

SOAH DOCKET NO. 582-15-2082

TCEQ DOCKET NO. 2015-0069-MSW

APPLICATION OF)	BEFORE THE STATE OFFICE
130 ENVIRONMENTAL PARK,)	
LLC, FOR PROPOSED)	OF
PERMIT NO. 2383)	
)	ADMINISTRATIVE HEARINGS

HEARING ON THE MERITS

Friday, August 19, 2016

BE IT REMEMBERED THAT at 9:00 a.m., on Friday, the 19th day of August 2016, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, William P. Clements, Jr., Building, 300 West 15th Street, Room 404, Austin, Texas, before KERRIE JO QUALTROUGH and CASEY BELL, Administrative Law Judges, and the following proceedings were reported by Jodi Cardenas and Lorrie A. Schnoor, Certified Shorthand Reporters.

Volume 5

Pages 1013 - 1209

1 PROCEEDINGS

2 FRIDAY, AUGUST 19, 2016

3 (9:00 a.m.)

4 (Exhibit PCCD Nos. 7 and 8 marked)

5 (Exhibit Protestants No. 43 marked)

6 JUDGE BELL: All right. Good morning.

7 We're back on the record. It's Friday the 19th, and we
8 will continue on with Applicant's direct case.9 Mr. Ryan, are you ready to call your next
10 witness?11 MR. RYAN: Yes, sir. We'll call
12 Mr. Russell Marusak.

13 (Witness Marusak sworn)

14 PRESENTATION ON BEHALF OF THE APPLICANT (CONTINUED)

15 RUSSELL MARUSAK,

16 having been first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. RYAN:

19 Q Would you state your name for the record?

20 A Name is Russell Marusak.

21 Q And do you have in front of you Applicant's
22 Exhibit Volume 7?

23 A Yes, I do.

24 Q Do you see Exhibits Marusak 1 through Marusak
25 4?

1 A Yes, sir.

2 Q And what is Exhibit Marusak 1?

3 A Exhibit Marusak 1 is a copy of my direct
4 testimony.

5 Q Are there any corrections that need to be made
6 to that?

7 A Yes, there is. On Page 7, Line 33, at the end
8 of the sentence, we have Pages 275 to 670. We want to
9 change that to Pages 271-679.

10 Q Do you have a pen that you can write that in
11 with?

12 A Yes, sir, I do.

13 Q Would you do that?

14 A (Witness complies).

15 Q Did you make that change?

16 A Yes, sir, I did.

17 Q All right. Are Exhibits Marusak 2 through
18 Marusak 4 exhibits that are referenced in Marusak 1?

19 A Yes, sir, they are.

20 Q If you were to be asked orally here today each
21 of the questions in Exhibit Marusak 1, would your
22 answers be the same as in that exhibit?

23 A Yes.

24 MR. RYAN: Your Honor, I would offer
25 Exhibits Marusak 1 through 4.

1 JUDGE BELL: Any objections to Marusak 1
2 through 4?

3 (No response)

4 MR. FREDERICK: I'm sorry. I'm David
5 Frederick. I'll be handling Mr. Marusak. I understand
6 the main objection has been overruled, so we have no new
7 objections.

8 JUDGE BELL: All right. Very good.
9 Marusak 1 through 4 are admitted.

10 (Exhibit Applicant Marusak Nos. 1 through
11 4 admitted)

12 MR. RYAN: I'll pass the witness.

13 JUDGE BELL: Thank you. Any
14 cross-examination from Mr. Marusak from Plum Creek?

15 CROSS-EXAMINATION

16 BY MR. WILSON:

17 Q Mr. Marusak, my name is Bob Wilson, and I am
18 representing Plum Creek Conservation District. And my
19 understanding is that -- part of the -- your process
20 involved with the investigation and determination
21 conditions which relate -- part of it is that you
22 oversee the studies about conditions relating to
23 wetlands?

24 A Yes, sir. That's correct.

25 Q I have a general question on wetlands. I

1 recall -- and can't cite you the page -- but several
2 photographs in that report showing vegetation in the
3 area of the large pond on the south part of the Hunter
4 Tract. Do you remember anything about that?

5 A Yes, sir.

6 Q And I believe the comments were -- and my
7 question simply is, if a pond like that exists, do
8 sometimes wetlands generate around the edges of the pond
9 that would not be there were it not for the pond being
10 there?

11 A I think that's absolutely the case, and I think
12 our results reflect that.

13 MR. WILSON: Thank you, sir. That's all
14 the questions I have.

15 JUDGE BELL: Thank you, Mr. Wilson. Any
16 cross-examination from the Executive Director for
17 Mr. Marusak?

18 MR. VARGAS: Yes.

19 CROSS-EXAMINATION

20 BY MR. VARGAS:

21 Q Aaron Vargas, speaking for the Executive
22 Director. Good morning.

23 A Good morning.

24 Q It's Marusak? Is that right?

25 A Both As are as in "father," so you almost got

1 it.

2 Q Okay.

3 A Marusak.

4 Q Marusak.

5 A There you go. Perfect.

6 Q All right. So I'm going to try to be brief.
7 I've got one or two questions about five different
8 things: Your training and experience, preparation of
9 materials, jurisdictional wetlands, the Nationwide
10 Permit 14, and the Texas Parks and Wildlife Department
11 recommendations. Does that work?

12 A That will work.

13 Q All right. So looking at your Exhibit Marusak
14 1, Volume 7, I'm on Page 4.

15 So you were talking about your experience
16 starting on Line 28 through Line 32. You state that
17 you've done dozens of wetlands determinations with a
18 Corps' review or coordination and then numerous without.

19 Can you kind of give me a brief,
20 high-level explanation of, I guess -- you know, what --
21 in what instance would you need Corps' coordination and
22 when would you not when it comes to these wetlands
23 determinations?

24 A Okay. Generally when we have a project and we
25 conduct delineation, after we're comfortable with the

1 results of the delineation, the next role is to overlay
2 the project footprint on the delineation.

3 In many cases because that's what the 404
4 program tells us, is we try to avoid and minimize
5 impacts. And there are times where working with some
6 projects we can avoid and minimize impacts to where
7 either, A, we don't impact wetlands at all -- I'm going
8 to back up. Can we use the term "Waters of the US"?

9 Q Yeah.

10 A Waters of the US is a larger classification of
11 which wetlands is a subset. So we either avoid impacts
12 altogether or we minimize impacts to where they are
13 sufficiently below certain types of permit threshold
14 criteria to where notification to the Corps is not
15 required.

16 In those instances, those are examples of
17 numerous delineations for both private and public
18 sectors where projects did not require coordination.
19 That's very common. There are other times where
20 sometimes you have a developer that, you know, his
21 definition of the project purpose and need is such that
22 we exceed those thresholds. Sometimes you just have big
23 projects where it's impossible. An example would be a
24 long highway project.

25 Q Yeah.

1 A And you have to go through the notification
2 process with the Corps and get the Corps' approval.
3 Dozens and dozens, at first isn't an impressive number,
4 but when you look into the fact that those take -- you
5 know, Nationwide Permits can take, you know, sometimes
6 six months; individual permits can take 12 to 18.
7 That's kind of an idea of what the process is.

8 Q Okay. Thank you. And then next page, Page 5,
9 you talk about your trainings starting on Line 16
10 through 19. You list, I think, about four of them.
11 Were any of those offered by the TCEQ or in conjunction
12 with the TCEQ?

13 A I do not believe so because they were with a --
14 I believe they were all with a group called WTI, the
15 Wetland Training Institute. I believe that's just a
16 private enterprise. I don't think there are any state
17 sponsorships with that.

18 Q Okay. Did any of those cover the TCEQ MSW
19 rules concerning these wetlands and Waters of the US?

20 A No. The wetlands -- the wetland delineation
21 training course -- the interim supplement were
22 specifically to the Corps of Engineers' wetland
23 delineation manual. When you see the final two, one is
24 a wetland design and construction course, and that can
25 be independent of any regulatory process. It's just a

1 course on how to construct a wetland.

2 Q Uh-huh.

3 A And then the stream bank restoration seminar,
4 again, it's kind of towards Corps' principles that they
5 would expect to see.

6 Q Okay. So now I'm moving on to your preparation
7 of material.

8 So I'm looking at Page 7. Sorry. One
9 second.

10 A Sure.

11 Q Sorry. Page 6. So Lines 30 and 31, you were
12 asked if you prepared materials in an application for an
13 MSW facility, if you believed it did not meet the TCEQ
14 MSW rules. And you said no, you would never do that.
15 Can you tell me, what is your, I guess, definition here,
16 "prepare material." Is that kind of, you know, stapling
17 and putting papers together for the application?

18 A I think it's that and also sponsoring that
19 these materials meet the rules that I'm sponsoring.

20 Q Okay. So can you tell me, when do you make the
21 determination, I guess, in your process whether or not
22 you would think it complies with the TCEQ's MSW rules?

23 A Well, I think in the event of our, you know,
24 wetlands we -- in this case, we completed a process
25 through the Corps of Engineers. And then we still

1 evaluate it against the rules, which we still will have
2 to do. And I think the same also applies with our
3 threatened and endangered species with the corresponding
4 agencies.

5 Q Okay. So on Page 9, Line 40, you -- you start
6 talking about jurisdictional determinations. Can you
7 give me kind of a brief summary of the difference
8 between jurisdictional and non-jurisdictional wetlands?

9 A Okay. So the -- the difference between
10 jurisdictional and non-jurisdictional wetlands -- when
11 we delineate wetlands on a property, you're first
12 delineating whether or not they meet the criteria for a
13 wetland. There's no immediate evaluation of
14 jurisdiction through that process. The Corps has, you
15 know, procedures for some types of wetlands that may
16 meet criteria not to be jurisdictional. And generally
17 the term you may hear in articles, you know, that have
18 actually been, you know, prominent recently, is the term
19 isolated wetlands. If you can make sufficient
20 demonstration that wetlands are isolated, then those
21 would be examples of non-jurisdictional wetlands, but
22 you have to submit the paperwork to the Corps. The
23 Corps does their review process. If they agree, they
24 send it to the EPA. If the EPA agrees, then you get
25 your verification that those features are not

1 jurisdictional. The demonstration of isolation has to
2 be made. It's generally something that I as a
3 consultant do not make, you know, on my own.

4 Q Okay. And in this case, they were
5 jurisdictional. Is that right? Or some were and some
6 weren't? Is that what you're saying?

7 A We identified a lot of wetlands on the
8 property, the whole 1200-acre property. Some wetlands
9 we assume to be jurisdictional, and we state that in our
10 letter to the Corps.

11 Q Uh-huh.

12 A Also in our introductory letter to the Corps,
13 we spend a lot of -- it's actually not in the actual
14 letter, but we do provide the information in the
15 submittal that there were certain features that we deem
16 to be isolated and therefore should be considered to be
17 non-jurisdictional.

18 Q Okay. So then moving on to the Nationwide
19 Permit 14, can you tell me, I guess specifically what
20 that authorizes?

21 A You know, we can go to Exhibit 3. I'm sorry.

22 Q You're fine.

23 A Let's just go ahead. And I'm looking on --
24 yes. That's Exhibit 3, Page 16. Do you see about the
25 third paragraph, it says, "We have reviewed the

1 proposal, and based on the information provided, it
2 appears the activity would qualify for Nationwide 14 for
3 linear transportation projects"?

4 And then if we flip the page to Page 18 of
5 the same exhibit, you'll see a copy of Nationwide 14 for
6 linear transportation projects.

7 Q Okay. So that's for the road. Correct?

8 A That's correct.

9 Q And that's not the main road. It's the access
10 road?

11 A The access road, yeah.

12 Q Yeah.

13 A That's what this permit is for.

14 Q Okay. Can you tell me, I guess, what kind of
15 materials they're going to use to make that road? Is it
16 going to be gravel or dirt or, you know, concrete or
17 asphalt?

18 A I'm -- I'm not specific with the particulars of
19 the road construction. For me, it's the footprint of
20 the impact.

21 Q Okay. So the last thing I wanted to ask you
22 about is the Texas Parks and Wildlife Department's
23 recommendations.

24 So on Page 11 of Marusak 1, you state that
25 they gave you a list of recommendations, but you only

1 followed certain ones that -- that were required by
2 TCEQ's MSW rules. Is that right?

3 A I think the word I would prefer to use would be
4 that we addressed certain -- I don't want to imply that
5 we are not going to follow them if we don't address
6 them. But we address what we felt were the rules as
7 outlined, you know, on that page of the ones that were
8 applicable to the rules.

9 Q So the recommendations were -- the one you
10 didn't follow or the one you didn't -- I'm sorry -- what
11 was the word you used?

12 A Addressed.

13 Q The one you didn't address was the
14 revegetation. Is that correct?

15 A Well, let me see here.

16 Q Or do you know?

17 A Let's see. I think around Page 22, you know,
18 we did address it where it starts with "Regarding
19 vegetation impact." I'm sorry. Line 22, Page 11.

20 You know, on that particular instance, we
21 did address vegetation impacts through other components
22 of what I understand are the municipal solid waste
23 application. Now, she might have provided other
24 recommendations and they didn't address those
25 recommendations specifically, but there is some

1 addressing of, you know, vegetation impacts and how
2 those are addressed in the application.

3 Q Okay. What about revegetation? Is that
4 included in vegetation?

5 A Yes.

6 Q Okay. So do you know which recommendations you
7 didn't follow?

8 A I'm just finding the letter.

9 Q So I believe it's 130EP-1, Page 683.

10 JUDGE QUALTROUGH: I'm sorry. What
11 exhibit is that?

12 MR. VARGAS: Volume 7 of Environmental
13 Park, EP-1, Page 683. I believe that's where it starts.

14 THE WITNESS: I think it's Volume 1.

15 JUDGE QUALTROUGH: Volume 1. Okay.

16 MR. VARGAS: I'm sorry, Volume 1.

17 THE WITNESS: Well, if we go through the
18 vegetation recommendations, it says, "Parks and Wildlife
19 recommends clearing of mature and native trees be
20 avoided." They recommend that. I don't think that
21 implies that that's a requirement. And I think if you
22 look at the site and look at where the landfill is
23 situated, there are certain avoidances, you know, as it
24 pertains to clearing of vegetation. And I think that
25 argument is defended in the next sentence where it says,

1 "Loss of vegetation should be minimized." So they
2 implied that some vegetation is going to be lost, and
3 they say it should be minimized by using site planning
4 and construction techniques to avoid and preserve
5 existing trees, shrubs, grasses, and fords. I think you
6 can look at most of the site and agree that, you know,
7 that's been practiced to some extent.

8 The part that I am not -- I can't say for
9 certain because I don't think we've done a survey on
10 every tree lost, but I can't say that the application
11 says that they're going to replant three saplings for
12 every tree lost, nor do I believe that they've made that
13 commitment.

14 Q (BY MR. VARGAS) Okay. And that was the only
15 one out of all these recommendations that you didn't
16 fully implement?

17 A That would be my understanding.

18 Q Okay.

19 MR. VARGAS: That's all the questions I
20 have. Pass the witness. Thank you.

21 JUDGE BELL: Thank you. Any
22 cross-examination for this witness from OPIC?

23 MR. TUCKER: I have no questions.

24 JUDGE BELL: All right. Very good. On
25 this side, are we going to go --

1 MR. FREDERICK: It sounds to me like TJFA
2 would be up.

3 JUDGE BELL: All right.

4 CROSS-EXAMINATION

5 BY MR. FREDERICK:

6 Q Mr. Marusak, good morning.

7 A Good morning, again.

8 Q You know me. I'm David Frederick. I'm
9 carrying water today with you as the witness on behalf
10 of the citizens group, our citizens group.

11 Let's start. I'm going to ask you
12 questions that come out of your direct testimony in
13 Volume 7 of the application. So if you wanted to have
14 that handy, and then I'll ask you questions about the
15 background work that is -- on which your direct
16 testimony is based. And those are those pages that you
17 just identified a few moments ago out of Volume 1. So
18 Appendix 2-D out of Volume 1.

19 Let's start out on some background
20 information in -- in Volume 1. So 130EP, Volume 1, and
21 then starting at Page 271, which is -- okay.

22 Am I correct that is -- the letter is what
23 it is. But it's your letter to somebody at -- to
24 Ms. Walker at the Corps of Engineers covering various
25 documents.

1 A Correct.

2 Q Now, one of the documents that's covered is the
3 wetlands delineation which is itself Attachment B to the
4 letter that goes to her, but it is the main body of --
5 and we can look up and see exactly what the designation
6 is. But it is Appendix 2-D up there of Volume 1.
7 Right? That is at least the wetlands delineation that
8 is in Volume 2?

9 A Correct.

10 Q So starting at Page 275 in Volume 1, Appendix
11 2-D is where there is a fairly lengthy 600 pages or so
12 of work that Halfp did. That document is stretching up
13 through -- you changed the last page number on it. But
14 stretching up through all the photographs and all the
15 data sheets to -- well, actually you didn't send the
16 part back there in the back that has to do with the
17 state, did you, the state determinations? You didn't
18 send everything all the way up through 679, or did you?

19 A No, sir.

20 Q So what was the last page?

21 A Page 670.

22 Q Okay. And then there was a supplement to that,
23 I take it. Am I not correct that there was an October
24 of 2013 supplement to that first batch of material you
25 sent in on September 6th?

1 A Yes, I believe so.

2 Q Now, can you find that for me in the record? I
3 couldn't find that. I didn't find it, anyway.

4 I don't mean to be tricky. I don't think
5 it's here.

6 A No, no, no. I was checking on the date first.
7 I don't believe it's in here, no.

8 Q Now, what was in that supplement?

9 A I believe that supplement was a submittal to --
10 you know, again, let me just -- I want to verify the
11 date if that's okay.

12 Q Okay. So the -- I take that date from the
13 Corps' approval letter which is -- for the Nationwide 14
14 Permit. That approval letter is in your Exhibit 3 or 4.

15 A I think it's 4.

16 Q Your Exhibit 4.

17 A I'm sorry. Exhibit 3.

18 Q In which case, it's page --

19 A 16. I see a September 9, 2013; February 26,
20 2014; and a May 20, 2014.

21 Q That's right. So I guess I look at your
22 e-mails -- don't you remember that there was -- do you
23 remember that there were as many as two or three
24 supplements?

25 A I recall one in particular. I just don't

1 recall the date.

2 Q Okay. If you were -- in any event, you were a
3 moment ago, about to tell -- well, I asked you, at
4 least, what was the nature of the supplement?

5 A I am just looking here because I believe we
6 discussed it briefly.

7 Q No, I don't blame you.

8 A I just want to make sure I have the right
9 instance.

10 Okay. Here it is. Okay. So it's
11 October, 2013. It includes revised pages submitted to
12 the Corps.

13 Q Okay. Where are you?

14 A I'm sorry. Page 7 of Exhibit 1 of my direct
15 testimony.

16 Q Okay.

17 A Okay. So I'm on Page 7, Line 17. It says,
18 "The report was originally prepared in August 2013 and
19 submitted to the Corps. It includes revised pages
20 submitted to the Corps on October 2013 to correct
21 information regarding two areas addressed in the report,
22 ESD-4A and ESD-4D."

23 Q Now, for those who are not as familiar with the
24 layout of the area as you are, ESD-3 and -- or 4A and
25 4D, those are tributaries of that stream that comes down

1 along the eastern side -- pretty much the full eastern
2 length of the property. Right? It ends up down there
3 in the CSE pond?

4 A These are federal streams since the ES -- you
5 know, part of the abbreviation. D is a reference to
6 their -- a tributary of Dry Creek. And then the 4A and
7 4D is just a sequential numbering because there were
8 quite a bit of pieces associated with that tributary
9 network.

10 Q Okay. So --

11 A And, yes, on the eastern part of the property.

12 Q And what was -- do you remember anything about
13 the substance of the supplementation related to those
14 two streams -- tributaries?

15 A Well, we updated the original reported length
16 of the tributaries, and we updated the pertinent sheets
17 in the narrative document. So let me back up. There's
18 the narrative document.

19 Q That's the one we talked about earlier that
20 begins on Page 270 --

21 A 1, I believe.

22 Q And maybe even as late as 275, I believe.

23 A The wetlands delineation report. We updated
24 the narrative because in the narrative there were a
25 couple of references to that stream and its linear

1 footage. Then we also updated the appropriate figures
2 that had that feature originally shown on it. And then
3 the very last pages, I believe, we said it was 670 -- or
4 I mean -- yes, there would have been a corresponding --
5 there would have been corresponding lines for those two
6 streams in those tables that we replaced.

7 Q Okay.

8 A And also a explanation of what the nature of
9 the change was.

10 Q So the wetlands delineation report that we have
11 in the application that begins on Page 275 of Volume
12 1 -- 275 of Volume 1, it's -- it does not reflect those
13 4A -- ESD-4A and ESD-4D changes, but otherwise it's a --
14 that's why. That's correct?

15 A Oh, no, it does reflect those changes.

16 Q So it's not really -- okay. Again, I'm not --
17 I do not intend to be uselessly precise, but the
18 document that was sent in June to Ms. Walker -- I'm
19 sorry -- the document that was sent in September to
20 Ms. Walker did not have those particular pages that we
21 just finished discussing, but those pages have now been
22 integrated into that document that was sent to her.

23 A That's correct.

24 Q And as integrated, that's the document that we
25 have in our permit application?

1 A That's correct.

2 Q Okay. Now, a moment ago, though, we were
3 discussing a couple of other dates where information was
4 submitted, February -- again, looking at the approval
5 letter, as it were, from the Corps of Engineers, which
6 is the attachment to -- which is one of the attachments
7 to your testimony, Exhibit 3. There, there is reference
8 to some information received on February 26th of 2014
9 and some more on May 20th of 2014.

10 A Uh-huh.

11 Q Do you know what that information is?

12 A Yes, I do.

13 Q Okay. Please tell me.

14 A Okay. Let me go look at the dates. And -- so
15 we have a February 26, 2014 date. If you go to
16 Exhibit 4 in the application, which -- or, I'm sorry --
17 the Nationwide Permit Pre-Construction Notification.

18 Q Okay.

19 A Well, okay. Okay. Yeah.

20 JUDGE BELL: Mr. Marusak, could you give
21 us the --

22 THE WITNESS: I'm sorry. I was checking
23 which page I wanted to give you.

24 JUDGE BELL: Sure.

25 THE WITNESS: It's Page 15.

1 JUDGE BELL: Okay. We have been going
2 by -- it's easier for us to go by the exhibit number and
3 page number in the top right-hand corner.

4 THE WITNESS: Sorry.

5 JUDGE BELL: That's okay.

6 THE WITNESS: Volume 7, Exhibit 4,
7 Page 15. Did I do that correctly.

8 JUDGE BELL: So that's 130EP-4, Page 13?

9 MR. RYAN: No. Marusak 4.

10 JUDGE BELL: Marusak 4.

11 MR. RYAN: Marusak 4 in Volume 7.

12 JUDGE BELL: Got you.

13 THE WITNESS: There may be a lot of this.
14 I'll try to get it right.

15 JUDGE BELL: That's okay. I think we're
16 there.

17 THE WITNESS: Are you there,
18 Mr. Frederick?

19 Q (BY MR. FREDERICK) I'm there. And so that --
20 yes. I'm sorry. You can explain it more succinctly.

21 A Do you see my signature date of 2/24?

22 Q I do.

23 JUDGE QUALTROUGH: We're still looking.

24 THE WITNESS: I'm sorry. Page 15 --
25 Marusak 4, Page 15.

1 JUDGE BELL: Oh, yeah. These are on the
2 bottom right-hand corner.

3 THE WITNESS: Yeah.

4 JUDGE BELL: Okay. I'm there.

5 THE WITNESS: Do you see at the top you've
6 got two signatures? And then you have my signature,
7 which has a date of 2/24/2014? We generally try to --
8 you know, get those out pretty quickly, so I'm assuming
9 the 26 is a lag of when he received my Nationwide Permit
10 14 application.

11 Q (BY MR. FREDERICK) Okay. And then there's
12 this other date, May 20th.

13 A Okay. May 20th, you mention you had some
14 e-mails there. If you went back to the e-mail record at
15 or about around that date, Fred Land asked me to -- they
16 have internally an Excel spreadsheet. And for every
17 submittal like this that goes in, they have to log
18 Waters of the US resources on the site.

19 And generally when you have five or six
20 items on the site, they'll just enter in that data
21 themselves from our documents. On a project like this
22 where we delineated -- I don't know the number. I know
23 there's over 50 just by counting, you know, some of the
24 number designation. When we have such a volume of
25 delineated features, Mr. Land asked since I had already

1 the electronic data, if I could assist him in putting
2 that data into his database table.

