

1 IN THE CIRCUIT COURT
2 TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
3 ST. CLAIR COUNTY

4 FRANCES E. KEMNER, et al.,)

5 Plaintiffs,)

6 vs.)

NO. 80-L-970

7 MONSANTO COMPANY, et al.,)

8 Defendants.)

9 Before the HON. RICHARD P. GOLDENHERSH, Judge ,

10
11
12 TRANSCRIPT OF TRIAL PROCEEDINGS

13 March 13, 1984

14
15
16 APPEARANCES:

17 MR. REX CARR

18 MR. JEROME SEIGFREID

On Behalf of the Plaintiffs

19 MR. KENNETH R. HEINEMAN

20 MR. JOHN R. MUSGRAVE

On Behalf of Defendant Monsanto

21 MR. ALBERT SCHOENBECK

22 MR. STEPHEN M. SCHOENBECK

On Behalf of Defendant Norfolk and Western

23 SANDRA ROE
24 Official Court Reporter

I N D E X

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IDENTIFIED

ADMITTED

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HEMILOGIC
UNASABLE
COTTON CONTENT

1 BE IT REMEMBERED AND CERTIFIED there heretofore, on
2 to-wit: March 13, 1984, being one of the regular judicial
3 days of this Court, the matter as hereinbefore set forth came
4 on for hearing before the HON. RICHARD P. GOLDENHERSH, Circuit
5 Judge in and for the Twentieth Judicial Circuit, State of
6 Illinois, in Courtroom #14, St. Clair County Building,
7 Belleville, St. Clair County, Illinois, and the following was
8 had of record, to-wit:

9
10
11 (The following proceedings were had in chambers,
12 with Court and counsel present and out of the presence
13 and hearing of the jury:)

14 THE COURT: On Crunkilton's deposition, we stopped at
15 page 80.

16 MR. STEPHEN SCHOENBECK: On page 81, it's not really
17 an objection, but I think in my question at line 7, it's,
18 now, sir, there had been. I believe I had an "if" in there,
19 if there had been any contamination.

20 THE COURT: Yes. Now, sir, if there had been, it will
21 read. Okay, on page 83, line 19-- oh, that's just a question.
22 I guess 19, 20 and 21. On page 83, line 12, are you adopting
23 that objection?

24 MR. CARR: No, Your Honor.

1 THE COURT: So lines 12 and 13 are out. 84, line 5, are you
2 adopting that objection?

3 MR. CARR: No, Your Honor.

4 THE COURT: Okay. 5 and 6 are out.

5 MR. STEPHEN SCHOENBECK: I would think 7 and 8 should
6 not be read.

7 THE COURT: Yeah, 8 shouldn't be in also, you're right.
8 85, line 20, are you adopting that objection?

9 MR. CARR: No, Your Honor.

10 THE COURT: 20 and 21 are out.

11 MR. CARR: Judge, he didn't answer the question on line
12 16, that should be taken out.

13 THE COURT: Yes, he asks the other question on 23, right.

14 MR. STEPHEN SCHOENBECK: Your Honor, the first words in
15 the line of 23 I think should be out because I strike the start
16 of my question, maybe just start with "can" at the end of line
17 23.

18 THE COURT: Right, exactly. So it will read, can you tell us.
19 86, line 15. We don't need Kersting in again, do we? And
20 page 91, line 2, are you adopting that objection?

21 MR. CARR: No, Judge.

22 THE COURT: Okay. And 96, line 12. Seems to me that this
23 whole thing-- how about striking everything between 8 and 22?

24 MR. CARR: I haven't read it yet, Judge, I'm still laughing.

1 I guess it should all be stricken, 8 to 23 then.

2 THE COURT: All right. Page 104-- I'm sorry. Mr.
3 Carr, do you have any objections between 80 and 100?

4 MR. CARR: No.

5 THE COURT: Do you have any objections?

6 MR. MUSGRAVE: None, Your Honor.

7 THE COURT: Do you have any objections between 80 and
8 100?

9 MR. STEPHEN SCHOENBECK: Yes, I think a correction at
10 page 87, line 12, I think the word toxic should be toxin,
11 put the "n" on the end of it.

12 THE COURT: Okay.

13 MR. STEPHEN SCHOENBECK: The other thing was at page 97,
14 bottom of 96 and over onto 97, there's a lot of back and
15 forth about whether he was able to find records and he'll
16 have to look around the building and stuff like that. I don't
17 know that that really needs to be read.

18 THE COURT: Anybody object to taking it out?

19 MR. CARR: No.

20 THE COURT: Okay, so from line 24 to the bottom of the
21 page on 96, between 1 and 8 on page 97, I guess that's all
22 just records and files.

23 MR. MUSGRAVE: How far down on 97?

24 THE COURT: Through 8, that's just back and forth.

MR. MUSGRAVE: I do have one thing, Judge, on page 90, line 7, I think that date is wrong. It's inconsistent with all the other dates. I don't know whether the reporter took it down wrong.

THE COURT: What May 27.

MR. MUSGRAVE: Yes, isn't it April 27th?

MR. CARR: What page?

MR. MUSGRAVE: Line 7, page 90.

MR. CARR: Yes.

MR. STEPHEN SCHOENBECK: That is incorrect.

THE COURT: Let's change it to April. Fine. Okay. Nothing else between 80 and 100. Page 104, line 8.

MR. STEPHEN SCHOENBECK: I'm sorry, Judge, page 99, there was another typo. On line 4, that 2.8 should really be .28, as is indicated from lower down on the page and also in the memorandum.

THE COURT: The OCP?

MR. STEPHEN SCHOENBECK: Right. It's incorrect according to the exhibit and also--

THE COURT: You're referring to line 10, the OCP?

MR. STEPHEN SCHOENBECK: That's correct.

THE COURT: Anybody object to changing it to .28?

MR. CARR: If that's what's in the memo.

MR. STEPHEN SCHOENBECK: That is what is in the memo and,

1 I'm looking for the page.

2 MR. CARR: Let's correct it then.

3 THE COURT: Fine. Okay. Page 104, line 8. Theiss'
4 objection, are you adopting it?

5 MR. MUSGRAVE: Withdraw it.

6 THE COURT: Okay. Line 8 is out. What about line 10,
7 the objection there?

8 MR. MUSGRAVE: Withdraw that.

9 THE COURT: All right. 10 and 11 are out. Page 107,
10 line 15, that is also Theiss' objection.

11 MR. MUSGRAVE: Withdraw it.

12 THE COURT: All right, line 15 through 17 are out.

13 MR. MUSGRAVE: And 21.

14 THE COURT: Right. Are you withdrawing that?

15 MR. MUSGRAVE: Yes.

16 THE COURT: 21 is out, 25 also.

17 MR. MUSGRAVE: Yes.

18 THE COURT: Okay. It's withdrawn. And line 1 on page 108,
19 same basis. On page 108, line 18, Theiss has an objection.
20 What are you doing with that?

21 MR. MUSGRAVE: We'll withdraw it.

22 THE COURT: It's withdrawn. Page 109, line 6, what are
23 you doing with that one?

24 MR. MUSGRAVE: 109?

1 THE COURT: Line 6.

2 MR. MUSGRAVE: I'll withdraw it.

3 THE COURT: All right. 6 is out. And line 22, another
4 objection?

5 MR. MUSGRAVE: Withdraw it.

6 MR. STEPHEN SCHOENBECK: Your Honor, we would preserve
7 the objection as calling for hearsay, it relates to an entirely
8 different incident and strictly hearsay as to what was in the
9 article about what was some other problem with dioxin in the
10 Missouri area.

11 THE COURT: Overruled. I don't think so. I think
12 it's proper. Page 110, line 10. That's Theiss' also. Are
13 you adopting that?

14 MR. MUSGRAVE: We'll withdraw it.

15 THE COURT: All right. And lines 19 and 20.

16 MR. CARR: He asks a question on line 23.

17 THE COURT: Okay, so 18 through 20 ought to go out.
18 And I guess the first part of 22. And we'll start with, anyone
19 seen. So 18 through 22 are out. And the comment.
20 Page 113, line 13, that's Mr. Seigfreid. I guess 13 through
21 17 ought to go, through 18, ought to go out.

22 MR. MUSGRAVE: 12 through 20 out, you say?

23 THE COURT: Well, if the question is read back, I guess--
24 no, wait a second. Let's get rid of 12 through 20. I think

1 that's it.

2 MR. STEPHEN SCHOENBECK: Your Honor, at this point I'm
3 going to move that his answer be stricken as not responsive
4 to the question I asked. He tells me that my question is not
5 relevant and it's a non-responsive answer to the question there.

6 THE COURT: The question that starts on 3.

7 MR. STEPHEN SCHOENBECK: Yes, sir, the answer on 7 through
8 9, I would move to strike as being non-responsive.

9 THE COURT: Okay. Let me read it again.

10 MR. MUSGRAVE: Monsanto will join in the objection.

11 THE COURT: No. I disagree because he's talking about
12 something that he thinks is part of his opinion and is
13 preliminary to his reaching an opinion on two possibilities.
14 I think it's responsive. I would disagree with both of you
15 and keep it in. And then you clarify it on the question on
16 what you want answered and he answers that. But I think what
17 he's talking about is part of a component part of his determination
18 of possibilities, and I don't think it's non-responsive.

19 I don't have anything else up to the end. Anybody
20 have any objections between 100 and whatever the last page of
21 this deposition is, 116? Mr. Carr, do you have any objections?

22 MR. CARR: I'll object to the last, beginning on line
23 15 on page 115, Your Honor, and through the end of the
24 deposition.

1 THE COURT: On 115 where?

2 MR. CARR: Beginning of line 15, the re-direct
3 examination by Mr. Theiss.

4 THE COURT: Okay.

5 MR. CARR: He's prefacing the question with the fact
6 that Mr. Seigfreid asked him about a June '82 article, so
7 he wrote a June '82 article on contamination and then he goes
8 into an entirely new and additional point of whether or not
9 the FDA has established an acceptable level of dioxin, has
10 nothing to do with the questions that have gone on theretofore.
11 It calls for hearsay as to what the FDA has done and it's
12 certainly outside the scope of any cross-examination that
13 took place on the part of Mr. Seigfreid. I don't think anybody
14 asked in the entire deposition any questions about the
15 toxicity of dioxin or anybody's knowledge. No, he does ask
16 about-- I think the only objection that can really be made on it
17 is hearsay when it calls for what the FDA has established
18 as an acceptable level.

19 MR. MUSGRAVE: May I respond?

20 THE COURT: Sure.

21 MR. MUSGRAVE: Your Honor, this whole topic was gone
22 into by Mr. Seigfreid, I think if you look at page 109 you see
23 him asking questions about dioxin being carried by fish and
24 the preparatory remarks talked about this man reading an article

1 about dioxin and there is testimony in here about his own
2 studies and articles he's written about dioxin, including--
3 I'm trying to find the reference with regard to fish. The whole
4 area was opened up and gone into and hearsay testimony was
5 called upon for this man's opinions, and all this is is cross-
6 examination with regard to that and it's totally proper in
7 light of what's preceded it in the deposition.

8 MR. CARR: Your Honor, I agree, I'll withdraw the
9 objection.

10 THE COURT: Okay. Do you have any objections between 100
11 and 116?

12 MR. MUSGRAVE: None, Your Honor.

13 THE COURT: Do you have any?

14 MR. STEPHEN SCHOENBECK: Yes, Your Honor. Page 105,
15 lines 21 through 25, the witness is being asked questions that
16 are repetitious of his testimony from when Mr. Seigfreid
17 cross-examined him earlier, and I would refer specifically to
18 page 32, 33. The man's testimony at 195 and 106, line 1
19 to 18, he's just asked to repeat what he said earlier in
20 the deposition about observations he made as to the
21 discoloration of the water, the observation of dead fish and
22 the smell. This is all repetitious from the material on pages 32
23 and 33.

24 MR. MUSGRAVE: Monsanto would join in the objection.

1 THE COURT: Do you have anything to say?

2 MR. CARR: Your Honor, if my memory serves me right,
3 they challenged his observations and what he saw and how much
4 of it was his own knowledge and went into what he was able to
5 detect and where the fish count took place and Mr. Seigfreid's
6 examination--

7 THE COURT: You're talking about what, on 32 and 33. The
8 court reporter took 32 and 33 so I don't have it. So you're
9 saying this is rehabilitation basically?

10 MR. CARR: Yes.

11 THE COURT: Okay. I'll overrule the objection.
12 Anything else?

13 MR. STEPHEN SCHOENBECK: Nothing further, Your Honor.

14 THE COURT: Great. Let's finish up the deposition.
15 We stopped at page 44.

16 MR. CARR: 44, Your Honor, at line 7.

17 THE COURT: Okay.

18 (Court convened and the following proceedings
19 were had, in open court, in the presence and
20 hearing of the jury:)

21 THE COURT: Good morning.

22 MR. CARR: I think we are ready, Judge.

23 THE COURT: Okay. Go ahead.

24 (Mr. Seigfreid and Mr. Carr then continued to

1 read the evidence deposition of Ronald Crunkilton,
2 as follows:)

3 Q All right. Now, let's talk about Plaintiff's Exhibit
4 10 and let's start with the photograph in the upper right-hand
5 corner, excuse me, in the lower right-hand corner marked A
6 for purposes of identification.

7 Do you see that A on that photograph?

8 A Yes.

9 MR. CARR: And, Your Honor, for the record that
10 is Plaintiff's Exhibit 83 and we have the slide which
11 we'll show up there and I'll pass Exhibit 83 at the
12 same time. I wonder if the light could be, if we
13 could have a little dimmer on that. We have a dimmer,
14 don't we, Ralph, on that?

15 COURT CLERK: No, these are just off and on.

16 MR. CARR: Just off and on. Then we better do
17 it this way then.

18 Q And would you tell us what that photograph shows
19 since it's a 35 millimeter slide?

20 A That is the ditch north of the tracks that had
21 phenol compounds in it that was entering Saling Creek.

22 Q And how did you know that that had phenol compounds
23 in it?

24 A Water was sampled and the analysis showed that there

1 were compounds present.

2 Q And who took those samples?

3 A OH Chemical Company.

4 Q And was that water discolored?

5 A Yes.

6 Q And did it have the same discoloration that you
7 observed of waters that were contaminated by phenols?

8 A Yes.

9 Q All right. Now, moving along on that same row,
10 if you'll put the A photograph back so we don't lose our base
11 mark or benchmark, take the next photograph and tell us
12 what that shows.

13 A That is a close-up of the confluence of that ditch.

14 MR. CARR: And that Plaintiff's Exhibit 84.

15 Q And does that show the drainage of the toxic
16 chemicals into the creek?

17 A Yes.

18 Q What does that picture show?

19 A It shows the difference in color of water where
20 the ditch that was contaminated enters the creek.

21 Q And what caused that discoloration in your
22 opinion?

23 A The phenol compounds.

24 Q All right. Take the next photograph and tell us

1 what it shows.

2 MR. CARR: This is Plaintiff's Exhibit 85.

3 A That is a picture of the ditch upstream from where
4 it enters Saling Creek.

5 Q And what does that photograph recall to your mind?

6 A A discoloration in the water.

7 Q Do you have an opinion of what caused that
8 discoloration?

9 A Yes.

10 Q What was that?

11 A Phenol compounds.

12 Q All right. Take photograph number 4 from our
13 Plaintiff's No. 10 and what does that show?

14 MR. CARR: That is Plaintiff's Exhibit 86.

15 A That is another picture of the same ditch at a
16 different point that shows discoloration.

17 Q And when you speak of discoloration, are you
18 speaking of discoloration of phenols?

19 A In my opinion.

20 Q All right. Now, let's take the next photograph,
21 which will be directly under the A photograph, and what
22 does that show?

23 MR. CARR: This would be Plaintiff's Exhibit 87.

24 A That shows the same ditch farther upstream in the

1 City of Sturgeon itself at one of the road crossings.

2 Q Does it show any of the chemical compounds in
3 view in that photograph?

4 A Yes.

5 Q And was there any discoloration?

6 A Yes.

7 Q And the discoloration was from the phenols in
8 your opinion?

9 A Yes.

10 Q All right. Let's take the next photograph. What
11 does it show?

12 MR. CARR: And this is Plaintiff's Exhibit 88.

13 A It's the same picture from a different angle as the
14 previous.

15 Q Does it show the same discoloration?

16 A Yes.

17 Q All right. Now let's take the next photograph.
18 What does it show?

19 MR. CARR: This is Plaintiff's Exhibit 89.

20 A That's the other side of the road culvert that
21 the other two pictures were taken at.

22 Q Does it show any water, confluence of any type?

23 A Yes.

24 Q Is it discolored?

1 A Yes.

2 Q Is that discoloration from the phenols?

3 A Yes.

4 Q When you say other side of the ditch, what do you
5 mean?

6 A Well, the ditch runs under a street in Sturgeon
7 in two of the pictures. The first two pictures were taken
8 on one side of the street and the other two pictures, or
9 one picture was taken on the other side.

10 Q And are you speaking that two pictures were taken
11 on the east side of the street and two pictures taken on
12 the west side of the street?

13 A I believe two were taken on the east and one on
14 the west.

15 Q All right. Now, what does the next photograph
16 show?

17 MR. CARR: And that's Plaintiff's Exhibit 90.

18 A It's another picture of the ditch as it runs from
19 Sturgeon to Saling Creek.

20 Q Does it show any of the discolored water?

21 A It's not indicated in this picture. It's not a
22 close-up.

23 Q All right. Was there discolored water at that
24 location where the photograph was taken?

1 A Yes.

2 Q And was that water discolored by the toxic
3 chemicals?

4 A I believe so.

5 Q All right. Now, let me, just so we're clear here,
6 we could get mixed up, you started off with A. Will you
7 go across and mark the next photograph that you have
8 reported on, would you mark it with my pen a B in some
9 location, the next one C, so it is-- You may have to do that
10 with pencil. Go ahead and mark all of them, if you will.

11 All right. Now, we've been through Exhibits A
12 through H. Let's take Exhibit I, and I want you to tell
13 the Court and jury what that is a picture of.

14 MR. CARR: That's Plaintiff's Exhibit 91.

15 A That is a picture similar to picture H which
16 shows, again shows the ditch.

17 Q Does it show discolored water?

18 A From this viewpoint no.

19 Q Was the discolored water there in the ditch?

20 A Yes.

21 Q And in your opinion was that caused by the toxic
22 chemicals?

23 A Yes.

24 Q Okay. Let's look at the next photograph. What

1 is it, Ron?

2 MR. CARR: That's plaintiff's Exhibit 92.

3 A That's a picture of Saling Creek.

4 Q What letter is that?

5 A That's J.

6 Q And what does it show with respect to Saling Creek?

7 A I believe this is the Saling Creek upstream of
8 where the ditch entered the stream.

9 Q All right. Was it discolored?

10 A No, it was not.

11 Q It's my understanding that H is Saling Creek?

12 A Yes.

13 Q Upstream, isn't that correct?

14 A Downstream.

15 Q I'm sorry.

16 A Of the railroad tracks.

17 Q Your J is what?

18 J, what's the location of J?

19 A That is upstream of the confluence of the ditch.

20 Q And where would that be with relation to the
21 intersection of the railroad tracks and the stream itself,
22 what direction?

