

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WASHINGTON STATE DAIRY FEDERATION,)
the WASHINGTON FARM BUREAU, PUGET)
SOUNDKEEPER ALLIANCE, COMMUNITY)
ASSOCIATION FOR RESTORATION OF THE)
ENVIRONMENT (CARE), FRIENDS OF) PCHB No. 17-016(c)
TOPPENISH CREEK, SIERRA CLUB,)
WATERKEEPER ALLIANCE, CENTER FOR)
FOOD SAFETY, and RESOURCES FOR)
SUSTAINABLE COMMUNITIES,)
)
Appellants,)
)
vs.)
)
STATE OF WASHINGTON, DEPARTMENT OF)
ECOLOGY,)
)
Respondent.)

HEARING
VOLUME VII
June 6, 2018
Olympia, Washington
Pages 1380 through 1512

Taken Before:

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1 BE IT REMEMBERED that on Wednesday,
2 June 6, 2018, at 1111 Israel Road SW, Olympia,
3 Washington, at 9:02 a.m., before ANDREA L. CLEVINGER,
4 CCR, RPR, the following proceedings were had, to wit:

5

6 <<<<<< >>>>>>

7

8 (Board not present.)

9

10 JUDGE FRANCKS: We are Day 7 of
11 PCHB 17-016 C, and the board is not present. This is a
12 statement that Mr. Tebbutt would like to make regarding
13 videotaping.

14 MR. TEBBUTT: Yes. In response to the
15 board's refusal to allow Friends of Toppenish Creek to
16 videotape, Friends of Toppenish Creek today renews its
17 request and for the following reasons -- and this is a
18 quote from my client -- "This case has vital, as in life
19 giving, importance for the people of the Lower Yakima
20 Valley, for the most recent round of well testing found
21 that the water in 20 percent of domestic wells was unsafe
22 for drinking.

23 "The impacted people in Yakima County are the
24 working poor. We do not have the resources to travel to
25 Olympia and spend ten days participating in this

1 important discussion.

2 "As illustration, 75 percent of children in the
3 impacted area are eligible for free or reduced school
4 lunches. In the Yakima diocese, there are more masses in
5 Spanish than there are in English.

6 "5 percent of the children in the city of Yakima are
7 homeless.

8 "And one way to involve and inform the people of the
9 Lower Yakima Valley is to videotape the closing arguments
10 and make that video available at the impacted counties.
11 Thank you."

12 JUDGE FRANCKS: Okay. We are off the
13 record.

14 (Recess from 9:03 a.m. to
15 10:00 a.m.)

16 JUDGE FRANCKS: First of all, chess
17 clock, I forgot to get the time yesterday.

18 Did anybody happen to write it all down?

19 MS. BARNEY: We got ours.

20 JUDGE FRANCKS: Okay. Tell me what
21 yours was.

22 MS. BARNEY: Call it an hour.

23 JUDGE FRANCKS: And am I right, that
24 they cleared and so you don't have it from yesterday?

25 MS. MATSUMOTO: This was blank. Yeah.

1 I don't know that we actually even --

2 MS. NICHOLSON: I think we forgot to
3 use it entirely.

4 JUDGE FRANCKS: That's fine.

5 MS. MATSUMOTO: But if you would like
6 us to start today --

7 JUDGE FRANCKS: Yeah. Let's do it for
8 the rest of the witnesses.

9 Okay. Secondly, so yesterday there was the email to
10 the EPA from Jay Gordon that I didn't allow. I'd like to
11 mark it just so we keep track of what's going on.

12 So what's the next number for PSA?

13 MR. TEBBUTT: I think we're 82.

14 JUDGE FRANCKS: A-82. Okay. I'm
15 marking that as A-82.

16 All right. Oh, then we had the Reck dep, whatever
17 that was.

18 MS. NICHOLSON: Right. These are the
19 corrections to Bill Reck's deposition.

20 JUDGE FRANCKS: Okay. And they're in
21 an email; correct?

22 MS. NICHOLSON: They're in an email,
23 yes.

24 If I could approach, do you want to see them?

25 JUDGE FRANCKS: Yes. Yes. Why don't

1 you do that. What I'm thinking is, is anything
2 three-hole punched because I think what we might want to
3 do is put it in the notebook.

4 MS. NICHOLSON: We have a three-hole
5 punch, so we can do that.

6 JUDGE FRANCKS: And we don't have to
7 do that right now, but let's put one in the notebook just
8 behind his deposition transcript.

9 MS. NICHOLSON: Okay. So you just
10 want to make it a part of -- it's I-6 exhibit?

11 JUDGE FRANCKS: Yes. I think that's
12 the way to go.

13 MS. NICHOLSON: And could -- do you
14 want this one without a three-punch?

15 JUDGE FRANCKS: Yes. Why don't you
16 give that to me. And I'm doing that because I think what
17 we might want to do for the electronic exhibits is have
18 Lynn scan that in with --

19 MS. NICHOLSON: That makes sense.

20 JUDGE FRANCKS: So there we go. All
21 right. Those are all my preliminary items.

22 MS. NICHOLSON: We had one item to
23 make on the record about yesterday's offers of proof.

24 JUDGE FRANCKS: Yes.

25 MS. NICHOLSON: If I could make a

1 statement, we would like to object to the alleged offers
2 of proof. We object to the substance of counsel's
3 representation of what was evidence and testimony would
4 have been.

5 The representation was unsworn, inaccurate, and
6 improper. And the mode of receiving an offer of proof is
7 unreliable and cannot be properly considered.

8 JUDGE FRANCKS: Okay. All right. So
9 are we then ready to begin?

10 And, Ms. Barney, you have witnesses for us today?

11 MS. BARNEY: Correct.

12 JUDGE FRANCKS: Okay. Great.

13 MS. NICHOLSON: Did you want us to
14 rest the case and preserve our right for rebuttal
15 witnesses?

16 JUDGE FRANCKS: Why don't you do that
17 when the board comes in.

18 MS. NICHOLSON: Okay.

19 JUDGE FRANCKS: We'll start with you
20 and then we'll -- all right. All right. I will be back
21 with board. So we're off the record. Be back on in a
22 minute.

23 (Pause in the proceedings.)

24 (Board members enter.)

25 JUDGE FRANCKS: Have a seat. Let's go

1 on the record.

2 And we are here on June 6th in the dairy federation
3 case PCHB 17-016C. And we left off, I believe, at the
4 end of the witnesses for the dairy federation.

5 So, Ms. Nicholson?

6 MS. NICHOLSON: We rest, reserving our
7 right to call the rebuttal witnesses, if necessary.

8 JUDGE FRANCKS: Okay. Great.

9 So, Ms. Barney, do you have witnesses for us?

10 MS. BARNEY: I do, Your Honor.
11 Ecology would call Bill Moore.

12 JUDGE FRANCKS: The court reporter
13 will swear you in.

14
15 WILMONT H. MOORE, having been first duly sworn
16 by the Certified Court
17 Reporter, testified as follows:

18
19 DIRECT EXAMINATION

20 BY MS. BARNEY:

21 Q Good morning, Mr. Moore. Would you please say and state
22 your name for the court reporter and spell your name for
23 the court reporter, please.

24 A My legal name is Wilmont, W-i-l-m-o-n-t, H., M-o-o-r-e.
25 I go by the name Bill.

1 Q Could I ask you, please, to turn to, in the evidence
2 books in front of you, to R-26.

3 Do you recognize this document?

4 A Yes. This is my resume.

5 Q Okay. And you provided that to me prior to your
6 testimony here?

7 A Yes, I did.

8 Q Let's talk about your experience a little bit.

9 First, what is your educational background?

10 A I have a bachelor's of science in chemical engineering
11 and also extensive coursework in biology as well as
12 geology.

13 Q And what was your -- specifically was your degree in?

14 A Chemical engineering.

15 Q And are you licensed in the state of Washington?

16 A I am. I am a licensed professional engineer in the state
17 of Washington.

18 Q When were you first employed by the Department of
19 Ecology?

20 A January 25th, 1988.

21 Q And what was your first position with the department?

22 A My first position with the department was as a staff
23 engineer, providing -- doing -- basically writing
24 permits.

25 Q And can you tell us a little bit how you progressed

1 through the agency in terms of employment and
2 responsibilities.

3 A Sure. I -- for the first few years, I was writing
4 general permits. I also wrote the current WAC for the
5 general permits -- involved in writing the first general
6 permits that we -- the agency issued.

7 After a while, I was promoted to become a unit
8 supervisor. I was a unit supervisor for several years,
9 where I supervised a group of probably between eight and
10 twelve people over the years.

11 After that, I was special assistant -- special,
12 yeah, assistant, I guess, to the program manager, where I
13 did -- was given responsibility for writing our
14 stormwater permits. Led a team doing that work.

15 And then in nineteen -- no -- 2008, I was assigned
16 responsibility to lead the program development services
17 section, which is a group of -- at Department of Ecology
18 of about 35 or so folks, writing most of the general
19 permits that the agency issues.

20 Q And are you currently an Ecology employee?

21 A I am not currently an Ecology employee.

22 Q And when did you retire from Ecology?

23 A I retired from Ecology in January. Last day of working
24 with Ecology was in late December.

25 Q And did Ecology hire you back as a rehired employee to

1 participate in the hearing today?

2 A No.

3 Q And did I issue a subpoena to you for your appearance?

4 A Yes.

5 MS. BARNEY: Thank you. Ecology at
6 this time would move for the entry of R-26.

7 JUDGE FRANCK: R-26 is admitted.

8 (Exhibit No. R-26 admitted.)

9 Q (By Ms. Barney) So you mentioned being -- becoming the
10 section manager of the program development service.

11 Could you tell us a little bit more about what that
12 section of Ecology in the water quality program does?

13 A As I mentioned earlier, it's a section now with three
14 units, each about ten to twelve people. Total section
15 size is about 35 or so folks when I left.

16 The responsibilities for that section are to write
17 and issue, as I mentioned, I think, all but two of the
18 general permits that the water quality program issues.
19 So that's about 17 or 18 permits. I've lost track.

20 That section also is responsible for doing
21 rulemaking related to permitting, developing the permit
22 writer manual for writing individual permits. Comes out
23 of that group. Our stormwater manuals come out of that
24 group. A lot of technical assistance comes out of that
25 group.

1 Let's see.

2 Q Since you've been talking about general permits, what are
3 general permits?

4 A General permit is a single permit that the agency will
5 develop to cover multiple dischargers. In some cases,
6 it's thousands. For example, for the construction
7 stormwater permit, there's probably close to 2,000
8 permittees at least covered by that permit.

9 So it's a single permit that covers multiple -- a
10 number of facilities in lieu of writing individual
11 permits, which is a custom permit for a single -- you
12 know, for each single facility.

13 Q And why does Ecology issue general permits?

14 A Administratively, it's a lot simpler. Not simpler, but a
15 lot more streamlined. It takes, for us to write a
16 general permit, probably close to a year to write or
17 issue -- reissue a permit -- general permit.

18 That's about the same amount of time maybe to write
19 a single individual permit. And so if you think about if
20 we're going to be writing a thousand construction
21 stormwater permits, we just administratively don't have
22 the staff to be able to do that.

23 There are other advantages just besides the
24 administrative streamlining. I think one advantage for
25 the regulated community, people that the permits apply

1 to, is their permit terms and conditions are known
2 upfront. You can -- you can go right directly to our
3 website, and they're right there. It's much more
4 transparent.

5 It means that generally we're only going to argue
6 about what the permit terms and conditions are hopefully
7 only once when we write that permit, as opposed to
8 hundreds of times if we're writing numerous individual
9 permits.

10 Q Are general permits specific to a sector of industry?

11 A They can be.

12 Q And in terms of -- does that provide the agency with
13 efficiencies with regards to addressing a particular
14 sector?

15 A Yes. It does provide significant advantages, as I said
16 earlier.

17 Q So are CAFO permits different than other types of general
18 permits that Ecology issues?

19 A No, not really. I think that in some respects, the CAFO
20 permit is -- in some respects, I think the industry
21 that's being regulated is a lot more uniform under the
22 CAFO permit compared to some of our other permits.

23 For example, the industrial stormwater permit where
24 that might have an auto recycler covered by it and
25 Boeing. So you've got very wide range of facilities

1 being regulated by the industrial stormwater permit with
2 a wide range of capabilities of the folks that we're
3 regulating.

4 Whereas, the CAFO -- as an industry, the CAFO, which
5 is largely dairies, is a lot more homogeneous, a lot more
6 uniform.

7 Q So these -- were these CAFO permits issued while you were
8 still an Ecology employee?

9 A Yes.

10 Q And did you have responsibilities related to the
11 development of these permits?

12 A Yes. The permits that's -- John Jennings, who testified
13 earlier here, is a staff person in the section that I
14 used to supervise, and he and I worked very closely on
15 developing the permits.

16 Q And when did work on these CAFO general permits under
17 appeal begin, approximately?

18 A Oh, shoot. A long, long, long time ago. I think the
19 real push to get them issued, I think, was probably in
20 late 2013, but I'm not absolutely certain.

21 Q Okay. Did you receive any policy direction from Ecology
22 director on the permits?

23 A No. The only thing I got from the director was issue --
24 he wanted the permits issued yesterday.

25 Q How often did you meet with the director regarding the

1 permits?

2 A Oh, shoot.

3 Q Approximately.

4 A Between six -- half a dozen, dozen times.

5 Q And at any of those meetings, did she issue any specific
6 requirements or direction with regard to what should be
7 in the permit, or not?

8 A She did not provide me -- did not specify any direction
9 in terms of the permit content.

10 Q Did she provide anything with regard to how she viewed
11 the permits?

12 A She wanted the permits issued. She was a little -- at
13 times, I think, a little frustrated that they weren't
14 being issued more quickly, but that was the only
15 expression, the only opinions that I got from the
16 director.

17 Q Okay. Thank you.

18 So what sort of process did you and Mr. Jennings use
19 for developing the permits and decision-making within the
20 permits?

21 A The CAFO permit was not unique in this, in that we -- the
22 program and the agency would form permit development
23 teams, mostly their internal staff, particularly, if our
24 regions -- we have four regions in the agency -- if the
25 agencies were going to have an involvement in that

1 permit.

2 So they needed to have a sense of full ownership
3 around that, and typically we'd include staff from the
4 regions on these permit development teams as well as some
5 other sections of the program.

6 Generally tried to work by consensus around most
7 development teams. Those teams would work with -- tackle
8 different issues associated with development of the
9 permit.

10 There's usually a lead permit writer. In this case,
11 that was John Jennings who was responsible for kind of
12 collecting the information or the differences of
13 opinions, addressing those, and writing that --
14 documenting that in both writing the permit and the
15 factions.

16 Q Approximately how many people would be on one of these
17 development teams, specifically for the CAFO permit?

18 A For the CAFO permit, let's see. Probably five or six
19 people.

20 Q And you mentioned that the group tried to achieve
21 consensus on decision-making.

22 Did everyone always agree?

23 A No. I'd be disappointed if they did.

24 Q Why would that disappoint you?

25 A Well, you've got a large -- Ecology has got a diverse

1 group of people that works there that bring diverse
2 opinions to the project at hand.

3 And they have -- folks have different strengths
4 around that, and it's not uncommon to have differences of
5 opinions.

6 And, actually, that's why we use the permit teams,
7 is so we have -- we can get those differences of opinion
8 out there and develop a better permit as a result.

9 Q So how would you manage within the permit team or your
10 decision-making process? How would you manage those
11 differences of opinion?

12 A I think first step is to resolve to try and address them
13 at the staff level between the permit writer or the
14 different folks writing on the team.

15 If that's not successful, and folks feel strongly
16 about it, that issue usually gets elevated. It might
17 bring, say, regional folks, if they've got a strong
18 position on something.

19 They might bring it to their section manager, which
20 would be Mike, my counterpart that's worked at my level,
21 and the two section managers would try and work it out.

22 If that's not possible, if we're still sort of at
23 loggerheads, if you will, then the next step is to bring
24 it to either the program manager for a final decision
25 and/or to our program management team, which is -- is a

1 group of folks who are, you know, the section level,
2 which is what position that I had, a group of -- for the
3 water quality program consisting probably of, oh, 15 or
4 so people.

5 Q Do you recall if there were issues with these CAFO
6 permits that did go to the -- to the program management
7 team?

8 A Yeah. There were a couple -- there was one issue about
9 lagoon liners did go to the program management team at
10 one point about how we were going to deal with those for
11 discussion.

