

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MORRIS COUNTY
DOCKET NO. C-3939-84

DIAMOND SHAMROCK
CHEMICALS COMPANY,

PLAINTIFF,

VS

THE AETNA CASUALTY
AND SURETY COMPANY, ET AL, :

DEFENDANTS. :

STENOGRAPHIC TRANSCRIPT

OF:
NON-JURY TRIAL

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M O R N I N G S E S S I O N

DATE: SEPTEMBER 22, 1988
PLACE: MORRIS COUNTY COURTHOUSE
MORRISTOWN, NEW JERSEY

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I N D E X

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|----------------------------|---------------|--------------|-----------------|----------------|
| <u>MICHAEL CATANIA</u> | | | | |
| Mr. Falls | 2 | | | |
| Mr. Moser | | 46 | | |
| Mr. Cuyler | | 81 | | |
| Mr. Cologero | | 108 | | |
| Mr. L. Sheff | | 119 | | |
| Mr. Favetta | | 125 | | |
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| <u>FRANCIS KENNEDY</u> | | | | |
| Mr. Spivak | 131 | | | |

E X H I B I T S

| <u>NUMBER</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EV</u> |
|---------------|---|-----------|-----------|
| P-69 | Executive Order No. 40 dated 6/2/83 | 10 | |
| P-74C | Administrative order EO-40-6 | 20 | |
| P-80 | Administrative consent order No. 1 dated 3/13/84 | 20 | |
| P-81 | Administrative consent order No. II dated 12/21/84 | 40 | |
| P-84 | Record of Decision dated 9/30/87 | 45 | |

1 THE COURT: We're ready now for our next
2 witness, are we?

3 MR. FALLS: Yes. Michael Catania.

4 THE COURT: Mr. Catania, would you come up
5 here to the witness desk to my left. If you'll
6 go up to the Court aid.

7 M I C H A E L F. C A T A N I A, SWORN.

8 DIRECT EXAMINATION BY MR. FALLS:

9 THE COURT: Whenever you're ready,
10 Mr. Falls.

11 Q Mr. Catania, will you please state your
12 business address and present employment?

13 A I am the Deputy Commissioner of the New Jersey
14 Department of Environmental Protection. Our business
15 address is 401 State Street, Trenton, New Jersey 08625.

16 Q And would you please describe your
17 educational background after high school?

18 A I have a Masters Degree in political science
19 from Rutgers University and law degree also from
20 Rutgers University.

21 Q And when did you obtain those degrees?

22 A My law degree is 1980; my Masters Degree is from
23 1975.

24 Q And would you please describe your
25 employment history after your schooling.

Catania-direct-Falls

1 A From 1974 to 1982 I was employed by the Office
2 of Legislative Services which is essentially a
3 nonpartisan staff agency for New Jersey legislation.
4 During that time I served as staff to various
5 environmental committees to the legislature and drafted
6 a variety of environmental legislation.

7 In 1982 I joined New Jersey Department of
8 Environmental Protection and became the Director of the
9 Office of Regulatory Services. That is the office
10 within DEP which supervises all of the internal legal
11 staff of the department.

12 In February of 1986 I became the Deputy
13 Commissioner of the Department, and I serve in that
14 capacity now.

15 Q Now I'd like to show the witness a
16 document which has been marked as Plaintiff's Exhibits
17 69. Can you identify that document, please?

18 A Yes, I can. This is the executive order that
19 was signed by Governor Kean declaring a state of
20 emergency as a result of Dioxin contamination at 80
21 Lister Avenue, City of Newark.

22 Q Did you play any role in the preparation
23 or promulgation of that order?

24 A I did. I participated in drafting this order.

25 Q Now, when did you first become aware that

1 Dioxin had been found at the 80 Lister Avenue site?

2 A My recollection is that it was -- excuse me --
3 in May of 1983 I was informed by one of our staff in
4 the Division of Waste Management that we had received
5 the results of soil sampling that we had done at 80
6 Lister Avenue.

7 Q And was it the find of Dioxin in those
8 soil samples that triggered the executive order and the
9 action subsequently taken by the Department of
10 Environmental Protection?

11 A It was.

12 Q Now, how did the New Jersey Department of
13 Environmental Protection happen to test the 80 Lister
14 Avenue site for the presence of Dioxin?

15 A One of the units within DEP, which was at the
16 time called the Office of Science and Research, had an
17 ongoing research project to detect the presence of
18 Dioxin contamination at sites around the state.

19 That research effort in part was the result of a
20 report that the US Environmental Protection Agency had
21 done a year before that time -- this would have been
22 the end of 1982 -- which listed the sites around the
23 country state by state where one might expect to find
24 Dioxin contamination on the basis of the manufacturing
25 that had taken place there.

1 80 Lister Avenue and the former Alkalai site was
2 the first site we tested in New Jersey.

3 Q After you received the results of the
4 tests which showed the presence of the Dioxin what did
5 you do? That is what did your agency do?

6 A The first thing we did was to verify those
7 results. We asked the laboratories to confirm the
8 results that we had been given over the telephone.

9 After we did that, we consulted with the
10 Environmental Protection Agency, with our governor's
11 office and decided what we needed to do, and very
12 shortly thereafter contacted representatives of Diamond
13 Shamrock and asked them to come up to New Jersey and
14 sit down with us and discuss how best to handle the
15 problem.

16 Q And did you meet with them promptly?

17 A I did. I met with them personally several days
18 after.

19 Q After the receipt of the test results?

20 A Yes.

21 Q By the way, let me offer in evidence trial
22 exhibit 69.

23 THE COURT: Any objection to P-69 being
24 marked in evidence.

25 We'll mark P-69 in evidence.

1 (P-69 is marked in evidence).

2 Q I show the witness a document which has
3 been marked as Plaintiff's Exhibits 74C.

4 Can you identify this document?

5 A This is an administrative order issued by then
6 Commissioner Robert Hughey to Diamond Shamrock to take
7 certain measures to control the migration of Dioxin
8 contamination from the 80 Lister Avenue site.

9 Q And did you have any role in the
10 preparation or issuance of this?

11 A I did. I drafted this order.

12 Q And what did it require Diamond to do?

13 A Specifically to cover the site with a permeable
14 tarp and to take certain other measures including
15 security and fencing to secure the site and restrict
16 public access to the site and to try and control or to
17 minimize the migration of Dioxin contamination off
18 sight.

19 Q And did Diamond comply with that order?

20 A Yes, they did.

21 Q I'd like to show the witness a document
22 which has been marked as Plaintiff's Exhibit 80.

23 MR. FALLS: Before I -- before we discuss
24 Exhibit 80, I'd like to offer Exhibit 74C.

25 THE COURT: Is there any objection to 74C

1 coming in evidence?

2 MR. CUYLER: Your Honor --

3 THE COURT: I'm sorry.

4 MR. CUYLER: -- on all these exhibits I
5 really have no objection per se. I presumed
6 they're not being offered for the truth of any
7 of the conclusions drawn by any of the
8 administrative agencies, just for the fact they
9 were made and Diamond was subject to these
10 orders.

11 THE COURT: I think they're being offered
12 in the first place to show the state issued
13 certain orders with which Diamond has been
14 attempting to comply.

15 MR. CUYLER: That's certainly no problem
16 there.

17 THE COURT: It's possible that an argument
18 might be made that factual findings or recitals
19 in the order should be considered substantively.
20 And offhand I think there could be a use of the
21 order appropriately for that. They are official
22 government documents issued by an officer
23 charged with public responsibilities in the area
24 covered by the issuance. So I think under the
25 exception to the hearsay rule they can be taken

1 in substantively.

2 I am aware, of course, that we don't
3 necessarily have to end up buying all of the
4 factual findings. They're open to being
5 attacked by any of the parties. But I think I
6 have to say that if I, for example, -- I have a
7 finding by the commissioner, I think I can and
8 should consider that as being evidential of what
9 the finding purports to be.

10 I don't consider myself bound to end up in
11 the same place the commissioner does, but I
12 certainly would consider what he says as being
13 evidential.

14 MR. CUYLER: My point is this: For
15 instance, I believe on the governor's executive
16 order he makes a statement there was an imminent
17 threat of harm to an area of the neighborhood of
18 the plant. There's no basis upon which that can
19 be --

20 THE COURT: I'm sorry to hear you say that
21 because several years ago in another case I gave
22 commissioner possession of the site because I
23 agreed with that finding.

24 MR. CUYLER: That may well be the case,
25 but obviously just as your Honor cannot go

1 outside the record, I shouldn't have to be
2 confronted with a matter outside the record.

3 THE COURT: You shouldn't, but I think
4 what I can say at this point is that first of
5 all, the concept of imminent danger is an
6 irrelevant one, actually, and it depends for
7 what purpose. And as a matter of fact, I had in
8 another case made a finding that the
9 commissioner is entitled to do certain things
10 with this -- with this site, but that doesn't
11 mean that I'm bound to agree with all of these
12 findings.

13 But I think the -- I think we have to say
14 that the orders are admissible substantively in
15 terms of their findings as well as being
16 admissible to show that Diamond was directed to
17 do things.

18 Let me just see if I can cite the rule to
19 you.

20 MR. FALLS: I believe it's rule 63(15).

21 THE COURT: 63(15) deals with reports and
22 findings of public officials, and it says
23 "Subject to Rule 64, statement is admissible if
24 in the form of a written statement of an act
25 done or an act, condition or event observed by a

1 public official if it was within the scope of
2 his duty either to perform the act reported or
3 to observe the act, condition, or event reported
4 and to make written statement or statistical
5 findings," etcetera. We don't need to deal with
6 that.

7 But the commissioner is in the -- you
8 know, among other things he's charged with the
9 responsibility of making findings like that and
10 issuing orders like this, and I think his orders
11 are admissible substantively under rule 63(15),
12 but they're subject to attack and to
13 modification by other courts of course.

14 Also not being in terms of their own
15 compelling inference or lack of it just an
16 analysis of them might lead us not to accept
17 everything they say even though there's no
18 contrary evidence.

19 MR. CUYLER: I don't want to belabor the
20 point. Consuming too much time. They're
21 admissible, I agree, for a very limited purpose,
22 and with the Court's permission I'll submit a
23 memorandum of law..

24 THE COURT: Subject to the memorandum,
25 I'll take them in one as evidential that Diamond

1 was compelled to do certain things, and, two,
2 I'll take them in as being evidential of the
3 findings contained.

4 Go ahead, please.

5 Q Mr. Catania, can you identify this
6 document?

7 A Yes, this is an administrative consent order
8 entered into between the Department and Diamond
9 Shamrock with respect to the study and clean-up of 80
10 Lister Avenue.

11 Q And did you play a role in its development
12 and issuance?

13 A I did. I drafted the order and I led the
14 negotiating team that handled the negotiations with
15 Diamond.

16 Q And broadly, what does the order require
17 Diamond to do?

18 A Requires a variety of things. The first thing
19 it requires is a site evaluation, basically a study of
20 the extent and scope of the contamination on site. It
21 also requires a feasibility study to look at the various
22 alternatives for cleaning up the site.

23 It requires that Diamond post a letter of credit
24 in the amount of \$12 million to guarantee performance
25 of its responsibilities under the order and also the

1 establishment of a standby trust so the Department
2 could draw on that amount of money to hire its own
3 contractors in the event Diamond would not perform.

4 Q Now, in the course of your negotiations
5 with Diamond, did you inform Diamond as to the action
6 you would take if they refused to agree to the consent
7 order, to a consent order?

8 A Yes I did.

9 Q What did you tell them?

10 A We indicated that the state thought it was
11 necessary to move forward with the steady and clean-up
12 of the site. We were desirous of having Diamond
13 perform those functions but that the State would use
14 public dollars after directing Diamond to do that after
15 the Spill Compensation Control Act and State would
16 preserve its right to collect treble damages in the
17 event we had to use public dollars to perform those
18 functions.

19 Q If you had not been able to negotiate a
20 consent decree with Diamond, what relief would you have
21 expected to obtain through other means?

22 MR. CALOGERO: Objection, your Honor.

23 THE COURT: What's the objection.

24 MR. CALOGERO: Objection, your Honor, is
25 that Diamond did perform those functions and

1 whatever would have happened if they did not do
2 it is not relevant for the purpose of this
3 litigation.

4 THE COURT: It might be because --

5 MR. CALOGERO: Your Honor.

6 THE COURT: Yes.

7 MR. CALOGERO: Your Honor has already
8 ruled on the issue that that would be relevant
9 to and that was the issue as to whether or not
10 these orders constitute damages under the
11 insurance policies. And I think that's the only
12 issue that it's relevant to.

13 THE COURT: Well, I think the plaintiff is
14 entitled to show it wasn't truly a volunteer and
15 there would have been consequences even more
16 expensive than the ones thus far incurred if
17 they had resisted the orders and found out to be
18 wrong in their resistance.

19 I think when we're talking about the
20 treble -- the multiplication of damages and so
21 forth. I think they're entitled to show that.
22 I'll allow it.

23 A May I ask you to restate the question?

24 THE COURT: Would you read it back please?

25 (Previous question is read by the

1 reporter).

2 A The State would have drawn upon financial
3 resources available to us to conduct a study in the
4 clean-up. We then would have sought to recover the
5 costs of those actions from Diamond. So I guess my
6 answer would be is that we would have basically stood
7 in Diamond's place and done the same actions and then
8 tried to get the money back afterwards under the treble
9 damage provision of the Spill Act.

10 Q Now, do you have any experience -- have
11 you had any experience in the course of your work with
12 respect to the comparative costs of State-managed
13 remediation and company-managed remediation?

14 A Yes, I have.

15 Q And what has that experience shown you?

16 A That experience has shown me that it is
17 sometimes the case that private parties can engage
18 contractors and perform studies and clean-ups at a
19 lower cost than the State can.

20 Q Do you know whether that was the case
21 here? That is with respect to Diamond?

22 A With respect to certain aspects of that, that
23 certainly is the case. Because I was through staff in
24 the department aware of the costs that it would of have
25 been incurred had the department engaged contractors to

1 perform some of these activities, and through
2 discussions with Diamond and some of the contractors
3 they were discussing, I was aware of the comparison
4 between those costs.

5 And it was -- it was the case that Diamond was
6 able to perform the activities for a lower cost than
7 the department would have.

8 Q Now, can you describe the course of the
9 negotiations between the New Jersey Department of
10 Environmental Protection and Diamond which led up to
11 the administrative order which has been marked as
12 Plaintiff's Exhibits 80?

13 A They were very lengthy negotiations which took
14 place over a period of time of almost a year. They
15 were very complex negotiations in the sense that there
16 were a lot of issues involved in this consent order
17 that were not standard issues in terms of other things
18 that we normally negotiate.

19 I think they were cooperative to the extent that
20 the parties had I think a mutual interest in resolving
21 the problem, but they were by no means easy or resolved
22 quickly.

23 MR. FALLS: I'd like to offer in evidence
24 Plaintiff's Exhibit 80.

25 THE COURT: Is there any objection to

1 that? That's -- there is none. P-80 will be
2 received in evidence.

3 MR. CUYLER: Your Honor subject --

4 THE COURT: Subject to the same caveats,
5 Mr. Cuyler. I'll take it in both substantively
6 and in terms of Diamond's being compelled to do
7 these things, but I will reconsider that when I
8 have your memo.