23 A Downstream.

24 Q Let's go back. Let's go back. Saling Creek.

1 intersects the railroad track, does it not?

2 A Yes.

3 Q Now the railroad track runs in what direction in
4 Sturgeon, Missouri?

5 A East and west.

6 Q And Saling Creek runs in what direction where it
7 intersects the railroad track?

8 A North and south.

9 Q All right. Let's look at Plaintiff's Exhibit 10J,
10 at what place is that photograph taken?

11 MR. CARR: Now, you've got K in the slide
12 projector, Mr. Seigfreid. All right.

13 A That picture is taken north of the railroad
14 tracks which would be downstream at Saling Creek.

15 Q All right. And what does it show?

16 A It shows the site upstream or above where the
17 contaminated ditch enters Saling Creek.

18 Q So your camera, you're standing at the point of
19 the confluence between the stream, Saling Creek and the ditch;
20 and your photograph, it's looking to the south, is that
21 correct?

22 A Yes.

23 Q All right. Now, take the next photograph, what
24 letter is it?

1 A K.

2 MR. CARR: And that's Plaintiff's Exhibit 93.

3 Q And what does it show?

4 A That picture is taken to the south, and it shows
5 Saling Creek with the ditch entering on the right side of
6 the picture.

7 Q Now, is this where, in your opinion, the toxic
8 chemicals entered Saling Creek?

9 A Yes.

10 Q All right. And what does your next photograph
11 show?

12 MR. CARR: And that's Plaintiff's Exhibit 94.

13 A It shows Saling Creek downstream of the
14 confluence with the contaminated ditch.

15 Q All right. Now, did you travel on downstream
16 along Saling Creek on the 27th day of April, 1979?

17 A Yes.

18 MR. CARR: And this would be the end of the picture,
19 slides, Mr. Seigfreid.

20 Q Going back to line 9. Now, did you travel on
21 downstream along Saling Creek on the 27th day of April 1979?

22 A Yes.

23 Q And did you notice anything with respect to the
24 aquatic life?

1 A Yes.

2 Q What did you notice?

3 A There was a fish kill downstream of where the
4 contaminated material entered.

5 Q And did you make a count of the number of fish
6 that were killed?

7 A A count was eventually made. That was made on
8 May 2nd.

9 Q All right. And what did that count indicate was
10 the fish kill as a result of the phenols?

11 A 1,768 fish were killed.

12 Q And in what distance along Saling Creek did this
13 fish kill take place?

14 A In the three and a half miles downstream of where
15 the contaminated ditch entered Saling Creek.

16 Q So that would have been from the point where the
17 railroad intersected Saling Creek to the north three and a
18 half miles, is that correct?

19 A The ditch entered approximately 300 yards north
20 of the railroad tracks.

21 Q All right. And on the east edge of Sturgeon,
22 Missouri, is that correct?

23 A Yes.

24 Q So your measurements start at that point 300 yards

1 north of the railroad tracks?

2 A Yes.

3 Q Excuse me, 300 yards north of the railroad track
4 and extends along in a northerly direction or downstream
5 three and a half miles, is that correct?

6 A Yes.

7 Q And there were fish killed within that entire
8 distance, is that true?

9 A Yes.

10 Q Now, did you observe any phenol odor or smell on
11 the 27th day of April , 1979?

12 A Yes.

13 Q And did you observe that odor smell along Saling
14 Creek?

15 A Yes.

16 Q And did you observe that smell in the center of
17 Sturgeon?

18 A Yes.

19 Q And did you observe that smell in the area of the
20 Kemner ponds?

21 A Yes.

22 Q And can you tell, characterize that as to whether
23 or not it was a strong smell?

24 A Yes, it was strong.

1 Q Now, did you take any water samples from the
2 Kemner ponds?

3 A I did not.

4 Q Did you take any water samples from Saling Creek?

5 A Yes.

6 Q And did you test this water that you took to
7 determine whether or not it would kill fish?

8 A Yes.

9 Q How did you test it?

10 A We used bioassays.

11 Q And tell us what that means?

12 A In our bioassays we place test fish, which are
13 bluegill fry, in a sample of water and determine the
14 amount of time it takes for the fish to either show some
15 type of stress or death.

16 Q What happens when you put the bluegill--

17 MR. CARR: No, what happened.

18 Q What happened when you put the bluegill in the water
19 you obtained from Saling Creek?

20 A The water that was obtained immediately
21 downstream of the confluence of where this contaminated
22 material was entering the fish showed immediate stress and
23 were dead in four hours.

24 Q All right. Did you use any tests of water taken

1 at any other points downstream from the confluence of the
2 drain in Saling Creek?

3 A Yes.

4 Q And where did you obtain that test water?

5 A One mile downstream.

6 Q And what happened when you placed bluegill in
7 that water?

8 A There was no apparent stress in our 72 hour tests.

9 Q All right. Now, did you take any other samples
10 of water along Saling Creek?

11 A There was a sample taken at 3.3 miles and 8.7
12 miles downstream.

13 Q And when were those samples taken?

14 A Was taken on April 27th, 1979.

15 Q And what did those tests show?

16 A In our bioassays, those tests showed that there
17 were no toxic conditions present.

18 Q As of the 27th, so far as the fish are concerned?

19 A Yes. Yes.

20 Q All right. But did you find dead fish in the
21 stream prior to that, is that correct?

22 A At that time, yes.

23 Q All right. Did you find any other vertebrates in
24 the Kemner ponds that were dead as a result of the toxic

1 chemicals?

2 A There may have been.

3 Q Do you understand what I mean by vertebrates?

4 A Yes.

5 Q What are vertebrates?

6 A Animal with a backbone.

7 Q All right. And that could be fish, reptiles,
8 birds, mammals, is that correct?

9 A Yes.

10 Q All right. Would you tell us whether you found
11 any other vertebrates in the Kemner ponds that were dead
12 as a result of the toxic chemicals?

13 A The only thing I recall would be frogs.

14 Q And how many dead frogs did you find?

15 A I don't recall the number.

16 Q Was there a large number or small number, can you
17 characterize that?

18 A I really can't.

19 Q All right. Did you find any other wildlife dead
20 in the area of the chemical spill?

21 A I don't recall any.

22 Q All right. Now, did you return to the area on
23 the 30th of April, 1979?

24 A Yes.

1 Q And at that time had the carbon weirs been
2 located at the confluence of the drainage ditch and the
3 place where it entered Saling Creek?

4 A Yes.

5 Q And did you take water samples below the location
6 of the carbon weirs?

7 A Yes.

8 Q And did you test those samples on bluegill in a
9 test here in your laboratory?

10 A Yes.

11 Q And what happened when you tested this sample of
12 the water you had taken from Saling Creek at this point?

13 A I believe the water that was taken, that was being
14 taken from the ditch and not from Saling Creek, so our
15 test would be on that water.

16 Q All right. And what did that water show?

17 A It showed that it was toxic to fish in less than
18 ten minutes.

19 Q In other words, the fish died within less than
20 ten minutes?

21 A Yes.

22 Q And that was water that was taken on the 30th of
23 April, 1979?

24 A Yes.

1 Q Now, did you make some tests on the first of May,
2 1979?

3 A I don't believe we made any chemical tests.

4 Q Did you make observations about how the toxic
5 materials were moving downstream in Saling Creek?

6 A We may have made visual observations.

7 Q Did you write those in your memo dated May 23rd,
8 1979?

9 A Yes.

10 Q And what did your memo indicate and I'll ask you
11 to read your entry of May 1st, 1979, please.

12 A "The concentration of toxic material appeared to
13 be moving downstream at a rate of one and a half to two miles
14 per day.

15 Q Continue, please.

16 A "It was obvious that if any instream treatment to
17 be accomplished it would have to be initiated immediately.
18 The leading edge of the slug was approximately 3.3 miles
19 downstream. A small number of dead fish were observed
20 where the concentration appeared to be greatest. Carp and
21 bullheads were collected for analysis by the U.S. Fish and
22 Wildlife Service."

23 Q Now, do you have, do you have a copy of these
24 reports from the Fish and Wildlife with respect to these

1 carps and bullheads?

2 A No.

3 Q Can you tell us why not?

4 A No.

5 Q Now, on May the 2nd, 1979, did you and Jim
6 Czarnecki make a count of fish kill?

7 A Yes.

8 Q And where were most of the dead fish encountered
9 at that time?

10 A Immediately downstream of where the contaminated
11 ditch entered Saling Creek.

12 Q And how far did that kill extend?

13 A 3.3 miles.

14 Q Now, did you take any samples of the water from
15 either the ditch or Saling Creek for purposes of having it
16 tested by a laboratory?

17 A None, other than what would be represented in
18 these memoranda.

19 Q That's all you took?

20 A Yes.

21 Q All right. Otherwise you relied on the test that
22 somebody else made, is that correct?

23 A Yes.

24 Q And you relied, of course, upon your observation?

1 A Yes.

2 Q And you relied upon your senses--

3 A Yes.

4 Q -- of sight and smell?

5 A Yes.

6 Q And it's your testimony that you believe an area
7 of 8.7 miles downstream was affected by the
8 ortho-chlorophenol?

9 A Yes.

10 Q And that would be 8.7 miles from what point, Ron?

11 A From where the ditch entered in northeast Sturgeon.

12 Q And that's where it entered Saling Creek?

13 A Yes.

14 Q And it extended then on north 8.7 miles?

15 A Yes.

16 Q And it's your opinion that that area of the
17 stream was contaminated by the toxic chemicals?

18 A Yes.

19 MR. CARR: And here Mr. Schoenbeck cross-examined
20 the witness and Mr. Seigfreid will read those questions
21 and I will continue to read the answers of the witness.

22 Q Mr. Crunkilton, you said that when you first went
23 to Sturgeon on July the 11th--

24 MR. CARR: January the 11th.

1 Q Excuse me, on January the 11th, you were there to make
2 a determination as to whether the State's waters were
3 affected, is that correct?

4 A Yes.

5 Q Did you make a determination at that time as to
6 whether there was any immediate threat to the State's
7 waters?

8 A At that time there was no evidence of material
9 leaving the site and that was largely because the
10 materials solidified at freezing temperatures.

11 Q Did you then make the determination that there
12 was no threat to the State waters at that time?

13 A If all the material had been cleaned up, I'm not
14 sure it was really known the full extent of contamination.

15 Q I want to explain that I'm asking you about the
16 status of things on January the 11st, 1979, when you went
17 to Sturgeon, Missouri; and if you would, confine your
18 answer to that period.

19 A There was some concern at the time that
20 if the material was not entirely picked up that it could
21 threaten off site water.

22 Q You say there was some concern. Was that your
23 concern, sir?

24 A I think-- yes.

1 Q Did you communicate that concern to anyone
2 outside of the Missouri Conservation Commission Department?

3 A I think that was a fairly general assessment of
4 all the people involved with the cleanup, initial response
5 at least.

6 Q Let me ask you this, sir. Did you ever
7 communicate that concern that you say you had on January
8 11, 1979, to anyone from the Norfolk & Western Railway
9 Company?

10 A Not in writing.

11 Q In any fashion, sir?

12 A I don't recall.

13 Q Are you saying that you may have, you may not
14 have?

15 A Yes.

16 Q On what occasion-- Did you speak with anyone from
17 the Norfolk & Western on any occasion, sir?

18 A Not to my knowledge.

19 Q All right. So I take it you have no recollection
20 of ever having communicated any concern to anyone from the
21 Norfolk & Western Railway Company about possible future
22 hazard to State waters, is that correct?

23 A That's correct.

24 Q Now, sir, you have before you, do you not, your

1 memorandum of January 25th, 1979, which was marked at a
2 previous deposition as the Defendant's Exhibit 113?

3 MR. CARR: No, it will be Plaintiff's Exhibit--
4 it will read Defendant's Exhibit 1 at that time, but
5 Plaintiffs' Exhibit 113 now, I believe.

6 Q Right.

7 A Yes.

8 Q Sir, I'm going to read a statement from that
9 memorandum and I'll ask if this is an accurate statement of
10 the memorandum which you prepared. "Agent Billings and I
11 investigated and we did not believe that the material
12 posed an immediate hazard to State waters."

13 Is that an accurate statement from your report,
14 sir?

15 A Yes.

16 Q And was that your belief at that time, sir?

17 A On that particular day, yes.

18 Q Okay. I take it, sir, that if you did feel there
19 was an immediate threat to State waters you would have
20 told somebody about that, would you not, sir?

21 A Yes.

22 Q Because that was really part of your duty there
23 to determine whether there was any immediate threat to
24 State waters, isn't that true?

1 A Yes.

2 Q And you do not say anything to the railroad about
3 a belief that there was an immediate threat to State
4 waters, did you?

5 A No.

6 Q Did you at any time make any recommendations to
7 anyone from the Norfolk & Western Railway Company about
8 steps to prevent only groundwater contamination?

9 A No.

10 Q And as a matter of fact, your opinion as to
11 the concern for the future back on January the 11th, 1979,
12 was related to what might happen in the spring, isn't that correct
13 sir?

14 A Yes.

15 Q Why was that?

16 A Because once the temperatures warmed the material
17 would again be in liquid form and, of course, with
18 precipitation the material would be easily carried off site.

19 Q Okay. Is it your opinion that at this time on
20 January 11th, 1979, the material was in solid form?

21 A Yes.

22 Q And why was that, sir?

23 A The material solidifies at freezing temperatures.

24 Q Incidentally, what was the weather like when you

1 were out there at Sturgeon? You mentioned it was snow
2 covered. Could you tell me approximately what temperature
3 it was when you were out there at Sturgeon?

4 A It was below 32.

5 Q Wasn't it quite cold at that time?

6 A Yes.

7 Q Sir, is it fair to state that you were not
8 present at Sturgeon from the period of January 11th all
9 the way up to early March when clean up of the site was
10 progressing by the removal of contaminated soils?

11 A Yes.

12 Q So you actually did not know how much material
13 was removed during that period?

14 A Yes. That's correct.

15 Q And then when you did go back to Sturgeon that
16 was, I believe you said on March 17th, to look at Kemner
17 ponds, is that correct?

18 A Yes.

19 Q And I believe you said at that time you looked
20 also at Saling Creek or tributary of Saling Creek, is that
21 correct?

22 A Yes.

23 Q Do you recall which it was, just the tributary of
24 Saling Creek or also the creek itself?

1 A It was the headwaters of Saling Creek.

2 Q Okay. And isn't it correct that you saw no sign
3 of any contamination of that, those headwaters at that
4 time?

5 A Yes.

6 Q Now, sir, I believe you told Mr. Seigfreid here
7 earlier today you had an opinion that the fish killed in
8 the Kemner pond was caused by the phenolic compounds, is
9 that correct?

10 A I stated that the concentrations were sufficient
11 to cause death in fish.

12 Q And so you were not meaning to imply to the jury
13 that it was actually the phenolic materials in there that
14 had caused the fish to die, is that correct?

15 A Well, if live fish were present in the pond with
16 those concentrations they would be killed, sir.

17 Q Okay. If live fish had been present when the
18 phenolic materials entered the pond, you're saying that
19 would have been sufficient to kill the fish, is that true?

20 A Yes.

21 Q Is that your testimony?

22 A Yes.

23 Q Is it possible that the fish may have been dead
24 from some other cause prior to the time any phenolic

1 materials entered the ponds?

2 A Yes.

3 Q Isn't there a relatively common phenomenon that
4 sometimes is found in farm ponds under winter conditions
5 that will cause fish to die without any chemical
6 contamination?

7 A Yes.

8 Q Could you tell the Court and the jury what that
9 phenomenon is, sir?

10 A It would be called winter kill. It would be
11 caused by a depletion of the dissolved oxygen under ice,
12 snow covered ice in the winter.

13 Q It's certainly possible, isn't it, sir, that the
14 fish in the pond may have been killed by winter kill prior
15 to any phenolic materials entering the pond?

16 A That's possible.

17 Q As a matter of fact, you did look at one pond
18 that was near the Kemner household that you determined had
19 no chemical contamination and yet you did observe a fish
20 kill there, isn't that correct?

21 A I did not, but another person on our staff did.

22 Q And who was that?

23 A Jim Czarnezki.

24 Q You've seen his reports to that effect?

are part of your business records of the
department?

Q Ron, there was an exhibit here that had a map
attached. I believe it was 113A, B and C. Do you have
that before you?

A Yes.

Q If you would, sir-- if you would refer to the map
which has been previously marked as the Defendant's
Exhibit 113C--

MR. CARR: Plaintiffs' Exhibit.

Q Excuse me, Plaintiffs' Exhibit 113C, I understood
your testimony to be earlier that you did not draw this diagram,
is that correct?

A Yes.

Q And I also understood you to say that you did not
even see any culvert underneath the railroad track, isn't
that correct?

A Yes.

Q Okay. There is a culvert shown on the diagram
but you have no knowledge of the fact that there is even a
culvert there, isn't that correct?

A Yes.

1 Q So I take it that you have no knowledge one way
2 or the other as to whether anything could have flowed
3 through the culvert on or before March 17, 1979?

4 A Well, based-- I don't, I had not seen the culvert
5 but based on the lay of the land, water that falls on the
6 ground would have to drain through that general vicinity
7 of the pond, that is where the culvert is.

8 Q Are you talking about water that would fall to
9 the south side of the railroad tracks, sir?

10 A Yes. At least water to the south side.

11 Q Okay. You have no knowledge as to whether water
12 falling to the north side of the railroad track could flow
13 through the south side, based on your own personal knowledge?

14 A That is correct.

15 Q Now, I take it, you can't tell us one way or the
16 other if there was a culvert there whether that was opened
17 at any time on or before March 17, 1979?

18 A Yes.

19 Q When you were out there on March 17 had any
20 barrier been erected to the south of either of the Kemner
21 ponds?

22 A Yes.

23 Q And could you describe that barrier for us, sir?

24 A It was about one foot earth dam that was added to

1 the lower side of the pond.

2 Q Did you talk with anyone from the Norfolk &
3 Western Railway Company when you were out at Sturgeon on
4 March 17th?

5 A No.

6 Q Sir, I take it that you did not look at Saling
7 Creek in the area of the town ditch entry into Saling
8 Creek on March 17th, is that correct?

9 A That's correct.

10 Q The time when you mentioned that you did
11 investigate this area of the town ditch which flowed into
12 Saling Creek was over a month later?

13 A Yes.

14 Q And that was actually on April 27th?

15 A Yes.

16 Q Now, is it fair to say that when you went to
17 Sturgeon, back to Sturgeon on April 27th, that was in
18 response to a report that you had just received from
19 someone there at Sturgeon?

20 A Yes.

21 Q And who was that report from?

22 A It was Dean Connelly.

23 Q Do you know what his position was?

24 A He was a police officer with Sturgeon.

1 Q All right. Did Mr. Connelly tell you that this
2 was a condition which he had just observed?

3 A Yes.

4 Q He didn't represent to you that this condition
5 had been in existence for any period of time, did he, sir?

6 A No.

7 Q And you went out there that very same day that
8 you received the report from Mr. Connelly, did you not?

9 A Yes.

10 Q On April 27th, 1979?

11 A Yes.

12 Q And as a matter of fact, by the end of the day on
13 April 27th, 1979, the cleanup contractor, OH Materials, had
14 already put three carbon weirs along the town ditch, had
15 they not?