3 And the record of my Excel file, I
4 believe, was dated May 20th. And I'm assuming that's
5 what it is. That would be a same-day delivery through
6 e-mail.

7 Q Well, so why don't you look at Marusak
8 Exhibit 3 to your prefiled testimony, which is in Volume
9 7.

10 A Uh-huh.

11 Q And on Page 14 of that, Exhibit 3, it looks to
12 me like that e-mail would indicate a file delivery a
13 month earlier than May 20th. It's also two years later.
14 Right?

15 A Yeah. That's what I was going to say.

16 Q Forget about the month.

17 A It's 2016. We've got to look at the month,
18 too. I don't know that I can relate that e-mail to your
19 question regarding the dates of the Nationwide Permit.

20 Q Okay. So you don't today remember what it was
21 you said to the Corps in the general neighborhood of
22 May 20th of 2014?

23 A No. I just explained that I sent them an Excel
24 file.

25 Q And that is different from the Excel file

1 that's discussed here -- well, that's different from the
2 file that is discussed here. When I say "here," on
3 Page 14 of Exhibit Marusak 3.

4 A Yes. It's two completely different things.

5 Q Okay. Now, let me ask you about the
6 negative J -- well, the JD forms and -- back one step up
7 ahead of that.

8 You did send some jurisdictional
9 determination forms to Mr. Walker, right --

10 A Correct.

11 Q -- with that June 6 of 2013 submission?

12 A No. Well, let me check that date again. I
13 don't think it was June. I think it was September.

14 Q You are exactly right. I apologize.
15 September 6, 2013.

16 A Yes, we submitted a JD form for that.

17 Q Okay. And you only submitted forms, do I
18 understand correctly, for which you wanted negative JDs?

19 A We use the -- the term of art we use, we
20 submitted forms for which we requested a verification
21 for non-jurisdiction.

22 Q Okay. And those forms are not -- well, do we
23 have those in our application?

24 A I don't recall seeing them in the application.

25 Q They are certainly not the same as the data

1 sheets that we do have in the application?

2 A That's correct.

3 Q So the water bodies for which Halff was --
4 Halff was requesting a termination of
5 non-jurisdiction -- I'm sorry. I don't remember exactly
6 your phrase.

7 A That's good.

8 Q But those are the ones that if we were to look
9 at Table C1 in Volume 1, Appendix 2-D, Pages 668 through
10 670 --

11 A Yes.

12 JUDGE QUALTROUGH: I'm sorry. What were
13 those pages?

14 MR. FREDERICK: Those are Pages 668 --

15 JUDGE QUALTROUGH: 668.

16 MR. FREDERICK: -- through 670. It's the
17 pages immediately following the main Halff water --
18 wetlands delineation report.

19 Q (BY MR. FREDERICK) On those three pages,
20 there's a table and one of the columns in that table --
21 the table basically reflects various potential Waters of
22 the United States. Am I right?

23 A Yes.

24 Q And then the final column over on that table
25 announces whether Halff's research indicates there that

1 either is a Water of the United States marked "yes," or
2 is not a Water of the United States, marked "no."
3 Right? That's how we read that table?

4 A Let me -- there's a little check that I've got
5 to make here. For the most part, I would refer us to
6 page -- the same -- same volume. Just flip a couple
7 pages over to Page 673.

8 Q Okay.

9 A I think that's an easier way to determine, you
10 know, which of these features in our Non-Waters of the
11 US -- and the reason I want to do this is because if you
12 look over to Page 7 -- 674 of the exhibit, we have an
13 emergent wetland feature, EW34.

14 Q Now this -- my copy of the exhibit is not
15 terribly clear. Can you point me to where EW34 is?

16 A Okay. Let's see here. You got it opened all
17 the way up?

18 Q All right.

19 A Okay. So if you see the word "County Road" up
20 in the upper right-hand corner, I'm going to give it a
21 different number.

22 Q Okay.

23 A All right. And see County Road 179, if you go
24 to the left just inside the green line --

25 Q There's that open water feature?

1 A Actually, it's EW. It's actually EW20.

2 Q Okay. Actually that's E --

3 A That's EW20.

4 Q Was that also called EW4 at another time? Do
5 you think?

6 A Not that I recall.

7 Q Okay.

8 A Now, there might be an open water -- for --
9 associated with it.

10 Q Okay.

11 A I'd have to go look at another figure.

12 Q Okay.

13 A But this map is showing wetlands, which I
14 believe is what -- the question we were discussing.
15 Correct?

16 Q Well, what we were -- yeah, I'd like to have
17 the answer to that.

18 A Okay. And I think the -- I think the original
19 answer was -- was that -- were certain features on that
20 table, did they correlate to the AJD forms that we
21 submitted to the Corps. I'm trying to explain that the
22 answer is no. And see, EW20, that's a wetland fringe
23 associated with a pond.

24 Q Okay.

25 A And if you look back -- I'm going to flip back

1 real quick to Page 271.

2 Q You just said 271. Is that --

3 A Yes. That's the letter to Jennifer Walker.

4 Q Okay.

5 A We mention that EW20 is associated with an
6 excavated stock pond, isolated stock pond. And those
7 aren't considered in the realm of Waters of the United
8 States for which you have to request a verification of
9 non-jurisdiction.

10 So in that case, we can't just say every
11 table entry that has a "no" for no Waters of the United
12 States, necessarily has a corresponding AJD sheet. We
13 want to go back to Page 674.

14 Q Of Volume 1?

15 A Of Volume 1. Sorry.

16 Q I'm going to point to a cluster of wetlands
17 that are -- let's not concern ourselves with the
18 numbers, but let's count labels.

19 A I think we can agree there are one, two, three,
20 four, five, six, seven, eight, nine, ten labels.

21 Q Of --

22 A Kind of in the central part of the landfill,
23 upper left-hand corner --

24 Q Sure.

25 A -- you know, just to the right of the index

1 map. Those features had an approved JD form submitted
2 with them.

3 Q Okay.

4 A Do you see a feature up in the upper right-hand
5 corner? I believe EW-21.

6 Q Yes.

7 A I believe that had an AJD form submitted with
8 it. Then if you look at EW33, which is kind of that
9 lone wolf in the middle of the landfill footprint --

10 Q Okay.

11 A -- I believe that had a AJD form submitted with
12 it.

13 Q Okay. Now, not very long ago, you referred me
14 to Page 673 where there was a shortened version -- well,
15 there's a short table on Page 673. Those -- those are
16 only -- that doesn't really have anything to do -- has
17 something to do with it. It's not determinative of the
18 wetlands for which a negative JD was requested for --

19 A No, sir. I just felt that was the easiest way
20 to answer your original question.

21 Q So of the ones -- so did you request or
22 believe -- reflect that the Halff research had indicated
23 that there were some appropriately negative JD water
24 bodies outside of the facility boundary, which is, I
25 believe, the -- the boundary that's reflected on Page

1 674 of Volume 1?

2 A I'm going to ask you to please repeat the
3 question. I know -- I know where I need to be in the
4 report. I need you to ask the question about looking at
5 wetlands outside the facility boundary.

6 JUDGE QUALTROUGH: Excuse me. While
7 you're thinking of your question, can we get your
8 acronyms correct on the record? Your using JD, which
9 I'm assuming is jurisdictional --

10 THE WITNESS: Determination.

11 JUDGE QUALTROUGH: -- determination.

12 What's AJD?

13 THE WITNESS: Approved jurisdictional
14 determination.

15 JUDGE QUALTROUGH: Was there any other
16 acronyms I need to know of now before -- before you
17 leave and I'm --

18 THE WITNESS: I will make a mental note --

19 JUDGE QUALTROUGH: Okay.

20 THE WITNESS: -- to -- I'll work on -- I
21 work in the world of acronyms.

22 JUDGE QUALTROUGH: I do, too.

23 THE WITNESS: I will try to make a mental
24 note next time I've got an acronym.

25 JUDGE QUALTROUGH: Okay.

1 THE WITNESS: Okay. I apologize.

2 JUDGE QUALTROUGH: So AJD is approved --

3 THE WITNESS: -- jurisdictional
4 determination.

5 JUDGE QUALTROUGH: All right. And I
6 apologize for interrupting you.

7 Q (BY MR. FREDERICK) Let's clear this up and
8 make sure I actually have this correct. Approved
9 jurisdictional determination is a term of art that is
10 applied to, among other things, at least, a volume of
11 paperwork that's submitted to the Corps before a
12 jurisdictional determination has ever been made by the
13 Corps?

14 A Correct.

15 Q And then subsequently the Corps will say, "Oh,
16 yeah, you were right." Or, "Oh, sorry, Mr. Marusak, we
17 don't believe you there." And sometime down the road --

18 A Uh-huh.

19 Q -- the Corps will issue a report that is
20 itself, really the approval of the jurisdictional
21 determination -- the court's approval of the
22 jurisdictional determination?

23 A Correct.

24 Q Okay. Now, all I was really trying to get to
25 was, for which potential Waters of the United States did

1 the Corps -- did Halff request a negative jurisdictional
2 determination. And I thought I could figure that out
3 from that three-page table where we started my question
4 to you. But I now understand that that's not a good way
5 for me to figure that out. So my question becomes, what
6 were the water bodies for which -- and I'm saying the
7 negative jurisdictional determination was requested -- I
8 don't mean that in a pejorative or slanted way. I
9 just -- the ones that Halff does not believe are Waters
10 of the United States, and the court has now agreed with
11 you on that.

12 A Okay. I want to direct everybody to Volume 7,
13 Marusak 4, Page 32. Are you there?

14 Q I am there. Thank you.

15 A Oh, I'm sorry.

16 Q No, it's important.

17 A Okay. The best way to get that answer is to --
18 to generate my approved JD forms, which was Attachment A
19 to Ms. Walker. But, you know, looking at this map --
20 I'm looking on Page 32, which is a Waters of the US
21 project overlay. I'm going to start in the northeast
22 corner, and just tell me if these numbers aren't clear.
23 They're fairly clear on my copy. I'm going to start in
24 the northeast corner where we see EW21 and EW22.

25 Q I see those.

1 A Okay.

2 Q Those were ones for which a determination was
3 requested?

4 A Yes, sir.

5 Q Okay.

6 A Now, because we can see the numbers a little
7 bit better here, I'm going to rattle them off. An EW is
8 emergent wetland. In this case, it's just a name, but
9 that's our -- what we're thinking. EW27, 26, 29, 28,
10 30, 31, 32, 24, 23, 25.

11 Q Got it.

12 A EW33. Again, I believe EW35 might have also
13 had one. I don't know if we associated that with the
14 pond, which in this case we wouldn't have -- well, I can
15 refer back to my letter to Ms. Walker.

16 Q You mentioned 34. If you -- if you --

17 A We should be able to connect the dots. I
18 mean --

19 Q It looks like you've got 33 through 35 were
20 isolated?

21 MR. RYAN: 271.

22 THE WITNESS: Yeah. Okay. EW35 was not
23 in the list of wetlands that I associated with ponds. I
24 think I recall from memory we had a separate figure that
25 just had a lonely feature out in the middle of it. I

1 think that had an AJD form with it.

2 Q (BY MR. FREDERICK) And then how about 34?

3 A 34 and EW20 which is -- which we discussed
4 earlier over by the County Road label, we were -- if we
5 refer back to my letter to Ms. Walker on page 271 of the
6 same exhibit, AW20 and 34, they were considered part of
7 isolated stock ponds, which, again, you don't need to
8 submit a request for an AJD.

9 And if you also look just kind of
10 southeast of those, there's an EW19.

11 Q Okay.

12 A That feature is also on the list to Ms. Walker
13 where we said we were not requesting an AJD because
14 they're part of a stock pond. It's an old stock pond.
15 We don't need to request one.

16 Q Got it. Thank you. I understand that.

17 Now, for the ones that you did request,
18 the ones you just identified for which requests were
19 made, do the forms that you sent her contain information
20 that is not contained on the data sheets that -- for
21 those various water bodies and wetlands and stuff --
22 various wetlands -- that you submitted as part of your
23 wetlands delineation report?

24 A I wouldn't say so directly because a basis for
25 jurisdiction is different than a basis for whether or

1 not it meets a wetland.

2 Q So it might be -- it's kind of like you take a
3 data sheet and then you say, this is a wetland, but it's
4 not jurisdictional because it's isolated, for example?

5 A No. A wetland -- the wetland data sheets we
6 have in the application, I'm -- I should be able to just
7 pick a random page. There's enough of them.

8 Q Okay. So that's going to be Volume 1 and, you
9 know --

10 A Volume 1, Page 496, is an example of a back
11 side of a delineation sheet. There's no significance to
12 that number.

13 Q And 95 is the front side of that sheet?

14 A That's correct.

15 Q Okay.

16 A Those data sheets are to determine whether
17 something meets a wetland criteria-wise. Does it meet
18 the physical criteria to be considered a wetland.

19 Jurisdiction -- you can almost say that a
20 wetland data sheet is basically a -- kind of like a
21 biological determination. You know, does it meet the
22 criteria to be a wetland? A request for jurisdiction or
23 non-jurisdiction is a policy matter, isn't isolated. In
24 isolated, you launch into a train of demonstrations of
25 does it have significant nexus to a navigable water

1 which has ties to interstate trade and commerce. That's
2 a completely separate type of form, and I make different
3 types of demonstrations in that form.

4 Q Okay. That's -- thank you. I understand the
5 distinction, what's been added to the jurisdictional
6 determination form is not found in the data sheets?

7 A Right.

8 Q It's that justification you described, or some
9 justification related to policy or law as opposed to --

10 A Sure.

11 Q Okay. Now, let me ask you -- let's go back to
12 the exhibit that is -- your Exhibit 3, so Volume 7,
13 Marusak Exhibit 3. Excuse me.

14 A All right.

15 Q And then that's the June 20th letter from the
16 Corps to -- well, it's Mr. Kaufmann, but I think a copy
17 to you at least. Now, that's the letter -- that is not
18 itself the jurisdictional determination from the Corps
19 for those various wetlands that we've just been
20 discussing, is it?

21 A Not directly. But when you do flip over on
22 Page 16 of Marusak 3 --

23 Q Okay.

24 A When you actually flip over to Page 17, it
25 says, "The Corps based this decision on approved

1 jurisdictional determination that there were Waters of
2 the United States on the project site. The basis of
3 this approved JD is enclosed." That's basically where
4 they, you know, acknowledge the process in the JD.

5 I believe the -- the approved
6 jurisdictional determinations, I think, eventually get
7 posted -- they keep internal tracking and sometimes they
8 may post, available on the website.

9 Q But you were actually seeking a negative
10 determination?

11 A That's correct.

12 Q So all this -- isn't this -- well, this isn't a
13 negative determination, is it?

14 A That is an acknowledgment that an AJD request
15 was processed.

16 Q Okay. And will the determination itself, the
17 approval that's on the website, let's say, it will have
18 some explanation in addition to the material that you
19 submitted to the Corps, or would customarily there not
20 be any Corps' writing that would explain its approval?

21 A I'm not sure. I know it posts the form. I
22 think it just posts the forms that we provide. And
23 because they're approved, they're posted. I don't know
24 how they do their internal documentation, what records
25 they keep. You know, he had to process the AJD to issue

1 this permit.

2 Q Okay. Now, is -- so this is the -- this letter
3 that we're looking at here starts on Page 16 and goes to
4 17 of Marusak Exhibit 3. This is the Corps' approval of
5 your -- of Halff on behalf of 130EP's request that it be
6 allowed to proceed under Nationwide Permit 14. Is that
7 also right or are we not to that stage yet?

8 A I believe I discussed that with the ED. It's
9 on the prior page, on Page 16, where it talks about
10 authorization under Nationwide 14.

11 Q Okay. So then back here under your Marusak 4,
12 Marusak 4, there is an application -- well, I guess what
13 there is is a Pre-Construction Notification.

14 A There you go.

15 Q Right?

16 A For the record, if I say PCN, that's what I'm
17 referring to, Pre-Construction Notification.

18 Q And is that something for which you also get
19 some feedback from the Corps eventually saying that,
20 yeah, we approve your Pre-Construction Notification or
21 go ahead and start constructing since you've given us
22 notification or anything like that?

23 A The letter that we just discussed in the prior,
24 Exhibit Marusak 3, that is -- that is what's called a
25 verification letter that your project is authorized

1 under Nationwide 14.

2 Q Well, at the time that one -- does the
3 June 20th letter, 2014, does that come prior to -- it
4 does go prior to the date on the Pre-Construction
5 Notification. Right? That was --

6 A No, sir. I believe we established that was
7 February 2014.

8 Q Okay. So this letter is approval to proceed
9 under Nationwide Permit 14, provided that 130EP adheres
10 to the various things that you've said in your
11 Pre-Construction Notification would be the situation.
12 Right? I mean --

13 A I'm sorry. You've got to ask that again.

14 JUDGE QUALTROUGH: If you could -- if
15 you -- when you say "this letter" --

16 MR. FREDERICK: I'm sorry.

17 JUDGE QUALTROUGH: -- let me know which
18 letter.

19 Q (BY MR. FREDERICK) In the June 20, 2014 letter
20 from Mr. Stephen Brooks, which is at Pages 16 and 17 of
21 your Exhibit No. 3, that letter -- although it says you
22 may qualify for Nationwide 14 -- in Paragraph 3 it says
23 you may qualify -- it really means you do qualify
24 because we've looked at your notice of -- your
25 pre-construction notice?

1 A Yes.

2 Q Okay. Okay.

3 A It's always up to an applicant to -- you know,
4 commit to what's presented in the application.

5 Q And this covers all roadway from -- I'm going
6 to call it Highway 183 -- but whatever that highway down
7 there is -- up to, like, what's the kind of northern
8 terminus of this particular project that's covered by
9 Nationwide 14?

10 A Well, let me -- Volume 7, Marusak 4, Page 32.

11 Q I see.

12 A That is a general graphic where the road, as we
13 can define it as a road, transitions to, you know, the
14 outer edge of the landfill, outer levels of disturbance.
15 I'm sure it continues to be a road somehow, but that's
16 probably a question better for one of the other team
17 members.

18 Q Okay. So let me make sure I understand.
19 There's -- looking at Page 32, there is this irregular
20 purple perimeter that goes around the footprint of the
21 landfill apparently just outside the -- whatever that
22 waste management unit boundary, that's where the work --
23 that is where the access road hits that project impact
24 footprint, what is referred to in the legend as project
25 impact footprint?

1 A Again, I'm going to say I don't know exactly
2 where the limits of the road, you know, end at that
3 location. You know, for me, I was primarily concerned
4 where the limits of the road were relative to Waters of
5 the United States. How the road continues past that
6 connection shown on that figure, just southeast of
7 Feature EW38, again, I can't tell you exactly where it
8 continues to be a road and where it stops to be a road.

9 Q Okay. Okay. I understand. I believe I
10 understand the fact to be that Nationwide 14 covers not
11 only the roadway itself, but the various things that are
12 located in these outcroppings from the roadway. So
13 continue to look at Page 32 of -- down there at the
14 south end, there's like sort of a bump where we're going
15 to have a citizens' center -- a citizens convenience
16 center, I think it's called. And then there's some
17 offices. There's some scales for weighing trucks, and
18 there's some offices. And it doesn't actually -- well,
19 right -- these -- some other things besides pure
20 roadways are considered to be approved under the
21 Nationwide 14 approval?

22 A No, sir. The Nationwide Permit 14 language
23 makes that clear. You're getting the Nation -- well,
24 I'm just going to say, the Nationwide Permit language
25 makes it clear. I'm looking at Marusak 3, Page 18. If

1 you count down to the third paragraph, it says, "The
2 Nationwide Permit cannot be used to authorize nonlinear
3 features commonly associated" -- NWP is Nationwide
4 Permit -- "cannot be used to authorize nonlinear
5 features commonly associated with train station projects
6 such as vehicle maintenances or storage building,
7 parking lots, train stations or aircraft hangers; those
8 being examples, not an all-inclusive list."

9 We don't present that any of those
10 features that you described are located in any Waters of
11 the United States that would require authorization.

12 Q Okay. Thank you. Can I get you to look at
13 Marusak Exhibit 4, and particularly the Pre-Construction
14 Notification? I take it from that -- I think I have the
15 page number right, 17 -- that there's roughly 0.11 acres
16 of jurisdictional Waters of the United States that will
17 be impacted by the roadway project?

18 A Yes, that's the total surface area.

19 Q And I think I understand from the next few
20 pages over that the Halff didn't --

21 A I'm sorry. Can you give me a page number?

22 Q I'm sorry. Page -- well, I'm looking at
23 Page 20. Okay. So Volume 7, Marusak Exhibit 4,
24 Page 20, that Halff's recommendation was that there be
25 no mitigation required for the impact to that, more or

1 less, tenth of an acre, and that is a recommendation
2 with which the Corps, by sending that letter that we've
3 been looking at, which is to say -- well, the letter
4 from Mr. --

5 A Stephen Brooks.

6 Q -- has acceded to that recommendation, or
7 agreed with that recommendation, that there not be
8 mitigation. Right?

9 A I'm sorry. Yes, but --

10 Q You're right. The question was way too long.
11 Halff's recommendation was that no mitigation be
12 required, and the Corps has agreed with that?

13 A Corps will absolutely tell me if I need to
14 provide mitigation when I didn't. So that is correct.

15 Q To your knowledge -- well, certainly Halff
16 applied to the Corps for any other authorizations for
17 this particular landfill project other than the two
18 we've been discussing -- the negative JD and the
19 Nationwide 14?

20 A No, sir.

21 Q Let me ask you a number of questions now about
22 the actual wetland determination which is the document
23 that's in Volume 1 starting at Pages 675, I think --
24 275, I think we decided -- yes.

25 Let me get you -- if I could, let's start

1 out with looking at these aerial photos that you
2 actually discuss in your prefiled testimony. That would
3 be the aerial photos from 1966. And in a second, I will
4 give you a page number for that. That would be Page
5 No. 312.

6 A It's 1996.

7 Q 1996. Is that what I said?

8 A That's what you meant to say.

9 Q I believe I understand from your -- and correct
10 me if I'm wrong -- but I believe I understand from your
11 narrative portion of your report that the eastern -- I'm
12 going to call it half, but in exhibit -- well, in Figure
13 A3, so Page 312 of the wetlands and litigation report,
14 that eastern half of the area that does not appear to
15 have trees in it -- it's kind of pinkish colored -- on
16 Figure A3, that has historically been used as pasture
17 land. Is that what your understanding is?

18 A Can you repeat the question? I thought I heard
19 two questions.

20 Q Okay. Well, first, let's -- Figure A3, am I
21 not correct -- is an infrared photograph from 1996 of
22 the area where the land -- the whole landfill
23 property -- and the landfill property is outlined in
24 yellow?

25 A That's correct.

1 Q And then there is a -- an eastern portion of
2 that property that is mostly sort of a pinkish color.
3 And a western half, let's call it, that's a darker
4 color, kind of green or brown or something. Correct?

5 A Correct.

6 Q And then my understanding from my reading of
7 the Halff delineation report is that the eastern half,
8 the pink part, was historically pasture land. Is that
9 right?

10 A When I go look at the specific location where
11 we discussed aerial photography as a subset -- and I'm
12 on Page 282, same exhibit -- I don't see in those
13 paragraphs -- it talked about the impoundment and it
14 talked about headwater streams. There might be
15 somewhere else, you know, in this narrative where I talk
16 about that. If you can direct me to that location, then
17 we can discuss it.

18 Q Well -- are you --

19 A I'm sorry. I'm sorry. I was looking at the
20 wrong spot. You're correct. Over by where it says
21 Figure A3. Okay. Let me read it real quick.

22 Yes. Okay. I see where you're
23 referencing that.

24 Q And so my impression was -- and I'm not trying
25 to be tricky here. I just thought you thought that that

1 sort of eastern half had been used as pasture land, and
2 I don't know what you thought about the western half.

3 A Yes, I mean -- that's -- that's correct.

4 Q Did you talk to -- you or anybody with Halff,
5 that you're aware of -- talk with any of the neighbors
6 to just either confirm or explore that hypothesis?

7 A No -- well, first in this particular section,
8 the way the report is structured, we're talking about
9 just what any observer can review off the same resource.
10 So it implies -- any discussion in these sections we
11 don't talk about what we might know from site visits or
12 coordinating with anybody else. It's strictly, if you
13 go pull this image, what do you see. Now, the second
14 part of the question about talking to, you know,
15 adjacent landowners, we don't talk to adjacent
16 landowners, you know, on these types of studies unless,
17 you know, we're specifically directed to.