9 MR. CUYLER: Thank you.

10 (P-74C and P-80 are received and marked in
11 evidence.)

12 THE COURT: You've just given us and the
13 witness P-81. Go ahead.

14 Q Mr. Catania, can you identify that
15 document?

16 A Yes, I can. This is the second administrative
17 consent order that was entered into between DEP and
18 Diamond Shamrock.

19 Q And what generally does it require Diamond
20 to do? How does it relate to the first order?

21 A Basically supplements the first consent order.
22 This is what I would characterize as the oversight
23 consent order. It concerns the study and the
24 remediation of contamination on places other than 80
25 Lister Avenue, and similar to the first consent order

1 it requires that the scope and extent of the
2 contamination be identified and remediated, and I guess
3 I would explain that what it does, it integrates the
4 result of the activities under this consent order into
5 the feasibility study that is required under the first
6 consent order.

7 And what I mean by that is that the materials
8 that were remediated from a variety of offsite
9 locations in the vicinity of 80 Lister Avenue were
10 brought back to 80 Lister Avenue and to an adjacent
11 property, 120 Lister Avenue, and this became part of
12 the feasibility study to determine what was the most
13 appropriate ultimate remediation of that contamination.

14 Q In what way does -- does the order which
15 has been marked as Plaintiff's Exhibit 81 relate to the
16 120 Lister Avenue site?

17 A It covers that as one of the offsite locations
18 that will be studied and cleaned under this order.

19 Q Now, was your role with respect to
20 Plaintiff's Exhibit 81 essentially the same as your
21 role with respect to Plaintiff's Exhibit 80?

22 A Yes, it was.

23 Q And were the negotiations with respect to
24 that consent order comparable to those with respect to
25 Plaintiff's Exhibit 80?

1 A Very comparable.

2 Q Now, has Diamond, to your knowledge,
3 complied with the requirements of the administrative
4 consent orders which have been entered?

5 A There's been substantial compliance with the
6 provisions of both consent orders.

7 Q Going back for a moment, you mentioned
8 that the New Jersey Department of Environmental
9 Protection arranged for testing in and about the Lister
10 Avenue site?

11 A Yes.

12 Q Could you describe the testing that was
13 done?

14 A The initial testing that was done in the spring
15 of 1983 would have consisted of only a half a dozen
16 samples of soil. Would have been soil samples taken at
17 a variety of locations onsite based on the information
18 we had concerning the types of manufacturing processes
19 that had taken place on the site. So those were the
20 initial samples, just really a few of them.

21 Q And what was the testing that occurred
22 after that?

23 A A variety of testing took place after that. The
24 United States Environmental Protection Agency in
25 cooperation with DEP moved in and did extensive

1 sampling on the site as well as in the immediate
2 vicinity of the site, and basically that testing
3 consisted of continuing to sample outward everytime
4 they got analysis back that showed the presence of
5 Dioxin contamination so that ultimately a fairly large
6 area was tested until the samples came back showing no
7 Dioxin contamination.

8 Q Are you familiar with the phrase "action
9 level?"

10 A Yes, I am.

11 Q What does that mean?

12 A Action level is the standard that an agency like
13 DEP would use that would determine when remedial action
14 would be required. It's a threshold level of
15 contamination above which some clean-up would be
16 required.

17 Q And what was the -- what has been the
18 action level for Dioxin that you have used in
19 connection with the 80 Lister Avenue site?

20 A We have used a level of a part per billion.

21 THE COURT: That's billion as in boy?

22 THE WITNESS: Yes.

23 Q And where did you get that action level?

24 A That standard was established by the Center for
25 Disease Control, a federal agency in Atlanta.

1 Q And now can you identify for us to the
2 best of your present recollection the sites other than
3 the 80 Lister Avenue site where Dioxin was found in
4 amounts large enough so some remedial action was
5 required?

6 A There were several sites immediately adjacent to
7 80 Lister Avenue. Certainly 120 Lister Avenue, the Hug
8 Holdings Property, the SCA facilities at 100 Lister
9 Avenue, the Sheman-Williams facilities.

10 There was a portion of the Conrail tracks
11 servicing the Farmers Market and some of the industries
12 in that area that was contaminated. There was some
13 areas along Lockwood Avenue, Newark Box Board, Brady
14 Iron and Metals, and there were -- the property called
15 the Hildeman property on Raymond Boulevard, and there
16 were a variety of what we call parkway medians, the
17 median strips along various roads in the immediate
18 vicinity in the Ironbound Section of Newark that were
19 also contaminated and subject to remediation.

20 Q Roughly how large an area -- in roughly
21 how large an area was Dioxin contamination found?

22 A I would say about an 8 to 10 square block area.

23 Q Based on work that you have done on this
24 project, do you have an opinion as to how the Dioxin
25 which was found in the vicinity of 80 Lister Avenue got

1 there?

2 MR. L. SHEFT: Objection. I think it's
3 beyond the scope of this witness'
4 qualifications.

5 THE COURT: Read it back, Mrs. Nutting.
6 (Previous question is read by the
7 reporter).

8 MR. CUYLER: Your Honor, if I may.

9 THE COURT: Yes.

10 MR. CUYLER: Before a witness is offered
11 as an expert it's customary in our practice to
12 qualify him and allow voir dire.

13 THE COURT: I don't think Mr. --
14 Commissioner Catania has been offered as an
15 expert as such. So far he's being offered as a
16 major official of the department who would have
17 some factual information about it.

18 And the question really would be what --
19 let me just ask you, what do you know about the
20 site itself in terms of direct experience with
21 it?

22 THE WITNESS: I individually interviewed a
23 lot of the people in the area, Diamond's
24 officials, the people who own some of the other
25 properties that were the subject of

1 contamination.

2 Basically my experience would have been
3 trying to track the contamination. There are
4 some specific instances where I think I would
5 have personal knowledge and an opinion on how
6 the contamination got to a particular site. The
7 rest of it would be reliance upon opinions of my
8 staff that were also involved in the
9 investigation.

10 THE COURT: I -- I'm inclined to think
11 that Commissioner Catania is not a scientific
12 expert and cannot give scientific expert
13 testimony. That's really because in --
14 certainly in terms of his education, his
15 education is not scientific. His education is
16 in the area both of science and law.

17 His job has exposed him, obviously, to a
18 lot of scientific data and he undoubtedly has
19 spent a lot of time managing scientists and
20 managing scientific data. So I would expect him
21 to have a much greater sophistication than the
22 average lay person in this area because of his
23 dealing with these kinds of questions and these
24 kinds of people; but, even so, I don't think he
25 qualifies as a technical scientific expert in

1 this area.

2 I think, however, that he can probably
3 give opinion testimony as a -- in the same way
4 that any non-expert can give opinion testimony.
5 I'm referring now to Rule 46 Subsection 1 which
6 says that "If the witness is not testifying as
7 an expert, his testimony in the form of opinions
8 or inferences is limited to such opinions or
9 inferences as the judge finds (a) may be
10 rationally based on the perception of the
11 witness and (b) are helpful to a clear
12 understanding of his testimony or to the
13 determination of the fact in issue."

14 I'll let him give opinion testimony
15 subject to the limitations of this rule. He's
16 been on the site. He's talked to some people.
17 He has made some observations of his own. And
18 he might be expected to have some opinions which
19 make sense, at least to the extent that one
20 would be willing to hear what they are and look
21 at them.

22 But I do not think he is a scientific
23 technical expert. So he's testifying -- insofar
24 as he gives any opinion, he's testifying under
25 Rule 56 Subsection 1.

1 MR. BATES: Just for clarification, will
2 that limit his reliance on the opinions of his
3 staff which he just mentioned a moment ago?

4 THE COURT: Let's see -- let's see what
5 happens. See, the difficulty -- in a sense, no
6 one but an expert can even know that there is
7 Dioxin at a given spot. You know, you can't see
8 it. Nobody can see the darn stuff. Somebody
9 has to have a test made by at least a technician
10 and analyzed by somebody who is probably more
11 than a technician and then somebody says there's
12 four parts per billion of Dioxin in point A.

13 Well, I really don't want to waste time
14 getting some technician in here and some
15 supervisor of some technician to tell us that --
16 somebody is controverting the facts I certainly
17 wouldn't hear that. But if it's not a matter of
18 controversy, I really don't want that underlying
19 stuff just wasting time.

20 But if this witness is going to start with
21 the premise, he's going to say, well, our report
22 showed there was Dioxin at Site A which is 500
23 yards down the railroad track, and he then wants
24 to give an opinion that he thinks that got there
25 by wind or by railroad workers, you know,

1 walking along kicking the stuff, whatever he's
2 going to say, I'd be inclined to say this is
3 a -- something you don't need to be -- perhaps a
4 non-expert can testify.

5 MR. BATES: My fundamental problem, your
6 Honor, we have some schedules in this case for
7 the identification of experts. We had
8 requirements for the presentation of expert
9 reports. Until today, it was not our
10 understanding that Mr. Catania would be tendered
11 to give opinion testimony here at trial.

12 If in fact, for example, he's relying upon
13 opinions of his staff, we've not had the
14 opportunity, if we had known about this before,
15 to take some discovery or depositions of those
16 individuals to be able to challenge the basis,
17 for example, of their opinions or whatever.

18 And it seems to me it's a little bit
19 unfair for Diamond not to have identified him as
20 an opinion-giving witness before and then to
21 spring him on us at trial and force us without
22 proper preparation to try to by
23 cross-examination challenge --

24 MR. FALLS: The witness was questioned in
25 this area on his deposition.

1 MR. CALOGERO: Can I just bring up another
2 point? You've referred to Rule 56 as the
3 testimony in the form of an opinion.

4 THE COURT: Right.

5 MR. CALOGERO: My understanding of that
6 rule, and it's usually been brought up -- I
7 think the most common example that we have has
8 been a lay person can usually give an opinion as
9 that someone is intoxicated. It's come up a lot
10 in that case.

11 And usually the two key elements in that
12 case, your Honor, is that the person had an
13 opportunity to observe, that he had actual --
14 the actual observation of the facts on which the
15 opinion is based. We have had some testimony
16 here that he spoke to some individuals in the
17 area. He is going to give his opinion on how
18 Dioxin got there based on what some people in
19 the area said, your Honor. I don't think that's
20 proper under the rules.

21 What other people who may have been in the
22 Newark area, who may have been on Lister Avenue,
23 how they think it got there, certainly if they
24 want to come in and testify that's one thing.

25 THE COURT: Look, suppose he's going to

1 tell us that some old guy who lived in that
2 neighborhood told him that in 1969 New Jersey
3 Central, who used to own the Conrail tracks tore
4 up all the old tracks and laid down new tracks,
5 you know, for a mile around the site of this
6 factory. And then suppose he's going to say now
7 if they did that, that could have caused, you
8 know, stuff that was in the old tracks to
9 migrate down along the tracks. Suppose he says
10 that.

11 I don't regard that as something that
12 causes us to -- if somebody thinks it didn't
13 happen, I suppose that's an ascertainable fact
14 whether they did relay the tracks in 1969. I
15 really think what we have here is a manager, to
16 some extent, of a public response to the
17 situation, and I suppose he has some ideas about
18 how this stuff may have moved around, and they
19 may or may not make sense.

20 I'm inclined to think that even though
21 he's not an expert he has enough exposures to
22 what was going on at the site and analyzed it
23 enough so we might preliminarily at least hear
24 what he has to say and hear what it adds up to
25 in any event.

1 We have the same sort of thing with Mr.
2 Steward, although Mr. Steward obviously had more
3 hands-on contact with the site. I don't regard
4 him as having testified as an expert in this
5 case. I regard him as being primarily a fact
6 witness and, yet, he obviously knows a lot about
7 the underlying technology and a lot of
8 technological information was built into his
9 testimony. But he wasn't an expert.

10 This man is not an expert. I'll hear what
11 he has to say. Maybe I'll make some more
12 observations about how I analyze it after I've
13 heard.

14 Go ahead please. Do we have a pending
15 question?

16 MR. FALLS: There is I think. Maybe the
17 best thing would be to read it back.

18 THE COURT: It may be difficult to find.
19 If you happen to remember it --

20 MR. FALLS: Sure. I can restate the
21 question. Sure.

22 Q My question was whether you have an
23 opinion as to how the Dioxin that was found in the
24 vicinity of the 80 Lister Avenue site got there.

25 A I do. My opinion, based on my involvement in

1 the investigation, would be that there was likely a
2 variety of natural and manmade modes of transmission.
3 They would include things like, for example, when we
4 found high levels of contamination on the Brady Iron
5 and Metal site at 55 Lockwood Avenue. I interviewed
6 Mr. Brady. I looked at business records. And I found
7 business records which showed that scrap metal had been
8 purchased from 80 Lister Avenue including reactor
9 vessels that had been used to manufacturer herbicides.

10 Mr. Brady took those materials back to 55
11 Lockwood and cut them in pieces and scrapped them, and
12 the areas that he indicated that that occurred were the
13 areas we were finding very high levels of Dioxin
14 contamination.

15 In addition, there are other areas where he had
16 parked his trucks offsite where we were finding levels
17 of contamination where if you looked at the maps where
18 we plotted the other sample results there was no other
19 detectable limits -- levels of contamination.

20 So we came -- I came to the opinion that the
21 vehicle traffic could have been moving some of the
22 contaminated soil, and a lot of this, your Honor, is
23 not technical; it's really common sensical on my part
24 in that we had levels of contamination in the soil.
25 Things were moving the soil. Whether it was people's

1 shoes, whether it was the tires of automobiles or
2 trucks or whether it was rain or flooding or things
3 like that or airborne transmission of dried soil. In
4 the areas we were finding it it looked like there was a
5 variety of transport mechanisms and included all of
6 those things.

7 Q Thank you. Now was the Passaic River
8 tested for Dioxin?

9 A It was.

10 Q And what was found?

11 A There were levels of contamination found in
12 sediments of the Passaic River.

13 Q Has the New Jersey Department of
14 Environmental Protection reached any conclusion about
15 how the Dioxin present in the river sediments got
16 there?

17 MR. L. SHEFT: Objection, your Honor.

18 THE COURT: Yes.

19 MR. L. SHEFT: I have a problem with that.

20 THE COURT: Okay.

21 MR. L. SHEFT: We've gone from this man's
22 expertise now with the New Jersey Department --
23 now not only speaking for himself but now for
24 the State of New Jersey.

25 THE COURT: Well, he's always I suppose

1 been here as a representative of the Department.

2 Let me just ask, is there some real
3 controversy here? Let me just stop by saying I
4 would expect there wouldn't be too much real
5 controversy about what he said up till now on
6 the Dioxin on Mr. Brady's site, is there?

7 MR. FALLS: I wouldn't have thought so,
8 your Honor.

9 MR. CALOGERO: Your Honor, I think subject
10 to cross examining him a little more on the
11 particulars about his interview with Mr. Brady,
12 his testimony hasn't counted for all the other
13 sites he's listed where Dioxin was found.

14 THE COURT: No, but does it matter in
15 terms of any of the issues?

16 MR. CALOGERO: I think it does matter in
17 terms of the issues as for the Brady site.

18 THE COURT: Because if -- you know, if
19 somebody doesn't really think Brady bought scrap
20 metal over there, I suppose --

21 MR. L. SHEFT: Says Brady didn't buy scrap
22 metal and move it over. What this witness says
23 came off the scrap metal that Brady bought.