12 Then I think that's -- that was the one issue
13 that -- as I recall, that went to the program management
14 team.

15 Q And everything else was resolved at those -- at the more
16 preliminary level that you described before reaching that
17 team?

18 A Yeah. There was -- everything else was resolved either
19 at that level or between the section managers.

20 Q Okay. And as one of the staff who worked most closely on
21 the permits, what were the objectives for the CAFO
22 permits on their renewal?

23 A I had, going into this, two things that I wanted that I
24 felt were important to address. I guess they were two
25 deficiencies that I felt that were associated with the

1 earlier 2006-'7 permit, which was that permit was largely
2 a reactive permit. Meaning, we had to have a documented
3 surface water discharge before anybody could get covered
4 by that permit.

5 That document at surface water discharge is
6 cumbersome. It's basically reactive. You've already got
7 a problem. Now you're going out, trying to fix it.

8 The other thing we're trying to address was the --
9 kind of the administrative doom loop associated with the
10 old permit.

11 The old permit required, as part of the application,
12 that the applicant submit their nutrient management plan
13 for our review and approval once it's approved. Then
14 they could get covered.

15 Well, these folks generally didn't want to be
16 covered, so there wasn't much of an incentive to submit
17 an approvable nutrient management plan.

18 And so my two objectives in reissuing the permit was
19 to cover more facilities and have a more proactive permit
20 by addressing and have that permit address both
21 discharges to surface water as well as groundwater and to
22 address the administrative doom loop that -- of the
23 nutrient management plans.

24 Q So let's talk about those nutrient management plans.

25 What change of approach did you take in the permits

1 with regard to those to get rid of the doom loop?

2 A So I guess I should probably describe a little bit about
3 the doom loop. Again, you would get a nutrient
4 management plan, and it would come to us.

5 Actually, in illustration, we had one facility that
6 we were -- had a document surface water discharge. We
7 sent them a letter, saying, "You need to apply for the
8 permit because you have this discharge."

9 Didn't hear anything back from them. I think we may
10 have sent them a second letter. Still nothing. Ended up
11 issuing administrative order to that facility.

12 Still was not successful in getting it and ended up
13 having to issue a penalty for failure to comply with the
14 order.

15 All told, that whole process took over a year before
16 we were able to get an approvable nutrient management
17 plan and that -- tremendous amount of staff time around
18 that.

19 So my challenge to folks was, we're reviewing and
20 approving these nutrient management plans. Let's put
21 the -- again, we're approving them against some
22 yardstick, you know, something that is good enough.
23 Let's put that yardstick directly into the permit.

24 Q And where did the yardstick come from? What was the
25 source of the yardstick?

1 A The source of the yardstick, when we -- we followed the
2 minimal elements of the nutrient management plan that
3 came out of EPA's -- EPA rules, but we basically -- we
4 wrote the nutrient management plans and incorporated
5 directly into the permit.

6 Administratively, that kind of eliminates the doom
7 loop. I think it's a lot more transparent doing it that
8 way. Certainly it's -- administratively, for us, in
9 terms of our ability to cover folks, it's a lot more
10 efficient.

11 Q Why do you consider it more transparent?

12 A I guess having -- we've heard different numbers of
13 folks -- but potentially 250 or so separate nutrient
14 management plans, which become the enforceable part.

15 If they are submitted individually by each
16 individual producer and each one of them has to be
17 reviewed and approved by Ecology and then go out for
18 public review and comment, which is the process for that,
19 and then -- so that means the public now has 250 or so
20 nutrient management plans that they're going to have to
21 keep track of, potentially comment on.

22 Whereas, instead now there's one permit with one set
23 of practices that's identified directly in the permit.
24 And it's available to anybody, meaning that that permit
25 is up on the website. You can take -- download it. You

1 know it's not going to be modified based upon practices
2 that are unique to a certain farm.

3 Q And are there other examples of Ecology taking this
4 approach with general permits?

5 A Yeah. I think this -- yes. This goes back -- I think it
6 was late '90s, 1990s, the EPA adopted the Phase 2
7 stormwater rules, which had the same kind of model in it
8 that they had for the CAFO.

9 And the CAFO rules which basically were telling --
10 in that case, it was six minimum measures -- that a local
11 government was required to develop a stormwater
12 management program that contained elementally six
13 measures, and that was -- the idea was that each one of
14 those would be unique.

15 We realized in Washington our ability to review and
16 approve those was not doable, and we essentially end up
17 issuing stormwater permits, incorporated them directly
18 into the minimal requirements into the permit itself.

19 Q And do you consider that an -- that that was successful
20 for the Phase 2 permits?

21 A I think it was considered -- yes. I know that a lot of
22 other states were struggling with figuring out how to
23 administratively implement the Phase 2 rules.

24 We were a little slower than most states getting our
25 first permit issued. Folks came by -- and certainly a

1 lot of other states now are emulating the same process
2 that we took -- we did.

3 Q So how do the Manure Pollution Prevention Plans fit into
4 having the standards of the yardstick in the permit
5 itself?

6 A I guess the best way to describe it is, the Manure
7 Pollution Prevention Plan is the site-specific kind of
8 documentation on how that facility is going to comply
9 with the permit.

10 Q Again, is there another analogous type of document that
11 you have experience with in the general permits?

12 A As I said -- mentioned earlier, stormwater permits, have
13 them developing stormwater management programs.

14 It's a jurisdiction specific plan on how they're
15 going to comply with the permit. Similarly, most of our
16 stormwater permits have that same kind of thing, for
17 example, Stormwater Pollution Prevention Plan under the
18 industrial stormwater permit or the construction
19 stormwater permit.

20 Q Are those what's known as SWPPPs?

21 A Yes.

22 Q Did EPA review the CAFO permits before Ecology issued
23 them?

24 A Yes. We're -- as part -- well, let me first -- EPA did
25 review the permits.

1 As part of writing and issuing general permits, we
2 were required, as part of our delegation agreement with
3 EPA, to provide EPA with our -- all of the draft permits,
4 the ones that go out for public review and comment.

5 EPA has an opportunity to look at those and
6 evaluate, see at that point, and then in addition, we are
7 required to provide EPA with the proposed final permit,
8 meaning the permit that is just about ready to be signed,
9 if EPA wants to look at that permit before we issue it.

10 Q And did EPA have comments for Ecology on the proposed
11 permit?

12 A EPA did have comments on the proposed permit.

13 Q Was some of it related to how Ecology incorporated the
14 nutrient management plan?

15 A Yes. They were -- it took a fair amount of -- there was
16 some back-and-forth because we were changing the model or
17 the paradigm that EPA was used to around that.

18 Q Did EPA then agree with Ecology's approach?

19 A EPA understood Ecology's approach, and ultimately the
20 EPA -- it endorsed it. They did not object to our
21 permits being issued.

22 Q Thank you.

23 You have attended the hearing in this matter from
24 two weeks ago and then yesterday and today; correct?

25 A That's correct.

1 Q So I'd like to ask you some specific questions about some
2 of the issues that were raised during that time and look
3 for your response on Ecology's position on some of these
4 issues.

5 The first one would be: Why didn't Ecology include
6 groundwater monitoring in these permits?

7 A I guess the first and foremost reason is that I looked at
8 groundwater monitoring as being kind of looking in the
9 rearview mirror.

10 You're getting a sense of what's -- what is --
11 what's occurred at that site or in that area, assuming
12 you've got the wells set up and not what's necessarily
13 happening at that specific time.

14 You heard a lot of testimony here about, you know,
15 residual soil nitrates in soils, in the soil column, and
16 so on. That was part of the confounding factor that we
17 looked at, we considered.

18 It takes a fair amount of expertise to site a
19 groundwater monitoring well. It's not a simple thing to
20 do that work. It's -- then there are some practical
21 limitations in that in terms of making sure that what
22 you're monitoring with your wells and so on is, in fact,
23 the activity that you're interested in addressing.

24 In many cases, you heard testimony yesterday about
25 how these -- a lot of the facilities that the permit

1 covered, dairies and so on, are kind of a patchwork of
2 different fields in different areas.

3 And so the idea of being able to set up -- it's
4 not -- they're not homogeneous facilities necessarily.
5 In other words, the production area may be one place, but
6 you have fields that are, you know, dispersed.

7 And I think one of the other big challenges is --
8 particularly with respect to fields is that in many cases
9 producers will -- are not using the same fields from year
10 to year. They may be leasing fields and so on.

11 And then the ability to invest in putting in wells
12 on leased fields, for example, does not make sense
13 because you may not have access to that field that year,
14 and in some cases it may not be allowed -- may not be
15 permitted associated with -- as part of the lease.

16 Q So do you still agree with not including groundwater
17 monitoring in the permits?

18 A Yes, I do.

19 Q Do you believe that the permits are protective of
20 groundwater quality without groundwater monitoring?

21 A Yes, I do. Groundwater monitoring doesn't -- it's
22 monitoring. It's not an action. It's a feedback loop,
23 and I think that we've got other feedback loops in the
24 permit that are -- do a better job of that.

25 Q Could you give us an example of one of those.

1 A The soil testing is -- and the fall soil testing is part
2 of why -- I think that gives immediate feedback on how
3 well they're managing the nutrients.

4 Q Okay. Do the permits include surface water monitoring?

5 A They do in a -- I will include within that visual
6 monitoring, yes.

7 Q Could you explain that a little more.

8 A These permits, I guess, are pretty close to being a zero
9 surface water discharge permits. Certainly the
10 State-only permit does not authorize any discharges to
11 surface waters at all. And the combined permit has very
12 limited times when a surface water discharge could occur.

13 We view -- I view the surface water discharge
14 analysis to a spill, in that you don't -- we have, in
15 many of our permits, requirements that they do visual,
16 for example, for oil spills and things like that, rather
17 than going out and taking samples.

18 Visual -- this is -- it's sort of an on/off
19 question. Is there a discharge out of that pipe or out
20 of that ditch into the receiving water? If there is that
21 discharge, then, first, all cases under these permits,
22 that's the permit violation.

23 Q Okay. And do you still agree with not including a
24 requirement for, say, monitoring of discharges off of a
25 CAFO?

1 A If by "monitoring" you're suggesting going out there and
2 taking a sample and having analyzed, I still don't -- I
3 don't feel that that's -- that's -- I don't feel it's
4 necessary to ascertain compliance.

5 Q Okay. And you were here for Ms. Joerger's testimony?

6 A Yes.

7 Q And do you recall that she showed some photographs and
8 described situations she's observed?

9 A Yes.

10 Q Would those types of potential discharges that she
11 described be authorized by these permits?

12 A From what she described, none of those discharges would
13 be authorized.

14 Q I'm going to ask you to turn to the permit, which is
15 Exhibit R-1, and I'll ask you to turn to Page 22, which
16 would also be 22 in the PDF.

17 A Okay.

18 Q I want to look at the emergency winter land application
19 section there.

20 Can you tell us what this permit condition is
21 designed to address?

22 A This is -- it's about emergency winter land application
23 of manure, and what -- the reason this condition is even
24 in the permit is acknowledgment that we, in this permit,
25 placed restrictions on when and how much manure can be

1 applied by the producers or by the folks covered by the
2 permit.

3 I think -- from my perspective, I think there was a
4 very real probability that there's going to be a number
5 of folks covered by the permit that will have -- because
6 of those restrictions, may have less than adequate manure
7 storage at their facility.

8 In other words, the amount of -- their storage
9 capability, is there enough to go through the wintertime?

10 This is an acknowledgment that that's reality out
11 there and that what we want to do is provide some
12 direction, if you will, on how best to choose between our
13 really kind of two unacceptable outcomes: one,
14 overtopping of the lagoons and having significant
15 problems associated with that; or, two, the controlled
16 application to land.

17 Q So are applications under this provision still required
18 or still -- do still need to be in compliance with other
19 parts of the permit?

20 A Yes.

21 Q So in terms -- what other options would be available
22 besides the emergency applications at a facility, to your
23 understanding?

24 A I don't -- I mean, short of finding a neighbor that has
25 got a lagoon to be able to store it, I'm not sure that

1 there's any -- the cows are going to continue to produce
2 manure, and what this is an acknowledgment, they -- those
3 cows will produce manure and what do you do about it?

4 Q Okay. Thank you.

5 So first, Mr. Moore, first, in general, what is --
6 what is AKART?

7 A AKART is found in -- the term AKART is all known
8 available and reasonable methods of pollution control --
9 prevention, control, and treatment.

10 Q And how does Ecology define AKART just in general, not
11 specific to these permits?

12 A Ecology has defined AKART in regulation for ironically
13 secondary treatment is -- is defined as AKART for
14 domestic waste treatment plants. That's in a regulation.

15 Fish hatcheries as well as marine net pens both have
16 AKART, if you will, defined in regulation. Those are the
17 three sectors where we've defined it through regulations.

18 The next place where we define AKART is through our
19 permitting process. So when we write general permits,
20 those general permits represent -- you know, provide kind
21 of a definition of AKART for the facility to be covered
22 by that permit. And then when we write individual
23 permits, we also define AKART as part of the individual
24 permit writing process.

25 Q In terms of thinking about the general permit as AKART

1 for that particular sector, does Ecology look at
2 individual permit provisions and evaluate them
3 separately?

4 A No. Ecology considers the permit itself to represent
5 AKART, and I guess the best way to describe -- to explain
6 this a little bit is that there are -- besides, you
7 know -- for example, let's take the CAFO permits.

8 We have provisions around -- in the permit around,
9 you know, chemical storage and preventing the spills.
10 That's a part of AKART, for example.

11 Q Is cost a factor in Ecology's determination of AKART?

12 A Yes. I think that that's the "reasonable" part of AKART.

13 Q Does AKART change over time?

14 A Yes. AKART -- I mean, I think that what is AKART for one
15 permit cycle may not be AKART for the next permit cycle.
16 Our understanding of the industry may be different or the
17 amount of information we have could be, you know -- is
18 greater, and so that could -- AKART does -- does vary --
19 does evolve over time.

20 Q So when considering that the existing lagoons at CAFOs,
21 how does AKART apply to those existing lagoons?

22 A As I mentioned, the permit, as a whole, represents AKART
23 for CAFOs that are being covered by the permit.

24 And so with respect to the existing lagoons, we're
25 evaluating kind of -- the permit has a number of

1 provisions that apply to those existing lagoons.

2 The operation and maintenance requirements
3 associated with it, as I mentioned earlier, the spill
4 prevention requirements is a part of that.

5 The lagoon assessment is also part of all of that
6 is -- for this permit cycle represents the AKART for
7 those lagoons.

8 Q So in looking at the existing lagoons, did Ecology have
9 the information to indicate whether the lagoons were
10 properly designed or properly maintained?

11 A No. Our -- I think in many cases, that information
12 either doesn't exist or no longer exists.

13 Q So what did Ecology do in these permits to address that
14 lack of information?

15 A That's the lagoon assessment piece.

16 Q So there's been some discussion that -- and testimony to
17 the effect that possibly Ecology changed the definition
18 of how to measure the distance between the bottom of a
19 lagoon impoundment and the water table.

20 Were you here for that discussion?

21 A Yes, I was.

22 Q Do you believe that that's the case? Did Ecology change
23 its definition?

24 A I don't believe that Ecology changed our definition on
25 that at all. In fact, I think that it's always been

1 Ecology's position that it was -- the two feet separation
2 is from the outside of the bottom of the liner rather
3 than the inside of the bottom -- inside of the bottom of
4 the liner.

5 Q Could I ask you to turn to Exhibit R-14 and primarily
6 looking at Page 2 of that document.

7 A Yes.

8 Q Well, first of all, do you recognize this document?

9 A Yes. This is a letter from John Stormon, who is -- was a
10 hydrologist working for the Department of Ecology. He
11 has since retired to Ms. Sally Bredeweg of NRCS.

12 Q To your recollection, does Mr. Stormon have -- did he
13 have experience with waste storage lagoons?

14 A Yes.

15 Q And if we look at Page 2 here, the manure lagoon
16 standards, are you familiar with this part of this
17 letter?

18 A Yes. I have seen it.

19 Q And what does this -- what does this set out?

20 A One, this is providing comments to NRCS as NRCS is
21 updating their lagoon standards, as I understand at the
22 time. Lays out an expectation for the liner permeability
23 of one time ten to the minus six centimeters per second
24 and then so on.

25 Then Item 2 was a discussion about the separation

1 between the bottom -- the single liner being -- in this
2 case, it's an earthen liner. Minimum two feet vertical
3 separation between the bottom of the lagoon and the top
4 of the highest season groundwater.