18 Q Okay. I'm going -- I didn't mean to imply
19 criticism. I just wanted to know if you had any new
20 evidence, different evidence.

21 That same page that you referred us to of
22 the delineation report -- so Page 282 I believe is where
23 it talks about the terracing that is visible in the 1996
24 photograph?

25 A Yes.

1 Q And so you didn't -- Halff did discover some
2 terracing over there on that eastern side, at least, of
3 the permit boundary that showed -- or the study area
4 that's shown in Halff -- A3?

5 A The features on the aerial were field verified,
6 you know, eventually.

7 Q So those of us who are looking at it, when we
8 look at this infrared photograph, the terracing features
9 are indicated by these roughly parallel lines in this
10 sort of pinkish area on the eastern side. So there's a
11 set of parallel lines just north of the SCS pond. And
12 then there's another set north of that, and -- then
13 there's a little set up there in that far north portion
14 of the permit boundary -- I'm sorry -- of the property
15 boundary. Right?

16 A Correct.

17 Q And a layman's understanding of those would be
18 that ranchers do that to prevent erosion. I mean, is
19 that how the terracing gets to be there in the first
20 place -- happens to be there in the first place?

21 A That's a reasonable assumption.

22 Q Do you have any experience elsewhere with how
23 terraces came to be terraces?

24 A If I go back to my grandfather's farm, I can
25 recall -- and professional experiences, I'd have to

1 think back to a range of projects. It's not unusual to
2 encounter, especially in areas where there's a lot of
3 ag.

4 Q Well, I guess my question is they are not
5 really naturally occurring features. Nature wouldn't
6 make these terraces. Right?

7 A Correct.

8 Q At the time of your deposition, I believe you
9 did not -- did not then know about the nature of drought
10 conditions, if any, in Caldwell County in 2012 and '13.
11 Does that sound correct to you?

12 A What I recall in our deposition was there was a
13 mention of are you aware of the drought. And when I
14 hear are you aware of the term, "the drought," drought
15 has a -- people can interpret drought to mean, oh, it's
16 summertime, it's a drought. Or they can be referring to
17 a particular, you know, drought index of some type that
18 gives different classifications of what droughts are.
19 And I recall speaking -- I recall that part of a
20 conversation where you said, "Were you aware if there
21 was a drought?" And I was like, "I was aware that it
22 was summer, and in the summer you do have dry conditions
23 indicative of a drought."

24 Q Okay. And I preface that only so you wouldn't
25 think I was just wasting your time.

1 The real question is, do you today know
2 whether or not there were drought conditions of some
3 level in Caldwell County in 2000 and -- for the years of
4 2012 and most of 2013.

5 A I can reference -- it's called the Palmer
6 drought index. I did go back and look, and, yes, there
7 were different parts of the states that were in drought
8 conditions in June and July at that time, yes.

9 Q And how about in the spring?

10 A I don't recall.

11 Q And as you sit here today, you just don't know
12 where there were drought conditions in the spring of
13 2012 or 2013 on this 130EP property. Is that really
14 where we honestly are?

15 A Yeah. I don't recall what the drought indices
16 were for -- you said spring of 2013?

17 Q I said spring of 2012 --

18 A 2012.

19 Q -- 2013. You don't know what the drought
20 conditions were, in any -- on this property, do you?

21 A I don't recall specifically, no, sir.

22 Q Let's look at a few data sheets. Well, I'm
23 sorry. I'm sorry. Before we do that, why don't we look
24 at a couple portions out of the report itself. I'm
25 sorry -- the wetlands delineation.

1 So I'm going to ask you a question about
2 something you said on Page 287 of the wetlands
3 delineation -- I'm sorry -- Volume 1, Page 287, which is
4 within the wetlands delineation. You don't need to look
5 there unless you want to.

6 My understanding is that when those four
7 folks, Troegle, Littleton, Griffith and Boe, were out
8 doing through wetlands survey, that when they came upon
9 a site that did not have -- let me get the word exactly
10 right -- did not meet hydrophytic vegetation criteria,
11 at those sites, they determined it was not -- it was not
12 necessary to do any investigation of the hydric soils or
13 the otherwise hydrology of that site. Is that right?

14 A Yes. That is correct. After we coordinated
15 that with the Corps of Engineers, that's not a
16 determination we're going to make on our own.

17 Q Okay. You make the determination that there's
18 no -- that the criteria for hydrophytic vegetation has
19 not been met. That is a decision -- that is a
20 determination you make on your own -- or they make on
21 their own?

22 A Yes.

23 Q Now, I don't quite understand what all is
24 encompassed in the word "criteria." Do -- can you
25 elaborate for me? Does that mean that hydrophytic

1 vegetation has to be dominant or is it dominant or
2 what's the criteria? How does one determine that at a
3 particular spot, the hydrophytic vegetation criteria
4 have not been met?

5 A First you evaluate the vegetation on site.

6 Q Okay.

7 A And then, you know, on a particular sample
8 plot, you establish what are dominant plant species
9 based on their percent coverage. Then each species has
10 a wetland indicator status that is established
11 nationwide by region.

12 THE WITNESS: And, Your Honors, I'm going
13 to get into some acronyms. You're going to see
14 something that says FAC in a data sheet, perhaps. And
15 that indicates facultative. And, you know, that's a
16 plant that could be either/or. A good example is a
17 hackberry. We all know what hackberries are, I think.

18 Then you have -- on either side of that,
19 you have a FACU, which is FAC up, which means it usually
20 tends to be in more upland sites. Sometimes you'll see
21 UPL, which is upland. And then sometimes you'll see NI,
22 which is nonindicator, which means it's so far in the
23 drive that you either see a NI status in the regional
24 field book or it doesn't even make the list.

25 Now, going on the -- sliding the other way

1 from FAC -- you have FAC, you have FACW, which is FAC
2 wet. I believe we all know what black willows are.
3 Black willows are an example of a FAC wet. And then you
4 have something that's called an obligate, which is
5 designated by OBL.

6 Q (BY MR. FREDERICK) Okay. So then back to the
7 question of -- I understand we've got to figure out what
8 our vegetation is out there.

9 A Well, I think I still had a question that
10 needed to be answered.

11 Q Okay.

12 A And I was -- the progression I was giving --
13 the acronym information. We figure out which is which.
14 In 50 percent or more -- well, actually, let me refresh
15 that. I believe it's greater than 50 percent have to
16 be FAC or wet, being FAC, FAC wet, or obligate.

17 Q Now, I have seen in -- I believe it might even
18 be the Corps of Engineer's definition of wetland -- a
19 statement to the effect that something -- there has to
20 be a prevalence of hydrophytic vegetation. Regardless
21 of where I saw it, is there a difference between there
22 being a prevalence of something and there being a
23 dominance of something?

24 A Well, yeah. I mean, yes, because something can
25 be a dominant -- and how the composition by dominance

1 can determine the prevalence. And eventually the
2 prevalence is the answer. Is it hydrophytic vegetation,
3 if it, you know, meets that certain dominance --
4 dominance test that you see on different data sheets.

5 Q Okay. So I guess maybe I am -- I'm -- I'm
6 sorry. I'm not getting the difference between
7 prevalence and dominance.

8 A Prevalent -- dominance is -- the delineation
9 guidebook has a way of determining dominance once you
10 establish percent covered by area within a sample area.
11 You then use that dominance, you know, percent -- or you
12 use the dominance of that species. And if it's a FAC
13 or -- or a FAC wet or obligate -- say, I have a plot and
14 I have three -- let's just keep it simple. I've got
15 three obligate species that are dominant. I establish
16 that I have three obligate species in my plot. Then I
17 establish by their percent cover that each one is
18 considered dominant.

19 Q Does that mean each one of them is covering
20 50 percent of the plot?

21 A No.

22 Q Okay.

23 A As I said, there's a specific outline in the
24 delineation manual for testing for dominance. Let me
25 get back on track.

1 You establish that they're dominant. And
2 so in this case, I had three out of three. If I have
3 three out of three that are obligate dominance or
4 dominant obligates, whichever way you want to go -- I
5 have three out of three -- that's 100 percent are FAC or
6 wetter. FAC, FAC wetter, obligate. That's means I meet
7 the dominance text worksheet. Prevalence is just a term
8 trying to explain --

9 First, here's what the definition of
10 wetlands are. They have a prevalence of hydrophytic
11 vegetation. Here's how you determine that prevalence in
12 the field by measuring the cover, the dominance, and
13 then how those dominances relate to each other.

14 Q Is predominant a term that is used that means
15 something in relation to -- well, I've read predominant
16 in one of these pieces of paper, so I'm afraid that that
17 might be a term that's used in wetlands delineation. Is
18 it?

19 A That's a term where you just -- it's a -- you
20 may say a side is predominately covered by this or
21 predominately associated with this, but it is not -- you
22 know, the term "dominant coverage" is related strictly
23 to the data sheets.

24 Q Okay. I'm about to launch off into a data
25 sheet.

1 JUDGE BELL: Good time for a break?

2 JUDGE QUALTROUGH: Yeah.

3 JUDGE BELL: Okay. We'll take one, and
4 we'll be back at 10:45.

5 (Recess: 10:35 a.m. to 10:52 a.m.)

6 JUDGE BELL: All right. We are back on
7 the record continuing with cross-examination from TJFA
8 and EPICC with Mr. Marusak.

9 Go ahead, Mr. Frederick.

10 Q (BY MR. FREDERICK) Mr. Marusak, I said I was
11 going to switch off into data sheets, but I've got a
12 couple questions, actually, on the narrative portion of
13 the wetlands delineation, if we might clear those up
14 first before moving on.

15 If I could get you to turn to Page -- 290
16 is what I wrote down. Would you verify that?

17 A Yes.

18 Q The wetlands delineation, which is -- so that's
19 Page 290 of Volume 1 of EP Exhibit -- 130EP Exhibit 1,
20 Page 290.

21 A Okay.

22 Q Okay. I just don't understand that last
23 sentence. "Wetland features that occurred within the
24 vicinity of riparian woods complex were categorized
25 according to the shift in vegetative community and

1 topography." I've read it five times, and I just don't
2 understand it.

3 A Okay. I'm going to go ahead and read the rest
4 of the sentence.

5 Q Okay.

6 A "...and the soil and hydrology characteristics
7 are described in the context of a forest and wetland
8 community."

9 So, in essence, what that means, when we
10 locate our data points in the field, we don't just
11 randomly go and take them at regular intervals. We
12 usually take them at transitions between different
13 vegetation communities. So what we want to avoid doing
14 when we do delineations is have an obviously upland
15 plant community affect those dominance percentages we
16 were discussing earlier. We don't want those to affect
17 how we might interpret a wetland that we may have
18 identified.

19 In a practical example on this piece of
20 property is we've got a lot of mesquite on the property,
21 and sometimes in close proximity we have post oak.
22 Those are just types of plants you don't associate with
23 wetlands. We don't want to include those in a
24 vegetation classification for a wetland because it skews
25 the numbers. Otherwise, it makes it look like we're

1 trying to make a wetland feature dry by including -- or
2 let me rephrase that. Trying to make a wetland feature
3 not meet hydrophytic vegetation criteria by including a
4 typical upland plant that you wouldn't normally have --
5 so that's just basically distinguishing where we might
6 take our data points.

7 So what we're trying to say is we are not
8 going to discuss the plant species we saw in the forest
9 and wetlands, which generally makes sense to occur in
10 the greater context or in the riparian forest. So
11 that -- all we're saying there is you can go read the
12 discussion of forested wetlands on another page. It's a
13 distinct community, and we want to discuss it
14 separately.

15 Q Okay. I understand what you just told me. I
16 don't -- I'm having trouble making the sentence say
17 that. But do I understand correctly that you come to a
18 spot -- one comes to a spot where we're going to
19 collect -- fill out -- potentially fill out one of these
20 data sheets, and that spot has wetland features but is
21 in a riparian woods complex. And how do we -- how do we
22 look to the shift in vegetation community topography to
23 characterize that little site -- that plot?

24 A You're going to have riparian woods that are in
25 all instances not going to meet wetland vegetation -- or

1 not going to meet wetland criteria. So therefore, we're
2 not going to call them wetlands. However, within the
3 context of the riparian woods, we may see a geomorphic
4 depression, or we may just see a grammatic -- you know,
5 if you're in the context of riparian woods on a property
6 like this and you see a distinct geomorphic depression,
7 you know, maybe an old stream channel, which, again,
8 makes sense to be in the context of a riparian woods,
9 larger habitat, and when we see that change in
10 vegetation or just through our experience -- I mean,
11 we've done this enough times to know something looks
12 different. We say, "Hey, we want to take a point here
13 and see if it meets wetland criteria, and if it does, we
14 then delineate it."

15 Then when we come back and write this
16 report, we look at all of our data points. We go, okay.
17 We want to discuss these, and we don't -- I don't expect
18 everybody to pour through 120 data sheets or -- I think
19 we had 123. What we try to provide for the reviewer is,
20 "Hey, when you see data points" -- sorry -- "when you
21 see data points at this location, and it's in the
22 context of a riparian woods, this is what you might see.
23 However we want to point out to you that if you see a
24 point that's got a delineated forested wetland or a
25 forested wetland point, this is the type of vegetation

1 you're going to see."

2 So all we're saying in that sentence is
3 you're not going to read about forested wetlands in my
4 riparian woods narrative. You're going to go a couple
5 of pages where I have the section on riparian -- or on
6 forested wetlands. You're going to see all the criteria
7 we talked about on how the vegetation was different,
8 where -- what you see when you typically had green ash,
9 black willow, cedar elm, hackberry, something different.
10 We're trained to know when we see black willows or green
11 ash, that's kind of a cue that, "Hey, you might want to
12 stop and look at this." That doesn't always mean it's
13 going to be a wetland, but it triggers that we need to
14 stop and look at this differently than the last
15 vegetation classification we've been walking through.
16 And that's all that sentence says.

17 Q I'm not one of these people who would just
18 chase it all the way down to the end of the road. I'm
19 going to take -- I've got as much understanding of this
20 sentence as I can stand. Thank you.

21 A I tried my best.

22 Q May I get you to flip forward to page -- it's
23 Page 9 of the wetland determination. It's really
24 Page 10 of the wetland determination, so it's Page 287
25 of the exhibit.

1 A Okay.

2 Q In that chart up there, you have -- somebody
3 has put an asterisk by a couple of the open water
4 features.

5 A Uh-huh.

6 Q And one of those open water features by which
7 an asterisk was put was No. 4. And from reading the
8 legend, there's -- this table would indicate that there
9 may be a hydrologic connection between Open Water 4 and
10 the SCS pond. I think that that asterisk is just
11 misplaced, and it should be have been up on Open Water
12 2. And I think that from the text on the previous page
13 and the conversation we had a good while ago now about
14 Open Water 4, which is that stock pond that -- up in the
15 upper northeast corner of the footprint of the landfill.

16 A Yes. It looks like it should be Open Water 2
17 and Open Water 3.

18 Q Okay. So on these data sheets -- which we are
19 not going to talk about all these data sheets for sure.
20 My impression is that the data sheets themselves come
21 from -- which I believe they say Version 2.0. So these
22 are data -- these are forms -- am I not correct, that
23 these are forms that the Corps of Engineers put forward
24 in a 2010 supplement to the prairie plains region
25 guidance on wetlands delineations?

1 A Great plains region, yes.

2 Q Great plains region. Okay. And I take it
3 that -- so that's where these forms come from.

4 A Yes, sir.

5 Q Okay. And I take it that that 2010 wetland
6 delineation manual is, like, I guess -- I won't say the
7 authoritative Corps' document but it is certainly an
8 authoritative Corps' document on how to do wetlands
9 delineations. Right? At least in the prairie plains
10 area?

11 A The full title is it is a supplemental to the
12 original 1987 manual.

13 Q Okay.

14 A So you use them together.

15 Q So there's no real contest that one may rely on
16 things and forms, for example, that come from that 2010
17 supplement?

18 A Certainly, yes.

19 Q Okay.

20 A Different supplements have different data
21 forms.

22 Q Let me get you, I think, to look at one of
23 these data sheets just so we can understand a little bit
24 better, perhaps, this dominance kind of issue when it
25 comes to characterizing wetlands. If you turn to Page

1 437, which is the one I just -- so Page 437 of 130EP,
2 Volume 1, which is within the wetlands delineation
3 report.

4 A I'm there.

5 Q Okay. And that is -- we can look at -- well,
6 we'll go back and help find the data points in a minute.
7 But this is some data point out there.

8 A Uh-huh.

9 Q And I was attempting to walk through the
10 dominance test worksheet for this particular data point,
11 and I got confused. So maybe if you would explain this
12 to us, I -- it would help us understand the relationship
13 between dominance and prevalence.

14 A I want to first look back to my report to see
15 if we explained it in the report. We may not have. We
16 generally don't explain to the Corps their own methods.
17 If it's not in there, I can explain it. You know, I
18 don't -- I don't think it's in there. I'll just go
19 ahead and -- give me a few seconds to review it so that
20 way I can explain it once and don't have to confuse the
21 record by recanting.

22 Q Okay. Just so you'll know, my major source of
23 confusion has been that I don't -- I see that there are
24 two dominant species in the -- you know, FAC, FACW, OBL
25 categories, but then I'm not able to confirm that by

1 looking at the left column, so I think there's something
2 I don't understand.

3 A Okay. So the nature of your question was which
4 exactly?

5 Q Okay. Well, let's start out with the section
6 on vegetation on -- with the bottom half of Page 437.

7 A Okay.

8 Q Am I right that the data on the left-hand
9 column in the bottom half of the page, those are data
10 that are collected by those four gentlemen when they
11 were out in the field or one of those four gentlemen
12 when they were out in the field?

13 A Correct.

14 Q And those are roughly -- the percentages of
15 coverage that they've decided -- in whatever the size of
16 the plot was, and -- are the plots all the same size?

17 A Generally. There are times where you have to
18 adjust them for the same issue we discussed earlier so
19 you don't include things that shouldn't be included
20 within that time.

21 Q Okay. And in the right-hand side is where one
22 would do the dominance and prevalence and hydrophytic
23 vegetation indicators. Additional information which --
24 okay. So I don't understand where the two came from in
25 the dominance test worksheet and where the seven came

1 from.

2 A Okay. I think -- let's see. Where -- one, two
3 -- okay. Okay. So if you see in the dominant species
4 column, we see seven dominant species.

5 Q Now, just a second. The dominance species
6 column is that left column?

7 A Yeah, in the left column.

8 Q Okay.

9 A We see yes, yes, yes, yes. That's four. And
10 it looks like there should have been a no there, but
11 that's a no. We've got a yes, five; yes, six; yes,
12 seven.

13 Q Okay.

14 A So that's where the seven comes from. And it
15 looks like there should only be a one --

16 Q Okay. Way down there at the bottom -- I'm
17 sorry -- I just didn't see the -- the woody pines.

18 A Yeah. Those always get us because usually you
19 only have one type, and it's a very small percentage of
20 cover.

21 I don't see anywhere in the notes -- it
22 looks like they may have actually included -- so in
23 reality when you look at this calculator here on the
24 right side, it should probably be one out of seven,
25 which would make it even, you know, less likely to meet

1 the criteria for hydrophytic vegetation. But basically
2 the top value in the box would be any value that is
3 obligate, FAC, wetter FAC. So you see some of this at
4 the very first entrance, that's a hackberry, and it's
5 got a FAC designation. That should be a one.

6 Q I think what happened is that that same plant
7 occurs, then, in the shrub stratum?

8 A Yeah. So that might be a typo on the FAC up,
9 then.

10 Q That's what I think, probably.

11 A But I can tell you that that is really a FAC --

12 Q Okay.

13 A So that would be the 2 out of 7. So the typo
14 is in a different location. It's not a miscalculation.

15 Q And if I were to take -- so I think two-ninths
16 is roughly 29 percent. Is that what --

17 A Two-sevenths, sorry. You have 7 dominants.

18 Q Okay. And because it's lower than 50 percent,
19 this particular plot of ground gets characterized as not
20 wetland. Right?

21 A It doesn't meet the hydrophytic vegetation
22 criteria, and therefore, it's not going to meet wetland
23 criteria.

24 Q And is that just the rule of thumb that the
25 Corps' office told you you could use, or is it really

1 the test for federal wetland status -- well, for wetland
2 status, that all three prongs of the wetland test be
3 met?

4 A No. I think it's -- let me back that up. I --
5 I think it's a fair question because I think that we are
6 used to seeing data sheets. I am used to filling out
7 data sheets that have all three criteria filled out for
8 data sheets. When you go back to the 1987 delineation
9 manual, when you get to -- it's the section on field
10 surveys for -- you know, when it breaks it down to field
11 verification required, it breaks it down to less than
12 five and greater than five.

13 In the greater than five, they give you a
14 discussion of -- you know, you check hydrophytic
15 vegetation. And then you go into the direction for
16 doing a soil test. And they have two provisions that
17 say, if you have hydrophytic vegetation, that is all
18 obligate. All your dominants are obligate. It means
19 you don't have one FAC wet, nothing -- and you've got
20 obvious signs of hydrology. You don't have to take soil
21 criteria. You can assume that they don't exist.

22 So that's an example of where the
23 delineation manual does have instances where you don't
24 have to collect all data points. It then goes to Part
25 B, which says if you have all obligates and some FAC

1 wet, but you have a clear distinct boundary, you don't
2 have to take soil criteria because it can be assumed
3 that they exist.

4 Q So it sort of --

5 A I still need to finish because this is a key
6 point. The next sentence says, "If neither A or B apply
7 and the site meets hydrophytic vegetation criteria" --
8 actually, it says "but" the site meets hydrophytic
9 vegetation criteria. The slope, it's -- so it's a -- I
10 can honestly tell you that my practice is generally to
11 take all three. But the delineation manual allows you
12 to, especially in the sites where you have -- you have
13 sites that are dominated by things like mesquite and
14 prickly pear cactus, and there are a couple of other
15 cactus species we identified. And obviously, you don't
16 have hydrology indicators up on a hilltop. You won't
17 have to evaluate it because hydrology criteria you can
18 generally see. Yeah. We don't have to take the soil
19 material or the soil criteria because it's just extra
20 data. It's not going to matter in the determination of
21 whether or not it's a wetland.

22 So I can tell you that it's not the normal
23 practice, but it's not an option that is available for
24 us to exercise. And as I said, we call the Corps
25 beforehand to say, "Hey, we've got this site." We want

1 to make sure that if we do that, we're on the same
2 page." And they said, "Absolutely."

3 Q Okay. Well, no, I'm -- subject, pursuant to
4 what you said, I don't have any criticism that you're
5 following -- you were doing the project for the Corps,
6 and you did what the Corps told you to do, and that's
7 kind of all --

8 A It's a collaborative effort, I think. In the
9 end, they have the final say, but we work together.

10 Q Okay. Let's -- let me ask you -- let's see.
11 Let's look at this transect map for a second, which
12 is -- this is going to be in that same exhibit at
13 Page 317.

14 A I'm sorry. I'm there.

15 Q You are there, you say?

16 A Yes, sir.

17 Q Now, generally speaking, I view this as a map
18 that shows where the transects are on, which those four
19 gentlemen went out and did work, and there are different
20 kind of symbols on this sheet that show like what kind
21 of vegetative community did you find in each one of
22 those points, each one of those data points?

23 A Correct.

24 Q Now, following this figure -- it looks like
25 it's B1, and so the figure that's on Page 317 --

1 A Yes.

2 Q After a few photographs and a few pages -- then
3 we start in to the data sheets that are presented in the
4 application.

5 A Uh-huh.

6 Q There are only data sheets presented for the
7 data points that have been assigned numbers on -- on
8 this exhibit -- on the exhibit on Page 317. Right?

9 A Correct.

10 Q There are data sheets or were data sheets for
11 all those other points, but they're not in the
12 application?

13 A No.

14 Q Okay. Okay. And the thought is that if one
15 wanted to know what was at one of those data points
16 that's not in the application -- that is one of those --
17 yeah, one of those data points for which we do not have
18 data worksheets in the application, one should go to
19 Figure B1 on Page 317 and find a numbered vegetation --
20 a numbered marker that's kind of close to the one you're
21 interested in and that has the same vegetation
22 characteristic, that it is itself a riparian woods or is
23 itself a mesquite woods, and look at that data sheet.
24 Is that how one should best understand the
25 characteristics of -- of a data point?

1 A Yes. And we also may -- we told the Corps that
2 we have photographs if you want photographs for each
3 point. So we basically did log those locations, you
4 know, with photographs. But the -- they didn't ask for
5 it.