24 THE COURT: Now, if for example there's
25 nothing, you know, no other path of Dioxin

1 between Brady's place and the 80 Lister Avenue
2 plant so that we wouldn't think it got pushed
3 along the soil or blown by the wind, if there's
4 nothing, there's gaps and suddenly where he put
5 this junk there's collections of Dioxin, I
6 suppose without being a scientific expert one
7 can say it probably migrated on the material and
8 then got off the material onto the site. That
9 would be my fast reaction to it.

10 I would think that's not controversial.
11 If you have reason to think there's something
12 wrong with that, I'm certainly willing to hear
13 it. Point is I don't want to spend much time
14 with stuff that's not very controversial. And I
15 would think some of the ideas at least about how
16 this Dioxin got into the Passaic River are the
17 kinds of things that you would expect a man like
18 this to know in a way that isn't subject to much
19 controversy, but if it is I'd rather get the big
20 picture easily if there's no fight about the big
21 picture.

22 Now, let me say, I'll let him testify
23 about how his people told him they think the
24 Dioxin got into the river. I'm not enormously
25 impressed by it if somebody has a problem with

1 it.

2 MR. L. SHEFT: You are not enormously
3 impressed by it if somebody has a problem or
4 just not normally impressed by what is being
5 offered.

6 THE COURT: It's very simple, gentlemen.
7 If I have a public official like this who comes
8 in and tells me that his people made a study and
9 they did different things and this is what they
10 think happened, for starters I suppose I'm
11 inclined to think they probably have a pretty
12 good idea of how it happened. But I understand
13 that often things are done and assumptions are
14 made that may not hold water.

15 MR. L. SHEFT: I think my quarrel is more
16 with the quality of proof that is being offered
17 in this rather important case. I don't think
18 this is proof of the quality that should be
19 offered on the issue.

20 However, I certainly will respect your
21 Honor's ruling firstly because I have no choice.
22 But secondly, I assume, your Honor, we will not
23 be limited in our cross-examination on this
24 issue.

25 THE COURT: No, no, you won't.

1 MR. L. SHEFT: Thank you, sir.

2 THE COURT: And as I said, I don't think
3 Commissioner Catania -- not to demean him. I
4 don't think he's a true expert in these areas.
5 And we're getting very derivative. We're
6 getting summary information I think from him
7 which I'm willing to take to get a handle on the
8 problem.

9 All right. Passaic River, Dioxin.

10 How do you think it got there? What --
11 maybe tell us what the -- what was there so far
12 as you're aware and how you think it got there?

13 A Okay. I do not recall the specific values of
14 contamination that we found in the river. It's been
15 awhile since I looked at those analytical results.

16 My recollection is, though, that there is some
17 significant contamination in the sediments of the river
18 and that it is higher closer to the site and lower the
19 farther away you get from the site both upstream and
20 downstream.

21 It's a tidal river at that point there. My
22 opinion would be, as a result of my involvement with
23 this, would be there would be the same variety of human
24 and natural transport mechanisms.

25 You've got an area that has a bulkhead that the

1 fill line of the bulkhead has been changed over the
2 years, not only on 80 Lister Avenue but on the adjacent
3 properties, and in some of my interviews with people in
4 that area they told me that fill had been placed and a
5 bulkhead line had been changed so I assume if
6 contamination had existed in one area and someone dug
7 it up and put it behind a bulkead line or in front of a
8 bulkhead line it would have spread that way.

9 There was some indication in the interviews I
10 did both with Diamond Shamrock officials and some other
11 employees that some explosions had occurred on site
12 during the period of time that the herbicides which are
13 associated with the production of Dioxin had taken
14 place on that site, and these explosions at times may
15 have resulted in the deposition of materials from
16 buildings into the river.

17 In fact, there was one manufacturing facility
18 very close to the river that we had some indications
19 that there had been an explosion and part of the
20 building fell into the river.

21 So, again, it's my commonsense conclusions based
22 on the interviews and the materials that I looked at
23 that there was some mechanical transmission of soil
24 into the river from the site.

25 Q Were there any natural phenomena which had

1 causative effect?

2 MR. L. SHEFT: I didn't hear the question.

3 Q Were there any natural phenomenon that
4 contributed to the result you've described?

5 A The area is subject to flooding. I do not have
6 a present recollection of how many floods there were in
7 that period of time or how extensive they were.

8 I would assume though flooding could have played
9 a role in the transportation of the contamination.

10 MR. FALLS: I'd like to offer in evidence
11 Plaintiff's Exhibit 81.

12 THE COURT: Same -- Mr. Cuyler and others
13 have the same general objection. I'll overrule
14 that. 81 may be admitted into evidence.

15 (P-81 is received and marked in evidence).

16 Q I'd like to show the witness a copy of a
17 document which has been marked as Plaintiff's Exhibit
18 84. Can you identify that document?

19 A This document is what DEP calls a concurrence
20 letter with a record of decision which is prepared by
21 the United States Environmental Protection Agency under
22 the provisions of CERCLA, C-E-R-C-L-A, and it basically
23 states the department concurs with EPA's selection of
24 the remedy that was studied during the feasibility
25 study, basically the best way to clean up the site.

1 Q And what is the remedy which is described
2 there?

3 A Remedy in this case is an interim remedy which
4 consists of the construction of a slurry wall around
5 the site, the installation of a cap on the site, and
6 also the installation and operation of ground water
7 pumps to basically cap the site to contain the
8 materials.

9 The remedy further requires that on a periodic
10 basis, I believe it's every two years, that remedy be
11 revisited to determine whether or not there is any
12 offsite remediation possible for treatment or disposal
13 of the Dioxin.

14 It is premised upon the conclusion in the record
15 of decision that there is currently no place in the
16 country or outside the country for that matter where
17 these -- these materials, this volume of Dioxin
18 contaminated materials can be transported and either
19 treated or disposed of permanently.

20 Q Now, what is the present status of
21 proceedings with respect to the record of decision and
22 the actions taken by the New Jersey Department of
23 Environmental Protection?

24 A Approximately two years ago the Federal
25 Superfund Statute was amended and reauthorized. In

1 those reauthorizations and amendments there was a
2 provision put in that required therefore private
3 responsibility parties to implement a record of
4 decision, required the entry of a judicial consent
5 order in Federal District Court.

6 That process has been delaying the
7 implementation of the selected remedy in this case as
8 the federal government has tried to come up with
9 guidelines and procedures to implement that law. So
10 the current status of this remedy that was selected in
11 this ROD is that the department of justice and the US
12 Environmental Protection Agency are in the process of
13 negotiating that judicial dissent decree with Diamond
14 Shamrock and are preparing to enter it into Federal
15 District Court.

16 Q Now, referring to the program to remediate
17 the sites other than 80 Lister Avenue and 120 Lister
18 Avenue, what has been done to date and what if anything
19 remains to be done?

20 A There's a very specific scope of work that is
21 attached to the second consent order. And I believe
22 that is Plaintiff's Exhibit 81. Yes.

23 The work that has been noted in that -- the
24 offsite work, offsite of 80 Lister Avenue that has
25 been required by that consent order has been finished

1 with some very minor exceptions.

2 I believe there are five residential properties
3 in the immediate neighborhood where there are levels
4 over a part per billion where the owners have not
5 consented and granted access to the property for the
6 purposes of remediation. The river, as we discussed
7 earlier, is separate from that consent order and has
8 not yet been subject to remediation.

9 Other than that, everything offsite of 120 and
10 80 Lister Avenue with the exception of the river and
11 those five residential properties has been remediated.

12 Q Now, has -- are you familiar with the
13 remediation measures that have been taken?

14 A Yes, I am.

15 Q Have all of them that have been taken to
16 date been required by order of New Jersey Department of
17 Environmental Protection?

18 A Yes, specifically.

19 Q Are all of the remediation measures which
20 have been taken or which are contemplated by the Record
21 of Decision and the orders, are all of them designed to
22 deal with the Dioxin problem?

23 A Yes, they are. The orders also address other
24 chemicals and require evaluation and clean-up of other
25 chemicals. This gets a little complicated because

1 there's different categories of chemicals. I don't
2 know how much.

3 Q Go ahead and explain them.

4 A When we sat down with Diamond Shamrock initially
5 to discuss with them the best ways of evaluating the
6 problem onsite, and oversight for that matter, they gave
7 us a production list of the various products that had
8 been produced onsite, and you will see in the second
9 consent order an Appendix B which lists all of the
10 chemicals the department believes were handled at the
11 site.

12 And basically the consent order requires the
13 clean-up not only of Dioxin but of those other
14 chemicals as well down to levels that the order states
15 the department will establish clean-up levels for as
16 the process is ongoing.

17 As it turns out, the remedial measures that were
18 required to take care of the Dioxin on contamination
19 rendered that issue moot. In other words, everything
20 that was done to remediate the Dioxin more than took
21 care of any problems with any of the other chemical
22 contamination that the samples disclosed.

23 We were not aware that would have happened at
24 the time. In the event there was any difference, we
25 wanted there to be separate provisions for cleaning up

1 other chemicals as well.

2 Q Now, has any final decision been made by
3 the New Jersey Department of Environmental Protection
4 with respect to anything that might be done with
5 respect to the Passaic River?

6 A It has not at this time.

7 Q Is there any present timetable for making
8 such a decision?

9 A We did not have a specific timetable. There is
10 a study ongoing of the samples and the analysis that
11 has been done of the contamination and sediments in the
12 river and the State has reserved the right to require
13 Diamond and any other responsible party that the State
14 can identify to take whatever measures are appropriate
15 at the end of that study.

16 I cannot give you a specific timetable for that.

17 MR. FALLS: I'd like to offer Plaintiff's
18 Exhibit 84 in evidence.

19 THE COURT: Any objection? We'll mark
20 P-84 in evidence then.

21 MR. CUYLER: Same objection.

22 THE COURT: Very well. Mr. Cuyler has the
23 same reservation in terms of its substantive
24 use.

25 (P-84 is received and marked in evidence).

1 MR. FALLS: That's all I have of this
2 witness, your Honor.

3 THE COURT: Fine. Now, let's have
4 cross-examination. And you'd like to go first,
5 Mr. Moser?

6 MR. MOSER: I would.

7 THE COURT: All right. Fine.

8 CROSS-EXAMINATION BY MR. MOSER:

9 Q Good morning, Mr. Catania. My name is
10 Scott Moser. I'm representing Aetna.

11 A Good morning.

12 Q Mr. Catania, at your direction Diamond
13 submitted to you historical information on the location
14 and nature of the manufacturing processes at 80 Lister
15 Avenue, is that correct?

16 A That is correct.

17 Q And that included plans and diagrams of
18 existing and past buildings?

19 A That is correct.

20 Q You and your staff reviewed those
21 materials in the course of evaluating what you received
22 from Diamond and in designing sampling plans, for
23 example?

24 A That is correct.

25 Q And in the course of evaluating this

1 material, you reached the conclusion that the
2 contamination likely resulted from several activities
3 that took place over a long period of time, is that
4 right?

5 A Yes.

6 Q In fact, you felt it was a chronic
7 problem, right?

8 A I believe there's testimony to that effect in my
9 deposition, yes.

10 Q Now, I'm also correct, am I not, that
11 having reviewed all that material, you have no basis on
12 which to say the month or year when the contamination
13 began?

14 A That's correct.

15 Q And as a result of that, isn't it also the
16 case that you have no basis to say with respect to any
17 particular site when the contamination caused by
18 Diamond first reached any particular level?

19 A There would be some exceptions to that that
20 would generally be true. Exceptions would be things
21 like Brady Iron and Metal site when I have some
22 indication that materials were moved on a certain date
23 and that you could pinpoint it a little more precisely.

24 Q I'm going to come back to the exception
25 for a minute.

1 Generally then it is true you have no basis on
2 which to say what level of contamination was present at
3 any particular site at any particular time other than
4 1983?

5 A That's correct.

6 Q And at least on the basis of your
7 experience would you agree with me that it's not
8 possible to make those determinations with the
9 exception you mentioned earlier?

10 A Yes, the sampling we did indicated what
11 contamination was present at that time. There is no
12 way of sampling what contamination was present in 1967
13 or 1953 or anything like that.

14 Q Correct. Okay.

15 Now, you indicated that there was an exception
16 where in the case of Brady, for example, you thought
17 you knew a unique method of transmission. Were there
18 any other exceptions that come to mind?

19 A The Passaic River could be an exception because
20 the level of contaminants and their location in the
21 sediments in the river -- and this is beyond my
22 expertise I would freely admit -- may tell you
23 something about when those materials were deposited and
24 how long they had been there.

25 Q In any case, you're not in a position to

1 tell us?

2 A No, and the State has not yet drawn any
3 conclusions of that nature. The study is still going
4 on.

5 Q By the way, when you referred to
6 mechanical transmissions from the site to the river,
7 were you including in that the discharge of waste
8 waters and waste process materials?

9 A Yes, I would. There's a variety of pipes that
10 leave the site, storm water drains, conduits that are
11 in the ground that no one is really sure what they were
12 used for that would have discharged materials to the
13 river.

14 Q In fact, in the course of the
15 investigation you made -- you learned that Diamond
16 hooked up to the sewer in 1956, is that correct?

17 A I do not specifically recall that.

18 Q Do you recall -- do you recall being
19 advised by Diamond that prior to 1956 all discharges
20 from the plant were to the river?

21 A I do not recall specific time frame. I am aware
22 that prior to a certain point in time --

23 Q Fair enough. You just can't accept that
24 it was '56 as opposed to some other year?

25 A That's correct.

1 Q Now, in 1983, I think you indicated that
2 you first became aware that there was Dioxin at Lister
3 Avenue sometime in May, am I right?

4 A That's correct.

5 Q And then an emergency order was issued
6 directing that acts be taken to prevent the migration
7 from 80 Lister Avenue, correct?

8 A To minimize migration.

9 Q Well, I was going to ask you about that.
10 If you have in front of you the order that I believe
11 bears the caption EO-6?

12 A Yes. Plaintiff's Exhibit 74C.

13 Q That's the one. Could you just read for
14 us the -- what does paragraph 2 right at the bottom of
15 that order direct?

16 A Paragraph 2 says "Take other measures during and
17 subsequent to the installation of the aforesaid ground
18 cover as directed by the DEP's on-scene coordinator to
19 prevent further onsite migration of Dioxin."

20 Q So the order --

21 A "Offsight."

22 Q -- tells Diamond take such steps as were
23 necessary to prevent migration, correct?

24 A Yes.

25 Q Now, -- and in effect Diamond acted in

1 response to this order and put a tarp over the facility
2 and did various other steps in order to prevent such
3 migration, correct?

4 A Correct.

5 Q And that all took place in a relatively
6 brief period of time, did it not?

7 A Yes.

8 Q So that by sometime in say June of 1983
9 that work had been completed?

10 A That's correct.

11 Q And at the same time that was done
12 negotiations began on what became ACO 1, is that right?

13 A That's correct.

14 Q ACO 1 was actually agreed upon in March
15 1984, correct?

16 A Yes.

17 Q During the period from June 1983 to March
18 1984, that is after the tarp had been put on and the
19 fence had been put up, etcetera, am I correct that
20 except for monitoring that site to make sure that the
21 site wasn't disturbed there were no other activities in
22 terms of preventing further migration from that site?

