2 locations where the degreasing facilities were,

3 but I can't recall specifically.

4 Q Okay. The easiest way to do this is Mr. Berger's

5 going to ask you a couple of questions rather than

6 route them through me. Why don't you go ahead,

7 Norm.

8 EXAMINATION

9 BY MR. BERGER:

10 Q I just want to clarify what you observed

11 concerning this pipe that went through the plant.

12 My understanding is this pipe carried

13 fluids that were collected from various production

14 areas around the plant. Is that what you're

15 saying?

16 A Yes. There were lateral lines that ran to it from

17 machines that were located -- aligned parallel to

18 that trench.

19 Q Okay. And were there subgrade areas in and around

20 each of those machines where the fluids could

21 collect and then go into the pipe that would take

22 them into this larger pipe?

23 A That I don't know. I did not see that, and how

24 they -- how the laterals were collected to the

25 actual machines themselves, I'm not sure.

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1 Q Did you look to see how it is each one of these

2 machines would collect these fluids and get them

3 into this pipe?

4 A No. We basically, when I was there, we stood over

5 the location where the -- this large trench and

6 pipe existed, and then it was just pointed out

7 that these machines, these laterals, would come

8 to -- but, you know, the facility's in operation,

9 so I didn't walk over there to look and see

10 where -- how the pipe may have been directed --

11 collected to the machine.

12 Q Okay. Now, you testified earlier that these

13 proposed borings were concentrated in areas. And

14 I understand from your testimony that one of the

15 areas where the borings are concentrated is the

16 area along that pipe that collected all these

17 fluids, is that fair?

18 A Yes. There are a series of borings located in a

19 staggered fashion like on the left side of the

20 trench, then the right side of the trench, then

21 the left side of the trench as you --

22 Q The question I have now is are there borings

23 proposed around the locations of all the machinery

24 that generated the fluids that were taken into

25 this pipe?

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1 A No, there are not.
 2 Q Okay. So the source areas from those fluids are
 3 not part of the current investigation.
 4 MR. SEESE: Object to form of that.
 5 THE WITNESS: Correct.
 6 MR. BERGER: Okay. You can go.
 7 (Exhibit Nos. 32 and 33 were marked
 8 for identification.)
 9 EXAMINATION
 10 BY MR. COLLINS:
 11 Q Okay. Can I ask you about 32 now?
 12 A Yes.
 13 Q Okay. So 32 is a letter from the Department to
 14 Madison-Kipp, and up at the top here the
 15 Department is telling Madison-Kipp that the
 16 vertical and horizontal degree and extent of
 17 groundwater contamination has not been determined
 18 at the site, correct? Do you see that?
 19 A Yes.
 20 Q This is a 1999 letter, correct?
 21 A Yes.
 22 Q Isn't it true that five years earlier, in its
 23 initial responsible party letter, the Department
 24 of Natural Resources told Madison-Kipp the very
 25 same thing?

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1 MR. COHEN: Object to the form.
 2 THE WITNESS: Yeah. The responsible
 3 party letter states that they have a
 4 responsibility to define the extent of impacts
 5 and -- and deal with them.
 6 BY MR. COLLINS:
 7 Q And clean it up, right?
 8 A And clean it up, correct.
 9 Q And that was in 1994, the responsibility party
 10 letter, right?
 11 A Correct.
 12 Q Now, with this letter the State is telling
 13 Madison-Kipp essentially the same thing, correct?
 14 MR. SEESE: Object to the form of
 15 that.
 16 THE WITNESS: Yeah. If you look at
 17 the -- the second paragraph on, it -- it -- the
 18 letter states based on statute, what their
 19 responsibility is for defining the extent of
 20 contamination is.
 21 BY MR. COLLINS:
 22 Q And it's citing the same spill law as cited in the
 23 '94 letter, correct?
 24 A Correct.
 25 Q All right. Okay. And -- And in this letter, the