5 Q And you had said that Ecology's -- Ecology had always
6 considered the measurement from the bottom of the liner?

7 A From the outside -- or, yes, the bottom -- outside of the
8 bottom, yes.

9 Q Did you -- when the permit was issued, did Ecology
10 receive comments on this particular aspect of the permit?

11 A I'm not personally aware and have not seen specifically
12 those, but I know that this became an issue between the
13 draft and the final.

14 John and staff brought it to my attention, said,
15 here's -- and that's hence, you know, the -- I guess I'll
16 say the clarifying language that was placed into the
17 permit between the draft and the final.

18 Q Why do you call it clarifying language?

19 A I think there was a misunderstanding that, you know,
20 certainly in terms of what that two -- where you measured
21 that two-foot separation.

22 Q Okay. And you mentioned in this letter looking at that
23 lagoon seepage, so in terms of the lagoon seepage rate of
24 ten to the minus six, can you put that seepage rate into
25 perspective for the board.

1 A So a lagoon with, you know, say, an earthen-lined lagoon,
2 ten to the minus six, it's been compacted, and with that
3 level permeability, assuming another order of magnitude
4 to the manure sealing, would leak roughly a thousand
5 gallons per acre.

6 And I'll -- from a -- just to give that a little bit
7 of perspective, you know, it sounds like a lot. That
8 represents about -- assuming the change in elevation,
9 assuming no inputs or other outputs from that lagoon,
10 that represents a change in elevation of that lagoon of
11 .013 inches, which is about three sheets of paper per
12 day, or on an annual basis, it represents about 13 inches
13 of seepage per year.

14 Q And, in your experience, is requiring that ten to the
15 minus six permeability -- is that protective of
16 groundwater?

17 A That's -- that was the work that we had been doing, yes.

18 Q So why didn't Ecology require existing lagoons to be
19 double lined with leak detection or otherwise upgraded?

20 A Ecology -- I mean, that was -- as I mentioned, that was
21 one of the questions, and we didn't feel we had the basis
22 to do so. It's kind of hard to make the argument that
23 that's AKART, double line leak detection, given that, to
24 require that -- testimony has been presented here --
25 would be prohibitively expensive and more than likely

1 would put the vast majority of folks covered by the
2 permit out of business as a result of that.

3 And clearly putting people out of business is sort
4 of hard for me to make the argument that that is
5 reasonable for the AKART test, and we simply didn't have
6 enough information to determine whether or not lining all
7 the lagoons on a wholesale basis was necessary to protect
8 groundwater.

9 Q Could I ask you to turn to R-10, please.

10 A Okay.

11 Q Do you recognize this document?

12 A Yes.

13 Q Could we look at Page 7, please. I guess this is Page 7
14 of our PDF.

15 A Okay.

16 Q And where we're listing from the overall assessment form
17 the categories and subcategories that are the result of
18 the assessment.

19 A Yes.

20 Q Why is it that Ecology did not require lagoons with an
21 assessment of 3 and 4 not to be used?

22 A That's just not a practical kind of outcome. It would be
23 nice if we -- if -- and the reason it's not practical is
24 because you've got -- you've got cows that are producing
25 manure that are not going to stop producing manure just

1 because your lagoon is deficient or Category 3 or 4.

2 And our preference is that, if they have a lagoon,
3 even if it's in a 3 or 4, and certainly during the winter
4 months, if they continue to use that lagoon, and then
5 bring the lagoon back -- you know, and bring the lagoon
6 back into, you know -- upgrade it or bring it back into
7 proper shape as quickly as possible.

8 Q So as part of the development of the CAFO permit, did you
9 visit facilities around the state?

10 A Yes, I did.

11 Q Could you give us an estimate of how many facilities you
12 visited?

13 A Oh, probably around a dozen or so.

14 Q And did you visit -- you've heard at the hearing about
15 the Yakima dairy cluster dairies?

16 A Yes, I did.

17 Q Did you visit any of those facilities?

18 A I have visited -- I don't think I visited all of them. I
19 visited, I think, three out of the five.

20 Q So is it your understanding that those dairies are
21 representative of dairies or other CAFOs across
22 Washington?

23 A To the extent they're raising cows, yes. But to the
24 extent they are -- I mean, they are some of the largest
25 dairies, if not the largest, set of dairies in the state.

1 Q So as part of the permit development, did you or did
2 Ecology work on strategies for getting facilities
3 covered?

4 A Yeah. As I mentioned earlier, one of the things -- the
5 old permit wasn't particularly effective, and it was --
6 you know, we had a dozen facilities or so covered under
7 it, and I didn't consider that a successful permit.

8 So one of the things we wanted to do was make the
9 case that discharges to groundwater is also a trigger for
10 requiring a permit, which is a big difference between
11 this permit and the previous permit.

12 And in the case of folks with earthen-lined lagoons,
13 those lagoons, as we've heard here in a lot of testimony,
14 those lagoons do leak or seep.

15 In the vast majority of cases, that seepage will
16 probably end up getting to groundwater, and that then,
17 for us, is the trigger for requiring folks to get covered
18 by the permit.

19 So up -- you know, the first -- so that was sort of
20 the strategy for saying, okay, there's -- the universe
21 covered by the permit is going to be a larger universe,
22 and the trigger is not just the document surface water
23 discharge but also a discharge to groundwater monitoring.

24 Then in terms of the administrative process of
25 getting the permit -- I can speak up until the time I

1 left -- our first priority was to get those folks who
2 were under the old permit enrolled them into the new
3 permit, which is what -- we did do that pretty quickly.

4 And the second group of folks we were going after
5 were the folks that had -- who Department of Agriculture
6 were inspectors identified having certain -- a surface
7 water discharge within the last two years.

8 We then contacted -- wrote letters to those folks.
9 I signed all those letters to -- directing them to --
10 that they need to apply for coverage under the permit.

11 Q At the time that you left the employment of Department of
12 Ecology, do you recollect how many facilities were under
13 permit coverage?

14 A I think at the time I left, there was maybe about 15 or
15 so.

16 Q Okay. Thank you.

17 Mr. Moore, are you -- as you sit here today, do you
18 believe these permits are protective of water quality in
19 Washington?

20 A I think facilities covered by these permits and in
21 compliance with the permit terms and conditions would be
22 operating in a way that would be protective of water
23 quality.

24 MS. BARNEY: Thank you. That's all I
25 have.

1 Oh, Your Honor, may I -- sorry. May I move to enter
2 R-14, which was the Stormon letter.

3 JUDGE FRANCKS: R-14 is admitted.

4 (Exhibit No. R-14 admitted.)

5 JUDGE FRANCKS: Who's next?

6 MS. MATSUMOTO: Your Honor, I just
7 need a moment to switch our little connection here.

8 JUDGE FRANCKS: Why don't we take a
9 five-minute break so you can do that.

10 MS. MATSUMOTO: Okay. Sure.

11 JUDGE FRANCKS: So we're off the
12 record. Just be back at 11:05.

13 (Recess taken from 10:56 a.m.
14 to 11:05 a.m.)

15 JUDGE FRANCKS: Have a seat. Let's go
16 back on the record.

17 Ms. Matsumoto.

18 MS. MATSUMOTO: Yes.

19 CROSS-EXAMINATION

20 BY MS. MATSUMOTO:

21 Q Good morning, Mr. Moore.

22 A Good morning.

23 Q I'm Sarah Matsumoto on behalf of Puget Soundkeeper. We
24 met at your deposition earlier.

25 A Yes.

1 Q How are you?

2 A Doing fine.

3 Q So I have a few questions just following up on some of
4 what Ms. Barney asked.

5 And just to confirm, you've been here every day for
6 the duration of the hearing?

7 A Yes, I have.

8 Q Okay. And you've heard all of the testimony that's been
9 provided?

10 A Yes, I have. I stepped out -- I was out -- may have
11 missed a couple minutes, but --

12 Q Okay. And could we pull up Exhibit A-7, please.

13 Do you have the document in front of you?

14 A Yes.

15 Q And do you recognize that document?

16 A It looks like one of the -- one of Ecology's responses to
17 some interrogatories or requests for admission from the
18 Puget Soundkeeper Alliance.

19 Q Right. And if you turn, I think, two pages from the end,
20 there's a verification page that should contain your
21 signature.

22 Do you see that?

23 A Yes, I do.

24 Q And so you reviewed and verified under oath that these
25 responses are truthful; correct?

1 A That is correct.

2 Q Could you turn to Request for Admission No. 49, please.
3 It's the first one there, starting at Page 8.

4 A Yes.

5 Q So one of the things you discussed a little bit with
6 Ms. Barney was the -- sort of the process for getting
7 some more information about lagoons.

8 And that was kind of one of the intents behind this
9 permit; is that correct?

10 A That's correct.

11 Q Could you read RFA No. 49 for me, there, please.

12 A "Admit that the CAFO permit Section S7.B authorized a
13 discharge to groundwater from manure lagoons for at least
14 3.5 years before a permittee is required to implement a
15 plan to address the deficiencies noted in the lagoon
16 assessment required by the CAFO permits."

17 Q And then could you please read your response there.

18 A "Ecology admits that it is at most 3.5 years after permit
19 coverage before the permittee is required to obtain --
20 begin implementing a plan to address deficiencies noted
21 in a lagoon that is in a risk Category 3A, 3B, or 3C, or
22 4 based on NRCS Tech Note 23 assessment."

23 Q And you've reviewed the permit a number of times,
24 correct, the combined permit?

25 A Yes.

1 Q Okay. Do you recall, off the top of your head, the plan
2 that's referenced in the response in RFA -- the response
3 to RFA 49? One of the elements of that plan could be a
4 groundwater monitoring component; isn't that correct?

5 A As I recall, that --

6 Q And if you need to look at the permit.

7 A I would have to look at the permit to be certain with
8 you. To be honest with you, I've not spent a whole lot
9 of time looking at permits in the last six to eight
10 months, so that would be --

11 Q It's going to be in the Ecology binder. It should be the
12 first one, R-1.

13 A Yeah. I've got R-1 on -- open to Page 36.

14 Q And we're looking for the lagoon assessment section.

15 A Which is Page 36?

16 Q Yeah. And so looking down just at the requirements of
17 the lagoon assessment and then the follow-up, is there --
18 does the permit contemplate including a groundwater
19 monitoring component?

20 A Yes.

21 Q Okay. But it doesn't specifically require that
22 groundwater monitoring wells actually be installed within
23 the time frame that's provided in the lagoon assessment;
24 correct?

25 A That is correct.

1 MS. MATSUMOTO: Okay. Your Honor, I
2 would like to move to admit Exhibit A-7.

3 MS. BARNEY: Ecology will object. The
4 best evidence here is the testimony of the witness. It's
5 unclear to me why we would need to admit the document.

6 MS. MATSUMOTO: These are sworn
7 responses under oath, and Mr. Moore has already testified
8 that he contributed to providing the response. We would
9 like to have them in the record.

10 JUDGE FRANCKS: I'm going to allow it.
11 So I'm going to admit A-7.

12 (Exhibit No. A-7 admitted.)

13 Q (By Ms. Matsumoto) And, Mr. Moore, you also provided
14 some additional contributions to other discovery
15 responses, did you not?

16 A Yes, I did.

17 Q Okay. Could we look at Exhibit A-70, please. It's
18 possible it may be in the other binder behind you.
19 There's a lot of binders floating around back and forth.

20 A Yes.

21 Q And do you recognize this document?

22 A This is Ecology's responses to first set of
23 interrogatories and requests for production by Puget
24 Soundkeeper Alliance.

25 Q And did you provide and verify under oath that these

1 responses were truthful and correct?

2 A Yes.

3 Q Turn to the back of the document. Thank you.

4 If you could turn to Interrogatory No. 10 on
5 Page 20 --

6 A Okay.

7 Q -- and when you were speaking with Ms. Barney earlier,
8 you were talking about groundwater monitoring and how you
9 felt that there was some other elements of the permit
10 that provided protection, even though groundwater
11 monitoring is not included.

12 Do you remember that?

13 A I remember the conversation, although your
14 characterization is not what I would consider -- I mean,
15 that's not exactly what I said.

16 Q Okay. What did you say?

17 A I said that I thought there were other ways that
18 monitoring could provide feedback to -- on how -- proper
19 manure management practices.

20 Q And one example you gave was the --

21 A Soil.

22 Q -- soil sampling?

23 A Yes.

24 Q Okay. Could you read Interrogatory No. 10 for us,
25 please.

1 A "Describe with specificity how the CAFO permits adaptive
2 management approach prevents discharges of pollutants to
3 waters in the state."

4 Q And is it your understanding, adaptive management is
5 the -- sort of the Table 3 description in the permit?

6 A It's Table -- I would argue that the permit -- can't just
7 take Table 3 and, you know, remove it from the permit,
8 but Table 3 represents the majority of the adaptive
9 management elements of the permit.

10 Q And so that includes actions that are required to be
11 taken when permittees have certain fall soil nitrate
12 tests at various levels; correct?

13 A That's correct.

14 Q And your answer, the first two sentences -- it's a rather
15 lengthy answer, but your answer says, "Adaptive
16 management is not intended to completely prevent or
17 eliminate discharges. Surface and groundwater monitoring
18 discharges are continually authorized by the CAFO
19 permit."

20 A That's correct.

21 Q And you verified that under oath?

22 A Yes.

23 Q But you would still agree that if what you want to be
24 monitoring for is the condition of groundwater, soil
25 sampling is not something that could be an adequate

1 substitute; correct?

2 A That's correct. If you want information on what is the
3 groundwater quality, you would need to monitor the
4 groundwater.

5 MS. MATSUMOTO: Okay. Your Honor, I
6 would like to move to admit Exhibit A-70.

7 JUDGE FRANCK: A-70 is admitted.

8 (Exhibit No. A-70 admitted.)

9 Q (By Ms. Matsumoto) Mr. Moore, could you turn just one
10 more exhibit, to A-71, please.

11 And do you recognize this document?

12 A Yes. This is Ecology's responses to Puget Soundkeeper's
13 second set of interrogatories.

14 Q And, again, you are the signatory Ecology staff member
15 who verified those, that they are truthful and accurate?

16 A Yes.

17 Q And could you turn toward -- to Page 10, Interrogatory
18 No. 29.

19 A Okay.

20 Q Could you read Interrogatory 29 for us, please.

21 A "State with particularity how Ecology will monitor
22 weather conditionally authorized discharges from a
23 permitted CAFO facility are causing or contributing to a
24 violation of the State's water quality standards."

25 Q And could you read the response?

1 A "Means include: Permittee self-reporting, annual
2 reporting, routine inspections by WSDA or Ecology
3 inspectors, complaint driven inspections, and available
4 ambient monitoring data."

5 Q And when you were speaking with Ms. Barney, I believe you
6 kind of described what a visual monitoring component
7 would look like; is that correct? That's one example
8 of --

9 A That visual monitoring is a type of monitoring, yes.

10 Q Okay. And this permit conditionally authorizes
11 discharges to both surface and groundwater; correct?

12 A That's correct.

13 Q But it isn't possible to visually monitor for a discharge
14 to groundwater, is it?

15 A No, it would not be possible.

16 MS. MATSUMOTO: Your Honor, I would
17 like to move to admit Exhibit A-71.

18 JUDGE FRANCKS: A-71 is admitted.

19 (Exhibit No. A-71 admitted.)

20 Q (By Ms. Matsumoto) And could we turn to Exhibit A-72,
21 please.

22 A Okay.

23 Q Okay. And, Mr. Moore, do you recognize this document?

24 A Yes. This is Ecology's responses to Puget Soundkeeper's
25 third set of interrogatories.

1 Q And, again, did you sign and verify that these responses
2 are truthful and accurate?

3 A Yes, I did.

4 Q Okay. Could you please turn to Page 13, and I'm looking
5 at Interrogatory No. 39.

6 A Yes.

7 Q And could you read that, please.

8 A "Do the CAFO permits authorize a permittee to
9 conditionally discharge manure pollutants to groundwater
10 if the state -- of the state if such groundwater is not
11 in compliance with the state's groundwater quality
12 standard for nitrate, which is ten milligrams per liter
13 per WAC 173-200-040?"

14 Q And the response?

15 A "Yes."

16 Q And so just to make sure that I understand, a permittee
17 would be able to discharge pollutants, even if the
18 condition of the groundwater was already above ten
19 milligrams per liter for nitrate; correct?

20 A That's correct.

21 Q Okay. And, again, there's no groundwater monitoring
22 component required in the permit, so there's no way for a
23 permittee to know to what degree they're contributing
24 above and beyond ten milligrams per liter, which is
25 already a threshold set under the WAC; correct?