16 A Yes.

17 Q Now, sir, is it fair to say that the underground
18 drainage system that would--

19 MR. CARR: Which would have.

20 Q Excuse me, which would have drained through the town
21 ditch would not have drained the area of the major spill?

22 A I don't know.

23 Q You don't know one way or the other?

24 A Yes.

1 Q Okay. I take it that you had not received any
2 reports from anyone in between March 17th and April 27th
3 that there was any phenolic materials going through either
4 the underground drain or through the town ditch?

5 A Yes.

6 Q That is correct, my statement?

7 A Yes.

8 Q Now, Mr. Theiss was asking you about a finding
9 that you had made that there were still concentrations of
10 phenol and chlorophenol in the stream after the three
11 carbon weirs had been put up on April 27th.

12 Do you recall that testimony, sir?

13 A Yes.

14 Q If you would compare the results which you
15 received from your samples on April 27th, the samples
16 which you took from the ditch on that date, with the
17 results of the samples taken on April 30th, could you tell
18 us how those samples compare?

19 A There was about a ten-fold reduction in
20 concentrations of phenol compounds.

21 Q In absolute terms the amount of ortho-chlorophenol
22 in the water which had been some 240 parts per million
23 on April 27th had been reduced to approximately 26 parts
24 per million on April 30th, isn't that correct, sir?

1 A Yes.

2 Q And similarly the phenolic concentrations on
3 those two dates had been reduced from 150 parts per
4 million down to 16 parts per million, isn't that correct?

5 A Yes.

6 Q And Mr. Seigfreid has asked you--

7 MR. CARR: Was asking.

8 Q Excuse me. And Mr. Seigfreid was asking you about
9 something that was found 8.7 miles downstream. Actually the
10 numbers that you found for April 30th were less than one point,
11 one part per million, is that correct?

12 A Yes.

13 Q Your memorandum which you did prepare, which was
14 previously identified as the Plaintiff's Exhibit 1, does
15 contain the results of samples that were taken by OH
16 Materials, does it not, sir?

17 A Yes.

18 Q And you have been reading from those results,
19 have you not, sir?

20 A Yes.

21 Q Do you have any reason to question the results
22 that you've been reading from?

23 A No.

24 Q The level of ortho-chlorophenol that was found

8.7 miles downstream in Saling Creek was actually .28 parts per million, was it not, sir?

A Yes.

Q To your knowledge is that level toxic to fish?

A It would probably be not toxic to fish-- in less than a day or two.

Q All right. Incidentally, sir, as I understand your testimony about this whole incident, this was an isolated incident, was it not, sir?

A Would you explain?

Q Okay. You used the term concentrated slug of material moving downstream, did you not?

A Yes.

Q And to me that means that apparently at one time there was some contamination in the stream which you discovered to be on April 27th--

A Yes.

Q -- which moved downstream and then passed out of the Sturgeon area, is that correct?

A Yes.

Q That is what I'm saying by the isolated incident.

A I don't think-- no, I'm reading something else.

Q All right. Let me ask you, sir, if you would turn to the last page of your report of May 23, 1979,

1 could you read the last two sentences of your report?

2 A What page?

3 Q Page 4.

4 A "The fish kill occurred over an extended period
5 of time as a concentrated slug of material moved
6 downstream. Instream concentrations of lethal levels of
7 phenol compounds existed for at least 8 days, April 27th,
8 1979, to May 3, 1979, and possibly as long as 16 days,
9 April 17th, 1979, to May 3, 1979."

10 Q All right. So this incident that we're talking
11 about of any contamination of Saling Creek was something
12 that was limited to no longer than the period from April
13 17th, 1979, to May 3rd, 1979, isn't that correct?

14 A That is what our documentation that we have dated
15 shows.

16 Q And actually, sir, when you start the period at
17 April 17th as opposed to April 27th, you were just saying
18 that that is a possibility, isn't that correct?

19 A Yes.

20 Q You have no knowledge that there was actually any
21 contamination of either the town ditch or Saling Creek
22 during the period from April 17th to April 27th, isn't
23 that correct?

24 A The letter was based on speculation as to the

1 amount of rainfall that fell. All right. The chemical
2 concentrations documented only eight days. However, based
3 on what we knew we could speculate that it could have
4 possibly have occurred longer. We do not have any
5 information to document that.

6 Q All right. So what I understand you to say is
7 that all you can testify from your own personal knowledge
8 and tests which you saw is as to a contamination of the
9 town ditch and Saling Creek for the eight-day period from
10 April 27th, 1979, to May 3rd, 1979, isn't that correct?

11 A Yes.

12 Q And as to any other period of time, such as going
13 back to the starting point of April 17th, 1979, you actually
14 have to speculate, do you not?

15 A Yes.

16 Q Did you rely on the information that you had
17 received from Mr. Gilmer in carrying out your duties out
18 there at the scene, sir?

19 A Yes.

20 Q Do you have any reason to doubt the information
21 which you received from Mr. Gilmer in that regard?

22 A No.

23 Q Do you consider that information that you
24 received from Mr. Gilmer about the level of concentrations

1 that they were experiencing as of May 3rd to be reasonably
2 reliable information?

3 A Yes.

4 Q Sir, do I understand you to say that there was
5 some improvement in the carbon filtration system that OH
6 set up in this area?

7 A Yes.

8 Q Could you explain what you know about that?

9 A I only know that it was a high, rather high
10 efficiency filtration unit that was, to my knowledge,
11 state of art equipment.

12 Q Okay. Is it fair to say that on April 27th, 1979,
13 OH had set up something that could be referred to as a
14 temporary or stop gap measure to try to reduce the
15 concentrations of phenolic compounds, and that certainly
16 by May 3rd they had a much more efficient system in operation?

17 A Yes.

18 Q Do you know at what point in between April 27th
19 and May 3rd, 1979, OH had put in the more efficient
20 filtration system?

21 A No.

22 Q Now, sir, in your memorandum of May 23, 1979, you
23 do report the results of a test you made of some water
24 from Saling Creek that was 20 yards upstream of the

1 confluence with Saling Creek, is that correct?

2 A Yes.

3 Q Could you explain whether that was water that was
4 actually taken out of Saling Creek itself?

5 A Yes, it was.

6 Q And would 20 yards upstream of the confluence
7 with the town ditch be an area that was closer to the town
8 of Sturgeon than the confluence of the ditch with Saling
9 Creek itself?

10 A Yes.

11 Q And can you tell us what you found when you
12 made a bioassay with fish, with water taken from 20 yards
13 upstream of that confluence?

14 A There was no apparent stress in the test fish at
15 72 hours.

16 Q So that means you left the fish in the water for 72
17 hours and then you couldn't see anything wrong with them,
18 is that correct?

19 A Yes.

20 Q Now, sir, if there had been any contamination coming
21 from the Kemner ponds into Saling Creek, would it not have
22 been at that location 20 yards upstream of the confluence?

23 A It would have been there.

24 Q And doesn't the fact that your test shows no

1 apparent stress of the fish indicate that there apparently
2 was no contamination coming from the Kemner ponds in the
3 Saling Creek at that time?

4 A It could indicate that there were not toxic
5 concentrations coming from the Kemner ponds at that time.
6 I could not state that there was no material coming from
7 the Kemner ponds.

8 Q Do I understand you to say that if there was
9 anything coming it was obviously at a level that was not toxic
10 to fish?

11 A Yes.

12 Q Okay. Now, sir, I'm not clear on this point.
13 When you went to Sturgeon on April 27th, did you confine
14 your investigation to the town ditch and the Saling Creek
15 area and not go down to the west end near the Kemner ponds?

16 A That's correct.

17 Q So you couldn't tell us one way or the other what
18 the condition of the Kemner ponds was on April 27th?

19 A No.

20 Q You didn't even look at it on that date?

21 A No.

22 Q So you didn't observe whether there was any
23 aquatic life living or dead on the Kemner ponds on April
24 27th, is that correct?

1 A Yes.

2 Q The time when you looked at the Kemner ponds was
3 that occasion on March 17th, 1979?

4 A Yes.

5 Q Now, sir, to your knowledge the only contamination
6 of Saling Creek at levels that were toxic to fish occurred
7 during this eight day period from April 27th to May 3rd,
8 1979?

9 A Yes.

10 Q I take it, sir, that the photographs that you took
11 of the town ditch show what the ditch looked like on that
12 one day and no other as far as you know, is that correct?

13 A Yes.

14 Q And that day was April 27th--

15 A Yes.

16 Q -- 1979?

17 A Yes.

18 Q Incidentally, with regard to one of the photographs
19 that was shown you, I think it's Plaintiffs' Exhibit 2--
20 Mr. Seigfreid asked you about that photograph and I thought
21 I understood you to say at first that you didn't know what
22 the men in the picture were doing. Is that correct, sir?

23 A Yes.

24 Q Do you have any idea what the men are doing there?

1 A They were either picking material up or putting
2 material down.

3 Q So you don't know what material they were
4 handling at that time, isn't that correct?

5 A That's correct.

6 Q Did you talk to those men at that scene, sir, and
7 ask them what they were doing?

8 A No.

9 Q Do you know who they were employees of?

10 A No.

11 Q So you are really just guessing as to what work
12 they're doing?

13 A Yes.

14 Q Mr. Seigfreid asked you a question about observing
15 other dead vertebrates at Sturgeon, Missouri, and you said
16 you saw dead frogs.

17 Were you also talking about that one incident on
18 March 17th when you observed the Kemner ponds?

19 A State that question again.

20 Q In response to a question by Mr. Seigfreid you
21 indicated at one point out at Sturgeon you did see some
22 dead frogs, is that correct?

23 A Yes.

24 Q When did you see dead frogs there?

1 A It was on March 17th.

2 Q And only on that date, isn't that correct?

3 A Yes. Or April 17th. Excuse me. It was March 17th.

4 Q The day that you went out there--

5 A Yeah.

6 Q -- to investigate the report of the fish kill at
7 the Kemner ponds?

8 A Yes.

9 Q Incidentally, Mr. Seigfreid also asked you about
10 the Saling Creek being affected for an area of 8.7 miles.

11 Sir, to your knowledge the levels-- you did not
12 observe any dead fish in the area that was 8.7 miles
13 downstream, did you?

14 A No.

15 Q And by affected, I guess you were indicating there
16 was some concentration of ortho-chlorophenol and phenol in
17 that region?

18 A Yes.

19 Q Can you tell us what was the concentration of the phenol
20 at the area 8.7 miles downstream on April 30th, 1979?

21 A It was less than .06 parts per million.

22 Q Is that the same as being less than 60 parts per
23 billion?

24 A Yes.

1 Q Was that the detection limit of the tests?

2 A Yes.

3 Q So it indicates that there was really no phenol
4 detectible at that point?

5 A At that particular level.

6 Q You're talking about the level of 60 parts per
7 billion?

8 A Yes.

9 MR. CARR: And here there was cross examination
10 by Mr. Witzel, and again Mr. Seigfreid will read the
11 questions and I'll read the answers.

12 Q Ron, I have a few questions. We were talking
13 about Mr. Seigfreid and Mr. Schoenbeck asking you questions
14 concerning this slug of material that you described.

15 When you went out and you investigated the
16 material that was being discharged from this ditch, what
17 date was it that you observed that the leading edge of
18 this slug was 3.3 miles downstream from the ditch?

19 A May 1st, 1979.

20 Q And I gather you went out there and you made some
21 observations, you checked to make sure that the leading
22 edge of the slug was at 3.3 miles downstream from the
23 ditch, is that right?

24 A Yes.

1 Q Now, you also told us that you had made some
2 calculations to indicate-- first of all, could you tell us
3 how you did that? How did you determine the leading edge
4 of the slug that was at 3.3 miles?

5 A That's based on observation as to the behavior of
6 the stream organisms, expressing stress in relation to some
7 type of toxin. ON CONTAIN

8 Q And did you determine that by going downstream
9 and checking as you went along this stream that stress from
10 the phenol was occurring in the stream?

11 A Yes.

12 Q And did you stop at 3.3 miles or did you go
13 beyond and check there to determine?

14 A Went down as far as 20 miles.

15 Q So the 20 mile period, 20 mile stretch of that
16 stream you checked to find the leading edge of this slug of
17 material?

18 A Yes.

19 Q And you determined that to be 3.3 miles downstream
20 from the ditch on May 1st-- 1979?

21 A Yes.

22 Q Now, you also told us that you had established
23 that the sludge or slug-- which is it, sludge or slug?

24 A Slug.

1 Q I keep saying both ways to cover me. The slug,
2 the leading edge of the slug was traveling at one and a
3 half to two miles per day?

4 A Yes.

5 Q Now, how did you determine that?

6 A That may have been determined based on the
7 location of fish in stress several days before that.

8 Q Well, did you participate in making that
9 determination?

10 A Yes.

11 Q And from your scientific observations and
12 investigations at the scene, you were able to determine
13 that the slug was traveling at one and a half miles per
14 day?

15 A Yes.

16 Q Now, your first indication that there was a
17 discharge into the stream was that there was a discharge
18 into Saling Creek on that date?

19 A On what date.

20 Q On what date?

21 A On April 27th.

22 Q Now, if there had been a discharge beginning
23 on April 27th and you found that discharge to be traveling
24 at the rate of one and a half miles per day, how far

1 downstream would you have expected to find the leading edge
2 of that slug on May 1st, 1979?

3 A I don't think it would be reasonable to assume
4 that it was moving one and a half to two miles per day for
5 each of those days. It would just be valid for that
6 particular day or the day previous.

7 Q That particular day or the day previous?

8 A Well, this estimation of one and a half to two
9 miles per day is obviously based on an observation that
10 was made on perhaps the day before.

11 Q But the one and a half, if I understand you
12 correctly then, the one and a half mile per day figure for
13 traveling is valid for two days but not more than that?

14 A Probably.

15 Q What about for a day preceding that two day period,
16 would you expect your slug to be traveling at the same rate
17 of speed, faster or slower?

18 A I couldn't really state it. It would be dependent
19 upon the stream flow and the grading of the stream, the
20 nature of the stream channel. There is really a lot of
21 different factors that control the movement.

22 Q So all we've been able to ascertain from your
23 observations of the one and a half mile per day is that in
24 the two day period the sludge or slug traveled three miles?

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A Yes.

Q Now, you found the leading edge of the slug 3.3 miles downstream from the intersection of the ditch and Saling Creek on May 1st?

A Yes.

Q Now, how many days after your April 27th initial information that there was an entry of phenols into Saling Creek was it until you observed this slug 3.3 miles downstream?

A Three or four.

Q And you had checked 17 miles ahead of that particular point, is that right?

A Yes.

Q You didn't find any solution in that particular point, in that entire 17 mile area beyond the leading edge of the slug, did you?

A That's correct.

Q Now, if there had been a discharge prior to May 27th-- I'm sorry. If there had been a discharge of this ditch into Saling Creek prior to April 27th, 1979, in this period that you had told Mr. Schoenbeck that possibly could have been from April 17th, 1979, through April 27th, 1979, would you not have expected to find some evidence of at least another slug or of a further traveling of the

1 slug that you did observe?

2 A I wouldn't necessarily be able to determine
3 exactly the concentrations that may have been different
4 with an earlier slug.

5 Q If we're going to talk about different solution--
6 if there was an earlier slug, it was of such minimal
7 concentration that there was no way you could detect it when
8 you searched for it 20 miles downstream, isn't that correct?

9 A I would say if there was a significant slug
10 before that date there would have been no fish left or
11 fewer fish left to kill during the second slug.

12 Q So if, in fact, there was a previous slug, it had
13 to be of an insignificant concentration as far as potential
14 toxic effects on aquatic life in Saling Creek?

15 A Yes.

16 Q So if there was any concentrations-- if there was
17 any discharge, any slug between April 17th and April 27th,
18 it was an inconsequential discharge in all respects as to
19 effects, toxic effects, on aquatic life in Saling Creek?

20 A From which date?

21 Q April 17th through April 27th, 1979.

22 A Perhaps unless the material had-- let me say,
23 unless the material had been discharged from the ditch and
24 had pooled in a portion of Saling Creek, in a small area of

1 Saling Creek and then with subsequent rainfall was pushed further
2 downstream.

3 Q Did you find any indication that that happened?

4 A No.

5 Q Do you expect-- from a professional standpoint
6 and from your experience as a professional in fisheries, do
7 you have an opinion as to whether that pooling, and
8 subsequent discharge in conjunction with a second
9 discharge, occurred?

10 A I have no evidence that it did occur. I'm just
11 saying that it could have occurred.

12 Q I'm not asking you that. I'm asking you, as a
13 professional and on the basis of your professional opinion,
14 do you have an opinion whether that pooling occurred?

15 A Based on the physical evidence that we have, I
16 have no reason to believe that that happened.

17 Q In your opinion it would be that it didn't happen?

18 A Yes.

19 Q Now, you told us that you measured the fish kill
20 in Saling Creek on May 3rd, 1979, and in response to a
21 question by Mr. Seigfreid, you said that you found that most
22 of the fish were immediately downstream of the confluence.

23 A Yes.

24 Q What do you mean by the area or the distance

1 immediately downstream of the confluence?

2 A Are you talking about length?

3 Q Yes.

4 A Within the first mile.

5 Q Okay. How many fish did you find that were killed
6 in the 3, what is it, 3.3 mile distance that you checked?

7 A 1,768.

8 Q Now of the 1,768 fish, what percentage of them
9 did you find died within the first mile below the confluence?

10 A I can't tell you that without having the original
11 data in front of me.

12 Q Do you have that data?

13 A I'm not sure that we still do.

14 Q Did you record that data?

15 A Yes.

16 Q Was it a part of your record?

17 A It would not have been sent out with our--

18 Q Wasn't my question. Was that data part of your
19 record?

20 A Yes. Originally.

21 Q Would that be kept as part of the Department's
22 file or is that in a private file of yours where that was
23 kept, whenever it was kept?

24 A It would probably be in my file if it's still there.

1 Q Is that file in this building?

2 A Yes.

3 Q Does that file indicate where you actually found
4 the numbers or the percentages of dead fish?

5 A Yes. Let me just add that that information is not
6 always retained because it is summarized in a report.

7 Q Is it summarized anywhere in these records?

8 A No. Well, it's summarized yes, but it is not
9 broken down into the intervals.

10 Q Ron, all we're trying to do is to ascertain a
11 full answer to the question posed by Mr. Seigfreid as to
12 what area was affected, and then I believe a subsequent
13 question was what area was contaminated. I noticed we've
14 used the word affected and then contaminated in toxic
15 chemicals in that stream, and then all we're trying to do
16 is ascertain what that true area was.

17 Now, if it's 8.7 miles, we want to find that out.
18 If it's 3.3 miles we want to find that out. If it's 1 mile
19 we want to find that out. We don't want you to guess. If
20 you've got that data here I'd like you to do and get it.