23 A There were some other activities.

24 Q What were they?

25 A The installation of some fencing.

1 Q Yes.

2 A The site was physically closed so that human
3 beings and vehicles did not go on the site and track
4 things off of it, and security was posted there to
5 control access to the site.

6 Q In other words, once the site was secured
7 and security was posted to keep it that way there
8 wasn't anything else to do until such time as you
9 ultimately came up with a plan for a permanent
10 solution, correct?

11 A There were some interim measures. Typically,
12 what you're describing is accurate. We go in and
13 secure a site, we do the study, we do the sampling,
14 look at the alternatives, conduct a clean-up.

15 There can be an interim phase that I believe
16 took place in this case as well. There were a number
17 of drums on the site and those were samples, and some
18 of them were either repacked because they were in
19 danger of leaking sometime soon or they were
20 characterized so you wouldn't have things that could
21 ignite next to each other.

22 So there was some preliminary work done on the
23 site that I would characterize in terms of site
24 stabilization.

25 Q All right. In terms of the scope of the

1 activities that we're talking about here, is it
2 relatively minor?

3 A Yes.

4 Q And am I correct that basically, even as
5 we stand here today, the act -- the physical steps
6 taken with respect to 80 Lister Avenue are essentially
7 unchanged from what was done immediately in response to
8 those orders back in 1983?

9 A Some of the measures have occurred in the
10 interim. For example, there was a very large smoke
11 stack that was on -- on the location. And the
12 engineers felt that at some point it was in danger of
13 collapsing and maybe falling into the river. That was
14 demolished. That was taken down.

15 Q Any other significant activity since the
16 site was secured in 1983?

17 A Not to my present recollection.

18 Q All right. And I take it given the
19 passage of now nearly five years you are now and have
20 been during all of those five years satisfied that
21 Dioxin is not continuing to migrate from 80 Lister
22 Avenue?

23 A I would phrase that a little differently. I
24 would phrase it as I'm satisfied we've done everything
25 that is reasonable to make sure that it's either not

1 migrating or migrating at very low levels.

2 Q You've done the best that could be done
3 and with the exception of an isolated activity such as
4 the smoke stack or the barrels, you managed -- you made
5 sure that was done within the first 30 or 60 days,
6 correct?

7 A Smoke stack took place after. It wasn't until
8 quite awhile afterwards that became an issue.

9 Q Excepting the smoke stack and excepting
10 what you talked about with the barrels that you
11 repacked, you made sure that what needed to be done to
12 minimize any possible migration was accomplished in
13 those first 60 days?

14 A That was the first goal of our investigation,
15 yes.

16 Q Mr. Catania, I'm showing you a document
17 that's previously been marked for identification as
18 Plaintiff's Exhibit 83 bearing a title Supplemental
19 Administrative Consent Order. It refers to Occidental
20 Electrochemicals Corporation.

21 Can you tell us who that is?

22 A My understanding that is the successor to
23 Diamond Shamrock.

24 Q So we're still talking about Diamond
25 Shamrock --

1 A Yes, we are.

2 Q -- as we all have come to know it. And
3 can you describe for us generally what this order
4 provides?

5 A As it states, it's a supplemental administrative
6 consent order. It is not directly involved with the
7 clean-up. This is a research consent order in which
8 Occidental has agreed to pay for the cost of certain
9 research that would be conducted on the effect of
10 Dioxin contamination upon biota.

11 Q Pursuant to this order, Diamond is
12 agreeing to fund research on Dioxin that the order
13 recites is important to determine what are, if any, the
14 health and ecological effects of Dioxin on living
15 organisms, correct?

16 A Yes.

17 Q And pursuant to this order, Diamond agrees
18 to pay the sum of \$1,176,000, correct?

19 A Yes.

20 Q And Appendix A I take it is an
21 identification of the types of studies that are being
22 funded pursuant to this order?

23 A Yes, it is.

24 Q Without being grossly oversimplified,
25 those are going to be studies of the effect of Dioxin

1 on animals of various kinds?

2 A Yes.

3 Q And that's because, as you sit here now,
4 you, the agency rather at the time you executed this
5 order, you're not sure you know enough about what the
6 health and ecological effects of Dioxin are, if any, on
7 humans, right?

8 A Depends on what purpose you mean that for.

9 Q Well, that's what this study is all about,
10 isn't it. You're saying we don't know enough. We need
11 to have more studies and we want you to pay for it?

12 A Yes, that's accurate.

13 Q Now, you made reference in your direct
14 examination to the action levels for Dioxin. When was
15 the action level established?

16 A I do not recall this moment when it was
17 established. I became aware of it very much so in May
18 of 1983.

19 Q I don't want you to guess, but can you
20 approximate for us when that action level took effect?

21 A It probably would have been in the year
22 preceding that.

23 Q So probably roughly 1982?

24 A That would be my -- my estimate.

25 Q If for example in 1978, I had found Dioxin

1 on my property, was there then no action level in
2 effect with respect to Dioxin?

3 A I'm not aware that there was, but it also would
4 have been difficult in that period of time to measure
5 down to a part per billion for that particular
6 chemical.

7 Q But in any case, in 1978, the New Jersey
8 DEP was not ordering people who had Dioxin in their
9 property to clean it up? Correct?

10 A No, we were not. We had not yet launched any
11 program or investigation to discover and to remedy
12 Dioxin contamination.

13 Q Now, are you familiar with the New Jersey
14 statute that is known by the acronym ECRA, E-C-R-A?

15 A I am.

16 Q Can you just tell us briefly what that
17 statute is?

18 A That statute is basically a program to prevent
19 the creation of a second generation of abandoned
20 hazardous waste sites in this State, and it seeks to do
21 that by a variety of means.

22 It says that certain industrial establishments
23 as defined in the act which have certain standard
24 industrial classifications using the federal
25 government's SIC code have to, if they are going to

1 cease their operations or transfer their operations,
2 either be the subject of a sampling plan and a clean-up
3 study and be cleaned up or receive a -- what is called
4 a negative declaration from DEP to show no clean-up is
5 necessary.

6 It imposes that obligation on the transferor of
7 the property so in some sense it's a bio protection
8 statute; in a larger sense it's an Environmental
9 Protection Statute to make sure the contaminated
10 commercial real estate is not transferred.

11 Q And in order to comply with the statute as
12 is the transferor obliged to undertake certain studies
13 to verify that the property is not contaminated?

14 A Yes, either to prove to the Department's
15 satisfaction that no clean-up is necessary or to
16 identify the extent of the clean-up that is necessary.

17 Q Now, a chemical plant if located at Lister
18 Avenue, 80 Lister Avenue, today would fall within ECRA,
19 would it not?

20 A Yes, it would.

21 Q And if -- if I owned such a plant and I
22 wanted to make a sale and I came to you with the
23 readings for contamination that are found in Exhibit
24 34, the Record of Decision, exclusive of Dioxin --

25 A Uh-hum.

1 Q -- I wouldn't get the DEP approval to sell
2 the property, would I?

3 A That's not really accurate. You may get an
4 approval. We would require you to enter into an
5 administrative consent order, accept responsibility for
6 the clean-up, submit a schedule for that, post
7 financial assurances to guarantee your performance, and
8 with those conditions we would let the transaction
9 proceed.

10 Q I stand corrected. You'd let the
11 transaction go ahead but only if I undertook
12 affirmative obligation to clean up the property?

13 A Yes.

14 Q And just so it's clear --

15 THE COURT: Just wait a minute.

16 (Emergency vehicle passes outside
17 courthouse).

18 MR. MOSER: Thank you, your Honor. That
19 would have been an unfortunate time to make
20 things clear.

21 Q Just so it's clear, what we're talking
22 about now is property located at 80 Lister Avenue
23 having the levels of contamination contained in that
24 ROD exclusive of Dioxin, right?

25 A I'm not sure I understand the question.

1 Q Just want to make sure -- if you take a
2 look at Exhibit 84?

3 A Yes.

4 Q Take it you are generally familiar with
5 the levels of contamination found in 80 Lister Avenue
6 and reported in Exhibit 84, correct?

7 A Yes.

8 Q And all I'm saying to you is excluding
9 Dioxin contamination, there are a number of other
10 contaminants found on the 80 Lister Avenue site, are
11 there not?

12 A There are.

13 Q And if I came to you seeking approval to
14 sell the 80 Lister Avenue site and had those levels of
15 contamination exclusive of Dioxin, I would not be
16 permitted to sell the property unless I engaged in a
17 clean-up activity, correct?

18 A Or signed a consent order with a schedule for
19 it.

20 Q Yes.

21 A Yes, that's correct.

22 Q Now, is that generally true -- question
23 withdrawn.

24 Will the DEP generally require a clean-up of a
25 property that is covered by ECRA if the property

1 contains DDT contamination?

2 A The DEP would always require the clean-up of a
3 property, and by clean-up I assume we mean the options
4 like entering into a compliance schedule under consent
5 order. If there are any significant levels of
6 contamination of any priority pollutants or anything we
7 would be concerned about -- we wouldn't distinguish
8 between DDT or PCB or Dioxin or any other priority
9 pollutants.

10 Q In other words, any -- the presence of any
11 priority pollutant would require clean-up as we're
12 using that term?

13 A Not the mere presence. I mean now -- with the
14 technology that exists now we can measure down to parts
15 per billion and trillion. So the fact that something
16 is detectable doesn't mean that rises to an action
17 level that would require some remediation. And under
18 that statute, the department is charged with the
19 responsibility of first coming up with case by case
20 clean-up standards and eventually adopting regulations
21 to set those clean-up standards.

22 We are still very much in the early stages of
23 that process for all of the chemicals you might want to
24 remediate on a particular site.

25 I don't know how to answer your question. What

1 we would do when we got the sampling plan back that
2 showed the level of contamination we would take a look
3 at those and if we reached a judgment clean-up was
4 required we would then require it.

5 Q Could I ask you to back up a second. You
6 made reference to what you call the priority
7 pollutants?

8 A Yes.

9 Q And the Record of Decision refers to what
10 I think are called the 129 priority pollutants plus 40?

11 A Right.

12 Q Could you tell us what those are?

13 A Priority pollutants are 129 specific substances
14 which have been identified by EPA as pollutants, and
15 they are the most commonly tested for pollutants.

16 The plus 40 has to do with the analytical method
17 that is used to analyze priority pollutants. It is the
18 next 40 peaks on the instrument which is the
19 gaschromatograph maxspectrometer. So it tells you what
20 the next -- next highest values of substances are.

21 You may not know from looking at that what they
22 might be. So when we use that term in this consent
23 order, we require analysis of the 129 pollutants plus
24 the next 40 most prevalent substances in that sample.

25 Q I see. Now, are you also familiar with

1 something called the First Priority List of Hazardous
2 Substances? It's promulgated by EPA and the Department
3 of Health and Human Services. Is that different?

4 A Could you repeat that?

5 Q Something called First Priority List of
6 Hazardous Substances promulgated pursuant to Super Fund
7 Amendments and Reauthorization Act?

8 A I am generally aware of that.

9 Q Is that a different list than the 129
10 priority pollutants?

11 A I believe it is.

12 Q All right.

13 A I do not have a lot of personal knowledge of
14 that.

15 Q What's your understanding of that list?
16 What is it supposed to be?

17 A I think that list is intended to be the focus of
18 what -- what are called remedial investigations under
19 the Super Fund statute should begin with. Those are
20 the types of chemicals you should look for.

21 Q Why?

22 A Those would be the particular chemicals of
23 concern on a Super Fund site.

24 Q In other words, those are -- those are
25 dangerous chemicals?

1 A Those are the ones that could either pose a
2 danger to the environment or to human health.

3 Q Now on that list the EPA has gone further
4 and identifies the first 25, has it not?

5 A I do not know.

6 Q You don't know. All right. If I could
7 direct your attention to exhibit 84 which is the Record
8 of Decision.

9 MR. MOSER: If I may, Mr. Falls, do you
10 happen to have a copy of Exhibit 84 for us? I
11 want to make sure I don't confuse -- I think my
12 pages may not be in order. I prefer not to
13 confuse the witness.

14 Thank you very much.

15 Q If I could direct your attention to page
16 22. There's a paragraph bearing the roman number 5 at
17 the bottom. The first sentence reads, "As previously
18 recorded in earlier sections of this ROD, the results
19 of the remedial investigation indicate that the site is
20 contaminated by a large number of hazardous
21 substances."

22 Do you agree with that conclusion?

23 A Yes, I do.

24 Q And by the way, if I can move you back --
25 I'm sorry -- to page 11. You notice the first full

1 paragraph on the page beginning with "The changes
2 started in 1955?"

3 First of all, do you have any reason to quarrel
4 with the conclusion that DDT production continued on
5 the site until 1958 or 1959?

6 A No, I have no reason to quarrel with any of
7 this. In fact we indicated our concurrence of this
8 document.

9 Q And second of all, if you look later in
10 that paragraph, does that refresh your recollection
11 that the hookup date to the sewer was 1956?

12 A Yes, it does.

13 Q And was it your understanding based on the
14 investigation you did that prior to '56 all the
15 discharges went to the river?

16 A I do not specifically recall. I would presume
17 they were not hooked up into the sewer treatment plant
18 they would have had to go into the river?

19 I do not specifically recall that. I would
20 presume if they were not tied into the local sewage
21 treatment plant they would have been going into the
22 river.

23 Q Now, directing your attention, if I could,
24 to page 13 of Roman numeral 4, am I correct Roman
25 numeral 4 is a section which recites in prose the

1 highlights of the sampling investigation that was
2 undertaken with respect to the site?

3 A Yes.

4 Q And, for example, if we look at page 14,
5 the subparagraph A at the bottom indicates the -- is a
6 summary, if you will, of the sampling of the office and
7 laboratory building?

8 A That is correct.

9 Q All right. And I -- from looking at this,
10 I'm correct, am I not, that Dioxin was found in the
11 overwhelming percentage of the samples that were
12 undertaken in the office and the other buildings of the
13 site, correct?

14 A Yes.

15 Q Now, if I could then direct your attention
16 to page 15?

17 A 50?

18 Q 15.

19 A 15.

20 Q It's typographical. The last line on the
21 page refers to "near surface soils." And then
22 commencing with text beginning on page 15 am I correct
23 that the report at that point recites the -- summarizes
24 the sampling that was done in the surface soil?

25 A Correct.

1 Q And in addition to sampling for Dioxin,
2 sampling was done for the priority pollutants as well,
3 correct?

4 A Correct.

5 Q And when the sampling was done for the
6 priority pollutants of the 69 semi volatile compounds,
7 23 of those were found, is that right?

8 A Correct.

9 Q Now, can you find for us in the back of
10 Exhibit 34 where these results are contained?

11 A I have not looked at this document in two years.

12 Q I can appreciate that and I'll be happy to
13 help you. The trouble is the pages aren't numbered so
14 it may be a little tricky to find the right chart.

15 There is an Appendix B at the very back. It
16 looks to be about 25 pages from the back?

17 A I have a chart says "Summary of Detected
18 Volatile Organics and Near Surface Soils." The page is
19 not numbered in the appendix.