6 Q Okay. And then I'm trying to see -- we've got
7 some other -- some really large maps that show, like,
8 all the water features that you found. And so this
9 would have been in the Waters of the United States, so
10 Page 330. That doesn't seem to be right, however -- 303
11 of Volume 1.

12 A Yes, sir.

13 Q And the same thing we -- the data points that
14 are shown on those six maps that start on 303, and, I
15 guess, go through 308, those are the same data points
16 that we saw back there on Page 317?

17 A Yes, sir.

18 Q And are the sizes that we saw on table -- I'm
19 sorry. The sizes of the wetland features that we saw on
20 Table C1, which follows the wetlands determination and
21 it's got Page Nos. 668 through 670, those -- we've got a
22 column on that chart that shows how big each one of
23 these wetland features is, how many acres each one of
24 these wetland features is. Those measurements for what
25 the acreages are were the measurements that were taken

1 by -- by these four gentlemen when they -- they -- when
2 they found themselves -- well, when they found
3 themselves a wetlands spot out there -- a spot that they
4 characterize as a wetland?

5 A I'm going to make a distinction. The sizes
6 were delineated in the field by the placement of flag
7 markers. And I believe they were calculated or measured
8 as -- I think the word you used is calculated. To me,
9 that entails survey and locating on the ground. I
10 believe that the team surveyor came back and surveyed
11 our flags afterwards. I just want to make that
12 distinction.

13 Q Yeah. So a person other than -- I said
14 Troegle, is that how you pronounce it?

15 A It's Troegle.

16 Q Troegle, Littleton, Griffith, or Boe.

17 A Right.

18 Q Another person came back and figured out the
19 sizes. The surveyor was somebody else?

20 A Brandon Littleton and Josh Troegle determined
21 the sizes through the placement of flags. The flags
22 were surveyed by surveyors. Then Littleton and Troegle
23 and actually, me, myself -- I'm going to step back. I
24 can't verify that I verified the -- I was out there
25 after the survey or before. But I know Troegle and

1 Littleton did verify.

2 Q Okay. I guess that does raise my issue, a
3 fact. You didn't yourself collect the data that are on
4 the data sheets or survey the size of the wetlands?

5 A I think that's evident.

6 Q That's fine. But people that you trust did?

7 A Yes.

8 Q Okay. And whenever we read in your prefiled
9 testimony or in the wetlands delineation report that's
10 in Volume 1 some reference to wetlands, that is a
11 reference to wetlands as defined by the federal
12 government in that definition that you set out on Page 7
13 of your prefiled testimony?

14 A Yes, sir.

15 Q Looking for just a moment at Exhibit C1, which
16 is at Pages 668 through 670, if one added up the acres
17 in the acreage column for each one of those three
18 different types of wetland features -- of Waters of the
19 United States features, I should say, that's what --
20 that's how we would come up with, like, the total amount
21 of acreage that we're talking about in the -- is this in
22 the permit? I'm sorry. Is this within the permit
23 boundary or is this just within the facility boundary?

24 A It's within the property boundary.

25 Q Property boundary or facility boundary. And

1 this is the property boundary numbers. I think so
2 because it's for the entire delineation.

3 A Yes.

4 Q Okay. So if I wanted to know, like, how many
5 stream features are there -- how many acres of stream
6 features are there, then I just add up those -- that
7 acres column and come up with some total, which I got to
8 be 7.47 acres, but some amount of acres, and that would
9 be like all the ones that were in the property boundary?

10 A I -- subject to check; I don't know those
11 numbers, yeah.

12 Q But that's -- that's the concept?

13 A That's how you would do it.

14 Q Okay. Now, let me ask you a question about the
15 narrative on -- going back just a little bit further.
16 So at this stage in Exhibit 130EP-1 in those set of
17 pages that begin way back there on 271, which is the
18 delineation report. And then a few things that have
19 just to do with state law requirements as opposed to
20 federal requirements, if you look back there on Page
21 672 --

22 A 672?

23 Q -- 672, and that's followed by tables on 673
24 and -- well, 673.

25 A Yes, sir.

1 Q Feel free to -- I find this very confusing, so
2 feel free to take as much time as you want to think
3 about it. I believe I understand -- and you will
4 probably find it easier to look at the table than you do
5 to look at the narrative. I believe that there are
6 146 -- I'm sorry -- 1.46 acres of wetlands -- maybe not
7 jurisdictional, but just wetlands -- within the facility
8 boundary?

9 A Yes.

10 Q And then it looks like of those, .49 are at
11 Halff's determination, I guess now supported by the
12 Corps. .49-acres are jurisdictional to the federal
13 government. Right?

14 A Uh-huh.

15 Q But none of those jurisdictional wetlands are
16 actually within the footprint of the landfill, which is
17 what I take from the narrative.

18 A Yes.

19 Q And -- so -- so all 40.49 acres of wetlands
20 that are within the facility boundary are just somewhere
21 scattered around where there's no, like, landfill
22 footprint. I guess also no roadway.

23 A Pardon? I'm sorry. I'm going back and
24 rechecking my calculation of .49.

25 Q Okay.

1 A It's just easier to use the table on 673.

2 Q That's -- the .49-acres of wetland that are
3 jurisdictional to the federal government are neither
4 under the footprint of the landfill nor under the
5 roadway or the parking lot or the weigh station that is
6 attached to that roadway?

7 A Correct.

8 Q And then there were .97 acres of wetlands which
9 I just get by subtracting .49 from .46, which might
10 not -- that are just state wetlands, or at least they're
11 not jurisdictional to the federal government.

12 A Correct.

13 Q Some of those were within the footprint and
14 others of them are not. In fact, it looks like .68,
15 within the unit boundary. Is the unit boundary the same
16 as the footprint?

17 A I believe that's my -- I think 34 and 35 -- let
18 me get back to my map.

19 Q And when you say "get back to my map," which
20 map are you looking at?

21 A I'm sorry. I'm still trying to figure that
22 out. Yes. There's four that are not within the unit
23 boundary. We've got to check up at the top of the
24 table. I'm sorry. I was looking at Page 674 on my map.

25 Q 674. I've got you.

1 A Yeah. But there's actually. There's four --
2 four Non-Waters of the US not located within the waste
3 management unit boundary.

4 Q And the waste management unit boundary, is that
5 what we've been referring to as the footprint?

6 A Yes. That's my understanding. And it's shown
7 on Page 674.

8 Q Okay. You just told me you think there were
9 four -- did you just tell me you think there are four
10 that are not within that footprint?

11 A When we look at the Table 2-D-2.1 on
12 Page 673 --

13 Q Right.

14 A -- we have EW19, which is not a Section 404
15 wetland. And then the table has MA, which is not in --
16 unit boundary. And if you look on the map, which is the
17 next page, you see it down on the southeast end of the
18 landfill, EW21 has the same entries in the data table.
19 If you look up in the northeast corner, you see that
20 it's outside the green line on the map.

21 Q Okay.

22 A Then if you look down at EW34 and EW35, they
23 both have no for Section 404. They both have NA in the
24 entry for -- you know, within the unit boundary. When
25 you look on the map, you see EW34 and EW35 in the

1 southwest corner of the footprint, outside of the
2 southwest corner. You see them there.

3 Q Well, let me ask you to look at your Exhibit 4,
4 Page 32, which is a map that shows the northern
5 extension or the northern extension of the roadway -- so
6 EW34 and 35, although outside the footprint of the
7 landfill are within the facility boundary and they're
8 within the project impact footprint. Right?

9 A Correct.

10 Q Okay. Did you make any independent inquiry
11 about what was the facility boundary, or did you just --
12 or did they give you a facility boundary and you
13 accepted it?

14 A They gave me a facility boundary, and I
15 accepted it.

16 Q Let me get you to look at Page 676 through 679.
17 I've got a couple of questions there of, you know, EP --
18 130EP-1.

19 A I'm there.

20 Q So look at -- look on 676. And you recite
21 there the provision of 30 TAC, 330.553 (b)(1) that --
22 that requires a landfill applicant, you know, to make
23 certain demonstrations related to wetlands that are
24 involved in the landfill or recovery operation. And
25 then I see back here on Page 6 -- let me make sure I've

1 got this one right and not waste everybody's time. Let
2 me back up and ask you a threshold question. The Corps
3 of Engineers' policy that there should be no net loss of
4 wetlands, that's actually -- that's not really
5 regulatory, is it? It's not -- that is -- it's a policy
6 rather than a regulation. Is that your understanding?

7 A You know, that's something that I would have to
8 have the rule books in front of me. I'd have to have
9 the Federal Register in front of me to see exactly where
10 that -- to see if that's actually something in the
11 Federal Register, you know, codified or if that's
12 something that is a guidance letter.

13 Q Okay. But nonetheless, in your experience,
14 both with landfill applications and with the Corps,
15 regardless of whether it is policy or law, you've
16 been -- your Applicant clients have been required to
17 rebut the presumption that there's -- that they've been
18 required to address no net less of wetlands issue?

19 A We have been required to address all of the
20 components of (b) (1) -- or 330.553(b) (1).

21 Q Okay. I'm just worried -- or confused a little
22 bit. It says, "Where applicable under the Clean Water
23 Act" -- so looking back at Page 676, where you set out
24 what the -- what the regulation say it is. "Where
25 applicable under the Clean Water Act 404 or applicable

1 state laws," then you've got to do these other -- these
2 five things. And my understanding is that one of those
3 five things were -- if you had federal jurisdiction of
4 wetlands involved, you would have to demonstrate this
5 absence of feasible alternatives to taking those
6 wetlands. Right?

7 A That's the foundation section.

8 Q Okay.

9 A So, yes.

10 Q When you were working through those three or
11 four pages we've been discussing, 670 something, ending
12 in 679, when you were at -- when you were asking
13 yourself if a wetland was involved in the operation of
14 the -- in the operation of the landfill or recovery
15 operation, did you -- can you tell us what your thought
16 process was for determining that a piece of wetland was
17 involved or was not involved? What characterizes
18 involvement?

19 A I'm sorry. I don't know -- in -- where
20 you're --

21 Q Okay.

22 A I don't understand the question. Sorry.

23 Q Okay. So look at Page 676.

24 A Okay.

25 Q Where you've set out the threshold -- the

1 introductory language --

2 A Uh-huh.

3 Q -- and it says, "The presumption that no
4 practical alternative to proposed wetland recovery
5 operation is available, that does not involve wetlands."
6 Well, I'm trying to figure out what -- how one knows
7 whether wetlands had been involved or have not been
8 involved.

9 A Okay. All right. I understand the question
10 now. Yeah, the -- "involved" used in that sense is
11 within the context of the 404(b)(1) guidelines which is
12 in Section 404 involve -- it can involve by fill first
13 because that is -- that is what triggers 404, the
14 placement of fill material. Then there can be other,
15 you know, indirect impacts to wetlands through that
16 channel via, you know, vegetation clearing or something
17 like that within a wetland if that's part of the
18 project.

19 Q But does involvement actually require taking,
20 such as by fill or of dredging?

21 A I don't understand taking wetlands. You mean
22 removal?

23 Q Removal.

24 A Okay. Generally when you have a 404
25 alternatives analysis as it relates to the fill of

1 wetlands, you generally are having projects that involve
2 the total fill. You can fill a wetland and still have a
3 wetland when you're done filling. But to answer the
4 question, generally when you have a 404(b)(1) analysis
5 scale-type of project, you have fill involved in
6 wetlands that convert the wetland to a parking lot,
7 building space, roadway. So, yes, it generally means
8 total removal, but it -- not necessarily.

9 Q And we didn't have any wetlands involved -- any
10 federally jurisdictional wetlands involved for reasons
11 we've already discussed. The truth is we have -- the
12 past finding was that there's no federally -- federal
13 jurisdiction of wetlands involved in this project.

14 A Within -- impacted by the footprint.

15 Q Or the roadway?

16 A There's no wetland impacted by the roadway, no.

17 Q Okay. Well, let's look real fast to make sure
18 we all -- I think I know the answer, but let's look real
19 fast at your exhibit -- on Page 32, so -- Applicant's --
20 your prefiled testimony, Exhibit 4, Page 32. Found it?

21 A Yes, sir.

22 Q So there are within the -- what's called here
23 the project impact footprint, which is that sort of
24 purple line, not sort of -- that purple line, there are
25 obviously some of these emergent wetlands we discussed,

1 34, 35 and Open Water 5. Those aren't involved because
2 they're just not -- they're not federally
3 jurisdictional.

4 A Yes. That's true. They're not -- "involved"
5 in the context of -- my understanding is you're using
6 the word "involved" in a -- in a context of the code
7 language. So I'm not sure what you mean, "involved" in
8 this case.

9 Q Well, I'm just trying to find out, as I
10 understand it, the -- the -- again, really just going
11 back to the -- to the regulatory language. From -- and
12 I saw -- which you had on Page 676 of your -- well,
13 Exhibit 1 of 130EP-1. And I thought you told me that,
14 well, they would be involved -- to be involved, they
15 would have to be under the footprint or under the
16 roadway or maybe one of those ancillary things like a
17 weigh station or a parking lot or something?

18 A I think I used the examples, you know, not
19 specific to the landfill, but I follow. Yes.

20 Q Okay. So now I'm looking at Page 32, and I see
21 that there are some wetlands within this project impact
22 footprint --

23 A Yes, sir.

24 Q -- but outside of the waste management unit
25 boundary, which I think we have historically referred to

1 the waste management unit boundary as the footprint. So
2 had those been federally jurisdictional wetlands, would
3 they be involved or not be involved? They're outside
4 the footprint but they're within the impact boundary.
5 That's the question.

6 A If they're -- if they were, which I think we've
7 established that they're not Waters of the US. If they
8 were Waters of the US under Section 404 of the Clean
9 Water Act, you would have to address alternatives
10 pursuant to section 404(b)(1) for the placement of fill
11 in Waters of the US.

12 Now, the impacts are so small -- again,
13 we're talking about a isolated hypothetical. Those
14 impacts are so small the bubble presumption would not --
15 the -- the term they use is commensurate analysis --
16 level of analysis commensurate with impact. You know,
17 generally if the impacts are small enough to qualify
18 they're a Nationwide Permit, you can fit that analysis
19 within the context of the PCN document that we were
20 looking at earlier.

21 Q In the net -- in all of this, there are -- to
22 your knowledge, the 130EP project is not contemplating
23 wetlands mitigation of any type for either federally
24 jurisdictional wetlands or any of the other wetlands
25 that are just state wetlands. Right?

1 A There would be no need to for federally
2 protected wetlands because we are not impacting any.

3 Q Okay.

4 A And we are not required to because the other
5 affected wetlands are non-Waters of the US. And that
6 has been my experience on landfill projects and other
7 projects.

8 Q Okay. Let me --

9 MR. FREDERICK: May I approach, Your
10 Honor? I've got two copies of this.

11 JUDGE QUALTROUGH: Has this been marked?

12 MR. FREDERICK: No, not yet because it's
13 -- well, you'll see in a second.

14 Q (BY MR. FREDERICK) Mr. Marusak, I -- I guess
15 isn't it true that the Corps of Engineers recommends in
16 its 2010 regional supplement to the wetlands delineation
17 manual that special care has to be taken in identifying
18 hydric vegetation on lands that had been used as grazing
19 lands?

20 A It has provisions for situations where you
21 might have difficulty identifying vegetation in areas
22 that have been grazed.

23 Q And it has provisions.

24 A It has provisions.

25 Q Okay.

1 A To clarify, it gives you -- here's how you
2 identify hydrophytic vegetation. Here's how you
3 identify hydric soils. Here's how you go about
4 identifying hydrology. And in the event that you have
5 difficulty or limitations, we have guidelines for
6 identifying difficult wetland situations, what they call
7 in this document that you've given us.

8 Q And that should be incomplete. Okay. And a
9 condition that can lead to difficult identification of
10 hydrophytic vegetation is historic use as grazing lands.
11 Right?

12 A It can be.

13 Q That is one of the conditions that might lead
14 one to have to do -- to want to do some alternative --
15 you would have a term of art for it. I forgot exactly
16 what it was but other means of hydrophytic vegetation
17 categorization. Right?

18 A Correct.

19 Q And one of those alternative means is to
20 establish a -- I think they call it a reference field.
21 It's a -- it's a --

22 A Reference standard, I believe, is generally
23 what they use.

24 Q Yeah, a reference site.

25 A Right.

1 Q Now, that did not happen, and so tell -- why
2 don't you tell the examiners and all of us, the ALJs and
3 all of us, what is a reference site?

4 A A reference site would be -- a lot of times a
5 reference site would be a -- sometimes we have it where
6 it's mowed, where a site is -- let's think of pasture
7 use, not grazing, but the same effect as something is
8 being mowed.

9 Q Okay.

10 A And we may have a site that looks to be a
11 wetland; yeah, you can still see some things that might
12 be indicative of, you know, a wetland, but say for all
13 the vegetation that's been mowed, we might have a very
14 similar site nearby that is a same type of vegetation or
15 habitat complex, you know, like the categories we have
16 broken out in the report.

17 We -- well, No. 1, we would have a data
18 point for that location. And if that were a case, we
19 might reference the -- this location that's generally
20 the same. So looking at the vegetation, we would expect
21 that the vegetation might be similar to this undisturbed
22 site. That would be an example of using a reference
23 site.

24 Q And it wouldn't necessarily have -- okay. But
25 in any event, so I understand what a reference site is,

1 and did it have to -- it did not employ any reference
2 sites in evaluating hydrophytic vegetation for the 130EP
3 project. Right?

4 A No, sir.

5 Q I'm not going to move to introduce that.

6 MR. FREDERICK: Can we just take judicial
7 notice of this 2010 supplemental -- not just the few
8 pages I gave him, but the whole thing as far as I'm
9 concerned -- although there's only five or ten of them,
10 it's just -- it's a document nobody is really likely to
11 contest, I don't think.

12 MR. RYAN: My thought on that would be,
13 David, if these are the five or ten pages you care
14 about, I don't have a problem making it an exhibit. My
15 problem is, I don't have the whole manual. I don't have
16 any problem at all if you want to make this an exhibit.
17 I won't object to admitting whatever pages you have
18 here.

19 MR. FREDERICK: Okay. Well, that's
20 certainly a middle ground. It seems to me this is kind
21 of like -- almost like a regulation that we wouldn't
22 normally have to introduce it at all.

23 JUDGE QUALTROUGH: I don't know. Is this
24 in the Federal Register? Can we access this --

25 THE WITNESS: Well, see the ERDC/EL

1 TR-10-1 --

2 JUDGE QUALTROUGH: Just get this.

3 JUDGE BELL: Do you want to just offer it
4 as an exhibit just to make it simple?

5 JUDGE QUALTROUGH: I mean, what's the
6 reluctance?

7 MR. FREDERICK: Well, I would just think
8 we will get into briefing and people are going to move
9 on to grab other pages out of both.

10 This document and the 1987 document are
11 the two that he relied on -- like how he does his
12 wetlands delineation. So I would be surprised if only
13 these five or ten pages are of interest to anybody when
14 it gets around to briefing, I mean, but sure, I -- these
15 are the five or ten pages most helpful to me. I'd be
16 happy to have them introduced.

17 JUDGE QUALTROUGH: Subject to optional?

18 JUDGE BELL: Let's do it that way. What
19 number is it?

20 JUDGE QUALTROUGH: 43.

21 JUDGE BELL: You'll need to get it marked
22 through the court reporter.

23 MR. FREDERICK: I need to make copies and
24 come back after lunch.

25 JUDGE BELL: That will be fine, Fred, just

1 so we'll be --

2 MR. FREDERICK: So just so we'll be clear
3 and so there won't be a discussion and any confusion,
4 I'm going to introduce the cover sheet to the supplement
5 and then Pages 98 through 109 of the supplement, and
6 I'll come back after lunch with enough copies for
7 everybody.

8 JUDGE BELL: Very good. And no objection?

9 MR. RYAN: No.

10 JUDGE BELL: Protestant's 43 is admitted,
11 Fred.

12 (Exhibit Protestants No. 43 admitted)

13 Q (BY MR. FREDERICK) Okay. Mr. Marusak, I think
14 I have no more wetlands questions for you. I have a
15 couple of endangered species questions.

16 JUDGE BELL: Mr. Frederick, how much do
17 you have on that? I'm just wondering if we shouldn't
18 just take a lunch break now before we get started on
19 that.

20 MR. FREDERICK: I don't have much, but if
21 you want to -- you know, sure; we can take a break now.

22 JUDGE QUALTROUGH: Well, if you don't have
23 much --

24 JUDGE BELL: Yeah, let's keep going, then.

25 MR. FREDERICK: Okay.

1 Q (BY MR. FREDERICK) So the question I have for
2 you, Mr. Marusak, related to the endangered species
3 work -- which I say "endangered" -- the rare and
4 endangered species, is that a -- the rare part of it is
5 purely a state category of species?

6 A That's my understanding.

7 Q And what did Halff do -- did Halff -- did Halff
8 attempt to consider the impacts on species that were
9 rare but that were not threatened or endangered?

10 A Yes, we did.

11 Q You did this with -- Halff did this within a
12 study area. Right?

13 A Yes.

14 Q And that study area is coterminous with the
15 property boundary?

16 A Yes, sir.

17 Q Are you aware of guidance on how -- on how one
18 should go about defining a study area for species impact
19 evaluations?

20 A Not specific guidance. Generally the guidance
21 that I'm aware of is it's kind of species specific,
22 project specific, and then almost always it's larger
23 than the actual project footprint.

24 Q I asked you this question related to wetlands,
25 and I think it's the same answer for the endangered

1 species evaluation, but let me ask you. In your
2 attempts to, like, discover the likelihood of occurrence
3 of any threat -- rare, threatened, or endangered species
4 at the project site, did you talk to any surrounding
5 neighbors of the landowners?

6 A No, sir.

7 Q For species such -- in the first place, am I
8 right that the bald eagle is a scavenger species as well
9 as a hunter?

10 A Yes.

11 Q Is that same thing true for the Peregrine
12 falcon? Let's just take the American subset of the
13 Peregrine falcon.

14 A That has not been my understanding at all.

15 Q So would it not be right for a species like a
16 bald eagle, that one would want to look to the area in
17 which the bald eagle might scavage for determining
18 impacts on the eagle of a project?

19 A I think as far as you have to assume whether or
20 not that species would be present in the -- I think it's
21 false to jump to a conclusion of something that maybe --
22 I think first you have to see if you have a reason to
23 believe it would be in the area from the baseline
24 condition.

25 Q Well, did you actually -- in the area -- when

1 we say "area" in that context, you're talking about more
2 than -- or are you talking about more than the property
3 boundary?

4 A Let's just go to the report. I think we make a
5 habit to say very specifically within the study area.
6 We acknowledge that the county itself is within the
7 range, but when we make determinations of likelihood for
8 appearance, we speak to the study area, so I'll stick to
9 that term. Study area is the property boundary.

10 Q Okay. So he is now looking at exhibit -- at
11 Appendix 2-E, I presume that's what he's doing, which
12 begins at Page 681 of Volume EP131-- 130, Exhibit 1.
13 And I don't know exactly what page the study itself
14 starts on. It looks like his starts on Page 701. So
15 then Page 5 of that which is where that report discusses
16 the bald eagle, occurs on Page 708 and 09.

17 So am I right that -- well, tell me --
18 let's see. Am I correct, first of all, that Halfp did
19 not find any impact to be expected on the bald eagle
20 because of the 130EP landfill?

21 A Correct.

22 Q Now, can you tell me why or how it happened
23 that Halfp came to that conclusion?

24 A First we came to the conclusion that it would
25 be unlikely -- not impossible, but unlikely that a bald

1 eagle would occur in the study area, and if it would be
2 unlikely to occur in the study area. It's a hard train
3 of logic to imply that the landfill could affect
4 something that's not in the study area.

5 Q Well, the -- Halff found that the SCS pond
6 would provide suitable -- might provide suitable habitat
7 for the bald eagle. Right?

8 A Uh-huh.

9 Q So when you say that it will not -- it will
10 not -- it's not likely to occur in the study area, you
11 say that because you think although it might occur at
12 the soil conservation pond, it isn't going to?

13 A I think what we're trying to say is that, you
14 know, species habitats, just like people. We have
15 different requirements for where we choose to live.
16 It's not always just where your house is going to be.
17 It's going to be where your food is going to be.