21 A The information that we have is that the fish
22 kill extended 3.5 miles.

23 Q Is that-- Okay. 3.5 miles was the total distance?

24 A Yes. That's the area that was affected by contamination.

1 Q In other words, 3.5 miles downstream from the
2 confluence of the ditch with Saling Creek is the last spot
3 you found the dead fish?

4 A Yes.

5 Q Now, what I'm trying to find out is what was the
6 slug, where was the slug of these dead fish? Was it within
7 the first half mile, first quarter mile, first mile, and if
8 you've got that data here someplace I would like to see it.

9 A Okay. They were dead-- dead fish were found
10 throughout that.

11 Q I understand that. Throughout what?

12 A Throughout the 3.5 mile section.

13 Q I understand that.

14 A A pollutant is diluted, of course, with an increase
15 of stream flow you are going to find less mortality.

16 Q All right. And you're going to reduce the toxicity?

17 A Yes.

18 Q Do you recall, and again we're not going to ask you
19 for the exact numbers of fish, but your best recollection
20 of what percentage of this 1,768 fish you found within the
21 first mile below the confluence of the ditch and Saling Creek?

22 A I really couldn't approximate that.

23 Q You couldn't give us your best estimate? You have
24 no recollection whatsoever?

1 A No.

2 Q How about the last mile, do you have any

3 recollection of what percentage of the fish you were able
4 to detect, dead fish, within the last mile of these 3.5 miles?

5 A I could state that the first half of the affected
6 area had a higher concentration of dead fish than the last
7 half of the area.

8 Q So in the first 1.7 miles more than 50 percent of
9 the fish that you counted were found?

10 A Yes.

11 Q Can you be any more precise than that?

12 A No.

13 Q All that does is basically get us down to the
14 50/50 situation?

15 A Yeah.

16 Q 50 percent before halfway and 50 percent after
17 halfway, can you be any more precise than that?

18 A No.

19 Q You're not saying that 50 percent of the dead
20 fish were found beyond one half mile downstream, do I
21 understand you correctly?

22 A Yes.

23 Q That's correct. Are you not saying that?

24 A Yes.

1 Q Okay. As a matter of fact you have no
2 recollection, so you couldn't tell us it was as high as 80
3 percent in the first half?

4 A No, I couldn't.

5 Q Okay. Now, in response to Mr. Seigfreid's
6 question concerning that 8.7 miles downstream as to
7 whether it was affected by toxic chemicals, the truth of
8 the matter is, you found no detectible phenols or
9 chlorophenols at the 8.7 mile mark, is that right?

10 A There were detectible phenols at the 8.7 mile
11 mark.

12 Q What concentrations did you point there?

13 A .28 parts per million of ortho-chlorophenol.

14 Q What percentage of phenols or what concentration
15 of phenol?

16 A Less than .06 parts per million.

17 Q Per million or per billion?

18 A Million.

19 Q And the OCP was .28 parts per million?

20 A Yes.

21 Q So the total concentration of phenols and
22 chlorinated phenols you found at the 8.7 mile was .34
23 parts per million, is that correct?

24 A It would not be any higher than that.

1 Q And your testimony was that that level is not,
2 that those chemicals are not toxic to fish, is that
3 correct?

4 A That's correct.

5 Q So when you say it was affected, what do you mean
6 by that word, is that you were able to detect some minute
7 trace of it at that point but not that it had any type of
8 toxic effects on the fish at that point on the stream?

9 A That's correct.

10 Q You can't tell us at what point back up the
11 stream that there were-- You can't tell us at what point in
12 the stream the toxic effects on fish extended to other than
13 it was somewhere before the 8.7 mile?

14 A No, I can. It was in the 3.5 mile.

15 Q Okay. So the furthest it extended as far as being
16 toxic to fish three-- was three and a half miles?

17 A Yes.

18 Q And beyond that point the significance of toxicity
19 of fish--

20 A Was unknown.

21 Q -- was unknown. You didn't find dead fish beyond
22 that point?

23 A That's correct.

24 Q You found dead fish at the three and a half mile

1 point?

2 A Yes.

3 Q Three and a half miles downstream?

4 A Yes.

5 Q This was a moving body of water, is that right?

6 A Yes.

7 Q And these dead fish, when you found them, what were
8 they doing, were they floating on top of the water?

9 A In some cases, yes.

10 Q Some cases they weren't floating?

11 A Yes.

12 Q I assume those are probably the two possibilities,
13 is that right?

14 A Well, what happens when fish die in streams,
15 streams aren't, except in some portions of the state,
16 streams aren't open ditches without any obstructions in
17 them. Even in a moving body of water the fish generally,
18 especially in a small stream, don't move very far after
19 they die; they get caught up on stream tree branches,
20 obstructions, any type of material that is blocking the
21 channel. That's more characteristic of small streams like
22 Saling Creek is.

23 Q Well, whatever movement there would have been for
24 dead fish?

1 A Yes.

2 Q Would have been the result of flowing water of
3 Saling Creek, would that be fair to say?

4 A Yes.

5 Q And the flowing water of Saling Creek would have
6 been carrying it downstream, is that correct?

7 A Yes.

8 Q And whatever affects of the floating and the
9 movement of water in Saling Creek had?

10 A Yes.

11 Q The furthest downstream you found any dead fish
12 was three and a half miles?

13 A Yes.

14 Q You have a memorandum dated January 25th, 1979,
15 and I just want to clear up one particular point Mr.
16 Seigfreid asked you about. The last sentence of the first
17 paragraph stating: Western Environmental Services, St.
18 Louis referring to what has been marked as Defendant's
19 Exhibit 1-- do you have that memo in front of you?

20 A Yes.

21 MR. CARR: I don't recall what that number is,
22 Plaintiffs' Exhibit 114? Anyway, it's one of these
23 exhibits, Your Honor, I don't recall which it is.

24 A The last sentence of the first paragraph says:

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1 "Later, Western Environmental Services, St. Louis, a--

2 MR. MUSGRAVE: That's the question, Mr. Carr.

3 MR. CARR: Oh, thank you.

4 Q The last sentence of the first paragraph says:

5 "Later, Western Environmental Services, St. Louis, a
6 railroad response group, took over the cleanup operations."

7 I understand you to say you had no personal
8 knowledge of that particular statement, is that correct?

9 A Yes.

10 Q And the sole source of that was some undisclosed
11 comment you heard from someone or unidentified comment you
12 heard from someone?

13 A Yes.

14 Q And you just included that in this particular
15 memorandum without any personal knowledge?

16 A Yes.

17 Q And at no point did you have any conversations
18 with any persons from Western Environmental, is that correct?

19 A That's correct.

20 MR. CARR: Then we had re-cross examination
21 by Mr. Seigfreid.

22 Q Ron, I want to ask you a couple of questions, if
23 I may.

24 When did you first learn that there was this

1 contaminated toxic material running down through some kind
2 of a drain down the railroad right-of-way from the point
3 of the spill eastwardly?

4 A I believe it was March 16th or 17th when Jim
5 Czarnecki investigated.

6 Q All right. And any of these filters that were
7 put in, they were put in between the place where the water
8 drained out in this ditch in Sturgeon and Saling Creek,
9 were they not?

10 A Yes.

11 Q How far were these weirs that we've called them,
12 how far were they from the point where this water drained
13 out into the ditch in the City of Sturgeon?

14 A Several hundred yards.

15 Q So that this ortho-chlorophenol drained down a
16 ditch in the City of Sturgeon down to the place where the
17 weirs were, is that correct?

18 A That's correct.

19 Q And whatever the concentration of it was that was
20 measured at any time, that was the concentration that was
21 passing through the City of Sturgeon, isn't that true?

22 A Yes.

23 Q Now, let me ask you this, from your experience
24 would some of that ortho-chlorophenol have been deposited

1 in the bed of that stream as it passed along?

2 A It's possible.

3 Q Now, with respect to these measurements that are
4 shown in your report with respect to the ortho-chlorophenol
5 and the phenol content, for instance, who made those
6 measurements of ortho-chlorophenol as shown over on page 3
7 of Plaintiff's Deposition Exhibit No. 1?

8 A Most of them were made by the OH company. EPA
9 did one of the analysis.

10 Q Most of these numbers you've got came from OH
11 Materials which was the cleanup company, is that right?

12 A Yes.

13 Q And did you just ask them what the tests showed
14 and they gave that to you?

15 A I believe they're under some type of agreement to
16 provide any information they had to any investigating
17 agency.

18 Q I see. Was that done orally?

19 A I believe so.

20 Q And who was that given to? Was that given to you
21 since it's in your report?

22 A Yes.

23 Q And you just visited with the fellows out there
24 at the site and they gave you that information?

1 A Yes.

2 Q But so far as the Department of Conservation
3 actually running any of these tests, they didn't run any
4 of these tests?

5 A Not on this particular phase of the investigation.

6 Q The only tests that it ran were tests that were
7 run early on, isn't that correct?

8 A That's right.

9 Q And that was done by an agency that was employed
10 by the Department of Conservation, isn't that right?

11 A Yes.

12 Q So what you really observed was that, you
13 observed discoloration of the water itself in the Kemner
14 ponds and in the Saling Creek and in the material that was
15 coming down this ditch in town, isn't that right?

16 A Yes.

17 Q And this discoloration in your opinion was toxic
18 chemical of ortho-chlorophenol and the phenols and
19 whatever other chemicals that were in there, isn't that
20 right?

21 A Yes.

22 Q And then you observed the dead fish; you observed
23 that with your own eyes, didn't you?

24 A Yes.

1 Q And you sensed the smell; you smelled it, didn't you?

2 A Yes.

3 Q And you smelled it all over town?

4 A Yes.

5 Q You smelled it up at the Kemner property, didn't
6 you?

7 A Yes.

8 Q And down at the river you smelled it?

9 A Yes.

10 Q And as you were going up this river did you smell
11 it? As far as up at 8.7 miles downstream, could you still
12 smell the phenols?

13 A I think I could.

14 Q That's your best judgment?

15 A I think I recollect that I could smell it at that
16 point.

17 Q 8.7 miles downstream?

18 A Yes.

19 Q Have you been back to Sturgeon in recent months?

20 A No.

21 Q When was the last time you were at Sturgeon?

22 A I believe it was May 3rd, 1979.

23 Q And you could still smell the phenols and
24 ortho-chlorophenol at that time?

1 A Yes.

2 Q You could still smell it in all the places we
3 talked about?

4 A Yes.

5 Q Did you ever, were you ever told that there was
6 dioxin also in this tank car that spilled?

7 A Do I really-- when?

8 Q Were you ever told there was dioxin?

9 A Yes.

10 Q And when were you told that there was dioxin?

11 A I don't recall the date.

12 Q Was it sometime after you started going up to Sturgeon?

13 A Yes.

14 Q Was it sometime in April or May?

15 A I believe it was in March. I'm not positive there.

16 Q All right. And what were you told about the dioxin?

17 A I don't recall specifically other than there were
18 low concentrations of one particular type of dioxin.

19 Q Do you remember what type that was?

20 A It's 2,3,7,8.

21 Q And do you have knowledge of whether or not
22 that's the most toxic chemical known to man?

23 A I have knowledge that it's a very toxic chemical.

24 Q As a matter of fact, you wrote an article on dioxin

1 for the Conservation Currents, didn't you?

2 A Yes.

3 Q And that article was published in June of 1982,
4 wasn't it?

5 A Probably.

6 Q And do you recall in that article you said dioxin
7 is one of the most toxic chemicals known to man?

8 A Yes.

9 Q And did you also say that dioxin could be carried
10 by fish?

11 A Yes.

12 Q And did you find that that was a very serious
13 problem in the fish population that had been exposed to
14 dioxin?

15 A Yes.

16 Q And did you report that that was something that
17 was causing problems with our support fisheries in
18 Missouri?

19 A Yes.

20 Q And did you believe that that was a problem in
21 the Sturgeon area?

22 A We had great deal more knowledge of the problem
23 in the situation you're referring to than we had earlier.
24 It was not very much information known, at least available,

1 when the Sturgeon incident occurred.

2 Q So when you wrote your article in June of 1982,
3 there was more knowledge known?

4 A A great deal more.

5 Q But in retrospect knowing what you know now, this
6 dioxin would be a very dangerous thing in fish, would it not?

7 A Yes.

8 Q Now, when you made your investigation on March the
9 17th and saw this fish kill, did anyone in the area report to
10 you that they had seen dead fish before the toxic chemical
11 spill?

12 A No.

13 Q Anyone seen dead fish in the Kemner ponds before this
14 toxic chemical spill?

15 A No.

16 Q And did you inquire of the people that had reported
17 this, seeing these dead fish in the Kemner ponds, whether
18 or not they had been there before the chemical spill?

19 A I don't recall. In all likelihood they would not
20 have been there. I would not have knowledge of them because
21 there was ice on the ponds at the time of the chemical spill.

22 Q But it's your opinion that the chemicals were the
23 cause of the fish dying and being there, is that right?

24 A Yes.

1 Q Isn't it unlikely that you would see hundreds of
2 fish dead like you saw just from a lack of oxygen?

3 A It's likely that some fish would have survived,
4 small ones, if it was an oxygen related kill.

5 Q And did you see any surviving fish at all?

6 A No.

7 Q In your opinion were all the fish dead?

8 A Yes.

9 Q And in your opinion were they dead because of
10 this chemical?

11 A Yes.

12 MR. CARR: And here Mr. Schoenbeck asks some
13 questions on his recross examination, which Mr. Seigfreid
14 will read.

15 Q Ron, I want to clear something up. Mr. Seigfreid
16 asked you a minute or two ago about when you first learned
17 that there were phenol compounds going along the railroad
18 right-of-way in eastwardly direction and you indicated
19 that was on March 16th or 17th when Jim Czarnecki
20 investigated, is that correct?

21 A Okay. On that date I would have realized they
22 were going in a westerly direction.

23 Q You're talking about your testimony that phenolic
24 chemicals may have gotten in the Kemner ponds, are you not?

1 A Yes.

2 Q You're not talking about anything going into the
3 French drain and then into the town ditch and then into Saling
4 Creek are you?

5 A Yeah, that's correct. It was not until April 27th
6 that I found out that the material was draining to the east.

7 Q Through the Franch drain?

8 A Yes.

9 Q So when you answered Mr. Seigfreid's question a
10 little bit earlier, you did not mean to indicate that you
11 found out anything about the French drain or anything
12 going through a French drain on March 16th or 17th, isn't
13 that correct?

14 A Yes.

15 Q I take it, Ron, that it's still your opinion that
16 there are at least two possibilities as to what may have
17 caused the death of the fish in the ponds of the Kemner
18 property?

19 A I'm not sure that is-- to me that is not a
20 relevant question in that the concentration that was in the
21 pond was toxic.

22 Q Sir, I'm not asking you to pass on whether the
23 question is relevant but just answer the question.

24 A Based on that question there could be two
possibilities.

1 Q And those possibilities are that it could have
2 been winter kill or it could have been the phenolic
3 compounds, is that correct?

4 A Yes.

5 MR. CARR: Then there was recross-examination
6 by Mr. Witzel.

7 Q Ron, when you were checking Saling Creek in May
8 of 1979 you were at a point 8.7 miles downstream. What
9 date was that when you were checking the Saling area?

10 A April 27th.

11 Q April 27th?

12 A Yes.

13 Q And you tested the water at that particular level
14 and you found that the total phenolic compounds were less
15 than, I believe your testimony was before .34 parts per
16 million total concentrations, is that right?

17 A Yes.

18 Q And this is some direct mile or miles, but as the
19 crow flies, if the crow's instructed to fly in a straight
20 line, how far from Sturgeon--

21 A It would be somewhat less than 8.7 miles. The
22 distance that I measured is stream miles.

23 Q Okay. And the stream meanders?

24 A Yes.

1 Q So we're somewhat less than 8.7 but you don't
2 know exactly how far from--

3 A That's correct.

4 Q -- the city of Sturgeon in a straight line?

5 Now, if I understood your testimony before when
6 you were asked by Mr. Seigfreid that you were out at that
7 point on April 27th, 1979, that could you smell phenol,
8 ortho-chlorophenol at that point and the answer I
9 understood was, I believe I could, did you smell phenol;
10 do you know for certain you could smell phenol that far
11 from Sturgeon on April 27th, 1978?

12 A As you're aware, it's four years ago. I don't
13 have any record of smelling the material on that
14 particular day but I do recall that that was the furthest
15 downstream location that I could detect it just by smell.

16 MR. CARR: Then there was some redirect examination by
17 Mr. Theiss.

18 Q Mr. Crunkilton, Mr. Seigfreid has asked you about
19 a June 1982 article you wrote in Conservation Currents.

20 Has the Food and Drug Administration of the
21 United States established an acceptable level of dioxin of
22 contamination in fish that humans can eat?

23 A They have established what is called an advisory
24 level.

1 Q And can you tell us what that advisory level is,
2 set by the United States government?

3 A The concentrations?

4 Q Yes.

5 A Anything, any concentrations in edible fish
6 tissue over 50 parts per trillion are considered to be
7 inedible.

8 Q Okay. And what is the basis of their assumption
9 in terms of eating, would somebody be eating these fish on
10 a daily basis, weekly basis?

11 A That is based on an average consumption of fish
12 of four ounces per week.

13 Q Okay. Did you ever do any tests to see if any
14 2,3,7,8-TCDD was in the fish that died at Sturgeon?

15 A No.

16 MR. CARR: And that's the end of that deposition,
17 Your Honor.

18 THE COURT: Okay, gentlemen, could I see you at the
19 bench for a minute, please?

20 (Discussion was had at the bench between Court
21 and counsel and out of the hearing of the jury
22 and the court reporter.)

23 THE COURT: Ladies and gentlemen, we're going to take
24 a break in proceedings and also consider some matters in

1 chambers and then we'll resume on some testimony
2 before lunch. I would admonish you now as I do before
3 any break in proceeding and this admonishment will hold
4 for any break during the day, you are not to discuss
5 this matter among yourselves, with anyone outside the
6 jury panel, and you are not to form any opinions or
7 conclusions about the matters on trial. Thank you
8 for your attention. Court is in recess.

9 (The following proceedings were then had,
10 in chambers, with Court and counsel present,
11 outside the presence and hearing of the jury:)

12 MR. CARR: Your Honor, the plaintiff would offer Plaintiffs'
13 Exhibits 113, 114 and 115 at this time and would propose that
14 insofar as these copies are concerned that the jury be allowed
15 to read them at this time. I have prepared eighteen copies
16 of Exhibits 113 and 114, since they are rather lengthy, so
17 each juror can have one rather than take the time for each
18 juror to read them all. I have not prepared eighteen copies
19 of the other exhibit, but I can do so at the lunch hour,
20 and that's 115, I have not prepared eighteen copies of it.

21 THE COURT: So you prepared 113 and 114.

22 MR. CARR: And Plaintiff's Exhibit 114 I have prepared in
23 accordance with the Court's ruling as to the EPA analysis of
24 some of these samples. The Court ruled that that was hearsay

1 and not within the exception to the hearsay rule. I have
2 eliminated that and here's a copy.