20 Q That's correct.

21 A It is about a quarter inch from the back.

22 Q Which one do you have, non-volatile or
23 volatile?

24 A Right now I'm looking at the volatile.

25 Q Volatile. It says "Summary of Detected

1 Volatile Organics and Near Surface Soils," correct?

2 A Yes.

3 Q All right.

4 MR. MOSER: Your Honor, have you been able
5 to find that one? Perhaps if I show you the
6 page we're looking for.

7 THE COURT: Okay. What was the name of
8 the particular table?

9 MR. MOSER: Summary of Volatile Organics.

10 THE COURT: I have it.

11 Q This table shows the specific results of
12 the sampling done in the surface soils, right?

13 A Well it shows the aggregate results. It doesn't
14 necessarily give you the specific results of each
15 sample.

16 Q And it should indicate each one of the
17 priority pollutants that was detected as a result of
18 the sampling, am I right?

19 A Well, it's a chart for volatile organics, not
20 all priority pollutants.

21 Q The volatile organics component of
22 priority pollutants?

23 A Yes.

24 Q All right. Can you quickly tell us why is
25 benzene -- why do you test for benzene?

1 A Why do we test for benzene?

2 Q What's the concern?

3 A Benzene is a carcinogen.

4 Q And how about chlorobenzene?

5 A I don't think I'm the person you want to ask
6 about why a substance is on the priority pollutants
7 list.

8 Q Is it a carcinogen?

9 A I do not personally know whether chlorobenzene
10 is.

11 Q All right. Do you know -- take a look at
12 the list of contaminants. Of -- from among the
13 volatile organics. Can you identify any of them as
14 carcinogens?

15 A To be honest, I would not want to speculate on
16 how many on that list are carcinogens.

17 Q Let me ask it another way. We talked
18 earlier about whether you would require me to clean up
19 my property if we detected certain contaminants.

20 I thought your testimony in essence was if we
21 found any of the priority pollutants in sufficient
22 quantity we would make you clean up your property.

23 Looking at the results of the survey "Volatile
24 Organics, Near Surface Soils," which of the
25 contaminants listed there and the quantities listed

1 there is such that you would require clean-up of that
2 contaminant?

3 A I cannot answer that question without going
4 back and comparing this with the sampling results of
5 sites where we have required clean-up at those levels.

6 I am not off the top of my head familiar with
7 what might be clean-up standard for these individual
8 volatile organics.

9 Q Can you describe for me generally how
10 those standards are established?

11 A Yes. I certainly can do that. The thresholds
12 for the action levels are established on the basis of
13 survey of the existing literature, discussions with the
14 Environmental Protection Agency, discussions with our
15 own Department of Health and quite a lot of technical
16 discussion in-house to determine what is appropriate to
17 leave behind after a clean-up taking into account a
18 variety of factors, the kind of -- the kind of location
19 you're dealing with in terms of possibilities for
20 migration, the type of land use that will occur
21 afterwards, the types of uses of the site that are
22 likely to take place in terms of possibilities for
23 human exposure or migration to the environment.

24 It's a fairly complicated process and it's a
25 process that is fairly new for my agency as well as

1 other environmental agencies.

2 Q Do you have action levels for each of the
3 priority pollutants?

4 A No, we do not.

5 Q If you don't have an action level for a
6 priority pollutants, does that mean I don't have to
7 clean up no matter how much I have?

8 A No, it does not. In some cases we require it be
9 clean to non-detectable. In some cases we have
10 aggregate standards for all volatiles of a hundred
11 parts per million or 50 parts per million without
12 setting individual standards for all constituents of
13 that category.

14 Q All right. Will, let me ask it this way:
15 If we look just at the Detected Volatile Organics Near
16 Surface Soils Chart, okay?

17 A Yes.

18 Q Just so it's clear, this represents one
19 group of -- from that 129 priority pollutants, right?

20 A Yes.

21 Q And you take -- first of all, let's take
22 these readings in the aggregate. Is there any doubt in
23 your mind that in the aggregate these readings
24 exclusive of Dioxin would require clean-up?

25 A There's no doubt all these clearly require

1 clean-up.

2 Q Okay. Now, that's taking them -- that's
3 taking this sampling in the aggregate. Are you able to
4 look at the concentrations shown for some of the items
5 there and tell us with confidence that some of these
6 individual contaminants alone would require clean-up?

7 A Yes, I can do that.

8 Q Which ones can you say with confidence
9 would require clean-up if they were found alone?

10 A I would say virtually all of these.

11 Q So, if I happened to own 80 Lister Avenue
12 and I wanted to sell it and I came to you and I had
13 readings, almost anyone of these readings -- and that
14 was it -- you'd tell me I had to clean it up before I
15 could sell?

16 A Yes, I would.

17 Q Okay. I apologize for asking you to kind
18 of flip back and forth. Maybe you could borrow my pen
19 and stick it in that report so we don't lose the parts
20 of the page.

21 Back to the text around page 15 or 16. Again,
22 under the discussion of near surface soil samples, am I
23 correct the -- what the study indicated was that of 38
24 volatile organics, 13 were found?

25 A That's correct.

1 Q What we were just looking at was --
2 question withdrawn.

3 And then of the 35 pesticides on the list,
4 seven were found, correct?

5 A Yes.

6 Q And then of the 12 -- 13 -- I'm sorry --
7 metals on the list of priority pollutants, 12 were
8 found?

9 A That's right. Everything but thallium.

10 Q Ask you to do, if you can, go to the back
11 in the tables and find for us the table that shows the
12 sampling results for near surface soils for volatile --
13 for herbicides or metals.

14 A Well, the next chart following the one we were
15 just looking at is a summary of detected herbicides,
16 pesticides and PCB's in near surface soils. It does
17 not include metals in that. I believe that's a
18 separate chart.

19 Q Now, which of the items on that chart
20 would contain Dioxin?

21 A I'm sorry. Contain Dioxin?

22 Q Yeah.

23 A These are separate substances.

24 Q I appreciate that. Is there Dioxin -- is
25 there any Dioxin reading on that chart?

1 A No, this is not a chart of Dioxin --

2 Q Okay.

3 A -- analysis.

4 Q So excluding Dioxin at 80 Lister Avenue,
5 if I wanted -- if I owned 80 Lister Avenue and I wanted
6 to sell it, could I come to you with the readings on
7 any one of the lines on this chart and -- in that event
8 would I be ordered to clean it up?

9 A You certainly would.

10 Q Every single one of them?

11 A Yes.

12 Q Any single one of them, correct?

13 A Yes. I -- in addition, if this were not a
14 Dioxin site and I saw 2,4-D or 2,4,5-T on the list of
15 contaminants, I would direct you to sample for
16 2,3,7,8-TCDD which is the particular isomer of Dioxin
17 that we're concerned about in this case. Because these
18 products carry a risk of producing Dioxin as an
19 unwanted by-product of the manufacturer of 2,4-D and
20 2,4,5-T.

21 Q All right. Now, in my copy, if we looked
22 for the table for Near Surface Soils For Inorganic --
23 Summary of Detected Inorganic Parameters, which it
24 looks to me like it's about 20 pages back for some
25 reason.

1 A Near surface soils rather than soil borings.

2 Q Still talking about near surface soil for
3 the moment. Can you find that one?

4 A You said 20 pages earlier?

5 Q Farther back.

6 A Oh, farther back.

7 Q Let me see if I can help.

8 What are the items on the left-hand side of that
9 page?

10 A Those are the specific pollutants that belong in
11 that category.

12 Q Is that the category that we referred to
13 as metals?

14 A Yes.

15 Q So this is a third category of the
16 priority pollutants?

17 A Yes.

18 Q All right. What -- if I came to you with
19 a site that had those levels of contamination of those
20 metals, would I be able to sell without agreeing to
21 clean it up?

22 A That I honestly do not know. I'm not that
23 familiar with the values for metals that would trigger
24 a clean-up.

25 Q So even taking them in the aggregate, you

1 can't say?

2 A I honestly do not know.

3 Q All right. Returning you to the text, if
4 we look at the boring soil samples, --

5 THE COURT: What page now?

6 MR. MOSER: Have to bear with me. I have
7 to flip back, too. It's going to be about 16 or
8 17.

9 MR. CUYLER: 16.

10 MR. MOSER: 15, your Honor.

11 THE COURT: 16. Okay.

12 Q Am I correct that -- just describe for us
13 what's meant by boring soil samples.

14 A Boring samples are soil samples between zero and
15 six inches.

16 Q And what's meant by near surface?

17 A I believe that's down to a depth of 60 inches.

18 Q In the case of the boring samples, samples
19 were also taken for each of the priority pollutants,
20 were they not?

21 A Yes.

22 Q And in this case of 69 semi volatile
23 compounds, 27 were found, right?

24 A Yes.

25 Q And then of the 38 volatile organics, 10

1 were found, correct?

2 A I'm reading with you, yes.

3 Q And of the 35 herbicides, 10 were found?

4 A Yes.

5 Q Now, can we go to the back and find the
6 table for each of those? Is there a corresponding
7 table?

8 A There certainly should be. I think I have it.

9 Q Would you read the title for us?

10 A Summary of detected volatile organics and soil
11 borings.

12 Q Okay. And so everybody can follow, that's
13 the one the print's a little smaller than we've been
14 used to?

15 A A little smaller, a little darker.

16 MR. MOSER: Your Honor, have you had a
17 chance to find that one?

18 THE COURT: Yes.

19 MR. MOSER: Thank you.

20 Q Now, as you were with respect to the near
21 surface samples, are you able to say that in the
22 aggregate these readings of the volatile organics are
23 such if I own this property and wanted to sell it I
24 wouldn't be permitted to unless I cleaned it up?

25 A Yes, I would be comfortable with that statement.

1 Q Are you able to identify readings with
2 respect to any of the contaminants on this sheet and
3 say that alone those levels of contamination would
4 require clean-up?

5 A I believe would be virtually all of them that
6 show detectable results.

7 Q All right.

8 A Again, for the record, the clean-up standards
9 that would be determined would be on a case by case
10 method, and I'm not, from my head, reciting that we
11 have a volatile organic standard of X parts per billion
12 or aggregate standard necessarily so my answers are
13 premised upon what I know of the site and what the
14 clean-up standard would be for the site if Dioxin were
15 not present there.

16 Q Right. My point to you -- I recognize we
17 may -- you don't have the exact number in your head.
18 You may be off once or twice.

19 A Exact number doesn't exist. What I'm telling
20 you it's determined on a case by case basis.

21 Q If I came to you owning 80 Lister Avenue
22 and you picked the line on this chart and that was the
23 only thing I showed you, you'd say you're going to have
24 to clean that up, right?

25 A It's easy to say with respect to some of these

1 numbers. When the values get lower, what would happen,
2 and this exercise has not yet occurred except in this
3 courtroom this morning. What would happen, I would sit
4 down with my technical staff and say how do you feel
5 about leaving 12 parts per billion of toluene in the
6 soil borings and then we would discuss that with other
7 people and make some hopefully reasonable judgments
8 about about what a standard should be.

9 It would not take place by looking at charts for
10 the first time and saying what do you think of 12 or
11 what do you think of 36. I'm somewhat at a
12 disadvantage. I can give some impressions.

13 I certainly would not want my agency to be bound
14 by those, and I don't know how accurate my impressions
15 would be giving them to you in court this morning.

16 Q I'm certainly not going to seek to hold
17 your agency to what you're telling us this morning.

18 A I'm just trying to get a sense of the fact
19 that -- put it another way, when you look at these
20 readings, what you find is that you had a site that was
21 heavily contaminated with many pollutants, correct?

22 A Yes, that's correct.

23 Q And even if you took away Dioxin, if -- if
24 I had come to you with this site and taking virtually
25 any of the pollutants we've seen and shown you this

1 level of contamination, toluene, benzene,
2 chlorobenzene, hexachlorobenzene, you would have said
3 upon seeing those levels you have to clean this up,
4 correct?

5 A Yes.

6 Q And recognizing you may not be sure about
7 the last one, we can say generally that would be true
8 for most of the -- most of the priority pollutants that
9 were found?

10 A I think that's true. Which is exactly why I
11 required the testing for the other priority pollutants.

12 Q Yeah, and I think you said in your direct
13 exam that to the extent that the work for Dioxin wasn't
14 going to remedy the problem, you would have required
15 such remedy to be undertaken, correct?

16 A Yes.

17 MR. MOSER: Thank you, your Honor. I have
18 nothing further.

19 THE COURT: Do we have anybody who would
20 say be five minutes? I am not limiting anyone
21 to five minutes but I'll just do that person
22 before I break. If I haven't got that person
23 I'll break now.

24 MR. CUYLER: I have more than five
25 minutes.

1 THE COURT: Let's take that break now.

2 (Recess is taken).

3 THE COURT: Commissioner Catania remains
4 on the stand under oath. And Mr. Cuyler, if
5 you're ready.

6 CROSS-EXAMINATION BY MR. CUYLER:

7 Q My name is Steven Cuyler. I represent a
8 number of the insurance carriers in this litigation.
9 I'd just like to ask you a few questions.

10 You mentioned in response to some of the
11 questions placed to you that you did not reveal that
12 you're an expert in the toxicology, the hazards
13 presented by particular materials. I appreciate your
14 candor on that. But what I'd like to know is do you
15 recognize the name or do you know the individual
16 Marshall Sittig?

17 A I didn't hear the last --

18 Q Marshall Sittig?

19 A No, I do not.

20 Q You mentioned in your testimony today,
21 sir, that you had spoken with a number of
22 representatives and employees of Diamond Shamrock.

23 Would you tell us, please, who you spoke with
24 specifically that you recall?

25 A We were given a list of employees by Diamond

1 Shamrock. I do not presently recall the names of any
2 of the employees with whom I spoke.

3 And some of those contacts would have been
4 anonymous calls as well people calling in saying I used
5 to work at the facility, and they would give us
6 information that we would track down. I believe the
7 documents we produced including the list of employees.
8 I did speak with several people included on that list.

9 Q Do you recall speaking with a Mr. Steward?

10 A No, I do not.

11 Q Do you recall speaking with Mr. Kennedy?

12 A I do not recall the names of anyone I spoke
13 with.

14 Q Do you recall whether any of the
15 individuals with whom you spoke had ever been plant
16 manager or held that position at the Lister Avenue
17 site?

18 A No, I do not recall.

19 Q Do you recall speaking with a Mr. Burton?

20 A Burton?

21 Q John Burton?

22 A I do not recall any specific names.

23 Q How about Chester Mysko, does that ring a
24 bell?

25 A (Witness nods).

1 Q The answer is no?

2 A The answer is no.

3 Q Sir, let me ask you this: As I understand
4 matters, your role with respect to the 80 Lister Avenue
5 property was to determine whether it was contaminated,
6 if so, with what it was contaminated and the extent of
7 that contamination, is that fair?

8 A I think that's fair.

9 Q And then upon making that determination
10 you then had to find a way to in effect clean it up?

11 A Yes.

12 Q You were not in assuming a role in the
13 nature of a prosecutor to determine how it became
14 contaminated, whether there was any willful or
15 intentional violation of the law in the modality of
16 contamination, is that correct?

17 A That is correct. That would come later.

18 Q That will come later?

19 A That would have come later.

20 Q Is that investigation as to whether there
21 was any violation of the law, how this place became as
22 contaminated as it was, is that part of your function
23 or does that befall someone else within your department
24 or within the state?