Page 291

1 '99 letter, the Department reminds Kipp that the
 2 spill law authorizes the Department to enforce the
 3 cleanup of -- of contaminated sites,
 4 right? It's the beginning of the -- beginning of
 5 the second paragraph on the first page,
 6 Mr. Schmoller.
 7 A Yeah. Yes. Yep.
 8 Q Yeah?
 9 A Yes.
 10 Q All right. Let's go to 33 now, please. And 33 is
 11 a 2006 letter from the Department of Natural
 12 Resources to Madison-Kipp, correct?
 13 A Yes. September 28th, 2006.
 14 Q Yes. And then down near the bottom of the first
 15 page, in fact it's the third paragraph -- the
 16 beginning of the third paragraph on the first
 17 page, it says site investigation and remediation
 18 activities necessary to address the release of PCE
 19 at the Madison-Kipp site have not been moving in a
 20 timely manner, correct?
 21 A Correct.
 22 Q All right. And then the next paragraph down, I
 23 want to read you a sentence from that. And that
 24 sentence says the WDNR considers the investigative
 25 and remediation activities and associated

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1 timeframes outlined in this letter as critical for
 2 compliance with Wisconsin State Statutes, and it
 3 gives a number, in addressing the release of PCE
 4 contamination from Madison-Kipp Corporation,
 5 right?
 6 A Correct.
 7 Q Isn't the State in 2006 telling Madison-Kipp
 8 essentially the same thing that it's been telling
 9 Madison-Kipp since 1994?
 10 MR. SEESE: Object to the form of
 11 that.
 12 THE WITNESS: Yeah. Again, the -- the
 13 2006 letter reiterates Kipp's requirements under
 14 292.11, the statute, to investigate and remediate
 15 the PCE contamination problem.
 16 MR. COLLINS: Okay.
 17 (Exhibit No. 34 was marked for
 18 identification.)
 19 THE WITNESS: Okay.
 20 BY MR. COLLINS:
 21 Q Okay. So Schmoller 34 is your predecessor, Dino
 22 Tsoris, writing to the file on August 31 of 2006,
 23 right?
 24 A Correct.
 25 Q And he's saying in the first paragraph that he

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1 spoke with some Madison-Kipp representatives and
 2 he's saying, and now I'm quoting, "Site
 3 investigation and remedial action activities in
 4 recent months have not been conducted. I had
 5 stated that the lack of progress was
 6 unacceptable."
 7 And then the next paragraph at the
 8 bottom Tsoris writes however, if the appropriate
 9 and necessary actions for investigation and
 10 cleanup of the PCE system do not proceed in a
 11 timely manner, enforcement actions, including the
 12 use of a consent order, would be initiated.
 13 Do you see that?
 14 A Yes.
 15 MR. SEESE: Object to the form of that
 16 question.
 17 BY MR. COLLINS:
 18 Q And you can see that this -- the date of Schmoller
 19 No. 34, Dino's letter to the file, it comes just
 20 about a month before the date of Schmoller 33,
 21 which is the same guy, Dino's letter to
 22 Madison-Kipp, right?
 23 A Correct.
 24 Q And he's complaining once again about
 25 Madison-Kipp's failure to timely and adequately

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1 address the PCE contamination problem, right?
 2 MR. SEESE: Object to the form of
 3 that.
 4 BY MR. COLLINS:
 5 Q Isn't that true?
 6 A That's what the August 31st memo says.
 7 Q Now, can we go back to the State's complaint,
 8 which is Schmoller Exhibit No. 31, please. And I
 9 want to ask you to look at paragraphs 21 and 22.
 10 Do you have those?
 11 A Yes.
 12 Q Okay. So paragraph 21 of the State's lawsuit
 13 against Kipp says Madison-Kipp has conducted
 14 investigative activities and implemented remedial
 15 measures described above to address and remove any
 16 immediate threats to human health and the
 17 environment, but its efforts have not been
 18 sufficient to define the full extent of the
 19 above-described contamination.
 20 Paragraph 22 says from on or before
 21 1994 to present Madison-Kipp failed to take those
 22 actions necessary to restore the environment or to
 23 minimize the harmful effects to lands or waters of
 24 the State caused by the discharge of
 25 tetrachloroethylene and PCBs contrary to, and then