18 The bald eagle, although we may have a
19 pond that might be suitable size for a bald eagle, you
20 know, the trees you have around the facility are
21 generally not the types of trees that, you know, my
22 experience in seeing bald eagles, to be nesting. It's
23 not as hard to see a bald eagle anymore. But a lot of
24 times where you see them, you know, kind of in the
25 Conroe-Houston area, we've even seen them out further

1 north in east Texas. You see them real frequently in
2 nesting in pine trees. They need a real high -- they
3 generally use real high locations as a suitable, you
4 know, nesting site. So it's -- you know, one, you have
5 a habitat component of food source that might be
6 suitable, but I don't think that you have a suitable
7 nesting site.

8 Now, that said, you know, we identify a
9 study area, but in the greater context of looking at
10 these things, we look at habitat inter-connectivity at a
11 larger scale. You know, if you had Google Earth here in
12 front of us, and you zoomed out, sure, you see a lot of
13 other little stock ponds like we might have on this
14 site, and I think to the northwest, you know, there's a
15 pond site that's comparable size. You just don't have
16 the connectivity of what I would consider forage areas
17 to, you know, perhaps suggest a bald eagle might use a
18 site, nesting at an alternative source.

19 You know, for example, Richland-Chambers
20 Lake is in east Texas. That's a project where I have a
21 lot of experience. And it's -- it's -- you know, you
22 have a large lake with a lot of large trees, and it's
23 very common to see bald eagles scattered out -- or --
24 it's common for landowners to report them, you know, at
25 their own pieces of property that are separate from the

1 lake visiting their ponds. And -- and that was when one
2 of the -- the transmission line projects I worked on.

3 Q Well, so that's kind of my question --
4 intending to be my question. I mean, for example, the
5 San Marcos River, isn't it about 20 miles away from the
6 landfill? 23 miles, I think I might have read.

7 A I don't recall the exact distance.

8 Q But is that the nature of the distance we're
9 talking about?

10 A I'd have to check.

11 Q Let's just assume it's a hypothetical --

12 A Okay.

13 Q -- that the San Marcos River were within
14 23 miles of the landfill. There have been eagle
15 sightings along the San Marcos River. Right?

16 A Maybe. I would have to check.

17 Q So you don't know anything about -- how close
18 is the -- the closest to this particular site that you
19 are aware of there being an eagle siting?

20 A Well, let me check something real quick. I can
21 perhaps answer what I don't know.

22 Now, this is not a definitive proof that
23 they don't exist. It's just -- you know, the type of
24 information we looked at. I believe we looked at the
25 USGS quadrangle map which contains the site. You know,

1 we looked at adjacent quadrangle maps to see if Texas
2 Parks and Wildlife had bald eagle recordings in their
3 database. A lot of people like to talk about when they
4 see a bald eagle. It's one of the more frequent hits
5 you get in that database.

6 Again, I'm -- make very clear that just
7 because it doesn't show up in this record as no nest,
8 that doesn't mean that there can't be one in those four
9 quadrangles, just don't know.

10 Q But I take it from what you say, it did not
11 show up in your scan of the database for those four
12 quadrangles?

13 A Correct. That's a reasonable tool that's
14 available to us, and we use it all the time.

15 Q Did you conduct any studies or read any
16 literature on the usage or the co-location of eagles and
17 bald eagles in a municipal waste --

18 A No, sir.

19 Q Did you receive any information from anybody
20 with 130EP project concerning the types of controls it
21 plans to use for rodents, boars, different types of
22 animals that might forage in the landfill?

23 A I know that there's a plan for scavenging, but
24 I don't have the details of it.

25 Q So you don't have any information about

1 chemicals that might be used to that end?

2 A No, sir.

3 Q Would you even grant that one would expect that
4 the prey base for an eagle would become larger with the
5 advent of the landfill?

6 A I can't agree to that. That entails a lot of
7 assumptions. I don't know what's going to go in that
8 trash. I've heard a lot of talk in the testimony about
9 daily cover, you know, on a landfill, so again, I --
10 that's a trail of assumptions that I can't testify to.

11 Q Do you have any knowledge about whether rodents
12 become more common in the area of a foot -- of a
13 landfill than they were prior to the advent of a
14 landfill?

15 A I don't have any specific knowledge of that,
16 no, sir.

17 MR. FREDERICK: I have no further
18 questions. Thank you.

19 JUDGE BELL: All right. Thank you. And
20 you've got some cross-examination, Mr. Magee?

21 MR. MAGEE: Yes, Your Honor.

22 I mean, I can tell you, it's going to be
23 anywhere from 15 to 30 minutes, maybe more.

24 JUDGE BELL: Okay. Let's go ahead and
25 take our lunch break, then we can take that on when we

1 get back. I guess 1:15, we'll be back to start that
2 cross-examination.

3 (Lunch Recess: 12:09 p.m. to 1:20 p.m.)
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1 AFTERNOON SESSION

2 FRIDAY, AUGUST 19, 2016

3 (1:20 p.m.)

4 JUDGE BELL: All right. We are back on
5 the record for afternoon session this Friday, and we are
6 to cross-examination of this witness by Caldwell County.

7 PRESENTATION ON BEHALF OF APPLICANT (CONTINUED)

8 RUSSELL MARUSAK,

9 having been previously duly sworn, testified as follows:

10 CROSS-EXAMINATION

11 BY MR. MAGEE:

12 Q Good afternoon. Is it Marusak?

13 A H after the S.

14 Q Marusak?

15 A Shock.

16 Q Shock?

17 A I know it's not there.

18 JUDGE QUALTROUGH: It's not there.

19 THE WITNESS: It's Czech. It's Czech.

20 Q (BY MR. MAGEE) Marusak?

21 A Yeah.

22 Q Okay. Unfortunately, I'm one of those people
23 that, like, once I make up what your name is going to
24 be, I struggle to ever get it right. So I apologize in
25 advance for that.

1 A I promise there will be no offense.

2 (Laughter)

3 Q (BY MR. MAGEE) Couple of things -- and by
4 that, I mean a couple -- that I want to go over with
5 you. One of the things I noticed, if you -- I'm going
6 to talk about Volume 1, Page 75 first. No, I'm sorry,
7 Page 278.

8 A I'm there.

9 Q And if we just look at 275, you don't have to
10 look back. This is your report for waters of the United
11 States delineation report, wetland determination and
12 identification. Right?

13 A Yes.

14 Q Okay. So at the very top, it says, The purpose
15 is Halff and associates -- I mean Halff Associates has
16 been retained to provide to 130 Environmental Park, LLC,
17 the environmental services necessary to perform Section
18 404 jurisdictional delineation and wetlands
19 determination and identification for the proposed 130
20 Environmental Park in Caldwell County, Texas. Right?

21 A Yes, sir.

22 Q And this report was written in August of 2013.
23 Correct?

24 A Correct.

25 Q And then if we look down at Section 2, on Page

1 278 of EP-1, the second sentence says, In June and
2 July 2013, site investigations were conducted to
3 determine the present-day extent of wetlands and waters
4 of the United States. Correct?

5 A Correct.

6 Q Okay. Then I think we've heard a couple of
7 different pages in this report like, for example, 437 or
8 497, either one of those -- we'll look at 437 first.
9 This was a data form that you went over with
10 Mr. Frederick. Right?

11 A Yes, sir.

12 Q And like, for example, it says the sampling
13 date was 6/19/2013.

14 A Yes.

15 Q So that's the day you were on-site. Correct?

16 A Yes.

17 Q And then it says the Applicant/Owner is 130
18 Environmental Park, LLC. You see that?

19 A Yes, sir.

20 Q Same thing on like 497, I just wanted to stay
21 on pages we had talked about.

22 A Sure. Okay.

23 Q On 497, for example, and the sampling date was
24 7/10/2013. Right?

25 A Yes, sir.

1 Q And the Applicant/Owner was 130 Environmental
2 Park, LLC?

3 A Yes, sir.

4 Q Were you actually doing work for 130
5 Environmental Park, LLC, at this time, or were you doing
6 work for another company?

7 A My understanding was that it was 130, LLC,
8 being the Applicant.

9 Q Okay. So if we look on Page 75 in Volume 1,
10 this is a certificate of fact from the Texas Secretary
11 of State's office. That first paragraph just says, The
12 undersigned Secretary of State does hereby certify that
13 the document, application for registration for 130
14 Environmental Park, LLC -- and it provides a file
15 number -- a Georgia, USA, foreign limited liability
16 corporation was filed in this office on August 20, 2013.

17 Did I read that correct?

18 A Yes, sir.

19 Q So you just don't have any information as to
20 whether they were already a registered company in Texas
21 doing business at that time of your July and June 2013
22 sampling, do you?

23 A No.

24 Q But it was your understanding you were doing
25 work for 130 Environmental Park, LLC?

1 A Yes, knowing who we have to -- you know, we
2 have to fill out those data sheets and provide that
3 information; we want to know who it's going to be.

4 Q Okay. So that was your understanding, was you
5 were working for that company at the time?

6 A Yes.

7 Q Okay. On your prefiled testimony, which I
8 think is Volume 7, and it's your prefiled testimony,
9 which was Marusak Exhibit 1, I wanted you to turn to
10 Page 4, I believe. No, it's Page 6. You with me?

11 A Yes, sir.

12 Q Okay.

13 A Sorry.

14 Q Line 27, the question was -- I mean, 25 was:
15 What is your understanding of the primary purpose of
16 TCEQ's MSW rules?

17 And your answer, at Line 27 of Marusak 1,
18 Page 6 was: The MSW rules provide standards for design,
19 permitting, and operation of MSW facilities to protect
20 human health and welfare and the environment.

21 Did I read that correct, your answer?

22 A Yes.

23 Q What aspect of your analysis that you performed
24 for this application had to do with the protection of
25 human health and the welfare?

1 A I will start -- demonstration of compliance
2 with Section 404 of the Clean Water Act.

3 Q Okay. And what else?

4 A And threatened and endangered species. That's
5 the Endangered Species Act.

6 Q Okay. And that was more the protection of the
7 environment. Right?

8 A Yes.

9 Q Okay. So outside of 404, the Clean Water Act,
10 anything else that your analysis did concerning the
11 protection of human health and welfare that you can just
12 think of?

13 A I think the Clean Water Act indirectly
14 accomplishes that, compliance with the Clean Water Act
15 indirectly accomplishes that, because Clean Water Act or
16 clean water in the abstract is a resource that human
17 health and welfare depend on.

18 Q If you'd look at Exhibit 3, Page 16 of Volume
19 7, Marusak 3, Page 16 -- you know, before I get --

20 A Sorry, I'm there.

21 Q Okay. I'm going to ask you -- I just have one
22 short question that's unrelated to this topic that I
23 thought before we moved on to it, maybe we could clear
24 up. On Volume 1, Page 684 --

25 A Volume 1, 684.

1 Q 683 and 684.

2 A Oh, sorry. Wrong volume. Okay.

3 Q So I think this is a document you went over
4 with Mr. Frederick about the Texas Parks & Wildlife
5 recommendations?

6 A I believe it was -- it was the ED.

7 Q Okay, the ED. On Page 684, at the top of the
8 page, was a recommendation concerning the clearing of
9 matured, native trees should be avoided. Loss of
10 vegetation should be minimized by using site planning
11 and construction techniques designed to avoid and
12 preserve existing trees, shrubs, grasses and forbs.

13 Did I read that correctly?

14 A Yes.

15 Q Okay. And then you've been here through some
16 other testimony. Are you familiar with the north end of
17 the proposed landfill site that talks about berms and
18 building a berm as well as some planting of trees on
19 that site?

20 A Yes, sir, I'm vaguely familiar with it. I do
21 recall hearing it.

22 Q So are you familiar with how much of the
23 northern end of the proposed facility boundary landfill
24 site is going to be contained inside that berm?

25 A How much of the northern landfill facility is

1 contained with inside that berm?

2 Q Right.

3 A I don't know that I can calculate that.

4 Q Okay. I mean, do you know if like that whole
5 northern end they're going to -- I don't know what word
6 to use, but let's just say bulldoze down all the trees
7 to construct that berm and then replant the trees?

8 A I don't know the specific details of that
9 location.

10 Q Okay. Do you know if the plans are to
11 revegetate this area with native trees and grasses as
12 recommended by the Texas Parks & Wildlife?

13 A I just want to make sure I haven't provided
14 that.

15 I'm looking -- I'm referring back to
16 Volume 7, Marusak 1, Page 11.

17 Q Okay.

18 A We do reference a drawing. It says -- I'm
19 looking down at Page 26. And I believe we talked about
20 that drawing during one of the cross. I can't recall
21 which.

22 Q So -- well, tell me again. You're in Marusak
23 Exhibit --

24 A Marusak 1, Page 11.

25 Q And what line are you at?

1 A 26. And I'm kind of the latter half of the
2 line.

3 Q I see, where you talk about --

4 A The same drawing shows the location along north
5 and northeast sides of the facility of a screening berm
6 that will be constructed and planted with vegetation,
7 including native species.

8 Q So if we look at 130EP-1, Page 143, it shows us
9 the screening berm which is -- starts right at the edge
10 of one of the ponds, I guess it would be, and then
11 continues around to Homannville Trail. Is that correct?

12 A Yes.

13 Q How much of that area was being bulldozed -- my
14 word again -- that had existing forest area, trees, and
15 that type of stuff?

16 A I want to look at -- I'm looking in the same
17 volume, Volume 1, Page 313.

18 Q Okay.

19 A Are we there?

20 Q Yes.

21 A Okay, sorry. All right. I'm going to pick a
22 geographic point of reference that I think we can all
23 identify. You see the kind of going north and south
24 across the property, it appears to be some type of
25 easement that goes through the property?

1 Q Right.

2 A Indicated by a cleared area on the map?

3 Q Correct.

4 A When I flip back to Page 143, the exhibit with
5 the berm and the wooded areas, I think we can agree that
6 the limits of the berm start east of that line.

7 Q Okay.

8 A So going back to that same aerial, we can
9 determine that the darker green west of the utility --

10 Q Right.

11 A -- it probably has bigger trees, larger trees,
12 those look to be avoided. You can see the, you know,
13 where the berm follows the perimeter of the study area
14 shown on the map, you know, we're zoomed out, but you
15 can see that there's not a lot of tree cover along that
16 perimeter. I'm not going to say there's no trees;
17 there's things like mesquite, but --

18 Q It's not as dense as it is in other areas
19 then --

20 A Correct.

21 Q -- right, because the dark green doesn't really
22 indicate the size of the tree, but it certainly would
23 indicate the density of the tree cover in that area.
24 Right?

25 A I think that's fair, yes.

1 Q Okay. So when I look back at your sentence on
2 Marusak 1, Page 11, starting at Line 26 through 28,
3 where you're referring to the same drawings and the --
4 of that screening berm will be constructed and planted
5 with vegetation, including native species, does that
6 also mean, since it says including native species, that
7 just makes me think there's also going to be introduced
8 species in there as well?

9 A There may be turf species. I don't know the
10 specifics on that.

11 Q Does the application talk about the
12 introduction of nonnative species?

13 A If it does, I'm not -- I do not know the
14 planning details.

15 Q Okay. Now let's go to the exhibit we were
16 going to refer to earlier, which was Marusak 3, Page 16.
17 If we talk about an NWP, we're talking about a
18 nationwide permit. Right?

19 A Yes, sir.

20 Q Okay. And earlier, I think this is a document,
21 Marusak 3, Page 16, that was a letter from the Corps of
22 Engineers referring to that nationwide permit. Correct?

23 A Yes, sir.

24 Q Okay. So the first sentence in part of it says
25 that the purpose -- essentially of this letter is

1 concerning the proposal to construct the roadway
2 crossings of streams associated with a landfill and
3 transfer station located in Caldwell County. Right?

4 A Yes.

5 Q Okay. And then if we move down to the third
6 paragraph, it -- the letter states, from the Department
7 of the Army Corps of Engineers, We have reviewed the
8 proposal, and based on the information provided, it
9 appears that the activity may qualify for a nationwide
10 permit for linear transportation projects.

11 Did I read that correct?

12 A Yes, sir.

13 Q So they use the term "may qualify." Right?

14 A Yes.

15 Q And then it puts kind of a condition or a
16 limitation back on that may qualification in the last
17 sentence of that same paragraph, and it says, If the
18 permittee cannot comply with the conditions of the
19 nationwide permit, please reply.

20 Did I read that correct?

21 A Yes, sir.

22 Q And then I'm assuming those conditions that
23 this letter is referring to are found over on Page --
24 Page 18 --

25 A Yes, sir.

1 Q -- right?

2 And that's kind of at the bottom of the
3 page there where it says Nationwide Permit General
4 Conditions. Correct?

5 A Correct.

6 Q And then it goes through -- there's a whole
7 list in here, goes 1 through --

8 A Quite a bit.

9 Q Yeah. Several pages' worth of conditions that
10 you have to comply with. Looks like all the way --
11 starting on Marusak 3, Page 18 through maybe 29 or even
12 further.

13 A I think 29 is an accurate stopping point, yes.

14 Q Okay. So was it your testimony that this
15 access road qualifies for the Nationwide Permit?

16 A Yes.

17 Q Okay. So if we'll look at the same exhibit,
18 Page 15 -- I mean Page 20, at No. 15, this is referring
19 to a single and complete project. It says, The activity
20 must be a single and complete project. The same NWP
21 cannot be used more than once for the same single and
22 complete project.

23 Did I read that correct?

24 A Yes, sir.

25 Q And then if we look over at some of the

1 definitions in this, on Page 34 specifically, I'm
2 looking at single and complete, nonlinear project. Do
3 you see that definition described?

4 A I'm sorry, which -- which one of those two?

5 Q Single and complete, nonlinear project.

6 A Right.

7 Q Okay. About the middle of that definition, it
8 says, A single and complete, nonlinear project must have
9 independent utility -- in parenthesis -- see definition
10 of, quote, independent utility, closed quote, period.
11 Then it says, Single and complete, nonlinear projects
12 may not be piecemealed to avoid the limits of an NWP
13 authorization.

14 Did I read that correct?

15 A Yes.

16 Q So then when we look back at what the
17 definition of independent utility is, I think that's
18 found on Page 32. Can you read that definition for us
19 of an independent utility?

20 A Sure. Independent utility: A test to
21 determine what constitutes a single and complete,
22 nonlinear project in the Corps regulatory program. A
23 project is considered to have independent utility if it
24 would be constructed absent the construction of other
25 projects in the project area. Portions of the

1 multiphase project that depend on other phases of the
2 project do not have independent utility. Phases of a
3 project that would be constructed even if other phases
4 were not built can be considered as separate, single,
5 and complete projects with independent utility.

6 Q So to qualify for a Nationwide Permit, the
7 access road must have an independent utility. And by
8 definition, that means it will be constructed absent of
9 the construction of any of the other projects at the
10 landfill site. Is that correct?

11 A I think we need to back up and look at a
12 different definition.

13 Q Okay.

14 A You know, you picked out single and complete,
15 nonlinear project. For the Corps, the project that's
16 being permitted under the Clean Water Act is activities
17 associated with the access road. And when we review the
18 definition of a single and complete project, I mean
19 linear transportation project, it's completely
20 different.

21 Q Okay. So we're looking at the definition of
22 linear?

23 A Single and complete, linear project.

24 Q Okay.

25 A It's on the same Exhibit 3, Marusak Exhibit 3,

1 Page 34.

2 Q So it says, A linear project is a project
3 constructed for the purpose of getting people, goods,
4 and services from a point of origin to a terminal point
5 which involves multi -- multiple crossings of one or
6 more water bodies at separate and distinct locations.
7 Right?

8 A Yes.

9 Q So the term "single and complete project" is
10 defined as a portion of the total linear project
11 proposed and accomplished by one owner/developer, and
12 partnership and other owners -- and other association of
13 owners and developers that includes all crossings of a
14 single water of the U.S. -- I shortened that -- at a
15 specific location. Right?

16 A Yes, sir.

17 Q Okay. Well, good. Let's turn to -- in your
18 Marusak Exhibit 4, Page 35.

19 A Yes, sir. Oh, I'm sorry. I'm there.

20 Q It's a map. Right?

21 A Yes, sir.

22 Q Which talks about the culvert plan. Correct?

23 A Yes, sir.

24 Q And you're referring to the single linear
25 project -- right -- as being this access road?

1 A Yeah, and I think we need to keep reading the
2 definition.

3 Q Okay.

4 A For linear projects crossing single or multiple
5 water bodies several times at separate and distant
6 locations, each crossing is considered a single and
7 complete project for purposes of Nationwide Permit
8 authorization.

9 What that means is each single and
10 complete crossing of each creek is viewed as a separate
11 Nationwide Permit authorization. It's that way for
12 roadways. It's that way for pipelines. Those are
13 examples.

14 Q Except roadways are an example of where if the
15 county went out there and decided to build a new road,
16 right, they break those down into portions because
17 you're crossing that thing. That roadway will be there
18 regardless of whether there's a project at the end of it
19 or not. That -- the roadway will be there. Without the
20 landfill and the other development, you would agree with
21 me this roadway won't exist.

22 A The roadway exists because it needs to get
23 from -- the permitted project, being the roadway, needs
24 to get from Point A to Point B, just like any other
25 road. This case being an operating landfill, which does

1 not require a permit --

2 MR. MAGEE: I'm going to object as
3 nonresponsive.

4 Q (BY MR. MAGEE) That wasn't my question. My
5 question was: Is -- would the roadway exist if there's
6 not going to be a landfill or any of the other described
7 facilities?

8 MR. RYAN: Objection, relevance. He's now
9 back on the definition of nonlinear projects, which
10 Mr. Marusak has explained this is not.

11 MR. MAGEE: Well, I'm kind of getting
12 there, but I'll just shortcut it.

13 JUDGE BELL: Okay.

14 MR. MAGEE: This is not one project. The
15 entire roadway is not part of this permit. The permit
16 only consists of the roadway from where the permit
17 boundary starts to the landfill. They haven't included
18 this entire access road as part of this permit
19 application.

20 JUDGE QUALTROUGH: Of which permit, the
21 Nationwide Permit or this application?

22 MR. MAGEE: This application. And so
23 they've made a representation that this application,
24 that this access road is a complete project for a
25 landfill.

1 JUDGE QUALTROUGH: So are you arguing that
2 this is inappropriate under the Nationwide Permit?

3 MR. MAGEE: Yes.

4 JUDGE QUALTROUGH: And how is that
5 relevant to this particular contested case hearing?

6 MR. MAGEE: They're required to have this
7 permit. That's why they included it -- the Nationwide
8 Permit, they're required to have that as part of this
9 application.

10 JUDGE QUALTROUGH: Okay. But isn't that a
11 separate proceeding, separate authorization? Isn't that
12 something between them and the Corps? See what I'm
13 saying? I mean, it seems to me it's like a cart before
14 the horse kind of thing.

15 MR. MAGEE: He's representing that they
16 have it and they don't have to have -- that they are --
17 can operate under this. I only have like four more
18 questions, and then I'm done.

19 JUDGE BELL: All right. We'll overrule
20 the objection.

21 A So I guess -- can you repeat the original
22 question?

23 Q (BY MR. MAGEE) Yeah, my question is: Is this
24 roadway going to be constructed if there's no landfill
25 or any of the other proposed development?

1 A I'm comfortable with saying that the road will
2 exist, because the land -- it has to get to the landfill
3 from the highway.

4 Q Okay.

5 MR. MAGEE: I'm going to object again as
6 nonresponsive.

7 Q (BY MR. MAGEE) If there is no landfill and is
8 no other development, will the road be constructed?

9 A Again, I would say no.

10 Q Okay.

11 A Not that I understand.

12 Q And so then it's your testimony that based on
13 your review of these rules, you qualify for a Nationwide
14 Permit?

15 A Absolutely.

16 Q Okay.

17 MR. MAGEE: No further questions.

18 JUDGE BELL: All right. Thank you.

19 Any redirect for Mr. Marusak from the
20 Applicant?

21 MR. RYAN: Yes, Your Honor, just a little
22 bit.

23 REDIRECT EXAMINATION

24 BY MR. RYAN:

25 Q First, Mr. Marusak, would you turn in Exhibit

1 130EP-1 to Page 287? Did you testify earlier that there
2 was an error in Table 5?

3 A Yes, sir.

4 Q And did you testify that OW-4, the word "no"
5 should have an asterisk after it under "on-channel
6 impoundment"?

7 A Yes. It should be OW-2 and OW-3.

8 Q Okay. OW-3 has already got an asterisk.

9 A Yes, sir.

10 Q Would you make that change to OW-4 and OW-2?

11 A Okay.

12 Q And if you'll turn to Page 437.

13 A I'm there.

14 Q Could you identify the typo on that page?

15 A Yes. Under sapling/shrub stratum, we have a
16 FAC up indicator status for Celtis laevigata, which
17 should be FAC, F-A-C.