1 A There isn't a routine requirement. I mean, there's been
2 some discussion about where groundwater monitoring is a
3 requirement of the permit, but in terms of a routine
4 requirement in this permit to monitor groundwater, there
5 is no --

6 Q And the only -- isn't it true that the only place the
7 permit actually requires groundwater monitoring is what
8 we just discussed in the context of the lagoon
9 assessment?

10 A That's correct. There is also -- I believe it's Table 3
11 has groundwater monitoring as an option under --

12 Q Correct. But not a requirement?

13 A That's correct.

14 MS. MATSUMOTO: Okay. Your Honor, I'd
15 move to admit Exhibit A-72.

16 JUDGE FRANCKS: A-72 is admitted.

17 (Exhibit No. A-72 admitted.)

18 Q (By Ms. Matsumoto) Mr. Moore, Ms. Barney was asking you
19 some questions about conversations you've had with
20 Director Bellon.

21 Do you recall that?

22 A Yes.

23 Q Okay. And you spoke with her about how many times?

24 A On the CAFO permits, I think I spoke with her I think I
25 said between, you know, half a dozen or a dozen times.

1 Q And wasn't one of the things you discussed with her
2 groundwater monitoring?

3 A We did -- I did in the -- as part of the process of
4 developing the permits, we did brief the director on
5 various different aspects of the permit, things that, you
6 know -- most significant issues that were associated with
7 those permits and provided her with our -- what our
8 proposed path forward was.

9 Q And wasn't groundwater monitoring one of those components
10 that was discussed?

11 A Yes. Groundwater monitoring was one of those issues,
12 yes.

13 Q And when you were speaking with Ms. Barney earlier, I
14 believe you said that Director Bellon didn't really give
15 you any policy direction; is that right?

16 A That is correct.

17 Q And when you and I were speaking at your deposition last
18 summer -- I know it was a while ago -- but didn't you
19 testify then that Director Bellon was interested in the
20 CAFO permit process because it was a fairly high profile
21 activity within the agency?

22 A Yes.

23 Q And so I guess I'm just not understanding, if she had
24 that high degree of interest in a high profile program,
25 you know, why you were not hearing policy direction or

1 feedback from her? Did you not ask her for some
2 direction?

3 A So let me -- I think there's a little confusion here.

4 Did I get direction from the director on -- to do A,
5 B, or -- to include A, B, C, or D as a permit term or
6 condition? I did not get any of that direction.

7 I did bring to the director and briefed her on
8 several occasions about the major issues that were
9 associated with the permit. Whether or not to include
10 groundwater monitoring was one.

11 I provided her in a summary of kind of the pros and
12 cons around that and also provide -- and gave her -- this
13 is what we're proposing to do.

14 She -- and that -- in all cases where I did that, I
15 never got direction from the director to go in a place
16 that I did not already recommend going.

17 Q Did you ever ask specifically for her opinion or feedback
18 on a particular issue?

19 A I didn't have to ask the director for that. She makes it
20 pretty clear what she wants.

21 Q And what about the issue of permit coverage? Did you
22 discuss with her the -- I guess we could -- kind of been
23 referring to them as permitting triggers, for example,
24 who would be required to get coverage under the permit?
25 Is that something that you ever discussed?

1 A That is one of the things I did discuss with her, yes.

2 Q And, again, did she have any feedback for you on that
3 issue?

4 A Again, no. I mean, I -- I had laid out for her what the
5 changes that I thought were necessary for the new permit,
6 one of which was to change the permitting triggers from a
7 document surface water discharge only to a discharge
8 either to surface water or groundwater, and then we
9 talked about, you know, a seeping lagoon and that whole
10 process with her.

11 And she did not give me any direction to go any
12 other direction. Did not provide me direction to go any
13 other way than what we proposed.

14 Q You said she makes her opinion pretty clear in meetings?

15 A She can, yes.

16 Q Okay. Did she ever make it clear to you that she did not
17 want groundwater to be included in the permit?

18 A No.

19 Q Could we turn to Exhibit A-53.

20 A Okay.

21 Q Okay. Mr. Moore, do you recognize that document?

22 A It appears to be -- well, it's labeled as "Preliminary
23 CAFO Permit Presentation Outline," and it appears to
24 be -- it's got four slides. Actually, it identifies five
25 slides, but four slides with looks like a series of

1 bullet points.

2 Q And the exhibit is a number of pages, so if you turn
3 pages, there's actually a few more slides than just four.

4 A Oh, yep. I guess you're right.

5 Q Okay. And under where each slide is noted, it looks like
6 there are names of people in parentheses, including
7 Heather, Bill, and John.

8 Does Bill refer to you?

9 A Yes.

10 Q Okay. Did you participate in some presentations about
11 the preliminary CAFO permit?

12 A Yes, I did.

13 Q And who was the audience for those presentations?

14 A Well, generally, it was both the general public,
15 permittees, other interest groups.

16 Q Could you turn to Page 4, please. And the bullet points
17 at the top list various nitrate concentration values
18 broken out into categories of low, medium, high, and very
19 high.

20 Do you see those bullet points?

21 A Yes.

22 Q And is it your understanding that that corresponds to the
23 similar idea that we see in the current permit of Table 3
24 with the various risk levels?

25 A That's correct.

1 Q Okay. But looking at these numbers, Mr. Moore, these are
2 not the same numbers of nitrate concentration levels that
3 appear in the final permit, are they?

4 A No. They're not the same.

5 Q Do you know who decided to make the change to use
6 different soil nitrate levels between the preliminary and
7 the final permit?

8 A I probably should talk a little bit about how we --
9 again, who made the change. This was made as part of the
10 permit development team looking at the comments we
11 received and then sort of working at trying to address
12 those comments.

13 So -- and so who specifically? It was actually the
14 team was working on it. Would have been John and Melanie
15 and the other members of the team.

16 Q And were the fall soil nitrate levels anything you ever
17 had a conversation with Director Bellon about?

18 A I don't think that -- with that degree of -- I don't
19 recall having any conversations with the director over
20 numbers of the fall soil numbers.

21 General concept was provided to her in terms of
22 the -- you know, the nutrient budgets, fall samples, the
23 fall report card. I don't recall ever having a
24 conversation about specific numbers with her.

25 Q Okay. And could you turn to Page 3, please.

1 A Yeah.

2 Q The second slide says "lagoons" in bold there. Do you
3 see that one?

4 A I see -- says "lagoons," with a parentheses, "John."

5 Q Yes.

6 A Yes.

7 Q And so the first bullet point, again, is information
8 gathering, and you've spoken a bit about how, you know,
9 your goal with this permit cycle was to gather some
10 information about the state of lagoons; correct?

11 A That's correct.

12 Q Okay. Could you turn to Exhibit R-4, please.

13 A Okay.

14 Q Okay. And do you recognize this document?

15 A Yes.

16 Q It's been discussed a lot, so I imagine it's pretty
17 familiar to you by this time.

18 And could you tell us what it is, please.

19 A This is the manure and groundwater quality literature
20 review.

21 Q This was completed by your colleague, Melanie Redding;
22 correct?

23 A That is correct.

24 Q Could you turn to Page 65, please.

25 A Yes.

1 Q And it's 65 of the -- 63 of the document, I'm sorry. 65
2 in the PDF.

3 A Okay.

4 Q And the second paragraph, could you read that for us.

5 A "Numerous studies have documented leakage from manure
6 lagoons, and some have documented impacts to groundwater
7 from nitrate, ammonium, veterinary pharmaceuticals,
8 chloride, TDS, and bacteria."

9 Q Thank you.

10 And Ms. Redding's literature review is quite
11 extensive, wouldn't you agree?

12 A Yes.

13 Q And it's a comprehensive look at available scientific
14 literature on many of the aspects that are essential
15 components of the permit; right?

16 A That's correct.

17 Q And so it appears from the literature review that Ecology
18 already has in its possession numerous studies
19 documenting leakage from manure lagoons.

20 And so isn't Ecology already aware of -- that
21 lagoon -- unlined lagoons leak and that some action
22 beyond just gathering information needs to be taken?

23 A So I think that Ecology certainly was -- is aware when
24 we're writing the permit that the lagoons leak or seep.

25 The question is whether or not that seepage is, in

1 fact, causing exceedance of the groundwater quality
2 standards.

3 Q Didn't you testify earlier that in many cases that's
4 likely what's happening?

5 A That -- I don't believe that's what I testified.

6 Q You're familiar with waste storage impoundments and other
7 industries, are you not?

8 A I have some familiarity with that, yes.

9 Q And you've seen that synthetic liners are routinely used
10 to store waste in other industries?

11 A They -- it depends on the industry, but, yes, synthetic
12 liners is an option that is used.

13 Q Okay. Could we turn back to A-53, please.

14 A Okay.

15 Q Okay. And, again, this is the preliminary permit
16 presentation outline. If you could look at the first
17 page, please.

18 A Yes.

19 Q Down at the bottom where it says, "slide environmental
20 impacts," and the first bullet point says that, "There
21 have been several documented surface water discharges
22 from CAFOs since 2011"; correct?

23 A That's -- yes.

24 Q And in your time working with the Department of Ecology,
25 you were made aware of other surface water discharges

1 from time periods prior to 2011; correct?

2 A I can't say with certainty that I was made aware of some
3 of those perhaps before 2011. My involvement with the
4 CAFO permit started around 2011 or after.

5 Q Could we turn to Exhibit A-24, please.

6 A Okay.

7 Q Okay. And the second page is titled "AFO/CAFO Discharge
8 Information 2008 to 2010."

9 Do you see that?

10 A Yes, I do.

11 Q Okay. And do you recognize this document?

12 And it's a few pages, so if you need to skim
13 through, you can go ahead.

14 A I don't recognize this document.

15 Q Did you work with someone named Ron Cummings?

16 A Ron Cummings was in the watershed management section. He
17 was -- and I have worked with him some, yes.

18 Q Mm-hm. And if he -- is he in a role such that he would
19 be receiving information about AFO and CAFO discharges?
20 He would have access to that?

21 A At times he was in that role. I do not know what -- I
22 don't know when this was written. I don't know, you
23 know.

24 And, frankly, I'm not that familiar with what his
25 job is to know -- be able to say specifically.

1 Q Looking at the document, looks like there are about 30
2 discharges noted between 2008 and 2010.

3 Do you see those?

4 MS. HOWARD: Your Honor, I am going to
5 object. This is the same document that Puget Soundkeeper
6 is trying to introduce a number of times.

7 We haven't been able to establish the foundation of
8 this document so that the witness can actually testify
9 about the contents of the document.

10 JUDGE FRANCKS: So your objection is
11 lack of foundation?

12 MS. HOWARD: Yep. Exactly. Thank
13 you.

14 MS. MATSUMOTO: It's a public
15 document. It was created by an Ecology staff member
16 named Ron Cummings.

17 I'm trying to establish he was a colleague of
18 Mr. Moore and that work that Mr. Cummings did was
19 reliable.

20 And it was actually provided, again, both in our
21 Puget Soundkeeper's comments on the draft permit and in a
22 separate letter directed to Mr. Moore and some of his
23 other colleagues, asking for universal coverage of the
24 permit.

25 MS. BARNEY: Again, Your Honor, I'm

1 going to object to that. That's facts not in evidence.
2 Mr. Moore has said he doesn't recognize this document.
3 It's a foundation for Mr. Moore as a witness here, it's
4 not the -- the issue is not whether or not this is a
5 public document or a public record.

6 JUDGE FRANCK: I'm going to sustain
7 both of those objections. I think you haven't
8 established that he knows anything about this document.

9 Q (By Ms. Matsumoto) Mr. Moore, you spoke a little bit
10 about the Manure Pollution Prevention Plan when you were
11 talking to Ms. Barney.

12 Do you remember that?

13 A Yes, I do.

14 Q Okay. And I want to just pull up that section of the
15 permit, if we could, to Exhibit R-1, please.

16 A Okay.

17 Q Do you have that section of the permit?

18 A Yes.

19 Q Okay. And it's S4.Q pollution prevention plan is what
20 I'd like to look at.

21 A Okay.

22 Q And this second paragraph, could you read that for us,
23 please.

24 A "The permittee must have their initial MPPP prepared and
25 submitted to Ecology special condition S7.A within six

1 months of the date of the permittee receives permit
2 coverage."

3 Q So that means that at the time a permittee actually
4 applies for coverage under the permit, they don't have to
5 submit the Manure Pollution Prevention Plan; is that
6 correct?

7 A That's correct.

8 Q Okay. And the Manure Pollution Prevention Plan is not
9 itself available to the public prior to the permittee
10 getting permit coverage; correct?

11 A That's correct.

12 Q And so Ecology would then just issue permit coverage to
13 an applicant without even reviewing the MPPP; correct?

14 A That's correct.

15 Q Okay. And the public never actually has the opportunity
16 to provide comments on a facility's individual MPPP;
17 correct?

18 A That's correct.

19 Q And, similarly, when the MPPP is updated, if we could
20 turn to a little bit later in that section, Subsection 4
21 on Page 30 -- do you have that page in front of you?

22 A Yes.

23 Q Okay. And so those changes to the MPPP also are never
24 required by the permit to be made publicly available;
25 correct?

1 A If by "made publicly available" for public review and
2 comment --

3 Q I'm sorry. For comment, yes. Ms. Barney was asking you
4 some questions about lagoons and AKART also in the
5 context of Tech Note 23.

6 Do you remember that discussion? And you were
7 talking about double lining lagoons, and that I believe
8 you said that it would be difficult to make the argument
9 that you should double line the lagoons, especially when
10 you consider that people may be put out of business and
11 you didn't think that that would be reasonable? Is
12 that --

13 A I recall that.

14 Q -- correct?

15 A Yes.

16 Q Okay. But isn't it also equally unreasonable if people's
17 drinking water is being polluted, to allow that to
18 continue?

19 MS. BARNEY: Objection. Assumes facts
20 not in evidence.

21 JUDGE FRANCKS: I'm going to sustain
22 that.

23 Q (By Ms. Matsumoto) Mr. Moore, you agree that unlined
24 earthen lagoons have a seepage rate and will discharge
25 pollutants, and I believe you testified that, in many

1 cases, that will end up reaching groundwater; is that not
2 correct?

3 A That is correct. I did testify to that.

4 Q Okay. And so to the extent that that groundwater could
5 serve as drinking water for individuals in the community,
6 isn't it also a consideration of reasonableness whether
7 or not that the people who are drinking potentially
8 impacted water should have to continue drinking that
9 water or come up with some alternative means to treat
10 their water?

11 A So as I think I testified with Ms. Barney, we -- the
12 basis we have for putting in -- putting in requirement in
13 the permits is one of two. Either it's AKART, all
14 known -- the AKART basis, or the other reason for putting
15 in permit terms and conditions is to -- as necessary to
16 protect essentially water quality and not violate the
17 standards.

18 And it's not a zero discharge requirement, but it's
19 a requirement that that discharge that's being authorized
20 would not violate water quality standards.

21 Now, the water quality standards in the case of the
22 groundwater standards are intended to protect beneficial
23 uses, one of which is drinking water.

24 So if an increment degradation of those
25 groundwater -- of the groundwater is still below the

1 standards, it's not a violation of the groundwater
2 standards.

3 Q But what if it isn't incremental? I mean, what if
4 it's -- puts it above the threshold for ten milligrams
5 per liter?

6 A I'm not an expert on kind of how we apply the groundwater
7 standards. That's a little bit different. I've got a
8 lot more familiarity with surface water standards.

9 Melanie went into a fair amount of detail on that
10 when she testified, so I'd defer to her.

11 Q You mentioned that you visited some of the -- three of
12 the five clustered areas.

13 Was that what you said earlier?

14 A I believe I did.

15 Q Okay.

16 A That's what I testified, yes.

17 Q And was Cow Palace one of those facilities?

18 A I don't believe I did the -- I don't believe I visited
19 Cow Palace.

20 Q Which ones do you think you visited, if you can recall?

21 A I think I visited the DeRuyter facilities. And not very
22 good with names, but -- if you rattle off the names, I
23 could probably tell you which ones I am familiar.

24 Q Does Henry Bosma sound familiar?

25 A I think I was -- I went to one of the Bosma facilities.

1 I do not remember -- because I met Mr. Bosma. I'm not
2 sure if it was his facility. It was one of -- if -- he
3 may have several facilities. I don't know.

4 Q And how about Liberty dairy?

5 A I don't believe I was on that dairy.

6 Q You spoke also about emergency winter applications, and I
7 believe you said that you acknowledged the reality that
8 cows will continue to generate manure.