3 THE COURT: Okay, fine.

4 MR. CARR: As I propose to send to the jury.

5 MR. HEINEMAN: Is this the only one that has been
6 excised?

7 MR. CARR: That's correct.

8 MR. HEINEMAN: 115, as I understand it, Rex, is the
9 January 25, '79 memo?

10 MR. CARR: That's correct.

11 MR. HEINEMAN: From Crunkilton to Whitley. 113 is 3/29/79
12 from Czarnezki to Whitley. And they are being offered in toto
13 unexcised?

14 MR. CARR: That's correct.

15 THE COURT: Okay. What do you want to do?

16 MR. MUSGRAVE: Are you going to start with these?

17 THE COURT: 113, I suppose, so we can keep in some form
18 of order. Any objections?

19 MR. MUSGRAVE: Where is 113?

20 THE COURT: That's the March 29, 1979.

21 MR. MUSGRAVE: Is that to be excised at all?

22 MR. CARR: It has been already, 113 has. You recall we
23 had a conference and the Judge ruled certain parts dealing
24 with the EPA--

1 MR. MUSGRAVE: Do you have a copy of what you're excising?

2 MR. CARR: The Court has the original copy. I direct
3 your attention to-- yes, this is the one.

4 THE COURT: No, 114 is the one where I took things out.

5 MR. CARR: That's right, I'm sorry. No, 113 has not been
6 excised.

7 MR. MUSGRAVE: Okay. We object to the last paragraph
8 on the first page of Exhibit 113. Hearsay.

9 THE COURT: Anybody have anything to say on it?

10 MR. CARR: Judge, I would agree to eliminate the
11 statement as to what Dr. Van Gelder suggested in that
12 paragraph.

13 THE COURT: Fine.

14 MR. CARR: That is that sentence Dr. Van Gelder suggested
15 I'm willing to excise that.

16 THE COURT: What about the last sentence about informing
17 Kemner of the suggestion?

18 MR. CARR: I suppose it makes sense that should be
19 out also, Your Honor.

20 THE COURT: All right. Why don't I put a parentheses
21 around the part that goes out.

22 MR. CARR: You've got the original, I'll do it on the
23 copy because I'll have an excised copy that will be part of
24 the court record.

1 THE COURT: Okay. Any other objections to 113?

2 MR. MUSGRAVE: Yes, Your Honor. I would object on page 2
3 of the exhibit, Plaintiff's 113, in the last paragraph, the
4 sentence starting, this is a stop gap measure at best, and
5 to the end of that paragraph, which would include the next
6 sentence starting at, a small amount of precipitation, and
7 the last sentence, this would result in a slug. It's all
8 speculation and there's no foundation for this man's opinion.
9 And it's based upon speculation and conjecture.

10 MR. CARR: In response to that, Judge, there's nothing to
11 indicate that this is conjecture. This is their man that
12 they sent out to survey the situation, he is reporting
13 exactly what he found and exactly what he believes to be the
14 situation.

15 MR. STEPHEN SCHOENBECK: Your Honor, Norfolk would join
16 in the objection to that portion and would also add the
17 additional reason that this is hearsay. This witness was
18 never subject to cross examination on this information.
19 This is a memo from Mr. Czarnecki, whose deposition was not
20 even taken in this matter and certainly he should have been
21 subjected to cross examination about this point. I can
22 indicate to the Court that the reason that nothing further was
23 done on the spillway at that time was because the bulldozer
24 that they brought out there mired down in the mud because the

1 conditions were so wet. Certainly the railroad should be
2 permitted to cross examine the witness about this information
3 before this should be allowed to come in. So we object to it
4 for the additional grounds that it's all hearsay.

5 MR. MUSGRAVE: We adopt that grounds additionally, too.

6 MR. CARR: Judge, I don't believe it's hearsay, but I
7 don't have any, they noticed us that they were going to take
8 the deposition of James Czarnecki and we were available for
9 that purpose, they decided not to do so. This is a business
10 memorandum. However, it's not-- certainly the sentence where
11 it was reportedly done by the railroad upon EPA's
12 recommendation would be hearsay. The balance of that is a
13 statement of what he saw at that-- well, I suppose, this is a
14 stop gap measure, at best would not be a statement of what he
15 saw, but the balance of this would be his conclusion based
16 upon what he saw at the time, the physical appearance or
17 physical things that occurred. It's a report of facts as
18 contained in the business memo made by a person in the course
19 of his duties to report such facts.

20 MR. STEPHEN SCHOENBECK: I disagree with the
21 characterization as a statement of facts. It's an opinion by
22 this witness and there's been no qualification of the witness
23 to offer opinion on that matter. I would simply point out
24 it was noticed by Monsanto but not by the railroad.

1 THE COURT: Okay. I'll take out the sentence stating
2 this reportedly was done by the railroad upon EPA's
3 recommendation. I will also take out the sentence, this is
4 a stop gap measure at best. As to all other sentences, the
5 objections are overruled. Okay. Anything on 114?

6 MR. MUSGRAVE: Your Honor, the first page of Exhibit 114,
7 the second paragraph, drainage from this area may have been
8 entering Saling Creek since 4/17/79, we would object to that
9 as conjecture and speculation.

10 MR. STEPHEN SCHOENBECK: Norfolk joins in that. Hearsay
11 also.

12 MR. CARR: I'm sorry, I have the wrong exhibit.

13 THE COURT: The last sentence of the second paragraph,
14 about drainage.

15 MR. CARR: The last sentence on the second paragraph?

16 THE COURT: Right.

17 MR. CARR: This is something that he's already testified
18 to and been cross examined on this point, and I don't see
19 anything wrong with his statement, Your Honor. They have
20 examined him on that point at some length.

21 THE COURT: Okay. I remember it, too. Overruled.
22 Any other objections?

23 MR. MUSGRAVE: Not on page 1. Let me look at page 2.

24 MR. HEINEMAN: What's been taken out?

1 MR. CARR: Page 2, the EPA findings and that chart, and then
2 on that same page at the bottom of the page there's a statement
3 about the last sentence on that page, I don't have the
4 original in front of me, something about EPA found something
5 or other. The Court has the original, the last paragraph on page 3.

6 THE COURT: Yeah, Harry Gilmer, EPA, indicated that
7 affluent concentration were in the neighborhood of 30 parts
8 per billion. That's out.

9 MR. MUSGRAVE: Your Honor, that is page what?

10 THE COURT: Three.

11 MR. CARR: Last sentence on page 3, the sentence the Judge
12 just read.

13 MR. MUSGRAVE: Just for the record, we would object to
14 that being out.

15 MR. CARR: I'll be glad to have it put back in. You guys
16 were objecting to it being in before and that's the reason I
17 took it out.

18 MR. MUSGRAVE: Let me be sure I understand what you're
19 taking out.

20 THE COURT: The last sentence on the last paragraph of page
21 3 starting Harry Gilmer, parenthesis EPA.

22 MR. MUSGRAVE: Okay. No, I was referring to something
23 else on page 3 omitted. We're getting out of order here
24 because I still have some comments on page 2. Page 2 of

1 Exhibit 114 we would object to the statement under the date,
2 the paragraph that has the date immediately preceding it,
3 4/30/79, the sentence that starts, Mr. Rush indicated that
4 he had smelled phenol, et cetera. We'd object to that,
5 hearsay. We get to the next sentence, he contacted the O. and
6 H. cleanup supervisor, that's hearsay, and statement with
7 regard to what O. and H. said to him as hearsay. And we
8 would object to the last sentence in that paragraph, starting
9 it was apparent that O. and H., et cetera, there again that's
10 conclusion opinion based upon hearsay. We object to it on
11 that basis. The next paragraph--

12 THE COURT: Wait a minute, let's take them one at a time.

13 MR. STEPHEN SCHOENBECK: Norfolk joins in those
14 objections, Your Honor.

15 MR. CARR: With relation to the statement about Mr. Rush
16 indicating that he smelled phenol, Mr. Rush will be here and
17 he can be examined on that. But we are not offering it for the
18 truth of what Mr. Rush said. This is a factual report by an
19 investigator for the Department of Conservation who is
20 reporting what he found and was told what occurred. As far
21 as the OH statements are concerned, again the OH is the agency
22 of the railroad and it would be admissible for that purpose
23 even if it were not admissible as a part of the business
24 record, exception to the hearsay rule.

1 THE COURT: Rush is your next witness, isn't he?

2 MR. CARR: That's correct.

3 MR. MUSGRAVE: I don't know what its relevancy is if
4 it's not offered for the truth of it, and actually it's
5 double hearsay in that you've got O. & H. presumably telling Rush
6 who presumably tells these folks.

7 MR. CARR: There's nothing about what OH told-- oh,
8 yes, there is indeed.

9 MR. MUSGRAVE: There is indeed.

10 MR. CARR: Well, he will be here and he can be examined
11 on that point.

12 THE COURT: Assuming his testimony, I'll let it in,
13 since he is the next witness. Anything else on page 2?

14 MR. MUSGRAVE: Yes, Your Honor, the next paragraph on the
15 same page, the sentence that states, Mr. Rush was concerned
16 about the safety of his cattle. That's a conclusion on their
17 behalf stating the state of mind of someone else and can
18 only be based upon hearsay statements.

19 MR. STEPHEN SCHOENBECK: Norfolk would join.

20 MR. CARR: The witness is here and subject to cross
21 examination.

22 THE COURT: Same ruling. Anything else on page 2?

23 MR. MUSGRAVE: Nothing, Your Honor.

24 THE COURT: On page 3?

1 MR. MUSGRAVE: Just so the record is clear, we would
2 object to the excising on page 3 of the tests and the results
3 thereof that are indicated in the original exhibit, and I take
4 it that the original will be made a part of the record.

5 THE COURT: Oh, sure.

6 MR. CARR: You're objecting to the elimination of it?
7 I'm perfectly willing to put it back in.

8 MR. MUSGRAVE: What, the EPA analysis?

9 MR. CARR: Oh, absolutely.

10 MR. MUSGRAVE: Of what was found downstream?

11 MR. CARR: Yes. It was objected to when we went
12 over the deposition.

13 THE COURT: Yes, it was.

14 MR. MUSGRAVE: We didn't object to it. You wanted it
15 out because it was--

16 MR. CARR: No, no, no. I did not want it out. I
17 wanted it in.

18 THE COURT: One of you made an objection to it, I don't
19 remember which one?

20 MR. MUSGRAVE: You're correct. I'll withdraw that.
21 You're right.

22 MR. CARR: Withdraw what now, the objection you made
23 before or the fact that you want it in?

24 MR. MUSGRAVE: My objection that I'm making now.

MR. STEPHEN SCHOENBECK: Your Honor, so that I'm clear, I think that there is something that we do want in and that's the last sentence on that page where Harry Gilmer indicated that actual affluent concentrations were in the neighborhood of 30 parts per billion. That was taken out by Mr. Carr's objection.

MR. CARR: No, it was not.

MR. STEPHEN SCHOENBECK: The testimony in the deposition about that was from my cross examination and it was stricken at your objection, Mr. Carr.

MR. CARR: I may stand corrected on that, Steve.

THE COURT: I don't have a copy of it.

MR. CARR: Do you recall what page it was?

MR. STEPHEN SCHOENBECK: I'm looking for it right now. It was in Crunkilton's, page 77, 78, my cross examination of Mr. Crunkilton. And it was deleted on the basis of Mr. Seigfreid's objection which was preserved.

MR. CARR: It was an objection that we made at the time. I don't recall what we did, but I'll stand by the objection now since they objected to the analysis of the EPA in an earlier-- we'll stand on this objection as well, Your Honor.

THE COURT: Well, my understanding within this context that everything about EPA was hearsay.

MR. CARR: Yes, that was what the Court had concluded.

1 THE COURT: That's why those two analyses and the table
2 went out and logically the last sentence would go out. So,
3 is no one objecting or--

4 MR. CARR: Yes, we will object to it being in there.

5 THE COURT: Monsanto still wants the EPA part of the tables
6 in.

7 MR. MUSGRAVE: The posture we took originally was that
8 all of this was hearway. The Court ruled that the O. & H.
9 came in because of some agency relationship and I would again
10 point out to the Court that it says here that the actual tests
11 were run by ABC labs and says others, O. & H. Company
12 through ABC Labs.

13 THE COURT: I remember going through that. I still think
14 this material about EPA is hearsay, so I think it's
15 properly cleaned up.

16 MR. STEPHEN SCHOENBECK: Your Honor, just so the Norfolk's
17 position on this is clear, I think that there is no reason to
18 distinguish in here between the results from the O. & H. or from
19 the EPA and that we submit if the other results from O. & H.
20 are going to be read, the other results from EPA should be
21 read as well on this exhibit.

22 MR. CARR: Plaintiff stands on the original position.

23 THE COURT: O. & H. stands in a completely different
24 posture, than EPA. Okay. As it is cleaned up, any objections

1 on page 3.

2 MR. MUSGRAVE: Other than those already made.

3 THE COURT: Other than those already made.

4 MR. MUSGRAVE: None from Monsanto.

5 THE COURT: Do you have any?

6 MR. STEPHEN SCHOENBECK: No.

7 THE COURT: And page 4 is only one paragraph, any
8 objection to anything in that paragraph?

9 MR. MUSGRAVE: Your Honor, we would object to the word
10 primary used in the first sentence of page 4, there's been no
11 testimony other than concentrations of orthochlorophenol or
12 phenol compounds as being anything-- let me rephrase that.
13 There's been no evidence that anything other than ortho-
14 chlorophenol or phenol compounds were the toxic materials that
15 they had any role in discovering or measuring.

16 MR. STEPHEN SCHOENBECK: Norfolk would join in that.

17 MR. CARR: He's reading something that's really of no
18 consequence, Your Honor. The witness has given his opinion,
19 he's been cross examined on the point and dioxin was mentioned
20 as having been in the substance that he knew about, and I think
21 it stands on its own bottom.

22 THE COURT: I'm going to leave it in.

23 MR. MUSGRAVE: And the other exhibit--

24 THE COURT: 115.

1 MR. STEPHEN SCHOENBECK: Your Honor, it's the same objection,
2 but Norfolk would also make the objection on page 4 to the
3 last statement about as possibly as long as sixteen days
4 as being speculation. The Court has previously ruled on it.

5 THE COURT: I'll adopt my prior ruling.

6 MR. MUSGRAVE: We'll join in it.

7 THE COURT: So noted. 115?

8 MR. MUSGRAVE: On Exhibit 115 we object to it on the
9 basis that it clearly appears to be the statement of
10 Crunkilton, something-- well, the basis that it
11 constitutes hearsay.

12 THE COURT: Where?

13 MR. MUSGRAVE: The whole thing.

14 THE COURT: Okay. Are you joining in that?

15 MR. STEPHEN SCHOENBECK: I believe we made the same
16 objection to it when it came up in the direct examination.

17 THE COURT: Okay. Do you have anything to say on it?

18 MR. CARR: No, Judge, it will be identified as a business
19 record and the witness has been here, subject to cross
20 examination.

21 THE COURT: I don't see any problem with it. I've read it
22 over and I really don't see any, so I'll deny the objection.

23 (Court recessed for lunch at 12:05 P.M., to
24 reconvene at 1:30 P.M., at which time the

1 following proceedings were had, in open
2 court, in the presence and hearing of the jury:)

3 (Plaintiff's Exhibits 113-A and 114-A
4 were marked for identification by the reporter.)

5 THE COURT: Okay, gentlemen?

6 MR. CARR: Your Honor, at this time plaintiff would
7 offer into evidence Exhibits 113, 114 and 115 and the
8 Clerk has copies of each of those exhibits for the jury.
9 I would like at this time to ask the Court to admit
10 these into evidence and allow the jury to read these
11 exhibits.

12 THE COURT: All right. Any objections other than
13 the ones previously noted, gentlemen?

14 MR. HEINEMAN: None other than those previously
15 noted, Your Honor.

16 MR. STEPHEN SCHOENBECK: None.

17 THE COURT: Fine. Admitted over objections so
18 noted.

19 (Jurors read the exhibits which were passed
20 to each of them by the court clerk.)

21 MR. CARR: I think everyone is finished. We'd
22 like to call with the Court's permission, Mr. George Rush.

23 THE COURT: Fine.
24

1 GEORGE WILLIAM RUSH,

2 called as a witness on behalf of the plaintiffs, having been
3 first duly sworn, deposes and states as follows:

4 DIRECT EXAMINATION

5 BY MR. CARR:

6 Q Would you state your name, sir?

7 A George William Rush.

8 Q How old a man are you, George?

9 A 50.

10 Q What's your birth date, please?

11 A February 8, 1934.

12 Q Are you a married man, Mr. Rush?

13 A Yes, sir.

14 Q Your wife's name?

15 A Barbara.

16 Q And do you have children?

17 A Yes.

18 Q And their names?

19 A Glenn, Debbie and Greg.

20 Q They are all, your entire family plaintiffs in this
21 action?

22 A Pardon me?

23 Q Is your entire family, that is your children and
24 your wife and yourself plaintiffs in this action?

1 A Yes.

2 Q Where do you live, Mr. Rush?

3 A I live about three and a half miles northeast of Sturgeon.

4 Q And do you have a farm there?

5 A Yes, I do.

6 Q And I know this picture doesn't show your farm, Mr.
7 Rush, but could you indicate where your farm is located with
8 reference to Plaintiffs' Exhibit 3, if you would?

9 A Well, it would be out north and east of this picture.

10 Q It would be, this picture, I'm on the north side of
11 this picture, and the top of the picture would be to the
12 south and east, so toward this corner?

13 A Northeast.

14 Q Northeast would be this direction?

15 A More, yes.

16 Q And how far from Sturgeon do you live?

17 A About three and a half miles.

18 Q And how long have you lived there, George? In that vicinity?

19 A I've lived in that vicinity for the last twenty years.

20 Q And you've been farming there for that period of time,
21 haven't you?

22 A Yes.

23 Q All right. Directing your attention to the 10th
24 of January of 1979, did you live there at that time?

1 A Yes.

2 Q And did you have occasion during the day and days
3 following the 10th of January '79 to go into Sturgeon, the
4 village of Sturgeon?

5 A Yes, I did.

6 Q On what occasion was that, George?

7 A Well, I just go in the normal routine of life, I
8 go in there quite frequently.

9 Q And why is that?

10 A Well, it's closest town to my area and I do all my
11 trading there, my children go to school there, and so forth.

12 Q Are you on the Board of Education there?

13 A That's right.

14 Q And do you also belong-- Do you have a Chamber of
15 Commerce?

16 A Yes, I belong to the Chamber of Commerce.

17 Q And do you do business with the various business
18 establishments, hardware stores, banks, post office, grocery
19 stores, things of that sort in Sturgeon?

20 A Yes, I do.

21 Q Now, when were you there the first time following
22 the spill of January 10th, '79?

23 A I don't remember the exact day, it was the next two
24 or three days after the spill, if I remember.

1 Q Now, did you have occasion to note whether or not
2 there was some chemical at parts of Sturgeon other than just on
3 the railroad tracks on the crossing?

4 A Yes, I did.

5 Q And what was the occasion for noting that?

6 A It was at the filling station.

7 Q And where would that filling station be located?

8 A It would be just north of the railroad crossing at
9 Ogden Street.

10 Q Whatkind offilling station was it at that time?

11 A At that time it was a Texaco filling station.

12 Q And since that time has it been changed?

13 A To a Kerr McGee.

14 Q All right. And did you do business at the Texaco
15 station?

16 A Yes.

17 Q And were you in there-- well, state please, what you
18 observed with reference to the filling station and the chemical?