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1 it cites the spill law, correct?
 2 A Correct.
 3 Q That's the same spill law in paragraph 22 that was
 4 in the 1994 responsible party letter, right?
 5 A Correct.
 6 Q And it's the same spill law that's cited in the
 7 Department's 1999 letter to Madison-Kipp, which is
 8 Schmoller 32 in this deposition, right?
 9 A Correct.
 10 Q And it's the same spill law that is cited in
 11 Schmoller No. 33, the bottom of page 1 of
 12 Schmoller No. 33, which is the Department's letter
 13 to Madison-Kipp in September of 2006, correct?
 14 A Correct.
 15 Q Okay. So isn't it fair for a citizen of Madison
 16 to conclude that the State of Wisconsin, just a
 17 couple of weeks ago, sued Madison-Kipp for failing
 18 to address a problem that has existed since at
 19 least 1994?
 20 MR. SEESE: Object to the form and
 21 foundation of that. You can answer.
 22 THE WITNESS: I'm not sure I know how
 23 to answer that.
 24 BY MR. COLLINS:
 25 Q Let me ask you a better question then. The things

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1 alleged particularly in paragraphs 21 and 22 of
 2 the complaint, Madison-Kipp's efforts have not
 3 been sufficient to define the full extent of the
 4 above-described contamination, and also the State
 5 says that Madison-Kipp failed to take those
 6 actions necessary to the -- to restore the
 7 environment or to minimize the harmful effects to
 8 lands or waters contrary to the State's spill law,
 9 those things that the State put in its lawsuit of
 10 a couple weeks ago that I just read to you, those
 11 have been true throughout the period of time from
 12 1994 to the present, true?
 13 MR. SEESE: Object to the form of
 14 that.
 15 BY MR. COLLINS:
 16 Q True?
 17 A That's true. The -- From 1994 to today, the
 18 investigative activities have not fully defined
 19 the extent of contamination.
 20 Q And there hasn't been anything approaching an
 21 adequate cleanup during that same period of time,
 22 true?
 23 MR. SEESE: Object to form.
 24 BY MR. COLLINS:
 25 Q True?

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1 **A Yeah. The remediation efforts to date have not**
 2 **fully addressed the contamination.**
 3 **Q Okay. All right. So that being the case, don't**
 4 **you believe, isn't it your opinion, Mr. Schmoller,**
 5 **that the action that the State took in suing**
 6 **Madison-Kipp two weeks ago it should have taken**
 7 **much sooner?**
 8 MR. SEESE: Object to form and
 9 foundation.
 10 THE WITNESS: No, I don't -- I don't
 11 agree with that. We have many sites that we've
 12 cleaned up where we've not sued people. And so I
 13 think to make the assumption that had we filed
 14 this lawsuit 10 years ago things would be further,
 15 I'm not sure I can say that.
 16 BY MR. COLLINS:
 17 **Q All right. So what -- what happened recently**
 18 **regarding Kipp's failures to investigate and clean**
 19 **up that made Kipp's failures to investigate and**
 20 **clean up worse than those identified by the DNR in**
 21 **1999 and in 2006 --**
 22 MR. SEESE: Object.
 23 BY MR. COLLINS:
 24 **Q -- for example? Why were their failures to**
 25 **investigate and clean up as documented by DNR in**

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1 **1999 and 2006 any less worthy of the State's**
 2 **action than the ones that caused the State to take**
 3 **action and file this complaint in 2012?**
 4 MR. SEESE: Object to form and
 5 foundation.
 6 THE WITNESS: I think -- I think one,
 7 again -- I think probably two reasons. One is
 8 time. That from 1999 until -- until now, 13 years
 9 or so, you know, there hasn't been satisfactory
 10 action.
 11 And secondly, I think today, now, we
 12 know that the problem at the site is -- is
 13 substantially bigger than what we knew about in
 14 1999. So I think taking this legal action now,
 15 given the size of the problem, seems to make
 16 sense.
 17 BY MR. COLLINS:
 18 **Q Well, isn't -- isn't it true that you know much**
 19 **more about how big the problem is today because of**
 20 **all the testing that's been done in the last 12**
 21 **months?**
 22 **A Yes. The last -- last 12 to 24 months, yes.**
 23 **Q Okay. And isn't it true that the testing done in**
 24 **the last 12 to 24 months could have been done**
 25 **years earlier.**