9 And so the need for producers to do something with
10 all the manure that's accumulating in their lagoons
11 during the winter potentially is a reality they'll have
12 to face; is that correct?

13 A Not quite what I testified, but it was -- what I said
14 was, is that an acknowledgment that we are placing
15 restrictions on when producers can apply their manure,
16 which means that they may not have -- they need to store
17 more manure than they've had to do in the past.

18 And as a consequence, we wanted to provide some
19 direction about, you know, how best to deal with that to
20 avoid catastrophic lagoon failure.

21 Q But if it's a reality that they face, that many producers
22 are encountering this problem over the winter, doesn't
23 that mean that their lagoons aren't properly sized to
24 begin with?

25 A That may be the case. That's why part of the emergency

1 application triggers a requirement that they reevaluate
2 how much storage that they have and actually get -- put a
3 plan into place to be able to make -- to be able to
4 increase storage or reduce the need for storage.

5 Q And doesn't the permit require that they -- they size
6 their lagoons to handle a 25-year 24-hour storm event?

7 A That is correct.

8 Q Okay. Could we turn to A-76.

9 Mr. Moore, before we jump into this, I was asking a
10 little bit about visiting some of the cluster facilities,
11 and you said you couldn't recall whether you'd been to
12 Cow Palace; correct?

13 A That's correct.

14 Q Okay. Have you ever met with the Dolson family? Either
15 Adam or Bill Dolson.

16 A The name does not ring a bell for me.

17 Q Okay. Mr. Moore, you have A-76 in front of you; correct?

18 A That's correct.

19 Q Okay. And do you recognize this document?

20 A This is a document that was judging -- looking at the
21 date stamps, it's April of 2009, and I'm on the CC of at
22 least one of these emails.

23 But beyond that, I don't recollect this document at
24 all.

25 Q Okay. Do you know some of the other individuals who are

1 listed as senders and recipients of the email? For
2 example, do you know Tom Tebb?

3 A Yes, I do know Tom Tebb.

4 Q Okay. Did you work with Tom Tebb?

5 A Yes. I worked some with Tom Tebb, yes.

6 Q Did you ever discuss CAFO permit issues with Tom Tebb?

7 A Yes, I did.

8 Q And what was the context of your conversations with him?

9 A Had a couple of conversations. He was -- at the time
10 I -- at the time he was a regional director for central
11 regional office.

12 And we first were just beginning the process of
13 re-issuance of the permit, and I had a couple
14 conversations with him at that time.

15 Q And could you look halfway down the page, the email from
16 Tom Tebb to Melissa Gildersleeve and Robert Raforth -- I
17 don't know if I'm pronouncing that correctly -- but sent
18 on Monday, April 20th.

19 Could you just read the text of that, please.

20 A It says, "So does this mean we have no legal authority in
21 the permit to require soil column testing? Isn't this a
22 compromise reached by not requiring groundwater
23 monitoring? Where do we go from here?"

24 Q And so this was in 2009 that these conversations were
25 happening.

1 So groundwater monitoring has been something that's
2 been discussed and contemplated for a long time; correct?

3 A Apparently.

4 Q Did Mr. Tebb ever recommend to you that groundwater
5 monitoring should be included in the permit?

6 A I don't recall him specifically recommending that. I
7 remember having conversations about what we were trying
8 to do with this round of the permits, and he was
9 generally supportive.

10 Q But you don't remember ever specifically talking to him
11 about groundwater monitoring and getting his opinion
12 about whether or not it should be included?

13 A I mean, we laid out kind of the permittee strategy around
14 the permits. We laid out triggers and so on that we were
15 considering at that time.

16 And I don't -- and I don't recall ever specifically
17 having a conversation with Mr. Tebb about groundwater
18 monitoring.

19 Q And so we talked a little bit about Ms. Redding's
20 literature review, and you agree that it's a
21 comprehensive look of the available science; correct?

22 A Yes.

23 Q And I believe you've also acknowledged that, if you want
24 to know the condition of groundwater, the only way to
25 definitively know that is by performing groundwater

1 monitoring; correct?

2 A Correct.

3 Q So looking at this conversation that took place nearly a
4 decade ago, now Ecology has extensive science performed
5 by its own scientists that there is no substitute for
6 groundwater monitoring.

7 Isn't this another continuation of the same
8 compromise that Mr. Tebb was raising before?

9 A I was not a party to this, so I don't know. I mean, I
10 speculate as to what compromise he's referring to. I was
11 not involved in -- I don't -- I don't have firsthand
12 knowledge of what --

13 Q But this email was forwarded to you and to John Jennings,
14 who participated on your team as the permit writer;
15 correct?

16 A That is correct.

17 Q And so, again, groundwater monitoring is something that's
18 been contemplated for close to a decade, if not longer?

19 MS. BARNEY: Objection. Asked and
20 answered.

21 JUDGE FRANCKS: I'll allow it.

22 A Groundwater monitoring has been something that's been
23 discussed for quite some time, but it's -- was, yes,
24 discussed.

25 Q (By Ms. Matsumoto) And you've chosen not to include it

1 once again; correct?

2 A Yes.

3 Q And wouldn't you agree that a predominant source of
4 nitrate contamination in the Sumas-Blaine Aquifer and the
5 Lower Yakima Valley is from dairies?

6 A I don't have firsthand knowledge to say what -- whether
7 it is a predominant -- from dairies or whether or not
8 dairies are the major source or other general articles
9 are the main source. I don't have firsthand knowledge on
10 that.

11 Q But you've heard testimony to that effect during the time
12 that we've been here?

13 A I've heard testimony that there's -- that dairies are a
14 source. I think there's a question as to just how --
15 what proportion of the source they are.

16 MS. MATSUMOTO: Thank you. That's it
17 for me.

18 JUDGE FRANCKS: Ms. Howard? Are you
19 next?

20 MS. HOWARD: Do you want me to start
21 or do you want to do lunch break?

22 JUDGE FRANCKS: How long do you think
23 you're going to go?

24 MS. HOWARD: More than five minutes.

25 JUDGE FRANCKS: Okay. Let's -- I'm

1 happy to take the lunch break now.

2 MS. HOWARD: Yeah. I'm hungry. If
3 that's okay.

4 JUDGE FRANCKS: Okay. Let us take a
5 lunch break. We'll come back at 1:00.

6 And just to check, Ms. Barney, you have one more
7 witness after this?

8 MS. BARNEY: Correct, Your Honor.

9 JUDGE FRANCKS: Okay. Great. All
10 right.

11 MS. HOWARD: Your Honor, I do have
12 just a quick question. Is the three o'clock -- I know
13 you said that you only had until three o'clock today.

14 Is that a hard stop for us today?

15 JUDGE FRANCKS: Yes.

16 MS. HOWARD: Okay. Thank you.

17 JUDGE FRANCKS: We are off the record.

18 (Recess from 11:58 a.m. to
19 1:03 p.m.)

20 JUDGE FRANCKS: Have a seat. Let's go
21 on the record. We are back here after lunch.

22 Mr. Moore is still on the stand, and I believe we
23 have Ms. Howard questioning.

24 MS. HOWARD: We do, Your Honor.

25 ////

1 CROSS-EXAMINATION

2 BY MS. HOWARD:

3 Q Good afternoon, Mr. Moore. Thank you for being here.
4 Elizabeth Howard, on behalf of the dairy farmers and farm
5 bureau -- Washington Farm Bureau.

6 So a few questions for you. You indicated during
7 your testimony that there was one issue that went to the
8 program management team for consideration, that was the
9 lagoon liners.

10 What was the issue that was raised regarding the
11 lagoon liners that went to the program management team?

12 A Whether the permit should require the existing lagoons be
13 retrofitted across the board.

14 Q So it didn't actually have to do with the lagoon liner
15 standard in the permit itself?

16 A Indirectly it did. I mean, if the standard would have
17 been a different standard, if we had required the line --
18 the lagoons to be lined, it would be -- for example, it
19 could have been double lined with leak detection. That
20 would have been a different standard.

21 Q Okay. I'm not quite understanding you.

22 So the -- so try me one more time. The issue that
23 went to the project management team around the lagoon
24 liners was whether the lagoon liners should be
25 retrofitted? I didn't --

1 A The issue that went to the program manager, as I recall,
2 was whether or not to require the existing lagoons -- a
3 requirement to put in either synthetic liners or another
4 type of liner beyond what's currently required.

5 Q And how did that decision play out in terms of the permit
6 terms? Is it reflected in the permit?

7 A Well, if the result was that we are -- the result is that
8 continuing to use clay liners with a ten to the minus six
9 permeability.

10 Q Okay. So did you discuss at all the provision in S4.B
11 related to the vertical separation in the lagoon liners
12 in that conversation?

13 A No.

14 Q Okay. And why did the project management team
15 determine -- if this is correct, decide to stick with the
16 clay lagoon liners as a permit term?

17 A The reason for sticking with the clay lagoon liners is,
18 it properly operated, maintained, we believe, they are
19 protective of water quality and that we didn't have a
20 reason to go to beyond the current lagoon liners with the
21 clay liners from kind of an AKART standpoint.

22 Q So was economics a consideration in sticking with that
23 permit term?

24 A With respect to the AKART, yes.

25 Q Okay. Under the reasonableness part of AKART?

1 A That's correct.

2 Q Okay. Let's look at the permit, which is R-1, Page 13 of
3 the permit.

4 A Okay.

5 Q The -- I just want to point you to the parenthetical that
6 we've talked about a few times.

7 After "between the bottom of the liner," the
8 parenthetical, "measured from the outside of the earthen
9 liner," when was that?

10 A So I'm on a different Page 13.

11 Q Actually, Page 13 of the permit itself.

12 A Okay.

13 Q Your exhibits are not marked by the PDF pages, so I'm
14 just going off of the actual --

15 A Okay. Got it.

16 Q Got it? Okay. So that parenthetical that's there,
17 "measured from the outside of the earthen liner," when
18 was that, if you recall, added to the permit?

19 A That was after the close of the comment period and before
20 the final permit was issued.

21 Q So the first time that it showed up was in the final
22 permit?

23 A That's the first time it showed up in the permits, yes.

24 Q Okay. You hesitated when I asked you that question.

25 Is there a reason for that?

1 A Well, I think that Ecology is going back to the -- I
2 testified earlier, going back to the John Stormon letter
3 and even earlier than that, it's always been Ecology's
4 position that the two-foot separation is measured from
5 the bottom -- outside bottom of the liner.

6 Q And where is that -- where is that longstanding position,
7 if you will, documented in writing? It --

8 A It's documented -- I mean, that's the way we have --
9 that's the way Ecology has interpreted the John Stormon
10 letter.

11 Q Okay. Let's look at the John Stormon letter. That's
12 R-14.

13 The John Stormon letter was a letter from Ecology to
14 NRCS; is that correct?

15 A That is correct.

16 Q And what was the context for that letter, if you know? I
17 know you're not an author of the letter.

18 A I'm -- you know, in reading the letter, the context is
19 that John Stormon is providing comments to the NRCS folks
20 on their conservation practice 313 for waste storage
21 facilities.

22 He was not being able to make a meeting apparently,
23 and he was providing his comments or the agency's
24 comments in writing.

25 Q And let's look at the bullet points that you looked at

1 with Ms. Barney on Page 2, Paragraph No. 2, which
2 indicates -- that's the paragraph that talks about the
3 two feet of vertical separation between the bottom of the
4 lagoon liner.

5 There's no parenthetical there explaining that the
6 measurement would be from the outside of the lagoon
7 liner, is there?

8 A No, there isn't.

9 Q Do you know if there are any discussions with NRCS that
10 explain that that was what Ecology's view of that
11 sentence meant?

12 A I'm not aware that there was discussions about NRCS.

13 Q Are you aware that NRCS has ever required, as part of its
14 313 conservation practice standard, that a lagoon be
15 built so that the vertical separation is measured from
16 the bottom outside of the lagoon liner?

17 A I'm not that familiar with the NRCS standards.

18 Q Okay. This letter predates the 2006 CAFO permit;
19 correct?

20 A Yeah.

21 Q Okay. Just a date question. Thank you. Thanks for
22 going there with me.

23 Let's look at the 2006 CAFO permit. That's R-18.
24 I'm going to point you to Page 21.

25 And, actually, if you look at Page 20, just for

1 context, this is the section that talks about the waste
2 storage facilities in the 2006 CAFO permit.

3 If it helps, you can look at the first page just to
4 confirm this is the 2006 CAFO permit.

5 Do you see that?

6 A Yes.

7 Q Okay. And on Page 21, there's a reference to what new or
8 expanded waste storage facilities need to achieve with
9 regards to construction design.

10 Do you see the reference there to the NRCS
11 Conservation Practice Standard 313?

12 A Yes.

13 Q So would you agree that Conservative Practice
14 Standard 313 was the requirement for lagoons and lagoon
15 liners under the 2006 CAFO permit?

16 A That's -- that's what the permit says right now for new
17 and expanded waste storage facilities.

18 Q Do you see any discussion in the 2006 CAFO permit about
19 measuring from the bottom of the lagoon liner for
20 purposes of vertical separation?

21 A No.

22 Q Are you familiar with conservation practice Standard 313?

23 A I have read it. It was quite a while ago.

24 Q Okay. Let's look at it. Bear with me for just a second.

25 So it's -- again, in R-9 is 313. You can look at

1 Page 3.

2 A Okay.

3 Q So under the -- do you see the paragraph "design bottom
4 elevation"? There's a reference there to "Locate the
5 impoundment bottom elevation a minimum of two feet above
6 the seasonal high water table."

7 See that reference there?

8 A Yes.

9 Q Does -- do you interpret that to mean that the -- that
10 the two-foot vertical separation would be measured from
11 the inside of the lagoon liner or the outside of the
12 lagoon liner, if you know?

13 A I do not know.

14 Q Okay. Did you review the deposition transcript of Bill
15 Reck?

16 A No, I did not.

17 Q Are you aware of any CAFO permits that included this
18 parenthetical reference to measuring from the -- I keep
19 on messing up the language; sorry -- the outside of the
20 earthen liner?

21 A No, I'm not aware of any.

22 Q Okay. And is that terminology in any sort of a
23 regulation describing what lagoon liner standard must be?

24 A Not that I'm aware of.

25 Q Okay. So how would someone know that it's Ecology's

1 longstanding position that you would measure from the
2 bottom -- the outside of the earthen liner before
3 receiving a copy of this final permit?

4 A I think -- I think that's one of the reasons why the
5 parenthetical was put in there, is because it was -- it
6 became apparent that there was a difference -- different
7 people were interpreting where to measure the two-foot
8 separation from, and so that became apparent through the
9 public comment process, and that's why we put the
10 parenthetical in the permit.

11 Q But you haven't been able to point to any instance in
12 which Ecology actually did implement this term prior to
13 the final permit -- prior to this final CAFO permit.

14 Is that -- am I understanding you correctly?

15 A Without going back and looking at the 313 practices that
16 were in effect when the 2006 permit was in place, I -- I
17 can't say that definitively.

18 Q But you would agree that the 313 conservation practice
19 standard was the standard for lagoons under the 2006 CAFO
20 permit? That was your testimony before; correct?

21 A That was my testimony that -- at the time the permit was
22 issued, the version of 313 that was in place at that time
23 was in place.

24 I don't know what -- but 313 practices have evolved
25 over time. In my understanding, they're -- they are

1 updated periodically.

2 I don't know whether they -- were the same -- the
3 practices that were outlined in the May 2016 here that
4 we're looking at are the same practices and descriptions
5 that were in existence in the 2006 version of 313.

6 Q Are you aware of NRCS ever taking a similar position to
7 Ecology as outlined in this CAFO permit with regards to
8 measuring from the outside of the earthen liner to obtain
9 vertical separation to the water table?

10 A I had been told that at one point that the NRCS was
11 viewing it from -- and that there was some information in
12 our files to indicate that NRCS was measuring it from the
13 bottom -- the outside of the bottom of the liner.

14 Q And was that based upon -- do you remember who told you
15 that?

16 A That was based upon investigations by Melanie and as well
17 as John.

18 Q Okay. Was that based upon -- do you remember that
19 diagram that we looked at with Ms. Redding and
20 Mr. Jennings from Appendix C of the soil conservation
21 technical note?

22 A I recall the diagram. I mean, I don't have it memorized.

23 Q No. But I'm just asking you if that understanding was
24 based upon that diagram.

25 A It was based upon a diagram. I cannot testify that it

1 was the same diagram or not. I was not that familiar
2 with it.