19 A I was there at that time and I noticed orangey material of
20 some kind in the snow.

21 Q And where?

22 A It would be at the end of the, towards the end of
23 the driveway up past the pumps a little ways.

24 Q And had you noted that at any time before January 10th

1 of 1979, that same kind of orangish color in the snow in the
2 filling station driveway?

3 A Never have.

4 Q Could you distinguish that color from, say, the
5 color or any possible gasoline that might be in the drive?

6 A Yes, I'm familiar with what gas would look like,
7 it didn't look like that.

8 Q Okay. And now did you also come to town from time
9 to time to trade at these establishments that you've mentioned?

10 A Yes.

11 Q And could you tell whether or not there had been dirt
12 or material associated with the railroad tracks and the spill
13 itself through the town, distributed in various parts of the
14 town of Sturgeon?

15 A Yes, there seemed to be more, I'd say mud or material
16 on the streets from various vehicles that was used during the
17 spill.

18 Q George, as a farmer when you drive to town, do you
19 have any occasion to bring mud into the community?

20 A Oh, I use my vehicle on the farm. I drive through
21 mud occasionally, but most of it would fall off before I'd
22 get to town.

23 Q How many highway miles do you drive to get into town?

24 A Going to town?

1 Q Yes.

2 A From where I live it's about three and a half miles.

3 Q Now, Mr. Rush, in addition to your going into town
4 and seeing these observations, did you have occasion to note
5 a flooding of your property sometime during the month of April
6 of 1979?

7 A Yes, I did.

8 Q Does Saling Creek run through your property?

9 A Yes, it runs the full length of it.

10 Q When you say it runs the full length of it, you mean
11 Saling Creek travels the entire length of your property?

12 A That's right.

13 Q And how much distance would that be, sir?

14 A I'd say almost a mile.

15 Q And how much acreage is there involved in that farm
16 there?

17 A 229 acres.

18 Q And has Saling Creek, or does it on occasion in the
19 springtime or other occasions of heavy rain, does it flood and
20 has it in the past flooded portions of your farm?

21 A Yes, it has.

22 Q And how much of your acreage is subject to-- strike
23 that. How much of your acreage in 1979 was subject to flooding
24 by Saling Creek?

1 A Oh, approximately 100 acres.

2 Q Now, Saling Creek, before it gets to your property
3 does it pass through and around the city of Sturgeon?

4 A Yes, it does.

5 Q That is you're downstream of Sturgeon, is that correct,
6 sir?

7 A That's right.

8 Q Now, did you note in April sometime in April
9 anything unusual about Saling Creek insofar as it related to
10 your property?

11 A Yes, it appeared to be black.

12 Q And what part of April was that, do you know, sir?

13 A More so in the latter days of April.

14 Q Was your property flooded on two times in April?

15 A Yes, it was.

16 Q And did you have occasion to have come to your
17 property the people from the Missouri Conservation Department,
18 a Mr. Crunkilton and others who have testified here by
19 deposition today?

20 A Yes, I called them.

21 Q All right. Now, were you present or did you go to the
22 part of your acreage that was subject to flooding by Saling Creek
23 in the latter part of April in addition to the first part, or
24 first flooded time in April?

1 A Yes.

2 Q And about when did you get there toward the latter
3 part of April, George?

4 A I'd say it must have been 27th or 28th, thereabout,
5 the last few days of April.

6 Q And could you tell was your land in flood at that time,
7 when you got there?

8 A When I was there, no. I seen it prior to going down
9 to the creek area.

10 Q All right. And what did you see, sir?

11 A After I went to the creek area?

12 Q Yes.

13 A There was a lot of black residue in the grass and
14 pasture land. The creek itself was black. This residue on the
15 grass was more or less, I don't know, kind of an oily base of
16 some kind stuck to it.

17 Q To the best of your knowledge, Mr. Rush, had any
18 kind of black oily residue been deposited on your property by
19 Saling Creek at any time before January 10, 1979?

20 A No.

21 Q How much of your acreage at that time was flooded or--
22 strike that. How much of your acreage at that time in your
23 judgment was covered with the black oily residue that you have
24 described?

1 A Approximately a hundred acres.

2 Q Do you have or did you have cattle pastured in that
3 acreage at that time?

4 A Yes, I did.

5 Q Where would the cattle go when the acreage itself
6 was in actual flood?

7 A They'd go up to high ground.

8 Q Now, what did you do with relation to your cattle
9 after you saw your acreage in that condition that you've
10 described?

11 A I moved them.

12 Q And where did you move them, Mr. Rush?

13 A I rented a pasture and put them on it.

14 Q How far away is that pasture?

15 A It's roughly eight, ten, eleven mile.

16 Q How much, or for what period of time were your cattle
17 in fact, on the acreage that is adjacent to or in the flooded
18 area before you moved them, sir?

19 A Just a matter of a couple of days.

20 Q Now, have you ever returned your cattle to that
21 acreage, Mr. Rush?

22 A Never have.

23 Q Not since 1979?

24 A Not since, no.

1 Q When you moved them?

2 A No.

3 Q Now, directing your attention to Plaintiff's Exhibit
4 93, which is one of the slides which is the eight by ten
5 print of one of the slides that has previously been shown to
6 this jury, Your Honor. Directing your attention to Exhibit 93,
7 do you recognize that, Mr. Rush?

8 A Yes, I do.

9 Q And what is that, sir?

10 A That was taken from the extreme north end of my
11 farm.

12 Q And could you-- well, I'll just show them, they've
13 seen it before. And do you recognize Plaintiff's Exhibit
14 #91, sir?

15 A Yes, sir, I do.

16 Q As a matter of fact, did you go with Mr. Crunkilton
17 and the others from the Missouri Department of Conservation
18 when they actually took these pictures? Were you there?

19 A I was with them, I don't remember if that was when
20 they took the pictures or not, but I was with them that
21 morning, or afternoon.

22 Q And what is Exhibit 91, sir?

23 A That was taken from the road, a gravel road down by
24 John Bowne's property where the water had washed across and the

1 gravel you can see it washed out into the field.

2 Q Were you here when Mr. Bowne testified?

3 A Yes, I was.

4 Q And you heard him describe, does this picture show a
5 part of the property that John Bowne described as being flooded
6 by this flood?

7 A Right.

8 Q And that would be Exhibit 91. Now, handing you
9 Plaintiff's Exhibit 90, which is another of those slide pictures,
10 Your Honor, do you recognize that picture, sir?

11 A Yes, I do.

12 Q What is that, sir?

13 A That's the area uptown Sturgeon, just north of the
14 park area before it drains into Saling Creek.

15 Q And the water or the ditch that's within, that's
16 shown in this picture, is that part of Saling Creek or is
17 that a ditch that leads to Saling Creek or what is that?

18 A That runs into Saling Creek.

19 Q All right. This is a ditch then that goes into
20 Saling Creek, is that correct?

21 A That's right, yes.

22 Q All right. And that's in the town of Sturgeon?

23 A Right.

24 Q Now, Mr. Rush, did you, after the flooding that took

1 place in April of '79, what did you do with this property that
2 you had previously pastured these cattle on, sir?

3 A Well, what I could of it, I plowed up and started
4 farming it.

5 Q And what kind of crops did you grow there?

6 A Mainly just soybeans and wheat.

7 Q Now, did you have, through your attorney, Mr.
8 Seigfreid, or with Mr. Seigfreid, did you have a person by the
9 name of Matthew Zabik come onto your land and take soil
10 samples?

11 A Yes, I did.

12 Q And did you also have a veterinarian take samples
13 from various cattle of yours for Dr. Zabik's study or analysis
14 as well?

15 A Yes.

16 Q When did that take place, Mr. Rush?

17 A It must have been in June or July of 1979.

18 Q And did you learn the-- Why did you want your
19 cattle tested, Mr. Rush?

20 A Well, I wanted to make sure nothing was wrong with
21 them. They was only there a short period of time and still
22 I thought the possibility something could have been wrong with
23 them, and I wanted to have them checked out and see what was,
24 you know.

1 Q And was it reported to you or did you have reported
2 to you whether or not your cattle were indeed safe to sell?

3 A They were safe, yes.

4 Q Did you have that reported to you?

5 A Yes.

6 Q When was that, Mr. Rush?

7 A That would have been later on that fall, I say
8 August or September.

9 Q And who reported that to you?

10 A Mr. Seigfreid.

11 Q And did he give you the basis of that report?

12 A Yes, he said after looking over the reports of
13 Dr. Zabik and turned out that he didn't detect any
14 detectible levels of contamination, so he said, you know,
15 he thought it would be safe to go ahead.

16 Q Now, Mr. Rush, were you also advised at that time
17 as the result of the soil samples in September or August or
18 September of 1979?

19 A Yes.

20 Q And did you grow crop-- Following the information
21 that you received from Mr. Seigfreid as to the tests done on your
22 cattle, did you then sell your cattle?

23 A Yeah, it was a month or two later I sold them.

24 Q All right. Now, insofar as the crops are concerned,

1 what crops do you presently grow on the land?

2 A I still grow wheat and soybeans.

3 Q And do you grow crop on the land that you, that has
4 been subject to the flooding?

5 A Yes, I do.

6 Q How much of your land was not flooded at that time,
7 that is by land, I mean how much of your land that you could
8 plow or use for agricultural purposes or farming purposes,
9 how much of your land was not flooded at that time?

10 A I don't know how to answer that, it was about seventy
11 acres of the flooded land that I was farming, and the balance
12 would be out of that hundred acres up to 229 would be the
13 difference.

14 Q Now, during the following season and during the
15 summer-- strike that. During the summer of '79, or when
16 was it that you plowed up these acreage in order to grow
17 crops rather than have cattle on it?

18 A I believe it was later on that fall.

19 Q In '79?

20 A Yes.

21 Q Now, during the course and did you, in fact, plow up and
22 run your tractor over the land that had theretofore been
23 contaminated by the material in the creek?

24 A Yes.

1 Q Did you work that land and have you worked that
2 land every summer and every season since that time?

3 A Yes.

4 Q Could you state whether or not from time to time
5 you encountered dusty conditions in working that land?

6 A Yes, there was times when it was quite dusty.

7 Q The grass and the hay or the pasture that was on the land
8 at the time it was flooded, did you plow that land under?

9 A Part of it, what was suitable, I think, I baled
10 it for hay.

11 Q By suitable, you mean material that was not flooded?

12 A Yes.

13 Q And plowed the rest of it under?

14 A The rest of it I plowed under.

15 Q Were there other occasions after April of '79 that
16 you noted that the creek had a discolored condition?

17 A There was one time in the fall, toward fall of '79.

18 Q All right. Could you describe that for us, please?

19 A Well, it appeared to me the water was starting to
20 get blacker, darker again, and I was kind of concerned about
21 it and I think at that time I called the Conservation again.

22 Q Was the, in the fall of '79 were the O.H. Material
23 people still in Sturgeon working in the area of where the
24 tank car came to rest?

1 A Yes.

2 Q Did you have any familiarity with that operation?
3 Did you ever go down to see that operation?

4 A Yes, I did.

5 Q And approximately how long after they started that
6 operation was it that, it was in the fall that you saw the
7 creek turn black again?

8 A I'm not sure just exactly when they started their
9 operation, but I do know they was in operation the biggest
10 part of the summer.

11 Q All right. And what part of the fall was it that
12 you noted the creek turn black again?

13 A It was, I'd say late August.

14 Q Now, Mr. Rush, that creek as it flows from
15 Sturgeon there, are you familiar with the other farms that
16 adjoin that creek or that that creek runs through that are
17 subject to flooding?

18 A Yes.

19 Q How many farms that you have personal knowledge of
20 are subject to flooding in the same fashion or similar to
21 the way your farm was subject to flooding by Saling Creek?

22 A I could name several in my area there.

23 Q Would you name them?

24 A There's the Junior Jennings' property. Johnny Bowne's

1 A Yes, at that time, too.

2 Q I want to know if you saw anytime after September
3 of '79--

4 A No, I never noticed anything--

5 Q Let me finish the question first.

6 A Okay.

7 Q Did you see anytime after September of 1979 when
8 the creek turned black or became discolored, to your memory?

9 A No.

10 Q Is it unusual for dust conditions to be created when
11 you farm land, Mr. Rush?

12 A Yes, it is. I mean, yes, it is created when you farm.

13 Q My question is is it unusual for dust to be created
14 when you farm?

15 A No, it is not unusual.

16 Q All right. And from time to time while you're
17 farming are there days when it's windy and days when it's not
18 windy?

19 A That's true.

20 Q When you're farming the property, you're tilling
21 the property and when you're creating dust, does this wind
22 blow the dust from place to place, Mr. Rush?

23 A Yes.

24 Q Directing your attention to the odor that was

1 apparent or was present that's been described by others in the
2 city of Sturgeon, could you detect or did you note a similar
3 odor in the creek during the times that it was flooded
4 as you've described it?

5 A I remembered it more right after the water went
6 down. I really didn't get down that close to the water when
7 it was flooded.

8 Q All right. What about the area that had been
9 flooded with this material.

10 A Yes.

11 Q Did you note an odor in the area that had been
12 flooded?

13 A Yes.

14 Q And was this on your acreage?

15 A Yes.

16 Q Was this odor that you noted on your acreage that
17 had been flooded, was it similar to or different from the odor
18 that you smelled in Sturgeon?

19 A It was the same.

20 MR. CARR: I think that's all I have. You may
21 examine, counsel.

22 MR. HEINEMAN: Thank you.

23 CROSS EXAMINATION

24 BY MR. HEINEMAN:

1 Q Mr. Rush, my name is Ken Heineman, I represent
2 Monsanto Company and I'd like to ask you a few questions
3 about what you've just testified to.

4 A Fine.

5 Q Now, as I understand your testimony here this
6 afternoon, there was this incident in the fall of '79, is
7 that right?

8 A That's right.

9 Q When the water turned dark again.

10 A That's right.

11 Q And there was no flood at that time?

12 A No.

13 Q Just the creek water got a little dark.

14 A That's right.

15 Q And you called the Commission people?

16 A I think that's who I talked to, yes.

17 Q Did they come out?

18 A Yes, they did.

19 Q Yes, they did. And didn't they tell you that it was
20 maple squirts?

21 A That's right.

22 Q And that it was organic material.

23 A Either that or leaves, I mean, they didn't think it
24 was the chemical.

1 Q Not chemical. It was maple squirts, organic, and
2 that kind of thing in the fall of '79.

3 A That's true.

4 Q Now, I don't know how citified these jurors are.
5 Can you tell them what a maple squirt is?

6 A I don't know whether I can or not, but I'll try.
7 It's a worm that gets in the trees about in the fall of the
8 year and it's the droppings out of these worms. The way I
9 describe it.

10 Q Okay. That isn't what I thought was a maple squirt,
11 but okay. When I was a kid, the seed of the maple tree used
12 to come down with a little thing on the end and if you got them
13 when they were brand new, you could squirt them at somebody.

14 A I was thinking it was this worm with the web
15 around it.

16 Q Okay. What the people from the Missouri Conservation
17 told you was what turned the water dark in the fall of '79 was
18 this worm problem.

19 A It had to do with worms, I know that.

20 Q Okay. Now, let me get you back to about the time
21 of the spill here, Mr. Rush. You said that you saw the
22 chemical at the filling station.

23 A Yes.

24 Q Okay. And it was a spattering on the snow toward the--

1 A Well, I wouldn't say spattering, it looked like it
2 dripped on the snow.

3 Q Okay, a drip.

4 A Yeah.

5 Q And it was an orangish color?

6 A That's right.

7 Q And was it on the side of the station closest to
8 the track or farthest from the track?

9 A Closest to the track.

10 Q Okay. And what day was it that you saw that?

11 A It was the first day I went to town, there again
12 the second or third day, I just couldn't remember exactly what
13 day it was.

14 Q Was work under way on the clean up at that time?

15 A I'm sure it was.

16 Q And you said you saw dirt distributed through town,
17 now I want to ask you about that.

18 A Okay.

19 Q Now, this dirt that you saw distributed through
20 town, are we talking about great big piles of dirt?

21 A No, what I was talking about just seemed to be more
22 dirt left from wheel tracks and things like that than usual.

23 Q Okay. And there usually is dirt in town, isn't there?

24 A Not that much.

Q And that's 490 acres, that farm, right?

A Right.

Q The home farm.

A Right.

Q And that's the farm that you took over from your parents?

A Right.

Q And on that farm, that's strictly a grain farm, right?

A Yes.

Q And you, in addition to that, have a west farm, which is west of Sturgeon.

A Right.

Q And that has 183 acres, right?

A Right.

Q And you used to use that for farming, but you now just keep it in grass for grazing and hay?

A It's been in grass for several years.

Q Because it's too hilly for farming?

A Just isn't suitable for farmland.

Q That has nothing to do with the chemical spill, does it, it's just the topography of the land that makes it unsuitable?

A The reason I'm farming it, yes-- I mean the reason

1 I'm not farming it, yes.

2 Q But it's the north farm that has Saling Creek
3 running through it about a mile.

4 A That's correct.

5 Q And there you used to keep cattle, approximately
6 45 head?

7 A I didn't have that many at the time of the spill.

8 Q All right. How many did you have at the time of
9 the spill?

10 A As I remember I had 34 head on the creek at that time.

11 Q Okay. Then one ran off, and you had 33, is that
12 right?

13 A I don't know about that. I had 33 or 34, put it
14 that way, in that area.

15 Q I think, didn't you tell us once before that one
16 of them had run off, that you lost one somewhere?

17 A I could have, I don't remember it now.

18 Q But at any rate you had about 34 or 33 head on
19 the north farm at the time of the spill.

20 A Right.

21 Q Now, you identified these photographs of Saling
22 Creek as representing what the creek looked like as it
23 flowed past your north farm in the latter part of April of
24 1979, is that right?

1 A Yes.

2 Q April 27th, I think was when the Conservation people
3 came out there.

4 A Either 27th or 28th, right in that area, I don't
5 remember exactly.

6 Q And you went around with them and showed them the
7 parts of the creek they should look at?

8 A Well, I went with them for a while.

9 Q All right. And they took some pictures of the
10 creek?

11 A I guess they did, I don't remember them taking them
12 but evidently they did.

13 Q Okay. And on the 27th of April of '79, the creek
14 was in this condition, is that right, that's shown on
15 Exhibit 93?

16 A I would say that's about right.

17 Q Okay. So as I understand it, it had flooded twice
18 in April before these fellows came out?

19 A Once.

20 Q Once.

21 A Before they came-- Well, they came out, the last
22 flood is the one I'm talking about. It flooded again about
23 the first week or two of April.

24 Q Okay. Now, as a matter of fact, sir-- and the jury

1 has seen this information contained in some exhibits produced
2 by the Missouri Conservation Commission-- that you were
3 advised at that time, were you not, to take the cattle off
4 of that?