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1 **A The soil --**
 2 MR. SEESE: Object to form and
 3 foundation. Excuse me. I should have said that
 4 sooner.
 5 THE WITNESS: The soil investigation,
 6 yes. The groundwater investigation, yes. Soil
 7 vapor I'm not convinced because, again, I'm not
 8 sure soil vapor was identified as a problem in --
 9 in 1999.
 10 BY MR. COLLINS:
 11 **Q Well, and you don't know because you told me in**
 12 **the previous session you're not a -- a vapor**
 13 **expert, right?**
 14 **A Right.**
 15 **Q But, for example, the third well that's being**
 16 **drilled on -- on company property, or that's just**
 17 **been completed or is about to be completed, and**
 18 **the fourth and fifth wells which have yet to be**
 19 **drilled, there's nothing that prevented the**
 20 **drilling of those wells 15 years ago, correct?**
 21 **A Those wells could have been completed in earlier**
 22 **times, yes.**
 23 **Q In other words, if someone were seriously**
 24 **interested in the immediate aftermath of the**
 25 **State's 1994 responsible party letter in**

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1 **determining what the State told Madison-Kipp to**
 2 **determine, which is the nature and extent, the**
 3 **horizontal and vertical extent of groundwater**
 4 **contamination, drilling those wells that are going**
 5 **to be drilled in 2012 would have been a very**
 6 **appropriate thing to do.**
 7 MR. SEESE: Object to the form and
 8 foundation.
 9 BY MR. COLLINS:
 10 **Q Right?**
 11 **A Yes. Those -- To meet the requirements of the**
 12 **spills law, those wells could have been installed**
 13 **earlier.**
 14 **Q Those wells which are going to be drilled in 2012**
 15 **on company property are being drilled to**
 16 **determine, among other things, the horizontal and**
 17 **vertical extent of groundwater contamination,**
 18 **right?**
 19 **A Correct.**
 20 **Q They're being drilled 18 years after the State**
 21 **told Madison-Kipp to determine the horizontal and**
 22 **vertical extent of groundwater contamination,**
 23 **right?**
 24 **A Yes.**
 25 MR. COLLINS: Okay. If we take a

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1 little bit longer break, maybe 10 minutes, I can
 2 sort through with Mr. Berger and eliminate half
 3 this stack and tighten this up for everybody,
 4 okay. Give me 10 minutes and we'll shorten this
 5 up a lot. Thanks.
 6 (Recess taken.)
 7 MR. COLLINS: Okay. I'm all done
 8 asking questions, Mr. Schmoller. Thank you. I
 9 may come back, depending on what these folks ask,
 10 but I'm all done for now. Thank you.
 11 MR. SEESE: We've discussed with
 12 counsel for the witness that Madison-Kipp reserves
 13 its right to recall the witness for a deposition
 14 and ask questions of the witness when some more of
 15 the work currently being performed at the site
 16 is -- is undertaken. So at this point we have no
 17 questions, but we reserve our right to call the
 18 witness and notice the witness at a later time.
 19 MR. COHEN: U.S. Fire joins in that
 20 position.
 21 MS. ROSS: And Columbia Casualty and
 22 Continental are taking the same position as well.
 23 MR. BERGER: Okay. Thank you. We're
 24 not agreeing, but we are --
 25 MR. COLLINS: We don't join with them