3 Q Would it refresh your memory if we looked at the diagram?
4 Would that be helpful?

5 A We can look, yeah. We can look. I mean, again, this was
6 over a year ago that I had these conversations with staff
7 about this, and so I -- you know, I remember a diagram.

8 Q Okay. And I guess I'm just trying to understand your
9 testimony.

10 Is your testimony that diagram was one of the bases
11 for coming to this understanding about where NRCS had
12 measured the two-foot of vertical separation from?

13 A Again, a diagram, whether it's specifically -- whether
14 we're referring to the same diagram, I don't know.

15 Q Okay. No. That's fine. Let's put the diagram up so we
16 can be clear. R-7. And it's I believe Page 29,
17 although, I will tell you these, again, are not numbered
18 in your book.

19 So it's Appendix C, might be an easier way for you
20 to find it.

21 A Okay.

22 Q Is this the diagram that you recall looking at with
23 Ms. Redding and Mr. Jennings when you were discussing
24 where you understood NRCS measured from to obtain the
25 two-foot vertical separation?

1 A Again, it may be. I remember a diagram. I remember -- I
2 don't remember studying the diagram in great detail, but
3 I was -- it was a diagram similar to this.

4 Q Okay. Let's look at Exhibit I-56, Page 7, please. Let
5 me know when you're there. I know that's a big binder.

6 A Okay.

7 Q All right. Interrogatory No. 11, take a second just to
8 read that, if you would. I won't make you read it out
9 loud.

10 A (Witness peruses document.)

11 Okay.

12 Q Okay. So these are -- and if you look at the first page,
13 these are our interrogatories to Ecology and the answers
14 thereto.

15 Were you involved in helping provide the responses
16 to these interrogatories?

17 A I don't believe so. Looking at this signature date is
18 March 27th, 2018. I stopped working with the Department
19 of Ecology at the end of December.

20 Q Okay. Do you see the reference there to Appendix C at
21 the end of that interrogatory and response?

22 A Yes, I do.

23 Q Does that appear to be referring to the appendix that we
24 were just looking at -- Appendix C that we were just
25 looking at?

1 A It appears so.

2 Q Okay. Let's go back and look at it. R-9. R-7. Sorry.
3 And you can leave open the interrogatory just for
4 reference.

5 So if you could look at the first page of R-7, what
6 is it called?

7 A So the first page -- first page here is "Illustration for
8 Calculation of Hydraulic Gradient for a Compacted Liner,"
9 and it has the same title, yes.

10 Q Okay. So appears to be the same document; correct?

11 A That's correct.

12 Q Okay. And do you see back in the interrogatory where --
13 and I assume this is representing Ecology's
14 understanding, whether you were there at the time or not,
15 that the diagram shows that the proper measurement for
16 two feet of separation from the seasonal high water table
17 should be measured from the outside of the bottom of the
18 liner.

19 Do you see that response?

20 A Yes, I do.

21 Q Can you explain to me, if you can, how looking at
22 Appendix C, you can draw that conclusion?

23 A Well, there is no -- distance from the capital D there is
24 distance from datum to bottom of liner, and they're
25 describing where that line is attached to is the

1 bottom -- the bottom underside of the liner. It's not
2 the top of the liner.

3 Q And you're not aware of any discussions between Ecology
4 and NRCS, trying to get some clarification to confirm
5 that is a correct interpretation of this diagram?

6 A I'm not -- I didn't have any personal conversations, no.

7 Q And do you know if anybody on the project team did, the
8 permit development team?

9 A I couldn't say with certainty if there were or not
10 discussions.

11 Q Okay. With regard to, again, still this permit term,
12 were there any discussions with the public around -- or
13 were there any concerns about the potential economic
14 impact of this particular permit term on those who would
15 apply for coverage? I'm talking about the lagoon liner
16 permit term.

17 A To the extent they were -- the lagoon assessment costs
18 were included within the permit and -- but in terms of
19 specific discussions about cost for the public, no.
20 Maybe I've lost my train of thought.

21 Q Yeah. No. Let me try one more time. You saw my look.
22 I was trying to follow you too.

23 So with regards to the permit term related to the
24 two-foot vertical separation from the outside of the
25 earthen liner to groundwater, were there any discussions

1 with the public related to the economic costs of that
2 particular permit term?

3 A I do not believe so, no.

4 Q Did you have any discussions internally about costs?

5 A I don't recall any specific discussions about cost
6 because we didn't -- again, as I've testified earlier,
7 this was not viewed from Ecology. This is more of a
8 clarification of an existing requirement.

9 But we did recognize within the permit conditions
10 that, where lagoons had less than a separation, we
11 were -- had a fairly deliberative process in terms of a
12 plan and so on before -- in evaluating truly what the
13 impacts would be prior to actually requiring somebody to
14 register their lagoons.

15 A permit doesn't -- as you know, does not require
16 that.

17 Q But let's look at that actually because I think there's
18 been some confusion. You're referring to S7.B, correct,
19 the lagoon assessment process? Is that what you're
20 referring to?

21 This is R -- I'm sorry, R-1.

22 S7.B is what you're referring to, the lagoon
23 assessment?

24 A Yes.

25 Q And your view is that no action is required of a permit

1 holder under this particular provision of the permit?

2 A That's not what I said.

3 Q What did you say? What did you mean?

4 A What I said was, that does not automatically require. It
5 was an assessment of the lagoons. Complete a plan,
6 submit to Ecology within six months.

7 Then it also says, "Permittee has 18 months to
8 completion of the lagoon assessment to begin implementing
9 the plan."

10 So I was -- I misspoke earlier.

11 Q Okay. So Item No. 1, Paragraph No. 1, do you see again
12 there the reference to the two feet of vertical
13 separation in that paragraph?

14 How about -- maybe it would help if you just -- if
15 you don't mind just reading Paragraph No. 1.

16 A "A description of how the permit loan ensures there is at
17 least two feet of vertical separation between the bottom
18 of the lagoon liner as measured from the outside of the
19 liner and the water table including seasonally high water
20 table."

21 Q So that has the same parenthetical that we were looking
22 at?

23 A That's correct.

24 Q Okay. And this here is talking about the plan that the
25 permittee has to put together within six months after

1 doing the lagoon assessment; correct?

2 A That's correct.

3 Q So there's actually a requirement that their plan address
4 that two foot of vertical separation. Is that -- am I
5 understanding that correctly?

6 A Yes.

7 Q And then if -- once they complete that plan, if you look
8 at the next page, doesn't the permit term indicate they
9 have 18 months to begin implementing their plan?

10 A Yes.

11 Q So if a permittee doesn't have two foot of vertical
12 separation between the bottom of the lagoon liner as
13 measured from the outside of the liner, then they do, in
14 fact, have to come up with a plan to modify their lagoon
15 to meet that standard; correct?

16 A That could be one outcome of the plan I could envision.
17 Another outcome, which is, here's why -- for example,
18 here's why I don't think we need to modify, you know.
19 The separation may not be necessary or here's my proposal
20 for groundwater monitoring or something, some
21 alternative.

22 Q Where is the permit term that says that?

23 A I think that the way I would frame it is, it has six
24 months from compilation of the lagoon assessment to
25 develop a plan to address the deficiency. Address the

1 deficiency could mean retrofitting the lagoon. It could
2 mean other ways of addressing that deficiency.

3 Q But would you agree that the plan has to have a
4 description of how the permittee will ensure there is at
5 least two feet of vertical separation between the bottom
6 of the lagoon liner as measured from the outside of the
7 liner and the water table? Isn't that the plain language
8 of the permit?

9 A Yes.

10 Q So there really isn't an option, not to have that be --
11 that deficiency addressed in the plan -- through the
12 plan?

13 A The option doesn't appear to be as explicit as I thought
14 it would be.

15 Q Okay. And would Ecology depart from the terms of the
16 permit in implementing it?

17 MS. BARNEY: Objection. This witness
18 is no longer an Ecology employee. Wouldn't be able to
19 testify to that.

20 JUDGE FRANCKS: Sustain that.

21 Q (By Ms. Howard) You were the permit -- general permit
22 manager for many years; correct?

23 A Yes.

24 Q In your experience, did Ecology regularly depart from the
25 terms of a permit and enforcement of that permit? Is

1 that a standard practice for Ecology?

2 A No. Ecology wouldn't depart from the terms of the
3 permit, but Ecology -- because permit tries -- permits
4 try to anticipate as much as we can, there are times when
5 the permit -- what the permit is calling for may not be
6 appropriate.

7 And to the extent that there's language within the
8 permit that could -- could be interpreted as to get to
9 another -- to a more appropriate outcome, we have done
10 that.

11 Q As Ms. Barney just pointed out, you aren't able to speak
12 to whether or not Ecology would do that in this instance,
13 though; correct?

14 A That's correct.

15 Q Would you agree that the lagoon liner is a substantial
16 part of conducting the AKART analysis for these permits?

17 A It was a -- it was a substantial -- well, it was -- since
18 lagoon liners in -- are a -- a discussion around liners
19 was a significant kind of issue related to the permits.

20 It was incorporated when we evaluate the AKART. As
21 I said earlier, evaluate AKART not based on individual
22 permit term and conditions, but we looked at the permit
23 as a whole.

24 Q But you did specifically look, for example, as to whether
25 or not you would require double line -- double

1 synthetically lined lagoon liner or not in this instance;
2 correct?

3 A Yes, we did. We did. That was part of one of the
4 conversations we had, yes.

5 Q So you were specifically looking at the cost of the
6 lagoon liner when you're evaluating what would be AKART
7 for this permit? Did I understand you correctly?

8 A That was a consideration, yes.

9 Q Okay. And try not to make you repeat yourself here, but
10 I might a little bit just because I'm trying not to lose
11 my train of thought.

12 So with regard to the lagoon liner, did you have any
13 other discussions about economic impacts of requiring
14 certain permit terms for lagoon liners other than the
15 double lined?

16 A I believe there was an evaluation of the cost of doing
17 the assessments.

18 Q Okay. That was it?

19 A That's all I can -- yeah. That's all I can recall.

20 Q Let me just explore that just a little bit more, make
21 sure we're on the same page.

22 Did you get any specific comments related to the
23 two-foot vertical separation component of the permit with
24 regards to economic costs -- that was a bad question --
25 with regards to economics?

1 A I don't know if we got any specific questions on that.

2 Q You don't recall that coming up in any of the permit team
3 development meetings?

4 A I -- no. I do not recall that.

5 Q If you learned that that particular permit term was
6 significant cost to the potential regulated community
7 under the permit term, would that have had an impact on
8 your AKART analysis and whether that permit term, I
9 guess, taken as a whole, still satisfied your AKART
10 requirement?

11 A Yeah. If I -- again, if we'd known that that was going
12 to have a significant economic impact, it may have
13 changed the way of our analysis, yes.

14 MS. HOWARD: Okay. I think those are
15 all of my questions. Thank you, Mr. Moore.

16 JUDGE FRANCKS: Redirect, Ms. Barney?

17 MS. BARNEY: None. Thank you.

18 JUDGE FRANCKS: Mr. Moore, the board
19 can ask you questions. Let's see if the board has
20 questions.

21 Ms. Marchioro?

22 EXAMINATION

23 BY MS. MARCHIORO:

24 Q Good afternoon, Mr. Moore. Ask you a little bit about in
25 NPDES permitting process in terms of the public notice

1 and stuff.

2 So permit will go out for a draft -- as a draft and
3 get comments back. Is that the way it works?

4 A Yeah. Let me -- there is what's legally required and
5 then there's what Ecology actually does.

6 The legal requirements for the public involvement
7 around permits and so on are spelled out in two places.
8 There's some -- some requirements are spelled out in EPA
9 rules, and some are required -- some of those
10 requirements are spelled out and actually kind of
11 repeated in a WAC that Ecology has adopted, WAC 173-226.

12 The minimum requirements are public noticing of the
13 draft permit, 30-day comment period, and at least one
14 public hearing.

15 Ecology generally goes way beyond that, and in this
16 case we started off with listening sessions upfront to
17 get, you know, input into the permit, did a preliminary
18 draft, which is called a -- sort of a very rough idea and
19 here's what we're thinking about, giving people a chance
20 to respond to that and kind of react to that.

21 That then informs in this case -- may get it wrong,
22 but another draft, and I believe we did a preliminary
23 draft. Then we did the final draft, which is the formal
24 public review draft.

25 So each one of those. We don't -- for the

1 preliminary draft, we generally don't do a response to
2 comments. The response to those comments is the formal
3 draft.

4 Q Okay. So you'd have what's called a responsiveness that
5 would go out with the final?

6 A Final permit, yes.

7 Q And the fact sheet also would go with that?

8 A The fact sheet and an economic analysis are both required
9 to go out with the draft permit.

10 Q So in terms of just talking generally rather than about
11 this permit specifically, if comments come in on a draft,
12 the purpose of the comments is to help you refine the
13 draft; is that right?

14 A That's correct.

15 Q So changes can happen to the NPDES permit between the
16 draft and the final?

17 A That -- yes. I would be surprised. It's very rare that
18 we actually don't make changes in response to the public
19 comment.

20 Q And is there any legal requirement, regs or EPA's regs,
21 that require Ecology to go out and tell the entity that's
22 either getting an individual permit or the industry
23 that's getting a general permit that those changes are
24 going to be made and have them comment on them again, or
25 does it just come out in the final?

1 A They -- there is no requirement that I'm aware of in EPA
2 rules. There may be some case law around that.

3 I think that the -- the practice of Ecology has
4 always had is, are the comments -- are the changes being
5 made to the permit as a result of comments that we've
6 received? And it could be reasonably expected to stem
7 from those comments.

8 Q And those comments are made available to everybody before
9 you, in terms of the public -- that they're not just held
10 in Ecology's file? They're available to the public to
11 see what the comments are vis-à-vis your own comment if
12 they had submitted one?

13 A Right. We -- generally, the practice when I was there is
14 that when -- at the close of the public comment period,
15 as close to thereafter as we can, we try and post all of
16 the comments we've received, and so they're available for
17 other folks to look at.

18 We don't post the comments on a website. We didn't
19 before the close of the comment period because we didn't
20 want people's comments on other people's comments. It's
21 sort of an infinite loop, if you will.

22 Q And then there's discretion to reopen the comment period?

23 A Yes.

24 Q So what -- do you know what NRCS's purposes is?

25 A I'm a little hesitant to sort of -- I'm not that familiar

1 with them.

2 Q Okay.

3 A They provide guidance and assistance to --

4 Q But let's say they're different than EPA, which has an
5 environmental protection mission.

6 A Yes.

7 Q Okay. So in trying to get to this particular issue that
8 we've been talking about with Ms. Howard in terms of the
9 two-foot separation -- so let's say, just for argument's
10 sake, that the two-foot analysis or the separation, if
11 Ecology was following the NRCS guidance and, in fact, it
12 should be measured from the bottom of the lagoon as
13 opposed to the bottom of the water -- as opposed to the
14 bottom of the clay layer -- so in terms of this permit,
15 you indicated that you thought it is protective of
16 groundwater.

17 Is that, in part, based on the way Ecology measures
18 the distance between the bottom of the lagoon to the
19 groundwater table?

20 A Yes.

21 Q Okay. So let's say we agree with the dairy federation
22 that what should have been done was this alternate
23 location of -- I'll call it alternate -- pejorative way
24 to an alternative low location of measurement, what would
25 Ecology then need to be -- would you find that to be

1 protective of groundwater?

2 And if not, what would you want to see in the permit
3 to show that groundwater is being protected?

4 A A little bit outside of my area of expertise. I think
5 Melanie had testified to the needs of having two foot of
6 separation to attenuate viruses and attenuate bacteria,
7 and I'd rely on her for that.

8 Q Okay. In terms of would groundwater monitoring be a good
9 substitute, in your experience?

10 A Groundwater monitoring could be used to try and evaluate
11 whether you're having bacteria coming into the
12 groundwater in that case, yeah.

13 Q Okay. So I just want to go back to that -- Mr. Storman's
14 document because I know that there was some attachments,
15 and I don't know if I can remember what document that
16 was. Hang on a second.

17 Chime in, if someone wants to find it.

18 MS. BARNEY: R-14.

19 Q (By Ms. Marchioro) R-14. Thank you. So R-14.

20 So if we can go back, you referenced some
21 attachments, and I was just trying to get to -- one of
22 the previous witnesses testified about bacteria, et
23 cetera, but if you go down to this issue paper, starts on
24 Page 6 of the PDF, about halfway through the document.