25 A Which of my functions are you talking about?

1 I've had different positions at different periods of
2 time.

3 Q Your function currently.

4 A My function currently I would not be the person
5 doing the investigations.

6 Q Who is the person to your knowledge who is
7 in charge of that investigation?

8 A My successor in my previous position.

9 Q And that gentleman's name?

10 A Gerard Burke, B-u-r-k-e.

11 Q Gerard Burke. In your prior position did
12 you become involved with that investigation of Diamond
13 Shamrock?

14 A I would have to answer you by saying we did not
15 go very far along those lines because we had an
16 agreement that was being negotiated that looked as if
17 it would bear fruit and in fact was finally concluded
18 and executed.

19 Q So to put it in colloquial terms, you
20 didn't want to upset the apple cart while you had a
21 good thing going?

22 A No, I would phrase it differently. We certainly
23 did have contacts with the Division of Criminal
24 Justice.

25 We routinely refer situations to them. We work

1 with the Division of Law also and the Attorney General's
2 Office and we were prepared to do that. It was not
3 necessary.

4 Q To your knowledge are there ongoing
5 investigations into the conduct of Diamond Shamrock by
6 those other sections?

7 A To my knowledge there are not.

8 Q There are not?

9 A Although I have to honestly tell you they would
10 not be required to tell me if they wanted to
11 investigate people.

12 Q Sir, you mentioned in your testimony that
13 you had or you were aware that there were certain
14 conduits, drains, pipes leading from the 80 Lister
15 Avenue site into the Passaic River.

16 Q Could you tell us how many pipes, how many
17 drains, how many conduits the investigation disclosed?

18 A I do not presently recall how many. They are
19 detailed in some of the analytical data included in the
20 Record of Decision.

21 Q Was there any attempt made to determine
22 what period of time or during what period of time those
23 pipes, conduits and drains were used?

24 A Not really from that perspective. What we were
25 trying to accomplish is identify the scope of the

1 contamination and extent it had spread.

2 It was really quite secondary for those purposes
3 when it had spread. We were interested in the present
4 contamination and where it was and how to remedy it and
5 how to limit access to it. So we would have gotten
6 into those questions only so far as they were relevant
7 to a source that we may not know about or location of
8 contamination that we would not have known about

9 Q Sir, let me direct your attention to page
10 11 of the Record of Decision which I believe is P-84 in
11 evidence. Mr. Moser had directed your attention
12 specifically to the first full paragraph appearing on
13 page 11 that starts with the "The changes."

14 Do you have that reference?

15 A Yes, I have it before me.

16 Q Now, I take it, and correct me if I'm
17 wrong, that the site history that's reproduced in the
18 Record of Decision and in particular the site history
19 that appears in the first full paragraph on page 11 was
20 provided to you by Diamond Shamrock employees or
21 representatives, is that correct?

22 A In part.

23 Q Do you see anything in that first full
24 paragraph that came from some source other than Diamond
25 Shamrock?

1 A Paragraph that begins with "The changes"?

2 Q Yes.

3 A I have to honestly tell you at this point in
4 time I cannot identify the source of a particular fact.
5 This is five years ago.

6 Q Would you know of any possible source
7 other than Diamond Shamrock for the information in that
8 paragraph?

9 A We interviewed people who are the subsequent
10 owners of the property. We interviewed local
11 officials, residents, former employees, city officials,
12 anyone who we track down -- any lead we could find and
13 ask people questions about the site, and from that we
14 pieced together the site history that's in the Record
15 of Decision.

16 Q Let me direct your attention particularly
17 to the sentence "Among these," referring to the
18 changes. "Among these was a change instituted around
19 1956 to the trichlorophenol process effluent with the
20 Sewerage commission." I'm sorry. "With the
21 installation of an industrial sewer connecting to the
22 Passaic Valley Sewerage Commission Lister Avenue line.
23 Following installation of that connection" -- first of
24 all, did you have any source for the information that
25 that had connection -- connection had been made other

1 than the plant personnel itself?

2 A I do not presently recall.

3 Q Next, "Following installation of that
4 connection, most of the plant process wastes were
5 discharged through the" -- and I believe that
6 abbreviation stands for "Passaic Valley Sewerage
7 Commission treatment plant."

8 Do you recall what sources of information you
9 had from that?

10 A I do not.

11 Q Would it be fair to say whatever sources
12 you had, that information was confirmed to you by
13 Diamond Shamrock?

14 A I don't know that would be accurate. Some of
15 this would have been provided by Diamond. Others would
16 have been independent sources that we would attempt to
17 verify Diamond had provided us and in that case it may
18 well be that Passaic valley Sewerage Commission records
19 are being relied upon when that line was constructed.

20 Q Did Diamond Shamrock ever advise you that
21 as late as 1969 they were continuing on a regular basis
22 to discharge their plant effluent or at least part of
23 their plant effluent into the Passaic River?

24 A I do not presently recall any such information

25 Q Did anyone from Diamond Shamrock ever

1 advise you that in 1956 only half the plant had been
2 connected to the industrial sewer and that as a matter
3 of practice and routine another half of the plant,
4 including the 2,4,5-T production areas continued to
5 discharge into the Passaic River?

6 A I would have to answer the same way. I do not
7 recall. There is a specific document that was produced
8 at our request from Diamond very early in June of 1983
9 that gives the site history as well as a history of
10 waste disposal practices.

11 Q Would that have been a letter from Mr.
12 Hutton, perhaps?

13 A I believe. It would have been from his
14 predecessor Mr. Worthington, James Worthington.

15 MR. CUYLER: Bear with me for just a
16 moment. Excuse me one moment, your Honor.

17 Trying to see if we can locate that. I believe
18 I know the document you're making reference to
19 and I'd like to have identified. But let's just
20 go on.

21 Q Sir, if you look in the Record of
22 Decision, under the section -- I believe its hazards --
23 I'm sorry -- Risks Presented by the Site. It's at page
24 22. That section generally talks about what we refer
25 to, I believe, as Dioxin, TCDD, and also DDT. DDT is a

1 insecticide, is it not?

2 A Yes.

3 Q Recognizing that you do not claim to be an
4 expert with regard to toxicology, do you have any
5 opinion nonetheless as to which of those two materials,
6 Dioxin or DDT presents the greater hazard?

7 A Greater hazard to what?

8 Q Well, let's start with the greater hazard
9 to the environment.

10 A I think that would be a very complicated answer,
11 and I would not be particularly qualified to answer
12 that.

13 I think you would have to look at what part of
14 the environment you're looking at. Looking at whether
15 or not it makes bald eagle shells too thin to hatch or
16 looking at whether it builds up in the food chain or
17 looking at whether or not it can get into organisms
18 that human beings would consume.

19 It would depend very much on the specifics of
20 how you wanted to measure the danger and risks.

21 Q Is it at least fair to say DDT is a very
22 significant hazard to the environment?

23 A I think it would be safe to assume both of these
24 substances are substances that could be particular
25 problems.

1 Q Is it also fair to say that there is much
2 scientific debate concerning the exact extent of
3 Dioxin, the toxicity of Dioxin while there is very
4 little regarding the toxicity of DDT?

5 A I think it is probably more commonly accepted
6 that DDT is known to be a problem and Dioxin is a newer
7 danger, if you will; and there is a lot of scientific
8 debate concerning the levels of Dioxin that would pose
9 a danger.

10 Q I think we've found the exhibit. Let me
11 show you what has been premarked as Defense Exhibit 39.
12 And I'll ask you if that is the letter from Dr.
13 Worthington to you with enclosures, a report on 80
14 Lister Avenue. That was submitted to you in response
15 to your inquiry or request for information concerning
16 the operations of the 80 Lister Avenue facility?

17 A This is the letter I was referring to in my
18 earlier testimony.

19 THE COURT: Mr. Cuyler, would you let me
20 have an extra copy?

21 MR. CUYLER: I'm sorry, your Honor.

22 THE COURT: Thank you.

23 Q If you'll bear with me for just a moment,
24 Mr. Catania, I'll find the reference for you.

25 All right, first of all, on the first page of

1 the report, Plant Location and History, about the
2 middle of the first paragraph.

3 "In January '56 an easement was acquired for
4 construction of a 10-inch sewer line under the railroad
5 tracks on the east side of the property."

6 It's the first reference I find. Do you find
7 that, sir?

8 A Yes, I do.

9 Q All Right. Turn to page 5. I think we've
10 found it here. Environmental Management is the title.
11 The second paragraph, "Information about waste water
12 practices indicates that in 1956 process waste waters
13 were discharged through a 10-inch industrial sewer to
14 the Passaic Valley Sewerage Commission."

15 Do you see that?

16 A I do.

17 Q All right. "In the fifties and sixties
18 there were indications of acid discharges to the
19 Passaic River, but these releases were likely muriatic
20 acid and sulfuric acid." See that?

21 A Yes.

22 Q "The only acid discharges appear to be
23 amounts that were not sent to acid reclaimors."

24 Do you see that?

25 A Yes, I do.

1 Q "Both muriatic acid and sulfuric acid
2 should not have been contaminated with Dioxin since
3 they were not directly associated with the TCC
4 process."

5 Do you see that?

6 A Yes.

7 Q Now, sir, were you ever provided with any
8 information from Diamond Shamrock that contradicted the
9 information set forth in Dr. Worthington's letter,
10 Defense Exhibit 39?

11 A With respect to the specific sentences you just
12 read to me.

13 Q Yes.

14 A I do not recall any information that
15 contradicted that, but I have not looked at this letter
16 in over five years.

17 Q Now, sir, before you gave some testimony
18 concerning the modality by which contamination may have
19 wound up in the Passaic River, and I ask you
20 specifically whether you ever spoke with a Chester or
21 Charles Mysko and you told me you had not.

22 Let me read to you --

23 A I didn't say I hadn't spoken him. I said I did
24 not recall names of people I have spoken with. I may
25 well have spoken with him.

1 Q In the event that you have, let me read to
2 you a section of a deposition that was taken in this
3 matter on April 21, 1988 of Chester Mysko.

4 THE COURT: Chester Mysko is who.

5 MR. CUYLER: He was an employee.

6 THE COURT: Employee, worker.

7 MR. CUYLER: Plant operator, that is
8 correct. He was employed at Diamond Shamrock

9 Q I'll read that section starting at line 7,
10 page 10. -- I'm sorry page 7, line 8.

11 "Question: Can you tell me the date you
12 started employment with Diamond Shamrock?

13 "Answer: I don't remember the date. I
14 know it was August 1954.

15 "Question: Where did you live at the
16 time?

17 "Answer: Bayonne.

18 "Question: And when did you last work for
19 Diamond Shamrock?

20 "Answer: August 1969."

21 At page 36, line 3, the following series
22 of questions were placed to the witness:

23 "Question: To your knowledge were there
24 ever such occasions when, as you say, they would
25 get a bad batch -- we're referring now to

1 products manufactured at the plant, sir -- "and
2 it would be dumped into the Passaic River?

3 "Answer: Sure. I saw it. I saw good
4 batches go down the river by mistake too. That
5 is, didn't make it any better for the river.

6 "Question: Can you give me any idea of
7 the frequency in which a batch, good or bad,
8 might wind up into the river?

9 "Answer: I can't.

10 "Question: Was it once a month, once a
11 week?

12 "Answer: I would say better than once a
13 month. I don't know. I was only there eight
14 hour shifts. There are three shifts, 24 hour
15 operation. Anything could have been going on at
16 night. That's when it usually went down in
17 there anyway. They saved it until nighttime."

18 There was a request by Mr. Spivak to hear
19 the end of the question back. It continued:

20 "Question: Were you ever aware of
21 instances when the discharge lines from the
22 2,4,5-T area would back up and overflow the
23 sewers?

24 "Answer: In the 2,4,5-T area?

25 "Question: Yes.

1 "Answer: I don't remember any particular
2 time, but if you walked in the 2,4,5 area,
3 2,4,5-T area, there were always -- you
4 couldn't -- when you walked on the floor, you
5 went sliding. You had to be very careful
6 because it was all over the place, and it was
7 like an oily substance, and the water didn't
8 even want to wash it down. So what they used to
9 do is wash it down with sulfuric acid. They
10 used to soak the whole floor with sulfuric acid,
11 let it sit for an hour or two and hose it down
12 and everything went into the river, sulfuric
13 acid and 2,4,5-T and everything that was on that
14 floor.

15 "Question: Were you ever aware of any
16 change in the routing of the sewer lines such
17 that they no longer discharged into the river?

18 "Answer: They never did that, not to my
19 knowledge. I remember putting temporary lines
20 in like maybe a two or three inch pipe from some
21 particular tank into the river because they had
22 maybe no sewer going from this tank and they had
23 a batch that they had to dump.

24 "Question: And that would have been in
25 the 2,4,5-T area?

1 "Answer: I don't recall. It could have
2 been anywhere in the plant. We have done it
3 more than once.

4 "Question: At whose directions would you
5 run such temporary lines?

6 "Answer: My shop foreman would tell me
7 what to do. I don't know where he got it from.
8 I assumed the office."

9 Did you ever hear any information that reflected
10 that type of activity in terms of pollution of the
11 river?

12 A I -- I do recall some general information from
13 some of the people I interviewed concerning the
14 possibilities of intentional discharges to the river or
15 things of that nature.

16 Q The information that you got from these
17 people, did they indicate over what period of time this
18 intentional discharge into the river was taking place?

19 MR. FALLS: Objection to the form of the
20 question.

21 THE COURT: Why don't you restate it, Mr.
22 Cuyler.

23 Q Was there any information provided to you
24 as to when this -- to use your word -- intentional
25 discharging occurred?

1 A No, the information that I was provided was
2 generally what I would term antidotal. It would be
3 through a phone call or a letter that did not have a
4 return address and people would indicate that I used to
5 work there. They used to do bad things. It happened
6 sometimes, it happened all the time and we were never
7 able to pinpoint with any kind of accuracy at all or to
8 verify a lot of information.

9 And also to restate what I said earlier, for the
10 purposes of our program at that point, we were not
11 concerned with whether or not these were illegal
12 discharges or legal discharges when we were concerned
13 with identifying the contamination.

14 We did refer several of these allegations to the
15 Division of Criminal Justice, and there's a particular
16 Deputy Attorney General, Nicholas Vasile that I recall
17 having some conversations with. I would not have been
18 the one who would have been tracking down allegations
19 of criminal activity or illegal activity at the site.

20 Q Sir, please understand me. I'm not
21 seeking to impeach you.

22 A I understand that.

23 Q Or contend that you have not been doing
24 what you're supposed to be doing. That was my reason
25 for my question right up front.

1 Your interest in finding out what the problem is
2 as it exists and getting it cleaned up. I don't
3 dispute that.

4 I'm trying to probe the extent of your
5 knowledge, and if these references refresh your
6 recollection, as that last one did, that's what I'm
7 trying to do.

8 Let me read you a little bit more of Mr. Nisko's
9 deposition, and this speaks to some other conditions at
10 the plant. At page 10, line 3.

11 "Question: Were there any lines that led
12 out to the Passaic River that you were aware of?

13 "Answer: I just finished telling you,
14 they all went to the sewers, all sewers to the
15 river.

16 "Question: So when you were talking about
17 the sewerage or sewer lines, you were talking
18 about a line that ultimately led out to the
19 Passaic River?

20 "Answer: Yes. They had it strung all
21 along the property right along. They might have
22 had half a dozen or maybe more. I don't
23 remember how many.

24 "Question: Did you ever notice that any
25 of the discharge that went into those lines

1 would not make it to the river? That is that it
2 would get on the ground or spill or leak?