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1 on anything.
 2 (Discussion off the record.)
 3 MR. COLLINS: Same as before.
 4 MS. ROSS: Same as last time.
 5 MR. SEESE: Same.
 6 MR. COHEN: Same as before.
 7 MR. TINKER: Same for me as last time.
 8 (At 11:54 a.m. the deposition
 9 concluded.)
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1 STATE OF WISCONSIN)
 2 MILWAUKEE COUNTY) SS:
 3 I, KIM M. PETERSON, CM, Registered
 4 Professional Reporter and Notary Public in and for the
 5 State of Wisconsin, do hereby certify that the continued
 6 deposition of R. MICHAEL SCHMOLLER, was taken before me
 7 at the law offices of Whyte Hirschboeck Dudek, 33 East
 8 Main Street, Madison, Wisconsin, on the 11th day of
 9 October, 2012, commencing at 10 o'clock in the forenoon.
 10 That it was taken at the instance of
 11 the Plaintiffs upon verbal interrogatories.
 12 That said deposition was taken to be
 13 used in an action now pending in the United States
 14 District Court, Western District of Wisconsin, Wisconsin,
 15 in which KATHLEEN McHUGH AND DEANNA SCHNEIDER, et al.,
 16 are the Plaintiffs, MADISON-KIPP CORPORATION, CONTINENTAL
 17 CASUALTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY
 18 and ABC INSURANCE COMPANIES 1-50, are the Defendants,
 19 MADISON-KIPP CORPORATION, is the Cross-Claimant,
 20 CONTINENTAL CASUALTY COMPANY, COLUMBIA CASUALTY COMPAN
 21 and UNITED STATES FIRE INSURANCE COMPANY, are the
 22 Cross-Claim Defendants, CONTINENTAL CASUALTY COMPANY and
 23 COLUMBIA CASUALTY COMPANY, are the Cross-Claim
 24 Defendants, and LUMBERMENS MUTUAL CASUALTY COMPANY,
 25 AMERICAN MOTORISTS INSURANCE COMPANY and JOHN DOE

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1 INSURANCE COMPANIES 1-20, are the Third-Party Defendants.
 2 A P P E A R A N C E S
 3 THE COLLINS LAW FIRM, P.C., 1770 North
 4 Park Street, Suite 200, Naperville, Illinois, 69563,
 5 smc@collinslaw.com, by MR. SHAWN COLLINS, appeared on
 6 behalf of the Plaintiffs.
 7 VARGA, BERGER, LEDSKY, HAYES & CASEY,
 8 125 South Wacher Drive, Suite 1250, Chicago, Illinois,
 9 60606-4473, nberger@vblhc.com, by MR. NORMAN B. BERGER
 10 appeared on behalf of the Plaintiffs.
 11 MICHAEL, BEST & FRIEDRICH, LLP, Two
 12 Riverwood Place, N19 W24133 Riverwood, Suite 200,
 13 Waukesha, Wisconsin, 53188-1174, lmseese@michaelbest.com,
 14 by MR. LEE M. SEESE, appeared on behalf of the
 15 Madison-Kipp Corporation.
 16 MICHAEL, BEST & FRIEDRICH, LLP, 100
 17 South Pinckney Street, Suite 700, P.O. Box 1806, Madison,
 18 Wisconsin, 53701-1806, dacrass@michaelbest.com, by MR.
 19 DAVID A. CRASS, appeared on behalf of the Madison-Kipp
 20 Corporation.
 21 TROUTMAN SANDERS, LLP, 55 West Monroe
 22 Street, Suite 3000, Chicago, Illinois, 60603-5758,
 23 becky.ross@troutmansanders.com, by MS. REBECCA L. ROSS,
 24 appeared on behalf of the Continental Casualty Company.
 25 MEISSNER, TIERNEY, FISHER & NICHOLS,

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1 S.C., 111 East Kilbourn Avenue, 19th Floor, Milwaukee,
2 Wisconsin, 53202-6622, mjc@mtfn.com, by MR. MICHAEL J.
3 COHEN, appeared on behalf of the United States Fire
4 Insurance Company.

5 MR. STEVE TINKER, Assistant Attorney
6 General, P.O. Box 7857, Madison, Wisconsin, 53707,
7 tinkerse@doj.state.wi.us, appeared on behalf of the
8 Wisconsin Department of Natural Resources.

9 That said deponent, before
10 examination, was sworn to testify the truth, the whole
11 truth, and nothing but the truth relative to said cause.

12 That the foregoing is a full, true and
13 correct record of all the proceedings had in the matter
14 of the taking of said deposition, as reflected by my
15 original machine shorthand notes taken at said time and
16 place.

17

18

19

20 _____
21 Notary Public in and for
22 the State of Wisconsin

23 Dated this 18th day of October, 2012,
24 Milwaukee, Wisconsin.
25 My commission expires March 9, 2014.

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