25 A Yes. I've got it.

1 Q Have you read that one before?

2 A I have read it. It was -- first time I read it was
3 probably maybe a month or so ago.

4 Q Okay. That's back from 2002.

5 And, in fact, Ms. Redding is the author; is that
6 right?

7 A That's correct.

8 Q So back then, there's -- if you look down about Page --
9 talks about the concern -- Ecology expressing its concern
10 about viruses and pathogens.

11 A Yes.

12 Q So that's -- again, Ecology's been on record at least for
13 a few years, but that that's a concern; is that right?

14 A Yes.

15 MS. MARCHIORO: Okay. Let me just
16 check. I think that's it.

17 That's all. Thank you.

18 JUDGE FRANCKS: Ms. Brown?

19 EXAMINATION

20 BY MS. BROWN:

21 Q Yeah. Mr. Moore, congratulations on your retirement.

22 A Thank you.

23 Q So I need to sort of step back and get a little bit
24 bigger picture understanding of these two permits, R --
25 we're calling them R-1 and R-2 -- and to understand why

1 there are two permits and how a permittee knows which
2 permit they're supposed to apply for.

3 A Okay.

4 Q So maybe you can just kind of give me some general stuff
5 on that.

6 A Yeah. So state law requirements for permitting are, you
7 know, for what kind of things need permits are different
8 than they are for the Federal Clean Water Act.

9 Under the Federal Clean Water Act, discharge from
10 point source to surface water is required in the permit,
11 and that's the Clean Water Act.

12 And there's -- and under state law, the discharge to
13 either surface or groundwater from a commercial or
14 industrial operation requires a state permit.

15 Now, since -- if -- in terms of who needs a permit,
16 which permit they should be applying for, if the only
17 trigger that pulls somebody into the permit is a
18 discharge to groundwater, then either permit would be
19 permissible.

20 But if there's a discharge that's associated with
21 the discharge to surface waters, even under the 25-year
22 24-hour storm event type of situation, that would then
23 trigger the requirement to get the combined permit
24 because we can't authorize the discharge to surface
25 waters unless it's under the combined permit.

1 Q And the combined permit is R-1?

2 A I don't have the exhibits memorized. Let's see here.

3 Yes.

4 Q Okay. So R-1 authorizes, under conditions, discharges to
5 stormwater -- surface water and groundwater?

6 A That's correct.

7 Q Okay. And then R-2 just authorizes discharges to
8 groundwater. So that would be if somebody doesn't have
9 any discharge to surface water?

10 A That's correct.

11 Q Okay. So if they -- so then if they apply for one of
12 these permits, is that an admission that they have a
13 discharge to groundwater, for instance, if they apply for
14 R-2?

15 A Not necessarily. We have -- it doesn't -- in order for
16 Ecology to require a permit, we would have to demonstrate
17 there is action to be discharged, but there are
18 circumstances when we have this in our -- I say "our" --
19 but in the construction stormwater permit is an example
20 where that's a permit to discharge stormwater off of
21 construction sites.

22 Many, many construction sites are managing their
23 stormwater so they don't have a discharge at all.
24 Thereby, they're getting the permit as a kind of
25 insurance policy, if you will.

1 Q Okay.

2 A It's, in other words, here's a set of operating practices
3 that I'm going to follow, and if I'm following, the State
4 says I'm protecting water, water quality, and I can go
5 beyond that.

6 Q Okay. And so that's -- I'm trying to understand the
7 disconnect between the large number of operations that
8 meet the definition of CAFO as far as the number of
9 animals and state of the land and all that, but the
10 number that have actually applied for the permit.

11 And I'm trying to understand, is that an enforcement
12 issue or is it because there's a legitimate dispute about
13 whether there's discharge to groundwater? What -- can
14 you give me a little more context for this?

15 A I think it's a combination of both to have those things.
16 I think that there is -- I think it may have -- one of
17 the previous witnesses testified to the fact this -- the
18 fact that you have appeal going on provides uncertainty,
19 so people are uncertain what they're actually applying
20 for. That's one element there.

21 Ultimately, it's -- Ecology's going to have the --
22 my understanding is that Ecology has the burden of
23 proving that there's actually a discharge before a permit
24 can be required.

25 And so we had laid out a sequential process for

1 doing that response to some earlier questions. I -- we
2 wrote issue -- I mean, when I was with Ecology, we're
3 pulling in the folks who were covered by the past permit
4 in the new permit and getting them covered there.

5 We were going after those folks who actually had a
6 discharge, and we're getting those folks covered. And
7 then our next piece was to send off letters to a group of
8 folks who actually had -- who we believe had lagoons that
9 were a high likelihood of seeping to groundwater and
10 start that process of getting those folks covered.

11 But ultimately, you know, in my view, certain
12 percentage of those folks would challenge our
13 determination that they need to get that permit.

14 Q What would you be looking at to make that call on the
15 groundwater discharges? How would you select those
16 CAFOs?

17 A I can tell you how -- when I was with Ecology, how we
18 were --

19 Q Yeah, I understand.

20 A -- the proposal was. Selecting folks where we might have
21 little or no information. In areas where we have high
22 groundwater, I'm going to go around looking at the most
23 egregious and pull those folks in and work our way down
24 to those folks who are -- where the link is less direct.

25 Q So high groundwater table would mean it would be --

1 A The groundwater table would be one. I think that there's
2 a number of areas, for example, in Whatcom County where
3 the soil variance can either make a very hard case.

4 I mean, it's a fairly clear case, from my
5 perspective, that that earthen-lined lagoons in that area
6 are seeping to groundwater.

7 Q Okay. And so then I was also looking on the -- back on
8 the permits again where you talk about -- I'm looking at
9 the first question about permit coverage, S1. And both
10 of them talk about designated -- for small CAFOs
11 designated as significant contributor of pollutants to
12 surface or groundwater by Ecology.

13 And I was wondering who those -- not specifically
14 the names, but what does that mean?

15 A That would take, for example, a dairy with less than 200
16 head. It might have 50 head cows or something like that,
17 where this -- this language comes almost directly out of
18 the EPA rules.

19 Q Okay.

20 A My understanding. And it would require us to actually
21 have done a site inspection and said, you know -- and
22 make a determination that they are significant
23 contributors, in this case to surface waters.

24 Q Okay. So maybe if a situation where they had a
25 discharge?

1 A Yes. That could be one trigger.

2 MS. BROWN: Okay. I think that was
3 it. Thank you very much.

4 JUDGE FRANCKS: Mr. Wise?

5 EXAMINATION

6 BY MR. WISE:

7 Q Good afternoon.

8 A Good afternoon.

9 Q Does anybody ever get an individual CAFO permit? We're
10 talking about general permits here.

11 Is there such a thing as an individual permit?

12 A I think Ecology has at one point issued an individual
13 permit for a poultry operation. We may have issued an
14 individual permit for a large feedlot in Eastern
15 Washington.

16 Q Would there be any advantage to the permittee for getting
17 an individual permit? I mean, would it be more site
18 specific, more tailored to the operation?

19 A It could be a little bit more tailored to the -- to that
20 operation. Generally, in my experience, people would
21 much rather be covered by a general permit than an
22 individual permit.

23 Q And it doesn't sound like there's a lot of individual
24 permittees out there? Only two that you can think of?

25 A That's correct.

1 Q Okay. I asked this question earlier, but I'd appreciate
2 your perspective on it too. I'm still struggling with
3 this two-foot vertical separation, where the end points
4 are.

5 I can imagine how you could figure out where the
6 water table was, but I'm still struggling with where the
7 upper end point of that two feet is.

8 How do you tell where is the bottom of the liner if
9 you have, like, a clay liner, which could be, I think, of
10 various thicknesses?

11 A I think the way I would be -- I'm not a hydrogeologist
12 or -- so with those caveats, what I would suggest is that
13 it's where you've either started to amend the soils or,
14 you know, using -- if you're importing soils where you're
15 bringing in the new soils or amending existing soils.
16 That's where I would start that measurement from.

17 Q Okay. I'd like to just -- from your experience, just
18 kind of go through the enforcement process a little bit.
19 Say you got a report that there was someone without a
20 permit that had discharged.

21 What would your next step be?

22 A The next step would be a -- usually would be a letter.
23 Well, a little bit complicated. If there is a discharge,
24 we have a couple of options. We could take enforcement
25 for that, issue penalties for that discharge.

1 And those -- that order issued a penalty, the
2 operator getting that now has the ability to appeal if
3 they chose -- choose to do that.

4 We also -- when there is a discharge in terms of
5 getting folks covered by the permit, the next step would
6 usually order -- not an order, but the first step would
7 be an order directing them to apply for the permit.

8 If that's not a successful, using our escalation
9 policy, which is an administrative order, and if that's
10 not successful, a penalty.

11 Q Can you think of any situations where you've actually
12 done that whole process?

13 A Yes.

14 Q Are there very many of them?

15 A It's not that common, but I think the -- under the CAFO
16 permit, I think that that -- it's not that common
17 generally.

18 In other words, if we have for industrial stormwater
19 or construction stormwater, generally a letter is enough
20 to get folks to apply for a permit.

21 My experience is that, under the CAFO permit, that
22 it's a little bit more difficult to get folks to apply
23 for it.

24 Q If you'll indulge me a bit and say we're in a perfect
25 world from a regulatory agency standpoint. I'm

1 envisioning a situation where you have these CAFOs out
2 there and you actually require surface water and
3 groundwater monitoring all the time and then, like,
4 annual or quarterly reports.

5 Would that be an effective way to enforce the clean
6 water laws and the water quality? I mean, could that
7 work?

8 A I -- part of writing a permit is understanding the
9 capabilities of the permittees, and, for example,
10 installing -- let's take groundwater monitoring.

11 That's -- that's not a trivial exercise. It's
12 figuring out where to place the wells so that you're
13 getting the -- getting a representative sample. You're
14 measuring the activities that are occurring on that
15 facility as opposed to the activities that are going on
16 next-door or elsewhere.

17 That -- it's not -- it's done, but it's not
18 something that's within the capability of a CAFO
19 operator. They would have to hire and access, you know,
20 specialized expertise to do that.

21 And generally, Ecology would have to be involved --
22 should be involved if, in fact, we're going to be relying
23 on the results of that and determine a compliance.

24 So we would have to be in -- kind of making --
25 agreeing that, yes, those are places that -- in the

1 appropriate -- wells were placed in the appropriate
2 location.

3 There's -- there is also terms of collecting the
4 sample out of the well. You know, they don't really have
5 to be purged, something that, again, requires some
6 expertise around that.

7 And so in an ideal world, yeah, you could do it, but
8 right now, the way the analysis that we evaluated was
9 that -- remember, monitoring just provides information.

10 It doesn't change -- you know, it provides
11 information into how well the permit is working or not.
12 It doesn't, by itself, result in any environmental
13 improvement. It's the actions in the permit that result
14 in the environmental improvement.

15 Q Okay. Now, your understanding of AKART, the one factor
16 in there is reasonableness. Is reasonable for who? For
17 the permittee? For the public? For the agency? How do
18 you apply that reasonableness factor?

19 A That the reasonable -- it is as applied to the permittee.

20 Q So it's what's reasonable for the permittee?

21 A For the discharge, yes.

22 Q Yeah. Okay. Now, this -- I don't know if I get the name
23 right or not, but the dairy management act order of 9064,
24 I think it was, if you have your CAFO general permit, do
25 you still have to comply with that dairy management act?

1 A Yes. I mean, that they're not -- they are independent
2 statues.

3 Q Okay.

4 A Can I add a little bit there?

5 Q Sure.

6 A I think that the way we tried to write the permit, that
7 if you were in compliance with the permit, many of the
8 elements -- for example, Manure Pollution Prevention
9 Plan, many of those elements would come from the same
10 elements that are required under the -- during the Dairy
11 Nutrient Management Act.

12 Q So in your understanding, those two systems are somewhat
13 harmonized? They're not mutually exclusive?

14 A That's correct. We try to -- I mean, the legislature
15 passed 9064 and tried to harmonize the two regulatory
16 programs.

17 MR. WISE: Thank you very much.

18 JUDGE FRANCK: Questions based on the
19 board's questions.

20 Ms. Barney?

21 MS. BARNEY: I do have one. Thank
22 you.

23 FURTHER EXAMINATION

24 BY MS. BARNEY:

25 Q Mr. Moore, when Ms. Marchioro was asking about the

1 two-foot separation issue and where to measure -- and I
2 believe one of Mr. Wise's questions sort of also goes to
3 this -- the -- in using a soil or an amended clay liner,
4 those can be of various thicknesses; correct?

5 A That's correct.

6 Q So what happens if you have a two-foot liner and you
7 accept NRCS's measurement from the top of the liner as
8 opposed to the bottom of the liner? Does that mean you
9 have zero separation to groundwater?

10 A That's correct. That's one of the reasons why Ecology
11 has always looked at this as being from the bottom of the
12 liner -- the outside bottom of the liner.

13 MS. BARNEY: Okay. Thank you. That's
14 all I have.

15 JUDGE FRANCKS: Ms. Matsumoto?

16 MS. MATSUMOTO: Yes. Thank you. Just
17 a couple short questions.

18 FURTHER EXAMINATION

19 BY MS. MATSUMOTO:

20 Q Board Member Brown was asking you a bit about the
21 two-permit structure.

22 And isn't it true that another kind of by-product of
23 having that two-permit structure is that only the State
24 can take enforcement actions under the State waste
25 discharge permit?

1 A That's correct. There are -- our state legislature has
2 not chosen to incorporate -- well, call the provisions of
3 the clean water.

4 Q Right. And aside from monitoring being providing
5 information, it would also be a mechanism that would
6 allow you to take some enforcement action if there were
7 more monitoring provisions included in the permits;
8 correct?

9 A Certainly, if there were more monitoring in there, then
10 that's more permanent requirements, and so, yeah, there's
11 more opportunity for enforcement.

12 MS. MATSUMOTO: Thank you. That's all
13 I have.

14 JUDGE FRANCKS: Ms. Howard?

15 MS. HOWARD: Yes. Just a couple
16 questions.

17 FURTHER EXAMINATION

18 BY MS. HOWARD:

19 Q Back to sort of follow-up on follow-up.

20 Is it your understanding that NRCS allows a lagoon
21 liner or a lagoon to be built into the groundwater table?

22 A If you're measuring --

23 MS. MATSUMOTO: Your Honor, I just
24 want to object. I don't believe there were questions
25 about that from the board. It's beyond the scope.

1 JUDGE FRANCKS: I think it gets into
2 the discussion of the liner measurement. So I'm going to
3 allow it.

4 A Again, that -- to me, that reinforces where you do your
5 measuring. Is that from -- because it's quite
6 conceivable that you could have a clay liner that is
7 greater than two feet thick.

8 Q (By Ms. Howard) But Ms. Redding, I think, testified that
9 her understanding is that NRCS standard does not allow
10 you to build your lagoon into the groundwater.

11 Is that consistent with your understanding?

12 A That's my understanding, which means, to me, there's sort
13 of an inconsistency on that.

14 Q And you haven't read Mr. Reck's testimony?

15 A No, I have not.

16 Q Okay. Is it your understanding that -- so, again,
17 speaking to the reason for the two-foot vertical
18 separation, you're familiar with 313, the NRCS -- the
19 lagoon liner standard; correct?

20 A Yeah.

21 Q And are you also familiar with Appendix 10D from their
22 field handbook that is related to the 313 standard and is
23 kind of the how-to component of how to implement the
24 lagoon liners?

25 A I believe I have read Appendix 10.

1 Q Are you familiar with the -- with the description of the
2 purposes for eliminating seepage including -- let me try
3 this question to be a little bit better.

4 So Ecology -- when you're looking at this two-foot
5 vertical separation, you're sort of separating out -- to
6 what extent are you taking into account the ability of
7 the liner itself to perform functions like preventing
8 virus or bacteria from migrating into groundwater?

9 A I believe Ms. Redding spoke to that earlier.

10 Q And what did -- what is your understanding of that?

11 A My understanding that -- as I recall, the liner does have
12 some ability to remove a larger part of the bacteria. I
13 think that's -- as I recall, her testimony was, she --
14 she was less certain about its ability to remove smaller
15 things like viruses.

16 Q Would you agree that NRCS is an expert on its lagoon
17 liners and what they -- how they function?

18 A I think that -- I don't think that NRCS is an expert on
19 the water quality impacts of lagoons.

20 Q But are they an expert on the functioning of their lagoon
21 liners themselves?

22 A Again, I think that they are -- my understanding is, NRCS
23 is -- has not -- does not warrant, if you will, the
24 functioning with respect to water quality perspectives.