3 "Answer: I've seen sewers overflow,
4 sure."

5 Now, sir, my question to you is this: Do
6 you recall there were open split trenches in effect
7 that ran as part of the sewerage systems when you
8 inspected the properties?

9 A I do not recall.

10 Q Do you recall interviewing any personnel
11 at the plant who at any time told you that there were
12 such open split trenches and that when they would plug
13 up whatever was being discharged at that time would
14 simply spill out and contaminate the ground and the
15 immediate area?

16 A No, I do not recall. What my recollection is
17 generally, we were concerned about the pipes and
18 conduits and other means of access to the river and
19 enough to want them sampled and to make sure we
20 understand what exactly was entering the river.

21 Q Bear with me and let me read you another
22 piece of the testimony and I'll ask if this refreshes
23 your recollection.

24 This is again Mr. Mysko's deposition page 68
25 line 17.

1 "Question: You mentioned instances when
2 the sewers would overflow. These were the
3 sewers that would normally lead to the Passaic
4 River, is that correct?

5 "Answer: Yes. They would overflow
6 because of previous acid that was in there that
7 maybe solidified -- not maybe. It did solidify
8 and the build-up would shrink the sewer, get
9 smaller in there until it was chopped out. The
10 things overflowed.

11 "Question: When the sewers would
12 overflow, would any of the overflow run on to
13 adjacent properties?

14 "Answer: No, not that I know of.

15 "Question: What would happen to the
16 overflow?

17 "Answer: Sink into the dirt.

18 "Question: Did you ever observe a crust
19 forming on the dirt from the billed-up from the
20 overflow?

21 "Answer: Discoloration. I don't remember
22 if it had a crust on it or not.

23 "Question: But there was at least visible
24 evidence that there had been an overflow?

25 "Answer: Yes. You knew acid was there.

1 "Question: When you say acid, what type
2 of acid are you talking about? 2,4,5-T acid?

3 "Answer: It could have been 2,4,5-T. It
4 could have been sulfuric acid. It could have
5 been muriatic acid. They had a whole lot of
6 acids down there. Everyone at one time or
7 another wound up on the floor or in the sewer.
8 We are talking about acids. I remember" --

9 I'll discontinue. The rest of the answer
10 was nonresponsive. Unless Mr. Falls would like
11 to have me read it.

12 MR. FALLS: Let me see it.

13 MR. CUYLER: I'll finish the answer.

14 "We are talking about acids. I remember
15 when I first went to work there. They used
16 chlorine to make some of their by-products
17 and -- I mean to make their products and
18 by-products for chlorine and whatever they did
19 was muriatic acid and they had no facilities to
20 put this anywhere and they didn't need it so
21 they dumped it into the river, discharged it
22 into the the river, and this was going on for
23 years, and you are talking gallon-wise, boy oh
24 boy, I wouldn't be surprised if there was a
25 million, 2 million, 3 million gallons of

1 muriatic acid going in that river."

2 Sir, did you ever hear anything of that nature
3 from any of the plant personnel or any of the people?

4 A I do not specifically recall.

5 Q Okay. And that information sir, was that
6 at all conveyed to you by Dr. Worthington in his
7 Exhibit D-39?

8 A Again, this is the first time I'm looking at
9 this letter in five years. My recollection of my
10 conversations with Dr. Worthington and of this letter
11 are that there was some indication that this was the
12 best that they could reconstruct and there may have
13 been some other situations that happened or that they
14 were not aware of.

15 Short of rereading it now and giving you an
16 answer I'm not sure how else to respond.

17 Q You mentioned, sir, Diamond Shamrock gave
18 you a list of people, past employees --

19 A Yes.

20 Q -- that you might speak with. Do you know
21 offhand where we could find that list of people?

22 A That should have been an attachment to this
23 letter.

24 Q To that letter?

25 A And if not -- it's not an attachment to the

1 letter I have. I did get it at the same time. I'm not
2 sure whether it was in the same envelope with this
3 letter or came shortly thereafter, but it was in
4 response to the same inquiry.

5 Q Do you ever recall being advised by anyone
6 at Diamond Shamrock that a gentleman by the name of
7 John Burton who was plant manager through the 1950's
8 and up through 1960 lived here right in this very
9 county, Morris County, and he had information on the
10 plant and how it operated, the sewer lines, the
11 connections to the river?

12 Does that refresh your recollection?

13 A No, it doesn't.

14 Q Let me read you a little bit because we
15 got that information of Mr. Burton's deposition taken
16 on March 18, 1987. He was deposed actually on two
17 days, April 28, -- I'm sorry.

18 Mr. Burton was deposed, your Honor, on April 3,
19 1967 and on March 19, 1987. I'm reading from page 68
20 line 17.

21 "Question: Was any of Diamond's process
22 equipment connected to the sewer system in 1955?

23 "Answer: The sewer system was put in in
24 '56. At that time we connected everything in
25 2,4-D building into this new sewer system. The

1 system actually normally drained out through the
2 industrial sewer on Lister Avenue. Although we
3 had a connection so we could drain it into the
4 river."

5 Were you ever advised that even after they put
6 in the industrial sewer they maintained an alternate
7 system that they could at their whim divert material
8 from 2,4,5-D area into the river if there was any need
9 or necessity to it?

10 A I did not specifically recall.

11 Q Let me read you a section of Mr. Burton's
12 testimony beginning at page 158 line 4.

13 "Question: Did the sewerage commission
14 ever advise Diamond Shamrock that any of its
15 discharges to the river were illegal?

16 "Answer: They never caught us at it until
17 this one incident in 1956.

18 "Question: And what specifically did the
19 sewerage commission say about the discharges in
20 1956, that is what did --

21 "Answer: A pump that was pumping alcohol
22 had a small leak at the packing plant. It was
23 dumping alcohol into a discharge ditch and in
24 turn right into the river which was in terms of
25 total pollution a ridiculously insignificant

1 amount, but in the context of it, since he knew
2 we had been playing a cat and mouse game, this
3 was a legal reason for him to --

4 "Question: When you say he, who are you
5 referring to, a particular inspector with the
6 sewerage commission?

7 "Answer: I only remember one, although it
8 was likely there was others, but it seems to me
9 that most of the time there was one inspector."

10 You ever recall hearing anything like that about
11 a cat and mouse game?

12 A No, I don't, but by way of explanation, I would
13 tell you for our purposes it mattered not whether the
14 conduct that produced the contamination was legal,
15 illegal, criminal, a civil violation.

16 The statutes that we operated under at that time
17 were very, very different. Before 1970 we did not have
18 a Solid Waste Management Act. We had virtually no
19 statutory authority over hazardous waste. So in
20 essence we did not at this point in the investigation
21 spend any significant amount of resources in
22 determining whether or not the conduct was criminal or
23 illegal. We wanted to identify the extent of it and
24 clean up, however it got there.

25 Q Well, let me just correct you on one

1 point. Am I not correct in saying that as early as
2 1907 there was legislation in the State of New Jersey
3 which presently can be found in Title 58 that
4 prohibited pollution of lower reaches of the Passaic
5 River?

6 A We had water pollution -- we certainly had
7 statutes on the book before 1970 which prohibited
8 various types of pollution. There's even a fish and
9 game statute that prohibits the dumping of deleterious
10 substances in the waters of the state that may hurt
11 wildlife, but we did not have explicit provisions that
12 we have today that define willful, intentional
13 violations and impose criminal sanctions on those
14 violations.

15 And given the history of time that we're dealing
16 with from I believe 1951 to 1969, it presided -- most
17 of the statutes that I would operate under today were
18 in an investigation of some ongoing activity.

19 So what I'm trying to say is when we got
20 indications from former employees or residents or
21 neighboring facilities that there may have been some
22 illegal activities, what we were concerned with
23 specifically was that going to identify an area that we
24 had not yet tested for contamination rather was that
25 going to further criminal investigation.

1 Q Did you ever hear anything in the course
2 of your investigation about fish kills in the river
3 following Diamond's discharge of materials, pesticides,
4 herbicides?

5 A I think I do recall some information that there
6 may have been fish kills, yes.

7 Q That would have been then in contravention
8 of the fish and game statute that you just mentioned?

9 A It could have been.

10 Q Well, in any event, I won't belabor the
11 point, sir. There are volumes.

12 The point is you weren't out to determine
13 whether or not there was any intentional dumping into
14 that river or into the environment around the plant, is
15 that correct?

16 A Only insofar as that kind of information would
17 have led me to look somewhere else for contamination
18 that we hadn't yet looked.

19 MR. CUYLER: Thank you, sir.

20 THE COURT: Anybody else who would like to
21 ask questions?

22 MR. CALOGERO: I have a few questions.

23 THE COURT: Mr. Calogero.

24 MR. CALOGERO: Thank you.

25 CROSS-EXAMINATION BY MR. COLOGERO:

1 Q Mr. Catania, you discussed -- in your
2 testimony earlier this morning, you named some specific
3 sites that were identified by either the EPA or the
4 DEP, and you referred to these as off sites where
5 sampling had been taken of Dioxin contamination, is
6 that correct?

7 A That is correct.

8 Q And you also mentioned there were
9 residential areas that were tested, is that correct?

10 A That is correct.

11 Q And most of the specific names that you
12 gave us this morning were commercial or industrial
13 areas, is that correct?

14 A Correct.

15 Q And you also referred to areas that you
16 referred to as parkway medians, is that correct?

17 A Yes.

18 Q And by parkway medians, are you referring
19 to like public streets and roads?

20 A Yes. Strip between the sidewalk and the street.

21 Q And is it fair to state that there are
22 some areas which have been tested which were found to
23 have Dioxin contamination which are residential areas
24 which are not commercial -- in commercial areas and are
25 not part of roadways but are actually people's back

1 yards?

2 A Yes.

3 Q And people's houses?

4 A Yes.

5 Q And when you first began this study which
6 you stated was sometime in May of 1983 when the DEP
7 began this investigation, you decided or someone in the
8 DEP decided that you were going to look at 80 Lister
9 Avenue, is that correct?

10 A That is correct.

11 Q And the basis for looking at that was
12 because based on the information that you had, it would
13 be expected that there would be Dioxin contamination at
14 that facility, is that correct?

15 A That is correct.

16 Q And in fact when you arrived at that
17 facility, sampling was done at that facility at certain
18 specific sites at that location, is that correct?

19 A We conducted what we call bio sampling. You
20 look for the lower spots on the property where drainage
21 would naturally take runoff. You have information,
22 areas where manufacturing would have taken place and I
23 believe we did about a half a dozen bio samples.

24 Q And these were -- so sampling took place
25 in areas where you and the DEP expected there to be

1 Dioxin contamination, is that correct?

2 A Characterized a little differently, we expected
3 if there were Dioxin contamination there these were the
4 places you would likely find it.

5 Q And indeed you found Dioxin contamination?

6 A Yes.

7 Q At those areas where you expected to find
8 Dioxin contamination?

9 A Most certainly.

10 Q Do you know a Mr. James Staples in the
11 DEP?

12 A I do. He's our public information officer, our
13 press officer.

14 Q Do you read the "Star Ledger"?

15 A Occasionally.

16 Q Did you read it on September the 6th,
17 1988?

18 A No, I did not. But I know the clip that you're
19 referring to. I get clips. And several days later I
20 came across a clip that I believe you're referring to.

21 Q Did you speak to Mr. Staples about that
22 article that appeared in the "Star Ledger" on September
23 8, 1988?

24 A I did afterwards.

25 Q And that article states, "State Department

1 of Environmental Protection will seek to hold Diamond
2 Shamrock Corporation liable for polluting the Passaic
3 River with DDT and other chemicals from its defunct
4 plant on Lister Avenue in Newark, it was learned
5 yesterday. DEP spokesman James Staples said the agency
6 has information that the river was used to dispose of
7 toxic materials when the plant was in operation in the
8 1950's and 1960's."

9 Did you speak to Mr. Staples concerning that
10 statement that appeared in the "Star Ledger" on
11 September 8, 1988?

12 A I did.

13 Q And are you now aware of the information
14 which the DEP has which is the subject of that article?

15 A I don't believe that is any new information.
16 Mr. Staples handled a lot of press inquiries on this.
17 I asked him after I saw that clip whether he had any
18 new information that I wasn't aware of. He told me he
19 did not and that the basis for his statements were
20 previous conversations he had had with me, particularly
21 after we had signed the consent orders.

22 I think his comments refer to the fact that the
23 Passaic River is something that is reserved for further
24 action from both of the consent orders, and if you look
25 at the reservation of rights section, you will find

1 explicit language saying it is only meant to resolve
2 specific problems with respect to the contamination on
3 either 120 Lister Avenue or 80 Lister Avenue, and the
4 Passaic River is one area that we know needs further
5 sampling and further study. We are in the process of
6 doing that.

7 Q And as part of that further study and
8 further sampling, are you attempting to reconstruct
9 historically what was going into that river by Diamond
10 Shamrock in the 1950's and 1960's?

11 A I'm not sure what you mean by that.

12 Q Well --

13 A You mean to pinpoint at what date a discharge
14 occurred?

15 Q I'm not referring to what date discharge
16 occurred, but are you attempting to learn more about
17 the plant operations in the 1950's and 1960's in how it
18 discharged to the Passaic River?

19 Are those types of studies currently being
20 undertaken by the DEP?

21 A I would answer that by saying I would
22 characterize the studies underway as basically being a
23 feasibility study of the river. Remedial investigation
24 and feasibility study which seeks to identify the extent
25 of contamination of the river and look at the

1 alternatives in fact to see if there is any alternative
2 for cleaning the river.

3 We do not know. We could make the problem worse
4 by dredging or you could actually solve the problem.
5 Again, we would not be seeking to say at this point for
6 the purposes of this investigation that we found out on
7 such and such a date X substance came out of Y pipe for
8 a month or a day or an hour. That's not the purpose of
9 this investigation.

10 Q Would it be important to know the manner
11 in which substances were being discharged from the
12 plant into the river in order to help you in your
13 study?

14 A It would be important to know that insofar as
15 that would lead you to look at an area of the river or
16 someplace else offsite that you might not otherwise
17 consider testing.

18 Q Again, this is not a criminal investigation.
19 Whether there is one going on is separate from this
20 issue. That would not be my responsibility.

21 The study that Mr. Staples is referring to and
22 that I am discussing now would be to characterize the
23 contamination of the river and to look at ways of
24 cleaning it up.

25 And we have very explicitly reserved in all of

1 our discussions and all of our agreements with Diamond
2 the right to go back against Diamond and any other
3 party or parties that we may feel we can show legally
4 responsible for the contamination of the river when we
5 decide what is appropriate to do with the river.

6 Q At this point has DEP reached any
7 conclusion about the liability of Diamond Shamrock
8 vis-a-vis the pollution of the Passaic River?

9 A We have not -- we have not reached any
10 conclusions. I would have to tell you after we
11 finished the study and determined what is necessary to
12 do with the river, Diamond Shamrock would certainly be
13 the first party that I sat down with because they
14 operated that facility at 80 Lister Avenue.

15 Q Have any of these Passaic River studies
16 included the sampling for the presence of DDT?

17 A I believe there has been some sampling for DDT.

18 Q Have you heard or has -- During the course
19 of the investigation into pollution at the 80 Lister
20 Avenue site and surroundings, would you have any
21 conversations with any former Diamond employees in
22 regard to mounds of DDT appearing in the Passaic River
23 while Diamond was operating its facility?