5 A Off the creek. A representative from the state
6 veterinary stopped by the house, talked to my wife, didn't
7 talk to me, and advised us at that time be best to move the
8 cattle.

9 Q All right. And that was, and you moved them on about
10 the first of May, right?

11 A I moved them as soon as I could get a place to put
12 them, just a matter of a day or two there.

13 Q Right. But it was right after the 27th of April
14 when the Missouri Conservation Commission people came--

15 A It was all about the same time.

16 Q And right after that the state vet came and you
17 moved those cattle on or about the first of May.

18 A Yes.

19 Q And did you fence it off?

20 A There's no way I could fence it off.

21 Q So you didn't fence it off?

22 A No.

23 Q Now, did that, do I understand that there was a
24 portion of this flooded area, the place that was flooded in

1 April of '79 on which you farmed and baled hay, is that
2 correct?

3 A As I remember, I baled hay off of the higher part
4 of the land and turned around on some of that lower stuff.

5 Q Okay. So you didn't bale hay off the portion that
6 had been flooded?

7 A Not that I remember, no.

8 Q But you did farm seventy acres that had been
9 flooded, didn't you say?

10 A I had been farming part of that farm before the
11 flood, a portion, a small portion of it.

12 Q But you never grew anything on that flooded land
13 after April of '79?

14 A Yes, I grew crops on it.

15 Q Okay. And you grew crops on that property, so you
16 did farm that portion that had been flooded --

17 A Right.

18 Q -- after the flood occurred.

19 A Right.

20 Q Now, you told the jury here this afternoon that
21 you learned from Mr. Seigfreid the results of what the
22 veterinarian report was and the results of what Dr. Zabik's
23 report was, is that right?

24 A That's right.

1 MR. CARR: I don't know if he testified it was
2 Dr. Zabik's report that he learned, the veterinarian
3 gave the samples to Dr. Zabik, my understanding.

4 A That's right.

5 Q Well, not the state vet, I don't think.

6 A No.

7 Q We're talking about the vet from the State of
8 Missouri?

9 A No.

10 Q What vet are you talking about?

11 A I'm talking about a veterinary from Mexico, Missouri.

12 Q Okay. You are talking about a veterinarian from
13 Mexico, Missouri.

14 A Right.

15 Q Who came down and he's the one that said move your
16 cattle.

17 A No, he's the one that tested my cattle.

18 Q He tested the cattle.

19 A Yeah.

20 Q All right. And did he make a report of what he
21 found?

22 A I think he sent that, he told me at the time it
23 looked all right.

24 Q Uh-huh. So when he examined them on your property,

1 he told you the cattle looked all right.

2 A No, I already had the cattle moved when he examined
3 them. I had them on this rented pasture.

4 Q Okay. Wherever they were, he examined your cattle.

5 A Right.

6 Q And he said they looked all right.

7 A And took the samples.

8 Q Now, what kind of samples did he take?

9 A He took fat tissue, I think, or some kind of
10 material from the fat area by the tail.

11 Q Of the cattle.

12 A Of each one.

13 Q And this is the Mexico, Missouri, vet?

14 A Yes.

15 Q Okay. Now did he make a report to you about the
16 results of that examination?

17 A No.

18 Q Okay. But do I understand you to tell us today
19 that he did make that report to Mr. Seigfreid?

20 A No.

21 Q And Mr. Seigfreid told you the results?

22 A No, no. He made, he sent the sample, the way I
23 understand it, to Dr. Zabik, and Dr. Zabik made the report.

24 Q Are you sure you're talking about the same vet now.

1 A I'm sure I am.

2 Q Cause wasn't there a time in June of '79, didn't
3 Dr. Zabik himself come out to your property and take biopsies
4 from your cattle?

5 A No.

6 Q Never did.

7 A He took soil samples.

8 Q Took soil samples.

9 A Right.

10 Q When he was there, when Dr. Zabik was there, sir,
11 was the vet there at the same time?

12 A No.

13 Q So the taking of the samples from the cattle by the
14 vet occurred at a time different from when Dr. Zabik was
15 there?

16 A Right.

17 Q And it's your testimony, sir, that Dr. Zabik took
18 only soil samples and did not take any biopsies from your
19 cattle, is that right?

20 A That's right.

21 Q Now-- and it's further your testimony here today
22 in this courtroom that Mr. Seigfreid told you the results of
23 those Zabik tests, is that right?

24 A Over the telephone, yes.

1 Q Over the telephone. And there's just no doubt in your
2 mind about that, is that correct?

3 A That's correct.

4 Q Now, did he tell you these results in the last
5 couple of weeks or was it back in June or July?

6 A It was June or July.

7 Q Of '79?

8 A As I remember, yes.

9 Q He didn't tell you those results after Bill Kemner
10 testified here in court, did he?

11 A No. I saw the results after that, but he told me
12 prior to that also.

13 Q Let me ask you a little bit more about Dr. Zabik
14 coming out there, sir. How did he happen to come to your
15 property?

16 A Mr. Seigfreid made the arrangements.

17 Q Now, Mr. Rush, in fact, you went around with that
18 Dr. Zabik when he took samples from Bill Kemner's farm?

19 A Yes.

20 Q And he took samples from Bill Kemner's cattle?

21 A Dr. Zabik didn't take samples from Bill Kemner's
22 cattle.

23 Q He didn't?

24 A No.

1 Q Was there anybody else that did?

2 A Yes.

3 Q Who was that?

4 A The same vet I was telling you about from Mexico.

5 Q Were you there when that happened?

6 A I helped.

7 Q Okay. Was Dr. Zabik there at the time those
8 samples were taken?

9 A What samples?

10 Q The biopsies from the cattle?

11 A No.

12 Q He wasn't there?

13 A No.

14 Q And you went to Mr. Bowne's place?

15 A Yes.

16 Q And there Dr. Zabik took some soil samples?

17 A Yes.

18 Q And you were there when that occurred?

19 A Yes.

20 Q And you were there when Dr. Zabik took soil samples at
21 your place?

22 A Yes.

23 Q And as I understand your testimony, he didn't take
24 any biopsies from the cattle?

1 A No.

2 Q He didn't participate in that, and while he was there
3 that was not done, but that was done on some other occasion?

4 A It was done about the same time but not on that day.

5 Q Now, do you remember when your deposition was
6 taken, Mr. Rush?

7 A Yes.

8 Q In this case. And your deposition was taken in
9 1982, isn't that right, sir?

10 A That's right.

11 Q The 6th day of May of 1982.

12 A That's right.

13 Q And it was at my law firm's office here in Belleville,
14 wasn't it?

15 A Yes.

16 Q In fact, somebody from my firm took your deposition.

17 A Yes.

18 Q Remember that?

19 A Yes.

20 Q Bottom of page 187, counsel. Now, you remember
21 when that deposition was taken, Mr. Rush, and there was a
22 court reporter there?

23 A Sure do.

24 Q And you were put under oath?

1 A Right.

2 Q Just like you were here today?

3 A Right.

4 Q You were sworn to tell the truth, the whole truth,
5 and nothing but the truth so help you God that day, weren't
6 you?

7 A That's right.

8 Q Do you remember this question being asked: Was your
9 farm ever tested to determine whether it was contaminated?

10 Answer: We took tests, yes. Remember that?

11 A Right.

12 Q Question: Who took the tests? Answer: Dr. Zabik.
13 Remember that?

14 A Yes.

15 Q Question: Did you ever hear the results of his
16 tests? Answer: No, sir. Remember that?

17 A That's right.

18 Q Question: Did you ever ask anybody what the
19 results of his tests were? Answer: My attorney has all that.
20 Remember that?

21 A That's right.

22 Q Question: Didn't you want to know whether your
23 land was contaminated? Answer: Yes. Remember that?

24 A Yeah.

1 Q Question: You did not ask anybody? Answer: I
2 figured if he wanted me to know, he'd tell me.

3 A That's right.

4 Q Now, I understand, sir, that in May of 1982-- May
5 of 1982, Mr. Seigfreid had not told you the results of those
6 tests, is that right?

7 A At that time, sir, I was mistaken. And after I went
8 home I contacted my attorney and asked him if I'd ever seen
9 any of those tests and he showed them to me and I had seen
10 them prior to that, but I had forgotten at the time I was
11 giving that deposition.

12 Q So at the time you were put under oath in May of
13 1982, you forgot whether or not you had ever learned the
14 results of a test of your property for the presence of toxic
15 chemicals, is that right, sir?

16 A At that time I didn't ever remember seeing them, no.

17 Q Or ever hearing them either?

18 A I couldn't remember anything about them.

19 Q Let me ask you this further, on page 188, counsel.
20 From what I just read to you. After you answered: I figure
21 if he wanted me to know he'd tell me, this was asked. Do
22 you think it was contaminated or not? Answer: I'm sure it is.
23 Remember that?

24 A Are you speaking about the soil or the cattle?

1 Q Well, we were talking about the soil here.

2 A All right, in my mind I think it is. I still think
3 it is.

4 Q But at this time do you remember now giving this
5 deposition when you said you thought your soil was
6 contaminated at that time?

7 A Yes.

8 Q Question: You think your attorney allowed you to
9 continue to farm that contaminated pasture? Answer: Yes.
10 Do you remember that?

11 A At that time, sir, there was no information I
12 remember that would verify plants picking up contamination
13 through the soil.

14 Q So it's your statement that-- which time? At the
15 time your deposition was taken?

16 A As I remember, yes.

17 Q At the time your deposition was taken, it's your
18 testimony that you didn't know or you didn't have any reason
19 to believe that the plants would take up the contamination
20 in the soil?

21 A That's right, I thought the land was contaminated
22 but I hadn't had any information, anybody tell me that that
23 could be possible for the plant to take that up.

24 Q I'll come back to that in a minute, Mr. Rush. I'd

1 like to continue with this deposition portion I was reading.
2 After I asked, do you think your attorneys allowed you to
3 continue to farm that contaminated pasture. Your answer was
4 yes. Question: Why? Answer: I had to have an income,
5 I don't know why.

6 A That's one of the reasons, yes.

7 Q Now, it's your testimony that the results of the
8 tests from your-- from the veterinarian from Mexico were
9 turned over to Mr. Seigfreid and that you then, and they were
10 given to Mr. Zabik?

11 A That's the way I understand it.

12 Q And you found out the results from what Dr. Zabik did,
13 is that right?

14 A To Mr. Seigfreid.

15 Q Page 197, counsel, line 10. Do you remember when
16 your deposition was taken, Mr. Rush, this question being
17 asked of you. Question: What was the purpose of having your
18 cattle examined by this veterinarian from Mexico? Answer:
19 He was attempting to test for chemical residue. Remember
20 that?

21 A That's right.

22 Q Question: To determine whether your cattle were
23 injured by the chemical spill, is that right?

24 A Yes.

1 Q Answer: I presume, yes. Question: What were the
2 results of his test? Answer: Never really heard the results.
3 Question: So you don't know right now whether your cattle
4 were contaminated or not? Answer: No, sir, I don't. May
5 of 1982, do you remember that testimony?

6 A That's right.

7 Q Did you ever ask anyone whether your cattle were
8 found to be contaminated? Answer: There again, my attorney
9 had this information. I figured if he wanted me to know,
10 he'd tell me. Remember that, sir?

11 A Yes.

12 Q Now, you just told the jury today, didn't you, that
13 you believed that you got the results from Dr. Zabik and,
14 therefore, you don't think your cattle were contaminated, so
15 you went ahead and sold them, is that right?

16 A That's right.

17 Q That's what you're telling the jury here today?

18 A It was only on that contaminated pasture approximately
19 two days.

20 Q Let me refer you again to your deposition, page 197,
21 counsel, taken in May of 1982. You think your cattle were
22 contaminated? Answer: In my mind, I know they were, yes.
23 Question: How were they contaminated? Answer: By, through
24 the grass from the chemical. Question: You think they had

1 dioxin in them? Answer: I think it's possible. Question:

2 Well, did you sell those cattle? Answer: Yes, sir.

3 Remember that testimony?

4 A That's right, I sure do.

5 Q Question: What uses did you sell them for?

6 Answer: I don't know, I just took them to an auction and they

7 were sold at auction. Question: What happens to cattle once

8 they are sold at auction? Answer: Eventually they are

9 slaughtered. Question: They wind up as steaks and hamburgers

10 and things like that? Answer: It's quite likely. Remember

11 that?

12 A That's right, sure do.

13 Q Question: There could be steaks sold in stores with
14 dioxin from your cattle. Answer: Yes, sir, it could be

15 possible. Question: People might have been eating hamburger

16 made from your cattle that had dioxin in them? Answer: Yes,

17 sir. Question: You sold those cattle knowing that?

18 Answer: Yes, sir. Remember that?

19 A I said it could be possible, I didn't know.

20 Q Do you remember these questions and answers, Mr.

21 Rush, page 200, counsel? I meant to ask you, why did you go

22 ahead and sell your cattle even though you believed that they

23 were contaminated by dioxin and that those cattle would

24 eventually be made into steaks and hamburgers and eaten by

1 people who'd thereby be eating the dioxin? Answer: I
2 consulted with my attorney.

3 A That's right.

4 Q And he thought at that time, due to the situation,
5 I should go ahead and sell them.

6 A He based that decision on Dr. Zabik's results.

7 Q Question: Even though you were going to be
8 contaminating food in the supermarket? Answer: That was his
9 recommendation. Question: What was that recommendation
10 based on? Answer: I do not know. Question: Any other
11 reason you had for selling the cows? Answer: No, sir.

12 Do you remember that testimony, Mr. Rush?

13 A That's right.

14 Q So as I understand your testimony here today, sir,
15 you told the jury a few minutes ago that you had no reason
16 to believe at this time that grass grown on the contaminated
17 land would be contaminated--

18 MR. CARR: He's not said that at all.

19 A I didn't say that.

20 MR. HEINEMAN: I think he did, I think the record
21 will speak for itself.

22 MR. CARR: The grass was contaminated.

23 A I sure don't remember saying that.

24 Q In the deposition you certainly said it was, didn't you?

ERASABLE
COTTON CONTENT

1 MR. CARR: And he certainly says it today that the
2 grass was contaminated.

3 MR. HEINEMAN: I think the record will speak for
4 itself, Mr. Carr.

5 THE COURT: Go ahead, Mr. Heineman.

6 Q (Mr. Heineman) Now, you sell crops as well, don't
7 you, sir?

8 A That's right.

9 Q Do you know whether they're contaminated or not?

10 A I don't believe they are.

11 Q Do you know whether they are or not?

12 A I suppose it's possible, but I don't know.

13 Q Never bothered to find out?

14 A How would you find out?

15 Q Well, how would you find out? Have them tested,
16 like Dr. Zabik?

17 A No, didn't test no crop, no. But I never have
18 heard of anything to the fact that crops will pick up the
19 contamination through the plant.

20 Q So you don't think that crops will pick it up through
21 the soil either?

22 A I don't think so, no. I use chemical every day
23 on the farm on corn and whatnot and it doesn't go up into the--

24 Q You use anything for root worm on your corn?

1 A Yes.

2 Q Do you know how it works?

3 A I don't know how it works, no, I know I use it.

4 Q Do you know whether or not it gets down in the corn
5 root to kill the worm?

6 A I presume, that's what it's supposed to do.

7 Q Now, Mr. Rush, you told the jury that you send your
8 children to school in Sturgeon, is that right?

9 A That's correct.

10 Q Now, Sturgeon is four miles away from your house
11 approximately?

12 A About three and a half, four miles.

13 Q Three and a half to four. There's a school in
14 Centralia, isn't there?

15 A That's right.

16 Q And that's about six or seven miles away?

17 A Yes.

18 Q And you could send your kids to Centralia, couldn't
19 you?

20 A I probably could, but I chose not to.

21 Q Chose to send your kids to the Sturgeon school.
22 And your boys, I think, you have two of them, that were
23 sixteen and they could drive, correct?

24 A Yeah, but that costs money.

1 Q So that, let's say-- Sunnydale Academy is pretty
2 near where you live, isn't it?

3 A Yes, that's a Seven day Adventist Church, School.

4 Q And you don't want your children to go to the Seventh
5 Day Adventist School?

6 A I'd prefer them not to.

7 Q And as I understand, there's a bus that takes the
8 kids to the Centralia school, isn't there?

9 A That is correct.

10 Q Would that cost you anything?

11 A I'd have to pay tuition.

12 Q So to avoid-- How much is the tuition at Centralia?

13 A I really don't know. At our school it's Eighteen
14 Hundred Dollars a year per pupil.

15 Q At Sturgeon?

16 A That's right.

17 Q So you've got people that pay Eighteen Hundred
18 Dollars a year to send their kids to school at Sturgeon.

19 A Yes.

20 Q Do you encourage that on the Board?

21 A Yes.

22 Q So that do you believe that this area around Sturgeon
23 and the school is contaminated by dioxin and phenols, Mr. Rush?

24 A I believe the whole area is.

1 Q But in spite of that belief, you send your kids to
2 the Sturgeon school even though you could send them to
3 Centralia, and as a member of the School Board you encourage
4 people to pay tuition to send their children to the Sturgeon
5 school, is that right, sir?

6 A Yes, we have a northern school of Clark that doesn't
7 have a high school, and we try to attract those kids down to
8 our school for the tuition and extra enrollment.

9 Q Clark doesn't have a high school?

10 A No, sir.

11 Q Where do the Dominguez kids go to school?

12 A They go to Moberly.

13 Q Now, as I understand it, Mr. Rush, you believe your
14 land is contaminated by this flooding, is that right?

15 A That's right.

16 Q Do you believe it's contaminated by dust from the
17 spill site?

18 A I sure do.

19 Q And you think that dust has what, got dioxin in it?

20 A I believe it has.

21 Q And you think that dust has blown out four miles
22 from Sturgeon to your farm to contaminate it?

23 A I sure do think so.

24 Q And you go ahead and sell the crops off that farm,

1 don't you?

2 A Everybody else does, too.

3 Q Do you have any idea how many tons of material
4 were removed from that spill site in the first two and a half
5 months of January, 1979?

6 A Not really.

7 Q Do you have any idea at all?

8 A I know it would probably be a large amount.

9 Q You know they were scooping up and filling up
10 gondola cars and putting the waste material in thousands of
11 barrels and sealing them and sending them off? Do you
12 remember that?

13 A Yes, I do.

14 Q Now, did you know, Mr. Rush, that the EPA had
15 agreed to test homes in the Sturgeon area for contamination,
16 test the air in them, did you know that?

17 A I knew that they had air samples out. In fact,
18 they had one on the school ground.

19 Q Did you ever ask Mr. Gilmer of the EPA to come
20 out and check out your place?

21 A No.

22 Q Now, the jury has learned today from a memorandum
23 which they've got in evidence, which they've read just a
24 little while ago-- no, that's not right, let me straighten

1 that out. The jury learned today from the deposition of
2 Mr. Crunkilton, and I think you were here when the
3 deposition of Mr. Crunkilton was read, weren't you, sir?

4 A Yes.

5 Q Did you hear it?

6 A Yes.

7 Q Okay. And you heard Mr. Crunkilton say that when
8 he went to the scene in March of 1979, March 17th, I think,
9 he came back to Sturgeon?