25 Q So then you would be surprised to learn from their field

1 handbook that one of the purposes for their liner is to
2 prevent virus or bacteria from migrating out of the
3 storage facility into an aquifer water source?

4 MS. BARNEY: Objection. At this point
5 this seems to be quite beyond the scope of the board
6 questions.

7 JUDGE FRANCKS: I'm going to sustain
8 that objection. We've gone a little farther than the
9 board went.

10 MS. HOWARD: I'm trying to get to the
11 two-foot issues, so I apologize. I wasn't getting there
12 very directly.

13 Your Honor, actually, those are all my questions.
14 Thank you.

15 JUDGE FRANCKS: Okay. Thank you,
16 Mr. Moore. You're excused.

17 Ms. Barney, do you have another witness?

18 MS. BARNEY: We do, Your Honor.
19 Ecology would call Vince McGowan.

20 JUDGE FRANCKS: The court reporter is
21 going to swear you in.

22
23 VINCE MCGOWAN, having been first duly sworn by the
24 Certified Court Reporter, testified as
25 follows:

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DIRECT EXAMINATION

BY MS. BARNEY:

Q Good afternoon, Mr. McGowan. Would you please say and spell your name for the court reporter.

A My name is Vincent McGowan. It's V-i-n-c-e-n-t, McGowan, M-c-G-o-w-a-n.

Q And where are you currently employed?

A Department of Ecology, water quality program.

Q And how long have you worked for Ecology?

A A little over eight years.

Q And were you employed in the environmental field before that?

A Yes.

Q And where did you work prior to your engagement with Ecology?

A Prior to Ecology, I worked for the City of Olympia in their public works department for eight years, and then prior to that, I worked for an environmental consulting firm.

Q And what academic degrees do you hold?

A I have a bachelor's and master's degree in geography.

Q And do you have any licenses in the state of Washington?

A I have a licensed engineer in training license.

Q And what does that entail?

A That's the first step towards a professional engineer

1 license. So the engineering training license is received
2 after meeting experience and education requirements and
3 passing an exam.

4 Q Okay. Thank you.

5 What is your present position at the Department of
6 Ecology?

7 A I'm currently the program development services section
8 manager within the water quality program.

9 Q Is it fair to say that you are Ecology's new Bill Moore?

10 A That's fair, yes.

11 Q Did you participate in the development of the CAFO
12 permits?

13 A No, I did not.

14 Q And when did you start your position at the program -- at
15 program development services, your current position?

16 A My current position I started on December 1st of 2017.

17 Q And were you involved in that section prior to that?

18 A Yes. I worked in the section since -- so in -- from
19 2015 -- December 2015 until 2017, I was the municipal
20 unit supervisor within program development services.

21 And for three years prior to that, I was one of the
22 permitting and technical leads for the program, working
23 for Mr. Moore in the section.

24 Q So as part of that, did you ever -- and part of the staff
25 of the program services section, did you ever participate

1 in meetings with Mr. Jennings, Mr. Moore, or Ms. Redding
2 as they were developing the CAFO permits?

3 A No, I did not.

4 Q So today, what are your responsibilities with regard to
5 CAFO permits?

6 A So today I'm -- my current position, managing the section
7 that is leading the administration and implementation of
8 the CAFO permits.

9 Q And can you tell us what those duties entail --

10 A So --

11 Q -- just generally?

12 A Generally, the permit writer for the department is in
13 this section, and that person reports to unit supervisor,
14 reports to section manager.

15 And that position is responsible for coordinating
16 the permit implementation team. All of our general
17 permits will have a team, which, as Mr. Moore discussed,
18 that's a way for us to involve the regional -- the
19 regions, Ecology regions, and in this case that position
20 also works with the Department of Agriculture.

21 Q And so is there an existing implementation team for the
22 CAFO permit?

23 A There is, yes.

24 Q And are you then the program section manager that
25 oversees that?

1 A Yes. I'm the -- yes.

2 Q Okay. And, actually, I just have one final question for
3 you. Does the Department of Ecology today still consider
4 these permits protective of water quality?

5 A Yes, we do.

6 Q And does Ecology stand behind the permits as they were
7 issued?

8 A Yes.

9 MS. BARNEY: Thank you. That's all I
10 have.

11 JUDGE FRANCKS: Okay. Mr. Tebbutt?

12 CROSS-EXAMINATION

13 BY MR. TEBBUTT:

14 Q This is going to be quick. Good afternoon, Mr. McGowan.
15 I'm Charlie Tebbutt. I represent -- all the
16 environmental appellants in this case.

17 You're here, sir, because Mr. Susewind is unable to
18 testify; correct?

19 A Yes. That's my understanding.

20 Q And did he tell you about conversations he had with me
21 about why all lagoons leak and pollute groundwater?

22 A No.

23 Q So you're the implementation section manager; correct?

24 A The section that I manage writes and implements most of
25 the general permits.

1 Q Okay. So for implementation then, you're in charge of
2 knowing how many entities have applied for the permit; is
3 that correct?

4 A That's correct. Yes.

5 Q How many have applied so far?

6 A There are 23 CAFOs under the general permit.

7 Q Twenty-three. And which one? The combined or the State?

8 A Four of those are state only. The others are combined.

9 Q So 19 are combined, four are state?

10 A That's my understanding of the last time I looked, yes.

11 Q And so that's fewer than 10 percent of the CAFOs in the
12 state; correct?

13 A Based on the numbers I've heard over the last couple
14 days, yes.

15 Q Okay. Take a look at Exhibit A-73, Page 1. It's in the
16 binder back there, I believe. Maybe that one. I'm not
17 sure. The one that says Puget Soundkeeper. Yeah. All
18 the way to the back.

19 While we're getting to that, Mr. Susewind -- have
20 you discussed the permit background with Mr. Susewind?

21 MS. BARNEY: I'm going to object at
22 this point. This is beyond the scope of direct.

23 MR. TEBBUTT: Well --

24 JUDGE FRANCKS: I'm going to -- well,
25 go ahead. What's your response?

1 MR. TEBBUTT: Mr. Susewind isn't here.
2 This is -- it was represented that he would be here. We
3 understand he has a health condition, but it impairs our
4 ability to put on our case because we expected
5 Mr. Susewind to be here. He's his alternate, so we
6 should be able to ask him a couple questions.

7 MS. BARNEY: Well, if I may,
8 Mr. McGowan is representing the Department of Ecology
9 with Ecology's view of how the permit is now.

10 Mr. Moore was involved in the development of the
11 permit. Mr. Moore was the one that some of these
12 questions could have been directed to because he was
13 technically involved in the development of the permit.

14 Mr. McGowan has just recently taken over just in the
15 past -- you know, within the past several months and is
16 essentially taking the permit as it was developed.

17 So in terms of the development of the particular
18 conditions and aspects of the permit, those questions
19 could properly have been submitted to Mr. Moore, and, in
20 fact, Soundkeeper did submit questions to Mr. Moore.

21 JUDGE FRANCKS: I'm going to sustain
22 the objection.

23 MR. TEBBUTT: Well, again, Mr. Moore
24 knew nothing about this stuff. Mr. Susewind had the only
25 information that was available about the meetings with me

1 and with Ms. Rogers that are very relevant to this
2 discussion and should be able to be part of the
3 questioning. I should at least be able to know whether
4 Mr. Susewind discussed it with Mr. McGowan.

5 JUDGE FRANCKS: And I've sustained the
6 objection, so move on.

7 MR. TEBBUTT: All right. We've made
8 our objections for the record once again.

9 Q (By Mr. Tebbutt) Do you have Exhibit A-73 in front of
10 you, sir?

11 A Yes.

12 Q And on the -- on Page 16 of A-73, do you see that?

13 A Yes.

14 Q Is that your signature that appears on Page 16 of A-73?

15 A It is.

16 Q So you're testing that the statements made in this
17 document are true and accurate on behalf of the
18 Department of Ecology; correct?

19 A That's correct.

20 Q And if you take a look at Page 14 of A-73, the
21 Interrogatory No. 56 says, "Identify the facilities by
22 facility name and address that have applied for coverage
23 under the CAFO permits as of March 2017."

24 Do you see that?

25 A Yes, I do.

1 Q And Ecology provided an Excel spreadsheet with that
2 information; correct?

3 A That's what the response says, yes.

4 Q How many facilities have applied for the permit since the
5 Excel spreadsheet was sent to environmental appellants?

6 A I don't recall.

7 Q Do you have any idea?

8 A I'm not aware of any.

9 Q So they're all applied for by March of 2017, all 24 or
10 23, I think what you testified about?

11 A That's -- I believe so, yes.

12 MR. TEBBUTT: Your Honor, I would like
13 to move into evidence A-73.

14 JUDGE FRANCKS: A-73 is admitted.

15 (Exhibit No. A-73 admitted.)

16 MR. TEBBUTT: Well, I guess that's all
17 I'm allowed to ask about, so I'm done.

18 JUDGE FRANCKS: So, Ms. Howard, you
19 don't have any questions?

20 MS. HOWARD: I don't have any
21 questions.

22 JUDGE FRANCKS: Ms. Barney, redirect?

23 MS. BARNEY: No, Your Honor.

24 JUDGE FRANCKS: Okay. Board
25 questions?

1 MR. WISE: No questions.

2 JUDGE FRANCKS: Thank you,
3 Mr. McGowan. You're excused.

4 MR. TEBBUTT: Your Honor, there is one
5 matter that I would like to do at this time as a matter
6 of procedure.

7 I'd like to renew environmental appellants' motion
8 for judgment as a matter of law that there is no AKART
9 for existing lagoon. We've made that presentation
10 earlier, and as a matter preserving the issue for appeal,
11 we'd like to make it again and ask the board to rule on
12 it as a matter of law.

13 In addition, Your Honor, environmental appellants
14 are ready to go forward with their closing argument.

15 JUDGE FRANCKS: And because we don't
16 have time for all of the closing arguments today, we are
17 going to save those until tomorrow.

18 Also, I believe that other parties had asked for
19 rebuttal -- possible rebuttal witnesses, so I'm going to
20 look into that before we do our closing arguments.

21 But at this point all of that is procedural, so what
22 I propose to do is let the board go, adjourn our
23 proceedings for today, but I'd like to talk to counsel
24 before we leave. And then we'll talk about what's going
25 to happen tomorrow.

1 MR. TEBBUTT: Your Honor, again, on
2 the record, one more time, with regard to the request to
3 videotape the proceedings, I am under the impression that
4 KING 5 is not available -- may not be available tomorrow
5 to videotape the proceedings.

6 If they are not available, we renew our request for
7 Friends of Toppenish Creek to do so. As you can see,
8 there's plenty of room in the courtroom for a single
9 video camera. This is a public hearing. The PCHB rules
10 require that this be allowed to be videotaped. There is
11 no ability to prevent it. You can only manage how it's
12 done.

13 And so we, again, renew Friends of Toppenish Creek's
14 request to videotape so that other people in the state
15 can see what happens here in this proceeding.

16 JUDGE FRANCKS: Okay. So I am going
17 to adjourn our proceedings for the day and go off the
18 record.

19 We're going to excuse the board, and then I'm going
20 to come back and we'll talk about procedural issues,
21 including your video.

22 (Board members exit.)

23 (Pause in the proceedings.)

24 JUDGE FRANCKS: Okay. In no
25 particular order, I have a couple of things.

1 First of all, Mr. Tebbutt, your motion for the
2 judgment -- I can't remember all the words you used, but
3 the board will consider that, and I will report an answer
4 first thing in the morning at nine o'clock.

5 MR. TEBBUTT: Thank you.

6 JUDGE FRANCKS: On the request for
7 video, I issued my approval for KING 5 in part because
8 they are an independent party who's not a party to this
9 case.

10 If they are not available, then I will allow Friends
11 of Toppenish Creek to video, and I will use the same
12 parameters that I would have used or will use on KING 5,
13 if they are still available. And so -- which would be
14 one camera.

15 What I'm probably going to do is have it set over
16 there where the witness is and will be allowed to video
17 the closing arguments, be allowed to have one pan of the
18 board just at some point.

19 And I am -- and then also -- so that's that. And
20 I'd like that to be set up about 8:30 tomorrow morning so
21 it's all ready to go.

22 Also -- and then I will hold Friends of Toppenish
23 Creek to the limitations that they set forth in their
24 request about, you know, not editing and using it in its
25 entirety.

1 Also the closing arguments, I am going to hold you
2 to a time limitation. So it will be 20 minutes a party.
3 And we will commence those whenever we are done with all
4 our witnesses.

5 Okay. So that leaves me, I believe, to my last
6 question, which is rebuttal witnesses.

7 What rebuttal do people feel they need, and, if so,
8 who is it, what are they rebutting, and how long is it
9 going to take?

10 So who would like to handle that? Who wants to go
11 first?

12 Ms. Barney?

13 MS. BARNEY: I can start, Your Honor.
14 Ecology will not be calling any rebuttal witnesses.

15 JUDGE FRANCKS: Okay.

16 MR. TEBBUTT: Nor will Puget
17 Soundkeeper.

18 JUDGE FRANCKS: Okay.

19 MS. HOWARD: Well, I'd like to make it
20 interesting. We aren't going to be calling any rebuttal
21 witnesses either.

22 JUDGE FRANCKS: All right. So what
23 that means to me is that then, assuming the board doesn't
24 grant your motion, which I don't know at this moment,
25 then we will proceed with the closing shortly after nine

1 o'clock tomorrow morning.

2 MR. TEBBUTT: Your Honor, I would like
3 to request more than 20 minutes. I think I need about 45
4 minutes. There's a tremendous amount of issues that
5 we've put in, tremendous amount of evidence. And to do
6 justice to this issue, I believe we need 45 minutes.

7 MS. HOWARD: And, Your Honor, actually
8 we would request a little bit more time as well. I think
9 we're going to be closer to the 40-minute mark as well.

10 MR. TEBBUTT: Seeing as we don't have
11 any rebuttal witnesses, we should have time.

12 JUDGE FRANCKS: In light of the lack
13 of rebuttal witnesses, yes, I will let you each have 40
14 minutes.

15 MS. HOWARD: Thank you, Your Honor.

16 JUDGE FRANCKS: And what order are we
17 going to go in?

18 MR. TEBBUTT: I would like to go first
19 and last, Your Honor.

20 JUDGE FRANCKS: Okay. You're going to
21 reserve some of your 40 for your last?

22 MR. TEBBUTT: Yes.

23 JUDGE FRANCKS: All right. And then
24 who goes next?

25 MS. HOWARD: We'll be second.

1 JUDGE FRANCKS: Okay.

2 MS. HOWARD: And I'm not anticipating
3 needing to respond, but you never know, so I'll watch my
4 time accordingly.

5 JUDGE FRANCKS: Okay. I'll just leave
6 your chess clocks out there.

7 MS. HOWARD: There you go.

8 JUDGE FRANCKS: Okay.

9 MS. HOWARD: Your Honor, on the
10 videotaping, I'd like to request that we receive a copy
11 of the videotape that's made by Friends of Toppenish, and
12 I think I'd also like to request that we're notified
13 where that is used and when it is used so that we're
14 aware of that.

15 JUDGE FRANCKS: Well, how about you
16 guys talk about that, and if there's a problem, I'll deal
17 with that tomorrow morning.

18 MS. HOWARD: Okay. That sounds great.

19 MR. TEBBUTT: Sounds like a restraint
20 on free speech to me.

21 MS. HOWARD: Well, so this is why I'm
22 making the request of you because I am not sure. But
23 we'll talk and then we'll talk again in the morning.

24 JUDGE FRANCKS: All right. Anything
25 else?

1 MR. TEBBUTT: Not right now.

2 JUDGE FRANCKS: All right. Thank you
3 all. We are off the record. I will see you tomorrow
4 morning.

5 (Proceedings adjourned at
6 2:35 p.m.)

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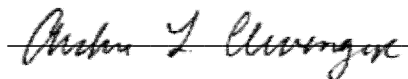
I, ANDREA L. CLEVINGER, a Certified Court Reporter in and for the State of Washington, residing at Olympia, authorized to administer oaths and affirmations pursuant to RCW 5.28.010, do hereby certify;

That the foregoing proceedings were taken stenographically before me and thereafter reduced to a typed format under my direction; that the transcript is a full, true and complete transcript of said proceedings consisting of Pages 1380 through 1512;

That I am not a relative, employee, attorney or counsel of any party to this action, or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

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IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of June, 2018.


(Court Reporter, CCR No. 3041)