18 Q Okay. Would you make that change?

19 A Okay.

20 MR. RYAN: Your Honor, I'll reoffer
21 Exhibit 130EP-1.

22 JUDGE BELL: All right. Any objections to
23 the reoffer of 130EP-1 with those corrections made by
24 the witness?

25 (No response)

1 JUDGE BELL: It is admitted.

2 (Exhibit Applicant No. 1 admitted)

3 Q (BY MR. RYAN) Do you have in front of you
4 Protestants' Exhibit 43?

5 A Yes, sir.

6 Q Are you -- I'm assuming that the pages that are
7 included here, starting on Page 98 of that supplement,
8 looks like it's either all or part of a section with a
9 heading "5, Difficult Wetland Situations in the Great
10 Plains"?

11 A Yes, sir.

12 Q In your opinion, did the work being done for
13 the wetlands delineation in determination at the 130
14 Environmental Park site, did it involve what's referred
15 to in this document as "difficult wetlands situation"?

16 A No, sir, I do not believe not.

17 Q Why not?

18 A Well, you know, we can start with the first
19 sentence where it says, Some wetlands can be difficult
20 to identify because wetland indicators may be missing
21 due to natural processes or recent disturbances.

22 Everything that falls after that, you
23 know, comes after that premise. I do not believe that
24 there are recent disturbances that warranted
25 consideration, and I do not think that natural

1 processes, given the ecology of the site, warranted
2 further evaluation under this section.

3 Q Okay. And that would include climatic and
4 rainfall conditions?

5 A Yes, sir.

6 Q Were you out at the 130 Environmental Park site
7 in connection with the wetlands delineation in
8 determination late in 2013?

9 A Yes, sir, those with the Corps of Engineers
10 field investigation, in December.

11 Q In December of 2013?

12 A Yes, sir.

13 Q And was that after a period -- sustained period
14 of significant rainfall?

15 A Yes. I believe October 2013 there was
16 significant rain.

17 Q When you were out there in December, were there
18 any differences in conditions that would relate to the
19 ability to thoroughly investigate wetlands within the
20 study area as compared to June and July of that year?

21 A No, sir.

22 MR. RYAN: I pass the witness.

23 JUDGE BELL: Thank you.

24 Any recross from Plum Creek?

25 MR. WILSON: No, Your Honor.

1 JUDGE BELL: Very good. How about from
2 the ED?

3 MR. TATU: No recross.

4 JUDGE BELL: Any from OPIC?

5 MR. TUCKER: No questions.

6 JUDGE BELL: Mr. Frederick?

7 MR. FREDERICK: Very quick.

8 RE-CROSS-EXAMINATION

9 BY MR. FREDERICK:

10 Q The last question that Mr. Ryan put to you
11 about your visit in December of 2013 and whether there
12 were different conditions then compared to the earlier
13 visits in June and July, is -- do I -- is that your
14 understanding of that question he put to you?

15 A I think it related to the application of our --
16 doing our delineation work.

17 Q I'm sorry. When you say related to the
18 application of doing your determination work, I don't --
19 what does that mean?

20 A Were conditions different that would have
21 influenced how we made decisions during our original
22 field work.

23 Q Conditions definitely were different in
24 December than they had been in January. Correct -- I'm
25 sorry, in June and July?

1 A Yeah, conditions are different than June -- in
2 December than June, July.

3 Q Okay. And then I guess I will ask you a
4 question about your understanding of P-43, which is the
5 excerpt from the 2010 guidance document. Is it your
6 belief that in order -- well, you emphasize that first
7 sentence. Do you believe that only recent disturbances
8 of a site could give rise to -- well, either recent
9 disturbances or, I suppose, natural processes? One of
10 those two things has to have occurred in order for there
11 to be a difficult wetland situation?

12 A I have a guideline that I go by, and it's this
13 book. So I will say yes, that's what I start with.

14 Q Well, that sentence doesn't really say that
15 those are the only causes of difficult wetland
16 situation, does it?

17 A No.

18 Q Okay. So there could be other situations,
19 maybe not natural processes and maybe not even recent
20 disturbances. That could give rise to difficult wetland
21 situations. Right?

22 A Yes.

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

25 JUDGE BELL: Thank you. Any recross from

1 Caldwell County?

2 MR. MAGEE: No, Your Honor.

3 JUDGE BELL: All right, very good.

4 Mr. Marusak, thank you for your time.

5 THE WITNESS: Thank you.

6 JUDGE BELL: Mr. Ryan, you ready to call
7 your next witness?

8 MR. RYAN: Yes. Kenneth Welch.

9 JUDGE BELL: All right, very good.

10 Mr. Welch, would you raise your right
11 hand?

12 (Witness sworn)

13 JUDGE BELL: All right, very good. If
14 you'll have a seat.

15 MR. RYAN: Your Honor, his prefiled
16 testimony is in Volume 6.

17 JUDGE BELL: All right. Whenever you're
18 ready, Mr. Ryan.

19 KENNETH J. WELCH, P.E.,
20 having been first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. RYAN:

23 Q Would you state your name for the record,
24 please?

25 A Kenneth Welch.

1 Q Mr. Welch, do you have in front of you what's
2 marked Exhibit Welch 1?

3 A Yes.

4 Q What is that?

5 A It is -- it is my direct testimony.

6 Q Are there any corrections that need to be made
7 to that?

8 A There's one correction on Page 4, Line 6. The
9 reference to "the City of Paris Landfill" should just
10 read "the Paris Landfill."

11 Q Do you have a pen you could make that change
12 with?

13 A (Witness complying)

14 Yes.

15 Q And is Exhibit Welch 2 an exhibit that's
16 referenced in Welch 1?

17 A Yes.

18 Q If you were asked orally here today each of the
19 questions in Exhibit Welch 1, would your answers be the
20 same as set out in that exhibit?

21 A Yes.

22 MR. RYAN: Your Honor, I'll pass the
23 witness and also point out that there was -- there was
24 an area of questioning that Ms. Perales asked me about
25 based on Mr. Maroney's inability to be here. She asked

1 who she could -- who she could ask about issues related
2 to the site operating plan, and I identified Mr. Welch,
3 so I'm not going to object to any questions she wants to
4 ask about that of this witness.

5 JUDGE BELL: All right.

6 MS. PERALES: And to be clear, I know that
7 I've made the proposal on how to proceed without
8 Mr. Maroney, but my intent was to be able to ask
9 Mr. Welch any questions that I would have asked
10 Mr. Maroney. Is that --

11 MR. RYAN: That's fine with me.

12 MS. PERALES: And I guess we should make
13 that clear for all the other parties as well and make
14 sure that that's okay.

15 MR. RYAN: Are you -- let me ask you this.
16 Are you waiving your -- any further cross-examination of
17 Mr. Maroney?

18 MS. PERALES: It depends on the responses
19 I get. That's what I was trying to explain earlier
20 today. If Mr. Welch has the information and the
21 background to be able to answer my questions, then, you
22 know, we'll see where we are. If he doesn't, then I
23 guess I'll just determine how necessary it is to have
24 Mr. Maroney back or whether we can just look at his
25 deposition and try to get that information in that way.

1 MR. RYAN: Well, Your Honor, I --
2 Ms. Perales hasn't given me a list of issues like we
3 discussed the other day. And I guess I don't -- I guess
4 I don't really understand that. What she says is that
5 if she's able to get her questions answered, then she
6 may consider waiving further cross-examination of
7 Mr. Maroney. I sort of don't understand that, because
8 the other half of that is, even if she does get her
9 questions answered, she may not.

10 JUDGE BELL: Right. Yeah. I wouldn't
11 expect them to waive their right to cross-examine
12 Mr. Maroney before the questions are asked and answered,
13 so let's just see where we get. I mean --

14 MS. PERALES: And to be clear --

15 MR. RYAN: And I wasn't expecting her to
16 waive it now. I guess I'm just a little concerned about
17 the idea that if I get all my questions answered, I may
18 be willing to waive cross-examination. I don't
19 understand that. But I guess, like you say, we can deal
20 with it when we get there.

21 MS. PERALES: And maybe I should have put
22 everything on the record this morning. You know, my
23 proposal was -- I don't know what Mr. -- I can't
24 anticipate what Mr. Welch will be able to answer or not.
25 I never proposed that I would come up with a written

1 list of topics that I intended to ask Mr. Maroney about
2 and then present to Mr. Welch.

3 I think the nature of the cross is that I
4 can ask him any questions, and if they -- you know, if
5 they lead to something else, then we'll -- I can further
6 cross on that. I can even question him on questions
7 related to, you know, his knowledge about how the
8 application was prepared or his credibility or anything.
9 So it's hard to pin down any topics.

10 What I proposed is that I try to ask
11 Mr. Welch all my questions. If there is an area that he
12 can't address, I'll look at the deposition of
13 Mr. Maroney. If we have responses, I'll submit that.
14 And if that takes care of everything, then we're good.
15 And this is all also contingent upon a doctor's excuse
16 from Mr. Maroney explaining why he can't be here for
17 cross-examination.

18 If that's acceptable to you, then I'll
19 move forward with asking Mr. Welch questions that I
20 would have asked Mr. Maroney; if not, then I'll limit my
21 questions to the prefiled testimony that Mr. Welch has
22 provided.

23 MR. RYAN: I don't have any problem with
24 you asking him any questions you want to ask him.

25 JUDGE BELL: That's what we need to do, so

1 let's move forward.

2 Did you want to offer Welch 1 and 2?

3 MR. RYAN: Yes, Your Honor.

4 JUDGE BELL: All right. Any objections to
5 Welch 1 and 2?

6 (No response)

7 JUDGE BELL: All right. Welch 1 and 2 are
8 admitted.

9 (Exhibit Applicant Welch Nos. 1 and 2
10 admitted)

11 JUDGE BELL: Any cross-examination from
12 Plum Creek?

13 MR. WILSON: Yes.

14 CROSS-EXAMINATION

15 BY MR. WILSON:

16 Q Mr. Welch, good afternoon. My name is Bob
17 Wilson. I represent Plum Creek Conservation District.

18 A Good afternoon.

19 Q Good to have you here.

20 Mr. Welch, your prefiled testimony at Page
21 3 asks, at Line 15, and then your response, Lines 18
22 through 21, if you've worked as an engineer on
23 applications for municipal solid waste landfill permits
24 or other MSW facility authorizations. And your
25 answer -- basically, I'll summarize it. You've been

1 engineer of record for more than 20, and then you talk
2 about TCEQ in particular. Is that correct?

3 A Yes.

4 Q All right. Have you ever worked on one in
5 Texas where the landfill was part of a small watershed
6 protection program instituted by the Natural Resources
7 Conservation Service?

8 A I'm not aware of any permit applications I've
9 worked on under the small protection plan program.

10 Q Do you know very much about the small watershed
11 protection plan of Natural Resources Conservation
12 Service?

13 A I'm familiar a little bit with it, but I
14 wouldn't consider myself knowledgeable.

15 Q All right. Thank you.

16 I'm going to ask you, then, about a -- two
17 pages of -- and they're in the original volumes of the
18 application that were filed, which I understand you were
19 the supervisor for at the time they were filed. Is that
20 correct?

21 A Yes, sir, I was the engineer of record.

22 Q All right. And these are Pages EP-1, Pages 66
23 and 67. Do you have those available to you?

24 A Yes, I have EP-1, 66 and 67.

25 Q EP-1, Page 66, my copy of it is a list of

1 landowners. Is that correct?

2 A Yes, sir.

3 Q And I see one easement holder identified on the
4 list. Is that correct?

5 A Yes, sir.

6 Q And is it also accurate to say that the Plum
7 Creek Conservation District easement is not identified?

8 A Well, I'll note that the landowners' list was
9 prepared by Hodde and Hodde land surveyors, and at the
10 time that this application was prepared, that was the
11 easement that I was aware of.

12 Q Yes, sir. I fully understand that, and I'm
13 going to call your attention to the typing at the top,
14 right under where it says Landowners' List.

15 A Yes, sir.

16 Q The sources for these landowners were the
17 Caldwell County Appraisal District office records
18 research conducted August 26, 2013. Is that correct?

19 A That is what that says, yes, sir.

20 Q All right. Now, you yourself didn't do this;
21 you just sponsored the application that contained this
22 document when it was filed?

23 A Yes, sir.

24 Q I didn't notice -- and maybe you can fill me in
25 because you knew about the applications when they were

1 filed -- a lot of discussions about what the obligations
2 of Plum Creek Conservation District, as local sponsor of
3 the small watershed plan, were to conduct operations
4 within its easement. Do you recall any discussion about
5 that?

6 A I don't recall that. If you could point me to
7 a certain portion of the application, but I don't recall
8 that.

9 Q Well, I -- when I asked Mr. Worrall about that,
10 he said he wasn't even aware that Plum Creek had an
11 easement. So I didn't expect to see it there, but I
12 wondered if it was any other place.

13 A When the application was originally filed, I
14 certainly was aware of the location of the SCS Site 21
15 dam.

16 Q Yes, sir.

17 A I do not recall that I was aware that Plum
18 Creek Conservation District had an easement on that
19 property.

20 Q Was there any investigation done into the
21 potential impacts on what Plum Creek had to do in
22 connection with its easement, rights, or obligations or
23 duties as a local sponsor under the small watershed
24 protection program in connection with the changes
25 contemplated by this application?

1 A I did not do any investigation into that.

2 Q Is there somebody else who would have done that
3 investigation?

4 A At the time the original application was filed,
5 no, I'm not aware of who the other person may have been.

6 Q All right. I could ask one other question, but
7 I'm going to let it go at that.

8 MR. WILSON: Thank you, sir. That's all
9 my questions.

10 JUDGE BELL: Thank you, Mr. Wilson.

11 Any cross-examination for Mr. Welch from
12 the Executive Director?

13 MR. TATU: Pass the witness, Judge.

14 JUDGE BELL: All right. How about from
15 OPIC?

16 MR. TUCKER: Yes.

17 CROSS-EXAMINATION

18 BY MR. TUCKER:

19 Q Good afternoon, Mr. Welch. My name is Aaron
20 Tucker with the Office of Public Interest Counsel. How
21 are you?

22 A Good.

23 Q Good. Just wanted to clarify a few things.

24 So you were the initial engineer of record
25 for the preparation and filing finally of Parts 1 and 2

1 of the application?

2 A Yes.

3 Q And that was filed on September 4, 2013?

4 A I believe that's correct, yes.

5 Q And when did you begin -- and sorry.

6 This was with Biggs & Mathews

7 Environmental, Incorporated?

8 A Yes.

9 Q And later you transitioned out of this role,
10 and Kerry Maroney took over as engineer of record.

11 Correct?

12 A Yes.

13 Q Okay. And are there two Biggs & Mathews, both
14 a Biggs & Mathews Environmental and Biggs & Mathews,
15 Inc.?

16 A Well, Biggs & Mathews, Incorporated --

17 Q Okay.

18 A -- is an incorporated consulting engineering
19 firm located in Wichita Falls, Texas. Biggs & Mathews
20 Environmental, Incorporated, is an incorporated
21 consulting engineering firm located in Mansfield, Texas.

22 Q And do both of those firms do work on this
23 project?

24 A After I transitioned out of the project, both
25 firms did work on this project, yes.

1 Q Okay. So Biggs -- you were and are employed at
2 Biggs & Mathews Environmental. Correct?

3 A That is correct, yes.

4 Q Okay. And Mr. Maroney works for Biggs
5 Mathews -- Biggs & Mathews, Incorporated. Is that
6 correct?

7 A Kerry Maroney is an employee of Biggs &
8 Mathews, Incorporated, and he is the president of Biggs
9 & Mathews Environmental.

10 Q Okay. So when I -- so, for instance, in your
11 testimony, BMI refers to Biggs & Mathews, Incorporated.
12 Sorry, I'm looking at Welch Exhibit 1, Page 5.

13 A Welch Exhibit 1, Page 5.

14 Q I'm sorry. Line 30.

15 A Yes, BMI refers to Biggs & Mathews,
16 Incorporated.

17 Q And, sorry, I'm just trying to clarify.

18 A I understand.

19 Q Okay. So Biggs & Mathews Environmental was
20 responsible initially for Parts 1 and 2 of the
21 application while you were working on this. Is that
22 correct?

23 A Biggs & Mathews Environmental was hired by
24 HHNT -- I believe they're incorporated --

25 Q Okay.

1 A -- as the consulting engineer to prepare permit
2 application materials for the 130 Environmental Park,
3 LLC permit application.

4 Q And when was Biggs & Mathews Environmental
5 hired by HHNT?

6 A I don't recall the exact date. It would have
7 been in the spring or -- the spring of 2013 for the 130
8 Environmental Park, as I recall.

9 Q Okay. So it's fair to say that you worked on
10 it from the spring of 2013 to -- to the initial
11 submission in September of 2013. Correct?

12 A And after that point in time, I remained
13 involved to respond to any administrative review
14 comments and also remained involved to transition my
15 role as engineer of record for the continuation of the
16 project to Kerry Maroney and also to Tyson Traw.

17 Q And when did that -- when did that transition
18 occur?

19 A That transition occurred during the --
20 primarily the fall of 2013 up through the -- I believe
21 the initial submittal of Part 1, 2, 3, and 4 was -- I
22 don't recall now if it was in January or February of
23 2014, but my role was to transition out of the engineer
24 of record role and --

25 Q It's fair to say it was a phase transition. Is

1 that correct?

2 A Yes.

3 Q Okay. And after the transition, Mr. Maroney
4 was the engineer of record. And in that role, was --
5 did -- was he working for Biggs Mathews Environmental or
6 Biggs & Mathews Incorporated, or is it fair to say both?

7 A He was -- he was working as an employee of
8 Biggs & Mathews, Incorporated.

9 Q Okay.

10 A He was -- he was performing the engineer of
11 record work for Biggs & Mathews Environmental.

12 Q Okay. Could I get you to turn to Volume 1 of
13 Applicant's exhibit?

14 A Yes.

15 Q I'm sorry. Just give me a minute. Could I get
16 you to turn to Page 49 of Applicant's Exhibit 130EP-1?

17 A Yes.

18 Q And the page I'm looking at is the legal
19 authority page. Is that correct?

20 A Correct.

21 Q And did you -- while you were serving as the
22 engineer of record, did you help prepare this page?

23 A Yes.

24 Q And is the page we see today the same as when
25 you submitted the -- actually, I'll take back that

1 question. I'm sorry.

2 On this page, did you indicate that the --
3 both the owner and the operator is 130 Environmental
4 Park, LLC?

5 A Yes.

6 Q And on this it says, No other person or entity
7 has over a 20 percent ownership of the proposed
8 facility.

9 A Correct.

10 Q Are you aware of any legal entity that owns
11 20 percent or more of 130 Environmental Park, LLC?

12 A No.

13 Q So if an entity were to own more than
14 20 percent of 130 Environmental Park, LLC, would you
15 need to disclose that on this part of the application?

16 A If I may --

17 Q Yeah.

18 A -- refer to the -- to the rules.

19 I think this portion of the application is
20 addressing Section 330.59(e). 330.59(e) is titled Legal
21 Authority: The owner and operator shall provide
22 verification of their legal status. The owner or
23 operator shall list all persons having over a 20 percent
24 ownership in the proposed facility.

25 And 130 Environmental Park, LLC is the

1 owner and operator of this facility, and there is no
2 other person or entity that owns more than 20 percent of
3 that entity.

4 Q If an entity were to own more than 50 percent
5 of 130 Environmental Park, LLC, would 130 Environmental
6 Park, LLC be considered a subsidiary of that company?

7 A Could you repeat that question, please?

8 Q Sorry. Sure. If another legal entity owned or
9 controlled more than 50 percent of 130 Environmental
10 Park, LLC, would that -- would 130 Environmental Park,
11 LLC, be considered a subsidiary of that company?

12 A I don't know. I believe that 130 Environmental
13 Park, LLC, is the -- is the owner of the proposed -- of
14 the proposed facility, both the owner and the operator.

15 Q Okay. Could I have you turn to Page 35 of
16 Applicant's Exhibit 130EP-1? This is the Corps data
17 form.

18 A Yes.

19 Q Did -- were you responsible for -- while you
20 were serving as engineer of record, were you responsible
21 for submitting this form or a similar form?

22 A Well, I would have included a similar form in
23 the initial submittal, yes.

24 Q Okay. Could you look at No. 20 -- Question
25 No. 21 on the Corps data form, which says independently

1 owned and operated? What's the answer that provided in
2 the application?

3 A Yes.

4 Q So this Corps data form is saying that 130
5 Environmental Park, LLC, is independently owned and
6 operated?

7 A I believe that that's what the answer says.

8 Q If 130 Environmental Park, LLC was a subsidiary
9 of another company, would the answer be no?

10 A I don't know the answer to that.

11 Q Do you not know if -- are you saying you don't
12 know if 130 Environmental Park is a subsidiary of
13 another company or if it was a subsidiary of a company
14 you -- let's start with the first question.

15 A Okay.

16 Q Are you saying you don't know if 130
17 Environmental Park is a subsidiary of another company?

18 A I don't know the legal status. I know that 130
19 Environmental Park, LLC, is incorporated as a -- as a
20 company in Texas.

21 Q Okay. And it's also incorporated in Georgia.
22 Is that correct?

23 A I don't know that.

24 Q As the engineer of record, is that something
25 you would need to know?

1 A I think as the engineer of record, I need to
2 represent if they are legal to do business in the state
3 of Texas.

4 Q Okay. I'll go back to Question No. 21. If a
5 company -- this is a general question.

6 A Okay.

7 Q If a company was a subsidiary of another
8 company, would the answer to No. 21 be no?

9 A Well, I don't know the answer to that.

10 Q Okay.

11 A Okay. I don't know the answer to that.

12 Q Have you looked at the documents that go along
13 with this Corps data form to see what the question is
14 asking?

15 A I'm sure at one point I did, but I don't
16 recall.

17 Q Is that something you -- do you not look at the
18 background documents for forms?

19 A Well, I do look at the background documents. I
20 don't recall what the -- what the instructions are for
21 that item.

22 Q Okay. If the -- if the -- I'll represent to
23 you that it's asking if it's a subsidiary.

24 MR. TUCKER: I think I have no further
25 questions.

1 JUDGE BELL: All right. Who's next? TJFA
2 and EPICCC?

3 MS. PERALES: Yes.

4 JUDGE BELL: All right.

5 CROSS-EXAMINATION

6 BY MS. PERALES:

7 Q Good afternoon, Mr. Welch.

8 A Good afternoon.

9 Q I'm going to start with your question about
10 your prefiled testimony, which is Welch 1. Do you have
11 that in front of you?

12 A Yes.

13 Q So to be clear, when you -- when you were the
14 permit engineer for this application, you were initially
15 tasked with submitting only Parts 1 and 2 or what we
16 call the land use compatibility portion of the
17 application. Isn't that right?

18 A That was our original submittal, yes.

19 Q Okay. And that's the only portion of the
20 application that was submitted with your seal as the
21 engineer of record. Isn't that right?

22 A That's correct.

23 Q So if we turn to Page 6 of your prefiled
24 testimony, and you go to the very bottom of that page,
25 there is a question that says: Did you participate in

1 assembly and submission of the application?

2 And your response is: As engineer of
3 record, I was responsible for assembly and submission of
4 the initial application. Do you see that?

5 A Yes.

6 Q So to make that clear, shouldn't it really say
7 assembly and submission of the initial application for
8 Parts 1 and 2 only?

9 A Well, Part 1 and 2 is a -- is a part of the
10 application.

11 Q Right.

12 A And the Part 1 and 2 was the portion I was
13 responsible for, yes.

14 Q Okay. And you were not at all ever the permit
15 engineer of record for the entire landfill permit
16 application. Is that right?

17 A Originally, I was intended to be the engineer
18 of record for the entire permit application, but as
19 we've discussed, I did transition out of that role.

20 Q And according to your prefiled testimony, you
21 prepared Parts 1 and 2, submitted them, and responded to
22 some administrative review comments and then
23 transitioned out. Is that right?

24 A Where are you reading, please?

25 Q So I'm summarizing your testimony from Page 5:

1 What was your role in connection with the application
2 after it was filed?

3 And you state: I prepared and submitted
4 responses to TCEQ's administrative review comments, and
5 then I transitioned out.

6 A Correct.

7 Q Okay. And then, again, on Page 6 -- let's
8 see -- starting on Line 22: What portions of the
9 application did you prepare?