24 A I do not specifically recall any conversation
25 about mounds of DDT. I do recall generally

1 conversations with employees about a variety of
2 practices which might have moved contamination into the
3 river which is why we wanted to treat the river
4 separately and do more study of it.

5 Q And what were those practices that you
6 recall?

7 A Things from housekeeping practices, sloppy
8 housekeeping, to explosions, to the variety of pipes
9 and things going into the river.

10 Q When you went on to the site in 1983 --
11 you did go on to the site at some point in 1983?

12 A I have been on the site several times.

13 Q And that was prior to the putting on of
14 the tarp, is that correct?

15 A No.

16 Q You never went on before the tarp was put
17 on?

18 A No. After the site was secured, after the top
19 was on with protective clothing.

20 Q Fine. I have no problem with that. You
21 referred to -- in your earlier testimony as to the cost
22 that would have been involved if the State had to clean
23 up the property as compared to the costs that are
24 involved or that were involved in Diamond Shamrock
25 cleaning up the property, and you say they would have

1 been substantially more if the State had to clean it
2 up?

3 A Yes, I did.

4 Q Is it your testimony that the State has to
5 spend more money to do the same job that a private
6 individual would have to do?

7 A In some cases yes. And that has a lot to do
8 with the State's contracting and procurement mechanisms
9 that are required by law.

10 In particular, in the hazardous waste area, when
11 we want to send a contractor out, particularly on short
12 notice, there are rates specified in the contract which
13 has been publicly bid, and when we send someone out on
14 short notice we pay emergency rates.

15 So in the case on several of the activities,
16 remedial activities that took place here, I did have
17 specific knowledge that if we wanted to do something in
18 the next several days it is going to cost the State X
19 and it would have cost Diamond X minus Y because they
20 were not operating under the same contract we were.

21 Q Now, there was some testimony earlier
22 before about ECRA and the statute, what that is and how
23 that works.

24 Isn't it true that at some point after Dioxin
25 contamination and contamination after these other

1 chemicals were found at the site, that the present
2 owner of that site sold the property to Diamond
3 Shamrock, is that correct?

4 A You talking about the Marisol?

5 Q Yes.

6 A Yes, that is correct.

7 Q At the time that sale took place ECRA was
8 in effect, was it not?

9 A ECRA took effect in 1981 I believe.

10 Q And this sale took place sometime in 1984
11 or 1985, is that correct?

12 A Yes, it is correct.

13 Q And at the time that that sale took place,
14 ECRA was not triggered by that sale, is that correct?

15 A There is a specific letter I believe in the
16 documents we had produced in response to the subpoena.
17 I sent the letter to I believe counsel to Diamond
18 Shamrock.

19 They asked what the Department's position was
20 with respect to ECRA and we wrote back and took the
21 position -- the portions of ECRA contract had been
22 satisfied; they were in substantial compliance but ECRA
23 requires initial notice that property is going to be
24 transferred, requires sampling plan to determine the
25 extent of any contamination, requires a clean-up plan,

1 requires posting and financial assurances and we
2 basically took the position through the two consent
3 orders that ECRA had been complied with and so --

4 Q And yet Marisol, which was the owner at
5 that time of the property -- of the property and which
6 would have been responsible under ECRA for cleaning up
7 the property, that Marisol had no responsibility?

8 A State didn't take position Marisol had no
9 responsibility. We had a consent order with a
10 predecessor to Marisol under which they had agreed to
11 accept responsibility and post financial assurances.

12 We have very much reserved our rights against
13 all of the parties should that prove necessary to go
14 against anyone else to achieve this clean-up.

15 MR. CALOGERO: I have no further
16 questions.

17 MR. L. SHEFT: I do, sir.

18 THE COURT: Okay, Mr. Sheft.

19 CROSS-EXAMINATION BY MR. LEONARD SHEFT:

20 Q Mr. Catania, did I understand you to say
21 that when you entered into the civil settlement with
22 Diamond you discontinued your criminal investigation?

23 A I am not conducting a criminal investigation.

24 Q There was a criminal investigation being
25 conducted, was there not?

1 A What I indicated was that there were several
2 aspects of my investigation that I referred to the
3 Division of Criminal Justice for follow-up as is our
4 standard operating procedure.

5 Once we had the consent order executed,
6 particularly the second consent order, we ceased those
7 aspects of the investigation which may have produced
8 any further evidence of that nature.

9 Q I see. So that it was the settlement of
10 the civil action that resulted in the abatement of the
11 criminal investigation? Do I have it right?

12 A Well -- I can't tell you the criminal
13 investigation has been abated or not. I'm not in
14 charge of that. If someone is doing that, they're
15 doing it under their own jurisdiction and authority.

16 Q But while you had some charge of this
17 there was a criminal investigation?

18 A There were aspects of this investigation that I
19 referred to the Division of Criminal Justice.

20 Q There were aspects of this case that
21 connoted some form of criminality?

22 A That raised a question of whether or not that
23 behavior existed.

24 For example, there was a -- one of the
25 workers -- in fact I think it was corroborated by

1 Diamond as well as former workers -- indicated to me
2 when we asked where's the waste from this facility been
3 going, and with respect to solid hazardous waste we
4 wanted to track down who the waste hauler had been.

5 We were given a name. I believe the name was
6 Nicholas Toscano. We tried to track him down. We
7 requested the assistance of the Division of Criminal
8 Justice in doing that to see if we could interview this
9 person to see if anything illegal had taken place.

10 We subsequently found out Mr. Toscano had died.
11 We located a death certificate in the county records in
12 Newark and that went no further. So there were aspects
13 of what we were looking into, and our standard
14 operating procedure required whenever we're looking
15 into something that has any implications of criminal
16 behavior we refer it to the Division of Criminal
17 Justice.

18 Q Did anybody ever tell you Mr. Toscano was
19 given unmarked containers of Dioxin contaminated carbon
20 to haul away?

21 A I do not specifically recall that.

22 Q Is that criminal?

23 A Would have to first ask you when that occurred.
24 There's a number of questions I would have to ask you.

25 Q '69 to 1970. Was it criminal then?

1 A What specifically are you asking is criminal?

2 Q The giving -- the generation and
3 transportation of Dioxin contaminated carbon in
4 unmarked 55 gallon drums?

5 A Transportation in and of itself or
6 transportation to a particular place?

7 Q I don't know where it went.

8 A Well, my understanding of the laws is that as of
9 1970 solid waste, which includes hazardous waste,
10 hauler had to be registered with the Department of
11 Environmental Protection.

12 Prior to that time there were some local
13 statutes, local regulations of the Department of
14 Health. So I don't think I can tell you based on the
15 facts that --

16 Q Okay.

17 A -- accepting that kind of material for
18 transportation in 1969 would have been a criminal act.

19 Q Speaking of unlabeled drums, when you
20 examined the site, did you find any 55 gallon drums or
21 any size drum on the site with contents that were
22 unlabeled?

23 A Yes, there were hundreds of such drums.

24 Q Really. Did you ever find out what was in
25 these hundreds of such drums unlabeled?

1 A After extensive sampling we did.

2 Q Would you tell us?

3 A There's a whole variety of priority pollutants
4 as the Record of Decision indicates that were in the
5 drums.

6 Q And did you find out whose product this
7 was?

8 A In some cases yes; in some cases it was drums
9 that were filled when Harisol and their employees
10 started to clean the site after they acquired it from
11 Diamond Shamrock. In some cases it was materials that
12 were there before that time.

13 Q Diamond Shamrock product?

14 A In some cases I believe, yes.

15 Q All contaminants and pollutants?

16 A You ask me did all the drums have contaminants
17 or pollutants or was everything in the drum
18 contaminants and pollutants?

19 Q Whichever you like.

20 A There were plenty of priority pollutants and
21 contaminants extensive throughout the site in the drums
22 we sampled.

23 Q And the drums were unmarked?

24 A Most of the drums were unmarked.

25 Q Just one or two more questions please.

1 You've been very kind.

2 In order to evaluate this Diamond site, did you
3 contact any other manufacturers of 2,4,5-T to determine
4 the nature and quality of the pollutants that one could
5 expect to find on such a site?

6 Did you get in touch with any other
7 manufacturers to determine what kind -- qualify or
8 quantify the nature of the pollutants that would
9 normally be found of a manufacturing site of 2,4,5-T?

10 A We didn't contact other manufacturers. Our
11 research people did do research and contacted
12 scientists at EPA and some universities doing Dioxin
13 research about those issues.

14 We also attempted to find out whether or not we
15 could fingerprint the Dioxin to find out whether in
16 fact the Dioxin we were finding six blocks away was the
17 Dioxin that was onsite.

18 Q And did you find out you could?

19 A There was some sampling done and a gentleman
20 named Chris Rapke, who is an academic in Sweden, and we
21 sent some of our samples to Mr. Rapke for analysis
22 because he was working on an analytical method to try
23 to fingerprint Dioxin.

24 To the best of my knowledge at this point that
25 has not been done with any precision.

1 Q I see. Thank you, very much.

2 MR. FAVETTA: I have a few questions.

3 Antonio Faveatta, AIG group of companies.

4 CROSS-EXAMINATION BY MR. FAVETTA:

5 Q Do you have the Record of Decision before
6 you?

7 A I do.

8 Q On page 28 there's a table with Cost
9 Summary of Alternatives. Would you turn to that
10 please?

11 THE COURT: What document are we looking
12 at now?

13 MR. FAVETTA: ROD. P-84.

14 MR. FALLS: What page.

15 MR. FAVETTA: Page 28. Table II, Cost
16 Summary of Alternatives.

17 A Yes.

18 Q Am I correct in stating that Alternative
19 III is the alternative recommended by the ROD?

20 A Yes, I believe that's true.

21 Q Okay. The figure that appeared, the
22 dollar figure that appears under "Capital Cost
23 Estimate," does that include costs that have been
24 expended to date as part of total capital cost
25 estimate?

1 A I believe it does not.

2 Q Can you tell me whether it includes the
3 moneys previously referred to as part of the research
4 consent order which was part of the supplemental
5 administrative consent order?

6 A It does not. Those are wholly outside the scope
7 of the Record of Decision or the other two consent
8 orders.

9 Q And with respect to the final column
10 Operating -- "Annual Operating and Maintenance Costs"
11 there appears a figure of \$261,000.

12 Can you tell me on what that estimate is
13 predicated on?

14 A What it's pred -- I assume that is the estimate
15 for what it would cost to maintain the cap, to operate
16 the ground water monitoring wells, to maintain the
17 slurry wall, to control access to the site, to maintain
18 the fences, things of that nature.

19 Q How long will the ground water have to be
20 maintained, as you put it?

21 A I do not have an answer to that. I don't think
22 anyone does at this point.

23 MR. FAVETTA: Thank you. I have no
24 further questions.

25 MR. PIERCE: Couple of brief questions.

1 My name is George Pierce.

2 CROSS-EXAMINATION BY MR. PIERCE:

3 Q I believe, Mr. Catania, you testified that
4 Brady Steel had purchased some scrap steel from the 80
5 Lister plant, is that correct?

6 A Brady Iron and Metals.

7 Q Brady Iron and Metal. Can you tell us
8 approximately when that occurred?

9 A I do not recall a specific date. What I do
10 remember is that it was sometime during the Marisol
11 clean-up of the property which I believe would have put
12 it in the 1980 to '81 time frame. And I personally
13 with Mr. Brady went through business records on his
14 site and found bills of lading showing that X number of
15 tons of scrap, iron and other metals had been purchased
16 from Marisol and moved to 55 Lockwood Avenue.

17 Q So it wouldn't have been any time earlier
18 than 1980?

19 A Well, I asked Mr. Brady when I personally
20 interviewed him whether or not he had purchased other
21 materials, and he said he routinely purchased scrap
22 materials from all of the chemical companies operating
23 in the area. And while he didn't -- my recollection is
24 while he did not have any specific business records or
25 recollection of another transaction, he said it was

1 entirely possible.

2 Q But specifically from the 80 Lister plant,
3 any purchases from 80 Lister wouldn't have been prior
4 to say 1980?

5 A I think that would fall in the category it could
6 have been possible. There was no business records to
7 that effect. He did not have them back terribly far.

8 Q Was there any indication that he purchased
9 anything from the time when Diamond was operating the
10 plant?

11 A No specific indications. Only a possibility.

12 MR. PIERCE: No further questions. Thank
13 you.

14 THE COURT: Anything else?

15 MR. MILLER: Charles Miller representing
16 Royal Indemnity.

17 THE COURT: Okay. Come up, Mr. Miller.

18 CROSS-EXAMINATION BY MR. MILLER:

19 Q Sir, I have some questions concerning the
20 first testing at the site. I believe you said that DEP
21 was involved in ongoing -- an ongoing research project
22 to detect Dioxin around the State? A That is correct.

23 Q And when did that project begin?

24 A It began in the spring of 1983 when we had
25 received and reviewed the EPA Dioxin report that came

1 out. I believe the October, previous October of 1982
2 this facility was listed in the first category of
3 facilities that were recommended to be tested.

4 Q Prior to the research project in the
5 spring of 1983, had anyone contacted the owners of the
6 sites listed on that list?

7 A Anyone from my agency?

8 Q Yes.

9 A To the best of my knowledge, no.

10 Q Do you know if anyone not from your agency
11 had contacted them?

12 A I assume EPA would have had some contact in
13 preparing the report just to verify some of the
14 information that was in the report.

15 Let me ask you a clarifying question so I'm
16 giving good information. When you say the owners of
17 the site, you mean the current owners or talking about
18 Diamond?

19 DEP had some ongoing activities with Marisol as
20 that site was being purchased and cleaned up, and my
21 understanding is it was Mr. Nurger who is the president
22 of Marisol, it was his intention to start a chemical
23 facility there.

24 We certainly had some interaction with him. And
25 it would have been a site that we had some contact

1 with.

2 With respect to Dioxin, no. The first that we
3 would have been involved with the Dioxin would have
4 been the spring of '83 when we started our research
5 project.

6 Q And when was it that your agency first had
7 contact with Diamond Shamrock concerning the site?

8 A First contact would have been one of the very
9 first days of June of '83 when I placed a call to
10 Diamond Shamrock and talked with Mr. Worthington and he
11 came up and met with me several days after that.

12 MR. MILLER: Thank you.

13 THE COURT: Anything else? No one else
14 over on the defense side.

15 MR. FALLS: I have no redirect.

16 THE COURT: We'll excuse Mr. Catania then?
17 Fine. You're excused.

18 MR. ENGLE: Richard Engle from New Jersey
19 Division of Law. I just want to clarify one
20 thing before we leave and that is, assuming we
21 can be excused, I believe a subpoena has been
22 issued to Mr. Catania by someone on the defense
23 side with regard to testimony for next week.

24 I think we discussed this during the
25 break, and I want to clarify there is no need

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Q What was your next job --

THE COURT: Let's just stop at this point, please. It's 12:30. We'll break for lunch and resume at 1:30.

* * * *

C E R T I F I C A T E

I, DEBORAH A. NUTTING, an Certified Shorthand Reporter of the State of New Jersey, certify the foregoing to be a true and accurate transcript of my stenographic notes.

Deborah A. Nutting
DEBORAH A. NUTTING
CERTIFIED SHORTHAND REPORTER
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Dated: Sept 23, 1988