10 A Yes.

11 Q Because he'd heard about the Kemner ponds?

12 A Yes.

13 Q And in March of '79 when he came back, Mr. Crunkilton
14 of the Missouri Department of Conservation knew and was
15 informed that there was 2,3,7,8-TCDD in the tank car.

16 A That's right. At least I think he did anyway.

17 Q Did he tell you about that?

18 A I don't remember.

19 Q When you saw him in April of '79?

20 A I don't remember it.

21 Q You don't remember whether he did?

22 A Remember him telling me, no.

23 Q He may have?

24 A He may have, but I don't remember it.

1 Q Now, Mr. Rush, you filed suit in this case in 1979,
2 didn't you, sir?

3 A Yes.

4 Q And you filed suit initially in Boone County,
5 Missouri, didn't you, sir?

6 A That's right.

7 (Defendant Monsanto's Exhibit #27 was marked
8 for identification.)

9 Q Now, Mr. Rush, I'm going to let your attorney look
10 at this exhibit before I ask you about it, but I'm going to
11 show you a copy of the petition that you filed in Boone
12 County, Missouri, in July of 1979. But first, I'd like your
13 attorney to look at it.

14 (Mr. Carr examined exhibit #27.)

15 MR. CARR: I'm through, Mr. Heineman.

16 Q (Mr. Heineman) Let me hand you what's been marked
17 as Defendant Monsanto's Exhibit #27, which I can tell you is
18 a copy of the petition filed on behalf of you and your
19 family and served on Monsanto Company, and ask you, direct
20 your attention to Count 4. Have you ever seen this document
21 before, Mr. Rush?

22 A Yes, I sure have.

23 Q All right. Let me direct your attention to Count
24 4 of this petition, and it's a claim against Monsanto Company,

1 you see that?

2 A Yes.

3 Q And in there it says that one of the reasons you're
4 suing Monsanto Company is because there was dioxin in the
5 tank car being transported by Norfolk and Western Railway
6 Company, isn't that right, sir?

7 A That's right.

8 Q And you alleged that in July of 1979?

9 A As I remember, yes.

10 Q Now, in this lawsuit, sir, there are some things
11 alleged against Monsanto Company, are there not, sir?

12 A Yes.

13 Q And when you filed the lawsuit, did you allege in
14 that case, in that lawsuit, every single bit of information
15 that you knew at that time that supported your claim?

16 I mean, every detail, every fact? You didn't include all of
17 that in there, did you, sir?

18 A I really don't know.

19 Q Well, you didn't say anything in there, did you,
20 about the veterinarian that looked at your cattle?

21 A No, I didn't. I'm sure I didn't.

22 Q And you didn't say anything in there about Dr. Zabik,
23 did you?

24 MR. CARR: Your Honor, counsel knows that you don't

1 plead evidence in these complaints. This is unfair, I
2 object to this kind of cross examination. The lawyer
3 prepares that and we don't plead all kinds of things
4 in a Complaint, as Mr. Heineman ought to know.

5 MR. HEINEMAN: Exactly. That's just what I'm
6 getting to, Your Honor.

7 THE COURT: Gentlemen, approach the bench and bring
8 a copy of the petition, please.

9 (Discussion had at the bench between counsel and
10 the Court and out of the hearing of the jury and
11 the court reporter.)

12 THE COURT: Ladies and gentlemen of the jury, we'll
13 take a short break to consider a matter in chambers.

14 (The following proceedings were had, in chambers,
15 with Court and counsel present, and out of the
16 presence and hearing of the jury:)

17 MR. CARR: My objection was that he's charging
18 this witness with a failure to put into evidence of what
19 Zabik found and what the veterinarian found for Zabik,
20 I suppose, that he hasn't alleged in the Complaint, and
21 it would be improper to cross examine what he didn't allege
22 in the Complaint because he's not supposed to allege
23 evidence.

24 MR. HEINEMAN: Your Honor, it's not my purpose to

1 charge the witness and I think I'm about two or three
2 questions away from finishing with him. And I think
3 that if you would sit and wait, all I want the jury
4 to understand is that when the parties initiate the
5 litigation and they know facts in support of their own
6 claims that those facts are discovered as between the
7 parties, through the filing of discovery requests.

8 And that's when those facts are made known, and that's
9 the way this plaintiff made his facts known to me and that
10 is the way Monsanto made its facts known to the plaintiffs.
11 And that's all I want to establish.

12 THE COURT: That's already been established in
13 opening statements that everyone has agreed to.

14 MR. HEINEMAN: Well, Your Honor--

15 THE COURT: What, I mean, that's redundant. What's
16 the purpose of that?

17 MR. HEINEMAN: My purpose--

18 MR. CARR: My client is not a lawyer. Mr. Heineman
19 would be the one doing the testifying and the most this
20 witness could say is I presume that's what you tell me
21 and that's what I've heard in the courtroom, is nothing is
22 within this witness' knowledge at all that Mr. Heineman
23 is asking him questions of.

24 THE COURT: I think I directed the jury that

1 discovery takes place also, in my opening remarks.

2 I don't see what you're driving at that you need to go

3 into this Complaint. I mean, Missouri has closer to

4 fact, has more factual pleadings than we do, and even in

5 Missouri still you don't have to include everything.

6 MR. HEINEMAN: I'm not blaming the man or the
7 lawyers for not including everything in there. All I
8 want is for it to be established for the jury's benefit
9 by testimony of one of the plaintiffs that there were
10 facts that he knew about this situation which were not
11 pleaded, which were disclosed when discovery occurred.

12 THE COURT: For what purpose?

13 MR. CARR: Judge, it's irrelevant to any of the
14 issues here whether that's true or not, it's completely
15 immaterial and irrelevant.

16 MR. HEINEMAN: Well, I'll tell you, Your Honor, Mr.
17 Carr has implied to this jury that there was information
18 which Monsanto failed to disclose to him, which should
19 have been disclosed prior to the time that it was. And
20 what I'm trying to demonstrate is the fact of that
21 matter is that when he asked the question and the
22 question was answered in discovery, he was made aware
23 of that information. It was answered. And he's trying,
24 he said in his opening statement that he's trying to imply

1 there was some wrongdoing on Monsanto's part because
2 that information was made available when the question
3 was asked in discovery.

4 THE COURT: Just a second, are they bringing them
5 over?

6 MR. MUSGRAVE: She is checking the file and is going
7 to bring them up as soon as possible if they have them there.

8 MR. HEINEMAN: And what I am attempting to
9 demonstrate here is that that's the way facts in a
10 lawsuit are discovered, that my client has no culpability
11 as a result of that information being disclosed when
12 it's asked for by the opposing counsel.

13 THE COURT: Aren't you mixing a pleading question
14 and a discovery question? Because you're talking here about
15 a petition initiating the litigation in the Circuit Court
16 of Boone County, and the other thing is a discovery
17 matter.

18 MR. HEINEMAN: And I'm going to get into the
19 request.

20 MR. CARR: And, Your Honor, the discovery has got
21 nothing to do with this client. They have no knowledge
22 of discovery except what comes through the lawyers. And
23 whether Monsanto is culpable or not stands on its bottom
24 and not on anything that this man may or may not know

about the rules of procedure in various courts. It is immaterial and irrelevant what this witness knows or doesn't know about the contents of this Complaint and what's plead or not pleaded. And all Mr. Heineman now has confessed he's trying to do, he's trying to offset the effects on the evidence of this case, the facts that we know to be as to Monsanto's culpability in advance of the time we brought it out. And this is completely irrelevant and has got nothing to do with this witness nor his testimony on direct examination.

MR. HEINEMAN: All right. Now you confessed on the record then, what it is that you claim we should have done with the information from the records--

MR. CARR: You know exactly what you should have done in the information that's coming out as to what you have done.

MR. HEINEMAN: Well, Your Honor, I think we're entitled to show that in discovery that the facts that each side knows about their own case are disclosed in discovery and that there isn't any obligation upon any party to make those facts available prior to the time that they're asked for by the other side. There is essentially notice pleading laws in this state and that they're not required to tell us anything until we ask

1 them for it. All they are required to do is make a
2 pleading that's sufficient to plead a lawsuit, and we
3 find out the facts from them through discovery just the
4 same way they find out the facts from us.

5 THE COURT: Okay. Assuming that you are entitled
6 to do that, and you may very well be, this is not the
7 appropriate time, place or vehicle with this petition,
8 with this individual. You're talking about a petition
9 which is a pleading as to the stating of a cause of
10 action and not a discovery vehicle. You're talking
11 about and leaving an implication in my mind at least,
12 that you're suggesting to the jury that something should
13 have been left out or was left out, when in fact, if it
14 had been included it would have been subject to a motion
15 to strike as surplusage because it is surplusage, because
16 that's adequately pleaded. There will be a time and a
17 place in litigation to assert what you're asserting. This
18 is not the proper time or place or vehicle for it. And
19 so I am sustaining the objection to it, without making
20 any commitment, predilection or whatever to any ruling
21 in the future, but this is definitely not the way to do
22 it and I'm sustaining the objection to it.

23 MR. HEINEMAN: Your Honor, if the Court please, all
24 I'm trying to do is lay the foundation for the submission

1 of the discovery request. The first one that came into
2 this case from the defendants was filed by the N. & W.
3 in November of 1982, and that's all I'm trying to
4 establish is the order of the pleadings and the fact
5 that this occurred at that time. I'm not going to
6 accuse these people of not telling us all the facts in
7 the lawsuit or complaint or petition. I know they're
8 not required to do that.

9 THE COURT: Let me see the other pleading that you're
10 talking about.

11 MR. HEINEMAN: This is the other one.

12 MR. CARR: The record speaks for itself as to
13 what time what pleading came in, and in the course of your
14 defense if you want to read and let the Court and jury take
15 notice of what the, if it's proper so to do, what the
16 record of this Court display, certainly you can do it
17 at that time because the Court has records of what
18 documents came in at what time. This witness would have no
19 knowledge of what these court records reveal.

20 MR. HEINEMAN: Well, he signed, the witness has
21 executed sworn response to a request for production.

22 MR. CARR: You're attempting to impeach him in some
23 way on something he said in direct examination. Certainly
24 you can do it or if you want to call him in your case to

1 prove this point in your case as an affirmative fact,
2 I suppose you can call him. But at this point in time
3 it's not an issue. We certainly didn't refer to it in
4 our direct examination and you are completely beyond the
5 scope of any examination that we have conducted. May be
6 something you can prove or want to prove later on but
7 certainly not this way.

8 MR. HEINEMAN: Well, Your Honor, I think we are
9 entitled to do it. I think, I'm just trying to lay a
10 foundation for the question as to when the information
11 was made available to Monsanto Company. I would-- I
12 hate to inconvenience this witness, I'd like to do it now.

13 MR. CARR: We don't mind being inconvenienced, he
14 is a plaintiff, he's here at the call of any party.

15 THE COURT: Okay. My prior ruling still stands.
16 Objection is sustained.

17 MR. HEINEMAN: All right. Then I may not proceed?

18 THE COURT: You may not.

19 MR. HEINEMAN: With the discovery request either?

20 THE COURT: Right.

21 MR. HEINEMAN: So the objection is sustained?

22 THE COURT: Yes, it is sustained. I'm sorry if
23 I didn't make that clear, it is sustained.

24 MR. HEINEMAN: On the record, I'd like the record.

1 to show that-- Do we have a marking here? Well, it's
2 part of the court file. I'd like the record to show
3 that what I'm being prohibited from questioning the
4 witness about is our copy of a signed response to
5 Norfolk and Western's request for production from this
6 particular plaintiff, and I want to use the document to
7 question him and it's part of the court file. The
8 response is signed June 9th of '82, executed by this
9 plaintiff.

10 THE COURT: So noted.

11 (Court reconvened and the following proceedings
12 were had, in open court, in the presence and
13 hearing of the jury:)

14 THE COURT: Okay, Mr. Heineman.

15 MR. HEINEMAN: I have no further questions of this
16 witness, Your Honor.

17 THE COURT: Mr. Schoenbeck, do you have any questions?

18 MR. STEPHEN SCHOENBECK: Yes, Your Honor.

19 CROSS EXAMINATION

20 BY MR. STEPHEN SCHOENBECK:

21 Q Mr. Rush, I believe you testified that at one
22 time you had seen in the city of Sturgeon some orange looking
23 snow near the filling station there in town, is that correct?

24 A Yes, that's correct.

Q You didn't get that on you at any time, did you, sir?

A No.

Q All right. Now, you said that out at your north farm, which is part of your holdings, is it not, sir?

A Yes.

Q You said that at that part of your property that land flooded on two occasions in April of 1979, is that right?

A Yes, that's right.

Q Okay. Now I know that you said the second time was right around April 27th or 28th.

A As near as I can remember, yes.

Q Okay. Do you have a date in mind that the first flooding occurred, sir, when in April did that first flooding occur?

A I'd say 10th, 12th, along in there somewhere.

Q All right, sir. How long did that last the first time that it flooded in April of 1979?

A I really don't remember. Usually when that creek floods it doesn't last that long, it gets high and then it goes back down.

Q And sometimes within just the space of a day, is that correct?

A Yes.

Q As a matter of fact, when it flooded on the 27th,

1 didn't it just stay up for part of a day and go right back
2 down?

3 A I don't remember the exact time, but usually just
4 a day, day and a half at the most. Depends on how long it
5 keeps raining.

6 Q Is it possible that it was just, say the biggest
7 part of a day that it was the second time in April of 1979?

8 A I'd say the biggest share of a day, maybe a little
9 longer.

10 Q Okay, sir. And would your recollection be that
11 that's about what it was the first time it flooded there in
12 1979, in April?

13 A As near as I remember, yes.

14 Q Okay. And as I understand it, sir, that's
15 the first time that you noticed a smell of a phenolic
16 compound by the water in Saling Creek by your property, isn't
17 that correct?

18 A Which time you talking about?

19 Q I'm talking about April of 1979?

20 A Yes.

21 Q Okay, sir. And is it correct that that was also
22 these two incidents in April of 1979, were the last time that
23 you noticed the phenolic smell to the water in Saling Creek on
24 your property?

1 A I smelled it later after that, sir.

2 Q To the water, sir?

3 A Yes.

4 Q When did you smell it after that, sir?

5 A Practically all summer you could smell it in the
6 air. I presume it was coming off the water or off the land
7 or Sturgeon or somewhere, it was in the area.

8 Q You just smelled it in general, is that correct?

9 A That's right.

10 Q You did not see any blackish water that was due
11 to the phenol at any time after April of 1979, isn't that
12 correct?

13 A Not that I remember, no.

14 Q Okay. The time that you saw black water in the
15 fall of 1979, it was due to this problem with the maple worms,
16 is that right?

17 A Yes.

18 Q Okay, and that's what the Conservation Department--

19 A As soon as this one slug went through there, the
20 black water, the worst of it disappeared.

21 Q Now, sir, are you talking about the slug that you
22 saw in April of '79?

23 A Yes.

24 Q Okay. So that was an isolated occurrence?

1 A It kind of leveled off. It might have been a little
2 bit black for a period of time, but not near as bad as it was
3 at that time.

4 Q Okay, sir, and that was in April of 1979.

5 A Yes.

6 Q Just the one time.

7 A Yes.

8 Q Now, sir, you testified that Dr. Zabik came to
9 your property and took some soil samples, isn't that correct?

10 A That's right.

11 Q And you were with Dr. Zabik when he went around
12 and took those samples on your property, were you not?

13 A Yes.

14 Q And your attorney, Mr. Seigfreid, was with you at
15 that time, was he not?

16 A Yes.

17 Q And I would assume that when you went around on
18 your property, you would have pointed out to Dr. Zabik the
19 points that you thought were very likely contaminated,
20 would you not, sir?

21 A That's correct.

22 Q And that was the whole purpose of running the tests,
23 to see that the areas that had gotten flooded, whether they
24 were contaminated.

1 A That's right.

2 Q And you yourself showed him places in the creek bed
3 to take samples, did you not?

4 A I may have, we just picked them up more or less
5 at random, because the whole creek had been--

6 Q Okay, sir. And also places on the flooded portion,
7 the part that had been flooded in April.

8 A Yes, yes.

9 Q You pointed out some of those spots to him to take
10 soil samples?

11 A Right.

12 Q And, of course, when you got the results of the
13 soil samples from Dr. Zabik, you learned that there was no
14 contamination on your property, isn't that correct, sir?

15 A Yeah, I got them through my attorney, Mr. Seigfreid.

16 Q I'm not asking you how, sir, you got them, you've
17 testified to that, but the results were--

18 A They were negative, right.

19 Q -- that there was --

20 A Non-detectible.

21 Q Non-detectible on your property.

22 A Right.

23 MR. STEPHEN SCHOENBECK: I have nothing further,
24

Your Honor.

1 THE COURT: Do you have any re-direct?

2 MR. CARR: No, Your Honor.

3 THE COURT: Okay. You may step down. Thank you.
4 Gentlemen, could I see you at the bench for a minute,
5 please?

6 (Discussion was had at the bench between Court
7 and counsel and out of the hearing of the jury and
8 the court reporter.)

9 THE COURT: All right, ladies and gentlemen. We
10 have come to a point in the testimony in which it's a
11 time convenient to break and we have some matters that have
12 to be taken up outside the presence of the jury before
13 the next part of the testimony. So for that purpose we
14 are going to release you today. I would request that you
15 be back in the courtroom at 10:30 tomorrow morning.
16 Hopefully by that time we ought to be done and hopefully,
17 with what has to be done in chambers so we can just
18 proceed. I would admonish you now--

19 MR. CARR: The jurors still have exhibits, Your Honor.
20 I think they should be collected.

21 THE COURT: Right. If you would bring those up to
22 the clerk as soon as release you. I would admonish you
23 now as I do before any break that you're not to discuss
24 this matter among yourselves or with anyone outside

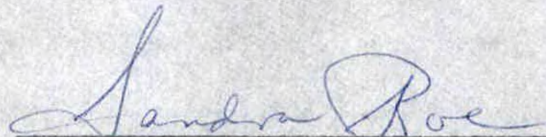
the jury panel or form any opinions or conclusions
about the matters on trial. It is an overnight break
and I would also admonish you you are not to read or
listen to or watch anything about either this trial in
particular or the subject matter of this trial. I
want to thank you for your attention and cooperation
and Court is adjourned.

(Court adjourned)

1 STATE OF ILLINOIS)
 2 TWENTIETH JUDICIAL CIRCUIT)
 3 COUNTY OF ST. CLAIR)
 4

5 I, SANDRA ROE, certify the foregoing to be a true and
 6 accurate transcript of the testimony and proceedings in the
 7 above entitled cause on March 13, 1984.

8 Dated this 15th day of March, 1984.
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 12 Official Court Reporter
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT)
3 COUNTY OF ST. CLAIR)
4

5 I, RICHARD P. GOLDENHERSH, Circuit Judge in and for the
6 Twentieth Judicial Circuit, do hereby certify that I have
7 examined the aforesaid transcript, and certify the foregoing
8 to be a true and accurate transcript of the testimony and
9 proceedings in the above styled cause on March 13, 1984.

10 Dated this 15th day of March, 1984.

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HON. RICHARD P. GOLDENHERSH

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REMILOCK