10 There again you make it clear that you
11 prepared or supervised the preparation of only Parts 1
12 and 2. And then since that time, Kerry Maroney became
13 engineer of record and nearly all of the parts and pages
14 of the original filing were replaced. Is that right?

15 A Correct.

16 Q And then since then, you've had no -- your seal
17 has not appeared on any other portion of the
18 application. Isn't that right?

19 A Only the three bullets that appear in that same
20 paragraph.

21 Q Okay. And you've had no further role in
22 preparing any other portions of the application after
23 you transitioned out. Is that right?

24 A After I transitioned out, that's correct.

25 Q And you mentioned that Mr. Maroney is an

1 employee of both BME and BMI. Is that right?

2 A No.

3 Q Okay.

4 A He is an employee of Biggs & Mathews,
5 Incorporated, in Wichita falls. He is not an employee
6 of Biggs & Mathews Environmental; however, he is the
7 president --

8 Q Okay.

9 A -- of the corporation.

10 Q And when he sealed the documents for the
11 application, he was doing so as an employee of BMI.
12 Isn't that right?

13 A I believe that's correct.

14 Q Okay. And you -- your seal -- or you're
15 affiliated with BME. Is that right?

16 A Correct.

17 Q Okay. Isn't it true that when the -- when
18 Parts 1 and 2 of the application, the land use
19 compatibility portion of the application, were
20 submitted, they were submitted in an effort to ensure
21 that something was on file before the -- before Caldwell
22 County had an opportunity to pass a landfill siting
23 ordinance?

24 A Yes.

25 Q And that's -- let me back up.

1 And you were also the engineer of record
2 for the Pintail Landfill application. Isn't that right?

3 A Yes.

4 Q And in Pintail, wasn't that also the case; that
5 is, that in Pintail, Parts 1 and 2 of the application
6 were submitted in order to attempt to get something on
7 file before the county had an opportunity to pass a
8 landfill siting ordinance?

9 A Yes.

10 Q And, in fact, 130 Environmental Park was
11 formed -- or at least its paperwork was filed with the
12 Secretary of State on August 20th, which was a mere ten
13 days before anything was submitted to the TCEQ. Is that
14 right?

15 A I would need to check on the exact date.

16 Q Okay. And these are in the application, so
17 we'll let the application speak for itself.

18 A Okay.

19 Q Speaking of Pintail, can you turn to Page 4 of
20 your prefiled testimony?

21 A Yes.

22 Q Starting on about -- let's see -- on Line 9,
23 you're asked whether any solid waste landfill
24 authorization amendment application that you've worked
25 on, prepared, and sealed as an engineer has ever been

1 denied by TCEQ, and your answer is no. Do you see that?

2 A Yes.

3 Q But, again, you were the engineer of record for
4 Pintail. Isn't that right?

5 A Yes. And that application was returned by
6 TCEQ.

7 Q Okay. And that return -- it was returned, but
8 that was not based on Pintail or your request for a
9 return. Isn't that right?

10 A I believe Pintail requested of SOAH that the
11 application be remanded to TCEQ.

12 Q And after it was remanded, TCEQ returned the
13 application. Isn't that right?

14 A That is correct. However, the application was
15 not denied; it was simply returned.

16 Q And did Pintail ask that the application be
17 returned?

18 A No.

19 Q And, in fact, didn't Pintail ask that it be
20 provided an opportunity to revise or correct its
21 application so that it could remain pending?

22 A I believe that's correct, yes.

23 Q And that was denied. Isn't that true?

24 A Well, the application was returned.

25 Q So your request to revise it was denied. Isn't

1 that right?

2 A I would have to reread the letter to understand
3 exactly what language was used.

4 Q Okay. If you need to refresh your memory, I
5 believe it's one of the Protestants exhibits. I believe
6 that should be Protestants Exhibit 32. The exhibits
7 should be up there.

8 A I have the letter.

9 Q Okay. And has that helped -- has that helped
10 you recall why it was that your -- the application was
11 returned?

12 A The first paragraph states that the Executive
13 Director is now returning the application.

14 Q And doesn't it go on to explain the reasons for
15 the return of the application? Too many revisions and
16 NODs?

17 A It does include -- in the second paragraph, it
18 does include items identified as to why the application
19 is being returned, yes.

20 Q Okay. And so does that letter make it clear to
21 you that this application was being returned in spite of
22 Pintail's request to be able to correct or revise it?

23 A Could you restate that, please?

24 Q Sure. Doesn't that letter indicate to you that
25 the reason that the application is being returned is not

1 because Pintail requested the return of the application.
2 Isn't that right? This isn't something --

3 A I believe that Pintail requested that the
4 application be remanded to TCEQ, and then TCEQ returned
5 the application to the Applicant.

6 Q Okay. Just so we're all clear, I'm not talking
7 about SOAH. So the request to remand it to the TCEQ was
8 made to SOAH?

9 A Correct.

10 Q I'm talking about the TCEQ. After it was sent
11 back to TCEQ, Pintail requested that it be allowed to
12 revise that application so that it could be -- remain
13 pending. Isn't that right?

14 MR. RYAN: Objection. Ms. Perales knows
15 that never happened. I don't know why she continues to
16 ask this witness the same question over and over again.
17 She knows that never occurred.

18 MS. PERALES: What never occurred?

19 JUDGE BELL: Well, first of all, I'm not
20 sure he's ever answered this specific question that
21 she's asking right now. But if he doesn't know the
22 answer, or if it isn't true, then he ought to answer
23 that way, one way or the other. So overrule the
24 objection.

25 And if you know, sir, could you answer

1 that question?

2 A Please ask the question again.

3 Q (BY MS. PERALES) So let me just make it as
4 simple or basic as possible. TCEQ returned the
5 application even though that's not what Pintail wanted.
6 Isn't that right?

7 A To my knowledge, Pintail requested that SOAH
8 remand the application to TCEQ, and I am not aware of
9 any additional requests made by Pintail to TCEQ. I
10 don't know that answer.

11 Q Okay. You don't know why Pintail wanted a
12 remand to TCEQ?

13 A I believe the request to SOAH included a
14 request to revise the application to address new
15 information.

16 Q So it's possible, then, that Pintail wanted a
17 remand to TCEQ so that TCEQ could return the
18 application? Is that a possibility?

19 A I don't believe that's what I said.

20 Q Okay. You just don't know either way?

21 A I don't know if there was an additional request
22 made directly to TCEQ or not.

23 Q Okay. So you were responsible for submitting
24 an application for a registration authorizing a transfer
25 station. Isn't that right?

1 A I have been asked to submit applications for
2 transfer stations, yes.

3 Q And in this particular case, in Caldwell
4 County, 130 Environmental Park submitted an application
5 for a transfer station registration. Right?

6 A Yes.

7 Q And that's something you were responsible for?

8 A The initial submittal, yes.

9 Q Only -- only the initial submittal?

10 A I made the initial submittal, and I believe
11 that at the point in time I transitioned out of the role
12 as engineer of record on the permit application, I also
13 transitioned out of the role as the transfer station
14 registration engineer of record, if you will.

15 Q So you're not the witness testifying here on
16 behalf of 130 Environmental Park that is tasked with
17 authenticating and supporting the transfer station
18 registration?

19 A I've seen a copy of the transfer registration
20 approval in one of the documents.

21 Q Do you recall testifying about it in your
22 prefiled testimony?

23 A Yes.

24 Q Do you want to turn to Page 5 to refresh your
25 memory?

1 A Well, I -- I believe I referred to Exhibit --
2 where is that? I believe I refer to 130EP-8 as a copy
3 of the approved transfer station registration No. 40269.

4 Q Okay. And had you seen that registration
5 before you prepared your prefiled testimony?

6 A Yes.

7 Q Okay. And were you still the engineer of
8 record for -- for this application for the transfer
9 station at the time the registration was issued?

10 A I don't believe so.

11 Q Do you recall who it was?

12 A I believe it was Kerry Maroney.

13 Q So Mr. Maroney was also the engineer of record
14 for the application for the transfer station at the time
15 it was authorized?

16 A I believe that is correct.

17 Q Okay. Isn't it true that the transfer -- the
18 transfer station application was also submitted for the
19 purpose of again getting something on file with the TCEQ
20 before the county had an opportunity to pass a landfill
21 siting ordinance?

22 A Yes.

23 Q Does 130 Environmental Park have any intention
24 of actually constructing or operating the transfer
25 station?

1 A To my knowledge, they do.

2 Q They do?

3 A To my knowledge, they do.

4 Q In conjunction with the landfill?

5 A Well, it's a separate approval, so they could
6 choose to construct it now.

7 Q And it's also -- the transfer station is also
8 referenced in the landfill application, isn't it?

9 A That is correct.

10 Q So they would be operating it in conjunction
11 with the landfill, if the landfill were permitted and
12 constructed?

13 A Well, they would be operated at the same time,
14 yes.

15 Q Okay. Do you know whether the site operating
16 plan contemplates the operation of the transfer station?

17 A I would have to look back at the site operating
18 plan to make that statement.

19 Q Okay. We'll get back to that in a while.

20 Initially, when Parts 1 and 2 of the
21 application were submitted, the transfer station wasn't
22 even mentioned in that landfill application. Isn't that
23 right?

24 A I would have to go back and look at the initial
25 submittal.

1 Q Okay. Do you recall getting any notice of
2 deficiencies from TCEQ advising that 130 Environmental
3 Park should include mention of the transfer station?

4 A I would have to go back and look at that first
5 NOD.

6 Q Okay.

7 A If you'd like for me to do so, I will.

8 Q We'll get to it in a second.

9 So in your prefiled testimony, you
10 mentioned that you received and responded to some
11 administrative NODs during the administrative review of
12 Parts 1 and 2. Is that right?

13 A That's correct.

14 Q Is that typical to receive notice of
15 deficiencies during the administrative review?

16 A Yes.

17 Q Do you recall what deficiencies were noted in
18 the original submittal?

19 A No. I would need to go back and look.

20 Q So as I recall from your deposition, as you
21 prepared Parts 1 and 2, you were coordinating with
22 Mr. Snyder, also from BME. Is that correct?

23 A I believe that's correct.

24 Q And as you coordinated with him and prepared
25 Parts 1 and 2, isn't it true that you also did an

1 initial observation or site visit of the -- of the site,
2 looking for any possible location restrictions?

3 A I believe that's correct.

4 Q And when I talk about location restrictions, do
5 you understand those location restrictions to be
6 location restrictions that are referenced in TCEQ's MSW
7 rules?

8 A Yes.

9 Q Among those location restrictions, is there a
10 restriction or requirement related to floodplains?

11 A Yes.

12 Q And so when you were initially conducting a
13 survey of the site and preparing Parts 1 and 2, did you
14 notice that a floodplain was present near or in the area
15 of the proposed site?

16 A I believe we included a copy of the FEMA
17 100-year floodplain map in the initial application and
18 identified where the landfill footprint would be located
19 on the property.

20 Q Yes, you did, in the application that was
21 submitted. And I'm talking about when you were
22 surveying the site and determining the land uses and
23 coordinating with Mr. Snyder as you're preparing the
24 application, did you notice that there were floodplains
25 in the area of the site?

1 A Well, I noticed that there were floodplains in
2 the area from reviewing the FEMA floodplain map.

3 Q Okay.

4 A I did notice there was, obviously, the SCS Site
5 21 dam on the site, and I did notice the -- what is
6 identified as Dry Creek and also what is identified as
7 the unnamed tributary to Dry Creek.

8 Q And did you also know that -- or did you
9 recognize, at least, that the proposed access road would
10 need to cross the floodplain?

11 A Yes, I believe I did.

12 Q And the access road is not included in the
13 facility boundary or the permit application. Isn't that
14 right?

15 A I believe a portion of the access road is not
16 included in the facility boundary.

17 Q The portion that accesses 183. Isn't that
18 right?

19 A That's correct.

20 Q Do you or the Applicant, 130 Environmental
21 Park, or BME, have any intention of -- well, let me back
22 up.

23 Will a CLOMR be required -- do you know
24 whether a CLOMR will be required before constructing the
25 site?

1 A I would refer that question to the drainage
2 engineer, Mr. Traw.

3 Q So are you familiar with the requirement
4 siting -- siting requirements related to floodplains?

5 A Yes.

6 Q And do you know whether there are any
7 requirements that apply if any portion of a landfill or
8 any facilities associated with a landfill will be sited
9 in a floodplain?

10 A I believe it's only if it affects the limits of
11 the floodplain.

12 Q And so at this time, you have -- you don't know
13 whether a CLOMR will be submitted?

14 A At this time I don't know.

15 Q Would Mr. Maroney know that?

16 A I don't know if Mr. Maroney would know it or
17 Mr. Traw would know.

18 Q In your experience, if a CLOMR is necessary,
19 isn't that usually done before the application is
20 submitted?

21 A It is done either before or at the same time.

22 Q Okay. And so if it's -- if a CLOMR -- if a
23 CLOMR application had been submitted before or at the
24 same time, that information would have been included in
25 the application that's submitted to TCEQ. Isn't that

1 right?

2 A Yes.

3 Q Will county approval be necessary if any
4 portion of the facility or the access road crosses a
5 floodplain?

6 A I do not know.

7 Q Okay. Have you ever had any meetings with
8 Caldwell County officials or Staff?

9 A I have not.

10 Q Have you ever had any meetings with Polonia
11 Water Supply?

12 A I have not.

13 Q What about with Lockhart Independent School
14 District?

15 A I have not.

16 Q The City of Lockhart?

17 A No.

18 Q Do you have the rules in front of you?

19 A I do.

20 MS. PERALES: May I approach the witness?

21 JUDGE BELL: Yes.

22 Q (BY MS. PERALES) Can you take a look at the
23 document I just handed you and that's labeled -- I think
24 it's P-23 or Protestants 23, see if you can identify it?

25 A This is a response to an August 1, 2014, notice

1 of deficiency letter. It is from Steve Odil -- oh, I'm
2 sorry. It is to Steve Odil from Kerry Maroney.

3 Q Can you please turn to Page -- Page 3 of the
4 document?

5 A Page -- Page 3 of the letter?

6 Q Yes. So if you -- yes. If you look at the
7 top --

8 A Okay.

9 Q -- left-hand corner, it has page numbers.

10 A Okay.

11 Q And take a look at No. 4. Do you see that?
12 I'll give you a second to read it.

13 A (Witness complying)

14 Yes.

15 Q So according to this comment, The TCEQ states
16 that it is awaiting some sort of documentation that a
17 floodplain development permit has been obtained from
18 city, county, or other agency with jurisdiction
19 regarding the access road that will need -- that will
20 cross the floodplain. Isn't that right?

21 A Yes.

22 Q And at least according to the language in this
23 comment, in No. 4, this is the second time that the
24 Executive Director has requested this information.
25 Isn't that right? It refers to the comment back in

1 May -- May 6, 2014. Isn't that right?

2 A Yes.

3 Q And the response provided by 130 Environmental
4 Park is that it's begun the preliminary platting process
5 with Caldwell County and will obtain all other necessary
6 authorizations as required. Isn't that right?

7 A Yes.

8 Q So -- and there's also a reference to a rule
9 here, 330.63, Subsection (c)(2)(D)(ii). Can you look --
10 can you grab that regulation from your rules?

11 A Okay. I think I'm there.

12 Q I'm having trouble getting there, so give me a
13 second. Okay, I'm there. So can you just read that --
14 the language from 330.63, Subsection (c)(2)(D)(ii) into
15 the record for us?

16 A 330.63(c)(2)(D)(ii)?

17 Q Yes.

18 A Okay.

19 Q And for context, can you start with the D
20 that's above it?

21 A Okay. For -- excuse me. For construction in a
22 floodplain, submit where applicable a floodplain
23 development permit from the city, county, or other
24 agency with jurisdiction over the proposed improvements.

25 Q So reading this rule, the language in this

1 rule, in conjunction with the comment that's included in
2 the Executive Director's NOD, does that suggest to you
3 that the Executive Director at least believes that there
4 will be construction in a floodplain and that
5 authorization is necessary?

6 A Could you ask the question again?

7 Q Sure. If you read the rule that's referenced
8 in the comment, the language in the rule referenced in
9 the comment, and the comment itself, wouldn't you agree
10 that the Executive Director believes that there's
11 proposed construction in a floodplain that requires
12 authorization from the appropriate agency with
13 jurisdiction?

14 A Having not been involved in this specific
15 portion of it, it's hard to project exactly what the
16 Executive Director is -- is looking for.

17 Q Okay. So you just can't tell?

18 A Well, when I read the comment, it appears he's
19 referencing there are two entrance roads that would
20 cross the floodplain. And so it does appear that they
21 are -- they are asking for information related to the --
22 to where those two entrance roads cross the floodplain.

23 Q And the response that's provided by 130
24 Environmental Park is that it has begun the preliminary
25 platting process with Caldwell County. Isn't that

1 right?

2 A That is what that response says.

3 Q So there's nothing in the response that
4 suggests that the preliminary platting process is -- is
5 what's -- all that's required to address the comment in
6 the NOD, is there?

7 A You're going to have to ask that again.

8 Q In your experience, does the preliminary
9 platting process address the requirement that's included
10 in 330.63(c)(2)(D)(ii)?

11 A I don't know the answer to that question as it
12 relates to a preliminary platting process.

13 Q Okay. Have you ever been tasked with
14 submitting a CLOMR for any portion of a solid waste
15 facility?

16 A Yes.

17 Q In doing so, was it your understanding that a
18 preliminary platting process was sufficient to comply
19 with the requirement that you obtain a CLOMR? Are those
20 two equivalent in any way?

21 A Please ask me the question again.

22 Q Sure. Let's start with the CLOMR. If a
23 portion of the facility is intended to be constructed in
24 a floodplain, you first -- that's when you need to get a
25 CLOMR. Isn't that right?

1 JUDGE BELL: Can you tell us what a CLOMR
2 is?

3 MS. PERALES: Sorry. Can you --

4 THE WITNESS: It's a conditional letter of
5 map revision.

6 JUDGE QUALTROUGH: A what?

7 THE WITNESS: A conditional letter of map
8 revision.

9 JUDGE QUALTROUGH: Map revision?

10 THE WITNESS: Map, M-A-P, and that is
11 obtained from the Federal Emergency Management Agency --

12 MS. PERALES: Agency.

13 THE WITNESS: -- FEMA. And a CLOMR is
14 requested when anyone proposes construction that would
15 change a FEMA-defined 100-year floodplain.

16 Q (BY MS. PERALES) Thank you.

17 A You're welcome.

18 MS. PERALES: That was a necessary piece
19 of information, wasn't it?

20 JUDGE QUALTROUGH: Yes, it was.

21 JUDGE BELL: Yes.

22 Q (BY MS. PERALES) So in your experience, when
23 you've had to -- or when you intended to construct part
24 of a landfill facility in a floodplain, you first -- you
25 first submit an application for a CLOMR to FEMA. Is

1 that right?

2 A If you were going to change -- if you propose
3 to change the limits of that 100-year floodplain, yes.

4 Q Okay. And in your experience, when you've had
5 to do that, do you recall also submitting any sort of
6 preliminary plat to a county?

7 A I do not recall having ever submitted a
8 preliminary plat to a county related to a conditional
9 letter of map revision.

10 Q Okay. Thank you.

11 MS. PERALES: May I approach the witness?

12 JUDGE BELL: Yes.

13 Q (BY MS. PERALES) So I've handed you a document
14 that's been labeled either P-24, or Protestants 24. Can
15 you take a look at that and see if you can identify
16 that?

17 A Well, this is a letter dated September 24,
18 2014, to Steve Odil. It is titled Response to
19 September 24, 2014 Request for Clarification. And it is
20 a letter signed by Kerry Maroney, and it includes
21 various attachments to the letter.

22 MS. PERALES: Okay. Before I get ahead of
23 myself, I'll offer Exhibit P-23.

24 JUDGE BELL: Any objections?

25 MR. RYAN: No.

1 JUDGE BELL: Protestants 23 is admitted.

2 (Exhibit Protestants No. 23 admitted)

3 Q (BY MS. PERALES) So back to P-24. This --
4 let's see. Can you take a look at Comment 1, please?

5 A Okay.

6 Q So as you mentioned, the beginning of this
7 letter suggested it's responding to a request for
8 clarification from September 24th, but it's also dated
9 September 24th. So either the request for clarification
10 was made on that same day, or maybe the dates are wrong.
11 It's not clear.

12 A I do not know.

13 Q Okay. In any event, Comment 1 is responding
14 to -- or I'm sorry -- response to Comment 1 is
15 responding to a comment that was made in an August 1st
16 NOD letter. Isn't that right?

17 A That appears so.

18 Q And this comment, again, notes that -- that
19 the -- there's a proposed construction in a floodplain,
20 and the ED is requesting a demonstration that the
21 proposed construction has a floodplain development
22 permit from the city, county, or other agency with
23 jurisdiction. Isn't that right?

24 A Yes.

25 Q And, again, 130 Environmental Park provided the

1 same response that it provided in P-23, and that is that
2 it has begun a preliminary platting process with the
3 county. Is that right?

4 A That's what the response says, yes.

5 Q Okay. Do you know when the application was
6 declared technically complete?

7 A I believe the application was declared
8 technically complete on October 28, 2014.

9 Q And is there anything in the application that
10 you're aware of that suggests that 130 Environmental
11 Park obtained any county authorization or submitted any
12 CLOMR to FEMA to address the NODs that we've just gone
13 over? Are you aware of anything in the application?

14 A I am not aware of anything in the application.

15 Q Okay.

16 JUDGE BELL: You want to offer 24?

17 MS. PERALES: I do. Thank you.

18 JUDGE BELL: Okay. Any objection?

19 MR. RYAN: No.

20 JUDGE BELL: All right. Protestants 24 is
21 admitted.

22 (Exhibit Protestants No. 24 admitted)

23 MS. PERALES: Your Honors, I intend to
24 offer -- or refer to next a copy of the draft permit.
25 The draft permit was included in the Executive

1 Director's prefiled exhibits, and then we offered a
2 portion of the draft permit as Exhibit P-30. But it
3 wasn't the entire thing, and now I want to refer to the
4 entire thing. So my initial request would be to just
5 substitute P-30 with the entire thing, or we can give it
6 a new number.

7 MR. RYAN: I don't have any objection to
8 substituting it.

9 JUDGE BELL: That sounds better to me.

10 MS. PERALES: Okay. We'll do that.

11 JUDGE BELL: Let's do that.

12 Q (BY MS. PERALES) Can you take a look at the
13 document that's labeled P-30 and see if you can identify
14 it?

15 A This is the draft permit issued by TCEQ for MSW
16 Permit No. 2383, 130 Environmental Park, LLC.

17 Q Okay. Can you turn to Page 11 of that draft
18 permit?

19 A Yes.

20 Q And go down to the bottom where it says Special
21 Provisions and take a look at the paragraph labeled A.

22 A Yes.

23 Q So this paragraph states, Before physical
24 construction may commence, the permittee must provide
25 the Executive Director with a floodplain development

1 permit from the city, county, or other agency with
2 jurisdiction over improvements authorized by this
3 permit. Is that right?

4 A Yes.

5 Q And this language appears to address the
6 comment that was included in previous NODs regarding the
7 requirement for a floodplain development permit. Isn't
8 that right?

9 A It would appear so.

10 Q So in at least three notice of deficiencies
11 that were issued to 130 Environmental Park, the
12 Executive Director had requested that authorization or a
13 permit be obtained from the county or other agency with
14 jurisdiction before the application could be declared
15 technically complete -- isn't that right -- in at least
16 three NODs?

17 A I believe that's -- I don't remember if there
18 were three NODs. There certainly were two.

19 Q Right. And one of them referenced an earlier
20 NOD. Right?

21 A Okay.

22 Q Okay. And the last response that we have here
23 anyway, from 130 Environmental Park to that NOD, was
24 that they had begun the preliminary platting process.
25 Isn't that right?

1 A Are you referring to Exhibit --

2 Q 24.

3 A -- 24?

4 Q Yes.

5 A Yes.

6 Q And, nevertheless, the application was declared
7 technically complete, and a draft permit issued with
8 this special provision. Correct?

9 A And that type of special provision is not that
10 uncommon.

11 MS. PERALES: I'm going to object as
12 nonresponsive.

13 Q (BY MS. PERALES) My question is: After that
14 last NOD was issued, the application was nevertheless
15 declared technically complete, and a draft permit issued
16 with this special provision. Isn't that right?

17 A That is correct, yes.

18 Q So do you have any knowledge of what happened
19 between the September 24th response to the notice of
20 deficiency and the October 28th declaration of technical
21 completeness of the application?

22 A I do not.

23 Q Do you know whether there were any discussions
24 held between any member of TCEQ and 130 Environmental
25 Park in that time frame?

1 A I do not.

2 Q Are you aware of any correspondence at all
3 between 130 Environmental Park and the TCEQ regarding
4 the substance of the NOD we were just talking about
5 related to a floodplain?

6 A Please ask that again.

7 Q Sure. Are you aware of -- so we've been
8 talking about this NOD, this comment and now a special
9 provision, that requires a floodplain development permit
10 before construction in the floodplain. And my question
11 is whether you're aware of any correspondence or any
12 communication at all between 130 Environmental Park and
13 any member of TCEQ about that topic between
14 September 24th and October 28th.

15 A I'm not aware of any.

16 Q Okay. And I think we've established that
17 there's nothing in the application that you've seen that
18 suggests that 130 Environmental Park has obtained any
19 sort of county floodplain development permit or
20 submitted any CLOMR request. Is that right?

21 A I am not aware of any.

22 Q Do you know whether 130 Environmental Park
23 requested that the special provision shown on Page 11 be
24 added to the draft permit?

25 A I do not know.

1 Q Who would know the answer to those questions
2 related to correspondence or communications between 130
3 Environmental Park and TCEQ and the requirement for a
4 floodplain development permit?

5 A I would think either Kerry Maroney or Tyson
6 Traw would know that answer.

7 Q Okay. So earlier we talked about your initial
8 site visit, or observations of the site, as you were
9 preparing Parts 1 and 2. During those observations,
10 were you made aware of, or did you observe yourself,
11 this Site 21 reservoir and dam?

12 A I did observe the Site 21 reservoir and dam.

13 Q And after you observed the Site 21 reservoir
14 and dam, did you attempt to obtain more information
15 related to that dam?

16 A Yes. We did have a meeting with Plumb Creek at
17 some point in September or early October, I believe.

18 Q And what was the purpose of that meeting?

19 A Well, it was a meeting that -- that was one of
20 the meetings I attended as part of my transitioning out
21 of the project, and the intent of the meeting was to
22 have a meeting with Plum Creek Conservation District and
23 request additional information from them.

24 Q What kind of additional information?

25 A Information related to the SCS Site 21 dam,

1 probably, among other things.

2 Q So -- and was that information provided to you?

3 A Well, that meeting was conducted during my
4 transition out of the project, so I personally did not
5 receive any of the information.

6 Q Okay. Were you aware that the -- that the dam
7 has been designated as high hazard?

8 A I have heard that, yes.

9 Q When did you first hear that?

10 A I don't recall.

11 Q Was it during this hearing?

12 A I mean, I did definitely heard it during this
13 hearing, yes.

14 Q Okay. Had you heard it before?

15 A I don't recall.

16 Q Okay. If that had been made known to you
17 either during the -- your meeting with Plum Creek or via
18 review of documents related to the dam, is that
19 something you might have remembered?

20 A I would think so.

21 Q Isn't it true that you were provided with the
22 original construction plans for that dam?

23 A I recall seeing the original construction plans
24 for that dam. At what point in time, I don't recall.

25 Q And isn't it true that those original

1 construction plans were provided to you by HHNT?

2 A They -- they may have been.

3 Q And at least today, you can't recall whether --
4 you don't recall HHNT also informing you that the dam
5 was designated as high hazard. Is that right?

6 A I don't recall.

7 Q Do you recall whether you took any notes during
8 that meeting with Plum Creek?

9 A With Plum Creek? I did not.

10 Q Okay. If you had taken notes, would those have
11 been discarded?

12 A I did not take any notes.

13 Q Okay. Is it the policy of Biggs & Mathews and
14 of you personally to discard comments, notes, and other
15 documents once a final application has been prepared and
16 submitted?

17 A I typically just discard any draft versions of
18 an application once it is submitted, yes.

19 Q And, in fact, don't you also discard e-mails if
20 they include any comments related to any portion of an
21 application?

22 A If an application has submitted, I would
23 discard those, yes.

24 Q And you would do so even if litigation were
25 anticipated. Isn't that right?

1 A That, I don't know.

2 Q Because you don't ever inquire about whether
3 litigation is anticipated?

4 A No.

5 Q Okay. I have several questions now related to
6 the site operating plan. And I believe you can find
7 that in Applicant's Exhibit 130EP-5, and we can start on
8 Page 105.

9 JUDGE QUALTROUGH: I'm sorry, what was the
10 page?

11 MS. PERALES: It's Page 105.

12 JUDGE BELL: 105?

13 Q (BY MS. PERALES) Are you there?

14 A Yes, I'm there.

15 Q Okay.

16 A Sorry.

17 Q So if we go to the third paragraph of that
18 page, the second sentence -- or let's see, maybe the
19 third sentence. I'm sorry.

20 JUDGE BELL: We're in the wrong place.
21 Which --

22 MR. RYAN: It's Volume 4.

23 MS. PERALES: Oh, yes.

24 MR. RYAN: I'm sorry, Exhibit 5 is in
25 Volume 4. That's just to throw everybody off. Did it

1 work?

2 JUDGE QUALTROUGH: It did.

3 JUDGE BELL: Okay.

4 MS. PERALES: And I'm on Page 105.

5 JUDGE BELL: We're there.

6 Q (BY MS. PERALES) Okay. And I've asked you to
7 turn your attention to Paragraph 3, and I'm focusing on
8 the third sentence that starts with the words, Support
9 facilities. Do you see that?

10 A Yes.

11 Q And according to this sentence anyway, the
12 support facilities will include a site entrance road, a
13 gate house, equipment maintenance and storage area,
14 large-item storage area, reusable material staging area,
15 Citizens Convenience Center, used scrap tire storage
16 area, wood waste processing area, leachate storage
17 facility, and truck wheel wash. Right? Is that right?

18 A Correct.

19 Q Which of those support facilities, if any, do
20 you know that are proposed to be located in a
21 floodplain?

22 A I'm not aware of any of those facilities
23 proposed to be located in a floodplain.

24 Q Or I should say proposed to be located in an
25 area that is currently designated as a floodplain.

1 A Well, I believe the site entrance road crosses
2 the floodplain --

3 Q Okay.

4 A -- but I don't believe any of those other
5 facilities are proposed to be located in a floodplain.

6 Q Okay. So the leachate storage facility,
7 that -- to your knowledge, that's not proposed to be in
8 a floodplain. Is that right?

9 A Well, I certainly could look back at a -- at a
10 map that showed the location of those facilities to
11 confirm that.

12 Q Okay. If you can direct us to one, that would
13 be great.

14 MS. PERALES: While he's looking for that,
15 would it be okay to take a quick restroom break?

16 JUDGE BELL: Good idea. Let's come back
17 at 3:30.

18 (Recess: 3:19 p.m. to 3:34 p.m.)

19 JUDGE BELL: Back on the record and
20 continue with TJFA, EPICC's cross-examination of
21 Mr. Welch.

22 Q (BY MS. PERALES) So before we took a break,
23 Mr. Welch, I believe you were going to look to see if
24 you could find a figure that showed us where some of
25 these facilities are in relation to a floodplain. Is

1 that right?

2 A Yes.

3 Q And have you been able to do that?

4 A Yes.

5 Q Okay.

6 A It's Applicant's Exhibit 130EP-1, Page 140.

7 And that is -- that is identified as Drawing 2A.21, the
8 Landfill Completion Plan, sealed by Greg Adams, depicts
9 the location of the landfill in the landfill completion
10 form. It depicts the 100-year floodplain. It also
11 shows the location of the maintenance building transfer
12 station, leachate storage facility, also the Citizens
13 Convenience Center and the gate house down on the far
14 south end. And it shows that those facilities are
15 located outside of the 100-year floodplain.

16 Q And where can I find on this figure a
17 designation for the FEMA 100-year floodplain?

18 A Well, the 100-year floodplain is the blue line,
19 and I believe that that is a line that was calculated in
20 the Attachment C, Drainage Design Report.

21 Q So when you say "calculated," you mean
22 calculated by 130 Environmental Park?

23 A Correct.

24 Q So this isn't the FEMA floodplain. Is that
25 right?

1 A No, I don't believe it is the FEMA floodplain.

2 Q Okay. Do -- is there a figure in here that
3 depicts the FEMA floodplain and the location of the
4 various facilities in relation to that floodplain?

5 A Let me look one other place. I believe that
6 there's a drawing in Applicant's Exhibit 130EP-2, Page
7 260. It is Drawing C2A4, Postdeveloped Floodplain Work
8 Map. It is signed and sealed by Tyson Traw. I believe
9 that depicts both the FEMA 100-year floodplain as well
10 as the 100-year floodplain calculated by Mr. Traw.

11 JUDGE BELL: What page was that,
12 Mr. Welch?

13 THE WITNESS: 130EP-2, Page 260.

14 JUDGE BELL: 260. Thank you.

15 THE WITNESS: Yes, sir.

16 Q (BY MS. PERALES) So if we were to look at this
17 figure, could you tell me -- let's see -- that the
18 support facilities that we listed earlier -- first, the
19 site entrance road, we know that's going to cross -- we
20 know that's going to cross a floodplain. Is that right?

21 A Yes.

22 Q And we also know that the site entrance road,
23 at least the portion that accesses 183, is not part of
24 the facility boundary. Right?

25 A The portion that extends from U.S. 183 to the

1 facility boundary is not within the facility boundary.

2 Q Okay. That -- that makes sense?

3 A Excuse me.

4 Q If it's from the facility boundary to 183, it's
5 not within the facility boundary?

6 A That's correct.

7 Q Right. Okay. Makes sense.

8 Let's see. What about -- what about the
9 Citizens Convenience Center?

10 A I believe that -- and I -- I did not prepare
11 this drawing, so any specifics of that nature, Mr. Traw
12 would need to answer.

13 Q Okay.

14 A Okay. It appears from my looking at 130EP-2,
15 Page 260, in -- just a second. I'll try to keep us in
16 the same volume. Okay. So if I -- if I look at
17 130EP-2, Page 260, and I also look at 130EP-2, Page 40,
18 I'm looking at Drawing C2A4 and Drawing B.2.

19 JUDGE BELL: You said 130EP-2, Page 40?

20 THE WITNESS: Yes, sir.

21 JUDGE BELL: All right.

22 Q (BY MS. PERALES) Okay.

23 A And it shows the location of the gate house and
24 the scales and the Citizens Convenience Center, and --
25 and I'm looking at Drawing Page 40. And you see that

1 those locations are south of the one tributary that you
2 can see there by the -- by the topographic contours.
3 And you -- when you flip back to 130EP-2, Page 260, the
4 floodplain is defined along that same tributary, if you
5 will. And it appears -- by my looking at those two
6 drawings, it appears that the Citizens Convenience
7 Center and gate house are on the south side of that --
8 that defined floodplain. However, you would need to
9 talk to Mr. Traw regarding the specifics of that -- of
10 that drawing.

11 Q Okay. And would that be true of all of the
12 facilities are listed here? If I wanted to know whether
13 they were located in a FEMA floodplain, it would be
14 Mr. Traw?

15 A Yes.

16 Q Okay. If any of these facilities were proposed
17 in a FEMA floodplain, would a CLOMR be required?

18 A If any of which facilities would be --

19 Q The ones that we just talked about that are on
20 Paragraph 3 of Page 105, so site entrance road, gate
21 house, storage areas, Citizens Convenience Center,
22 leachate storage facility. If any of those facilities
23 were located in a FEMA floodplain, would a CLOMR be
24 required, in your opinion?

25 A Well, in my opinion, those facilities are not

1 located within the FEMA floodplain, but you would need
2 to refer to Mr. Traw for the specifics of that question.

3 Q Okay. So my question is if, if any of them
4 were located in a floodplain. So it's a hypothetical.
5 Can you answer that hypothetical? Do you have --

6 A Well, I mean, hypothetically, if you locate a
7 facility within a FEMA floodplain that causes a change
8 in the limits of that floodplain, you would -- you would
9 need to request authorization to do so.

10 Q Okay. And so if there's no request for
11 authorization included in this application, can we
12 assume, then, that Mr. Traw or the engineer of record
13 determined that none of these facilities are going to be
14 constructed in a FEMA floodplain such that the
15 floodplain would be affected?

16 A You're going to need to ask Mr. Traw that
17 question.

18 Q Okay. Because you can't answer that?

19 A Ask the question again.

20 Q If --

21 A Please.

22 Q -- in this application, there is no CLOMR or
23 other request, other request for modification of the
24 floodplain, if it's -- if that's not included in these
25 application materials, could we then assume that none of

1 these facilities will be constructed in a FEMA
2 floodplain such that the floodplain would be affected or
3 impacted?

4 A I believe that's correct.

5 Q Okay. So I see that the transfer station is
6 not listed among the support facilities that are on Page
7 105. Do you consider the transfer station a support
8 facility to the landfill?

9 A I believe the transfer station has its own
10 transfer station registration number.

11 Q Okay. So in your opinion, the site operating
12 plan, does it need to -- does it need to contemplate or
13 incorporate any of the transfer station operations?

14 A I believe in the transfer station registration
15 application, it has its own site operating plan. So
16 activities within that registered facility would be
17 conducted in accordance with that site operating plan.

18 Q So, for instance, the waste acceptance rates
19 that are included in this 130 Environmental Park
20 landfill application do not contemplate any waste that
21 might come from the transfer station. Is that right, or
22 do you know?

23 A I don't -- I don't recall the specifics of
24 the -- of the waste acceptance rate.

25 Q Okay. Waste acceptance rates, those are

1 typically -- that's the kind of information that we
2 might find in Parts 1 and 2 of the application. Isn't
3 that right?

4 A I believe there's information included in the
5 Parts 1 and 2 of the application. I believe the site
6 life calculations are included in Attachment D --

7 Q Okay?

8 A -- which is the geotechnical portion of the
9 application.

10 Q And waste acceptance rates specifically, we
11 would find that in Parts 1 and 2. Is that right?

12 A I think it's in both --

13 Q Okay.

14 A -- it's in both locations.

15 Q And you prepared, at least initially, Parts 1
16 and 2 of the application. Right?

17 A Yes.

18 Q Do you recall what it -- what information you
19 relied on to come up with waste acceptance rates?

20 A May I refer to that portion of the application?

21 Q Of course.

22 A So which portion of Parts 1 and 2 are you
23 referring to?

24 Q Well, do you know where we might find the waste
25 acceptance rates?

1 A Well, there's a section in Part 1 that
2 discusses the waste acceptance rates. There's also a
3 section in Part 2 that discusses the waste acceptance
4 rates in terms of what the initial acceptance rate is
5 anticipated to be as well as the end of the site life
6 waste acceptance rate. And it also includes an estimate
7 of waste acceptance rates for the first five years of
8 site life.

9 Q Are you looking at Page --

10 A To look at --

11 Q -- 91?

12 A Go ahead.

13 Q Is that Page 91 that you're referring to?

14 A Yes, it is.

15 Q So -- and, again, Page 91 is included in Part 2
16 of the application. Right?

17 A Yes, it is.

18 Q So you would have drafted at least the initial
19 version of this -- this document?

20 A Correct.

21 Q So do you recall what information you relied on
22 to determine waste acceptance rates?

23 A I would have relied on an initial waste
24 acceptance rate that the Applicant would have provided
25 to me, and I would have relied on what they projected

1 their waste acceptance rate -- their generation rate
2 would be, their annual increase that they had -- they
3 had projected.

4 Q And when you say "the Applicant," do you mean
5 HHNT?

6 A I would have received that information through
7 HHNT. However, that information would have been
8 generated by 130 Environmental Park, LLC.

9 Q 130 Environmental Park, LLC, was formed on
10 August 20th. Isn't that right?

11 A I believe that's when they filed with the
12 Secretary of State based on the information in Part 1.

13 Q Okay. So if you -- if that information were
14 provided to you before the formation of 130
15 Environmental Park, would that have been HHNT that
16 provided it?

17 A I think what they were providing to me was
18 representing what the Applicant intended to achieve. It
19 was my understanding that -- that the Applicant and
20 operator at that point was going to be 130 Environmental
21 Park, LLC. I mean, I did receive that information from
22 HHNT --

23 Q Okay.

24 A -- yes.

25 Q Okay. Does 130 Environmental Park have any

1 prior landfill operating experience?

2 A 130 Environmental Park, LLC, does not.

3 Q Okay. So back to the site operating plan. Can
4 you turn to Page 106, please?

5 A Yes.

6 Q So what is your understanding of the purpose of
7 a site operating plan?

8 A A site operating plan will provide the
9 operational requirements to the operator of a -- of a
10 facility.

11 Q So is it kind of like an instruction manual for
12 operating the facility?

13 A I don't -- I don't know that I've ever referred
14 to it that way, but I guess you could.

15 Q Okay. On Page 106, under 1.2, General, the
16 first sentence after the first paragraph states,
17 Operational requirements are included in the following,
18 and then it references several portions of the
19 application. Do you see that?

20 A Yes.

21 Q So how -- how would one determine what the
22 operational requirements are by looking at all of those
23 different portions of the application?

24 A I'm not -- I'm not sure I understand your
25 question.

1 Q Well, let's start with the statement in this --
2 in this -- on this page. Do you understand what that
3 statement means?

4 A Which statement? I'm sorry.

5 Q Operational requirements are included in the
6 following, and then it lists the various --

7 A Well, the operational requirements of a
8 municipal solid waste disposal facility are primarily
9 included in Part 4, site operating plan. However, there
10 are operational requirements that are included, for
11 example, in the landfill gas management plan, that
12 provides information related specifically to the
13 landfill gas management aspects of a disposal facility.

14 The same could say for the Attachment D,
15 Waste Management Unit Design. Within that document,
16 there are specific -- there's a specific attachment
17 related to the leachate and contaminated water plan
18 which would include information, designs, operational
19 issues specific to the -- to the operation of the
20 facility.

21 So there are a number of those types of --
22 that type of information included pretty much in each
23 one of those -- those attachments, if you will.

24 Q Okay. And how would -- how would the
25 operational requirements from each of these attachments,

1 how would those be enforceable? How would that -- how
2 could a TCEQ enforcement officer know what to enforce by
3 looking at this site operating plan?

4 A Well, I think the TCEQ and enforcement person
5 would be -- would be knowledgeable of what's included in
6 a -- the facility investigation and design portion of an
7 application as well as Part 4 of the site operating
8 plan.

9 Q And what --

10 A I think that --

11 Q Go ahead.

12 A I think that they're fully capable of
13 conducting inspections and review of facility operations
14 and capable of determining if a facility is in -- is
15 conducted in accordance with the rules and regulations.

16 Q And we're talking about the site operating plan
17 right now. Right? That's what we're referring to?

18 A Well, we're referring to the site operating
19 plan and some of the other requirements that are
20 included in other portions of the application.

21 Q So how would an operator of the facility --
22 let's assume that the facility has been constructed and
23 is in operation. How would the operator know which
24 portions of the various attachments --

25 A Well, it's my experience that the landfills

1 that I'm familiar with have very knowledgeable and
2 experienced landfill operators that are very familiar
3 with the TCEQ rules and regulations in the operation of
4 a facility and are fully capable of operating that
5 facility in accordance with the permit and the permit
6 documents.

7 Q So you would agree, then, that the operator
8 would have to -- would not be able to simply rely on the
9 site operating plan to determine what the operational
10 requirements are?

11 A I think there's some portions of the operating
12 requirements that have information included in other
13 parts of the application that they would refer to.

14 Q Okay. Can you turn to Page 121, please?

15 A Yes.

16 Q And can you describe what this page is?

17 A This page describes the type of equipment that
18 the landfill would need to have on-site to be able to
19 manage the -- the annual waste acceptance rate. The
20 first column will say if I'm accepting 750 tons per year
21 or less, that defines what the minimum number of pieces
22 of equipment are that that facility needs to have.

23 Q Okay.

24 A If that -- if that waste acceptance rate then
25 increases above 750,000 tons per year up to 841,803 tons

1 per year, that's the minimum number of -- the minimum
2 number pieces of equipment that would be required.

3 Q Okay. And what's the first piece of equipment
4 that's listed there?

5 A A compactor.

6 Q Okay. And what is the function of the
7 compactor?

8 A Well, as noted on the function within that
9 table, the compactor primarily is used for waste
10 compaction and is also capable of pushing -- pushing
11 soil near the -- near the active working face.

12 Q Okay. I'm going to skip around a little bit
13 here and ask you to turn to Page 145.

14 A Yes.

15 Q And just to put this in context, I will --
16 let's see. I'm sorry. Give me one second. I might
17 have the wrong page.

18 JUDGE QUALTROUGH: It's about
19 four o'clock.

20 MS. PERALES: Oh.

21 JUDGE QUALTROUGH: If that changes your
22 plans.

23 MS. PERALES: Okay. Well --

24 JUDGE QUALTROUGH: I mean, is this a good
25 place to stop?

1 MS. PERALES: Sure. Yeah. I'm going to
2 have a number of questions on the SOP, so this is as
3 good a place as any.

4 JUDGE QUALTROUGH: Can we talk about next
5 week? Is anybody else concerned about running out of
6 time, getting everybody done next week?

7 MR. RYAN: Your Honor, I'm -- I know I've
8 been fairly optimistic. I think my view of the world
9 changed some this morning. I still think we can get
10 there, but --

11 JUDGE QUALTROUGH: How many witnesses does
12 TJFA have?

13 MS. PERALES: Well, I believe Mr. Ryan
14 has -- well, we had four fact witnesses. And I believe
15 Mr. Ryan has said that two of those he doesn't intend to
16 cross-examine, and so I think that we won't go through
17 those.

18 MR. RYAN: And the other two, I have less
19 than five minutes' worth of questions for, I think.

20 JUDGE QUALTROUGH: Okay.

21 MS. PERALES: And then the experts, we
22 have Dr. Ross, Mr. Wilson, Mr. Rubinov, Mr. Courtney,
23 and Mr. Harden. So that's five.

24 JUDGE QUALTROUGH: That's five.

25 MS. PERALES: Some of those have

1 limited --

2 JUDGE QUALTROUGH: Six.

3 MS. PERALES: -- scopes of testimony, so I
4 don't know. I -- I feel confident.

5 MR. RYAN: I still think we can get there.

6 MS. PERALES: I think we can get there.

7 JUDGE QUALTROUGH: Okay.

8 (Laughter)

9 JUDGE QUALTROUGH: I'm nervous.

10 MR. RYAN: Do I sense some skepticism?

11 JUDGE QUALTROUGH: I'm concerned about
12 that, and we still have the ED's two.

13 MR. RYAN: I think things will pick up
14 once we get to the Protestants' witnesses.

15 MS. PERALES: I think so, too, and I'm
16 almost finished with Mr. Welch.

17 JUDGE BELL: If we need to go late days
18 next week, but as I was telling Judge Qualtrough before
19 we went on the record the last time, we've got to be
20 done by next Friday.

21 MR. RYAN: Right.

22 JUDGE BELL: So however the parties think
23 we can make that happen, we're all ears.

24 MR. RYAN: Okay.

25 JUDGE BELL: It just has to be done.

1 JUDGE QUALTROUGH: All right, then.
2 Anything else we need to talk before we end for today?
3 MR. RYAN: Not that I can think of.
4 MR. WILSON: The only thing I'm going to
5 observe is Mr. Halliburton has a problem on Tuesday, so
6 I guarantee he'll be off and on on Monday.
7 MR. RYAN: I have one question. Can we
8 leave stuff that nobody wants in here over the weekend?
9 JUDGE QUALTROUGH: I think that's fine. I
10 can go double-check. I'm sure they're leaving us in
11 here.
12 MR. RYAN: Okay.
13 JUDGE QUALTROUGH: And you just won't have
14 access to it --
15 MR. RYAN: That's fine.
16 JUDGE QUALTROUGH: -- until Monday
17 morning.
18 MR. RYAN: That's fine.
19 JUDGE QUALTROUGH: I'll go double-check.
20 And I don't know. Do we need this on the record?
21 MR. RYAN: No, I don't think so.
22 JUDGE QUALTROUGH: All right. So we'll go
23 ahead and go off the record, and we'll finish for today.
24 All right, thank you.
25 (Proceedings recessed at 4:03 p.m.)

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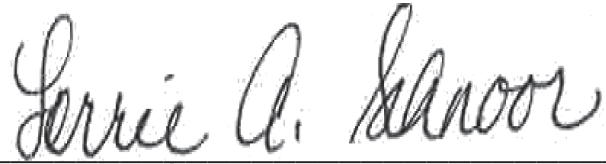
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