

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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	: Case No. 14-375-GA-RDR
In the Matters of the	: Case No. 15-452-GA-RDR
Applications of Duke	: Case No. 16-542-GA-RDR
Energy Ohio, Inc., for	: Case No. 17-596-GA-RDR
Adjustments to Rider MGP	: Case No. 18-283-GA-RDR
Rates.	: Case No. 19-174-GA-RDR

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	: Case No. 14-376-GA-ATA
In the Matters of the	: Case No. 15-453-GA-ATA
Applications of Duke	: Case No. 16-543-GA-ATA
Energy Ohio, Inc.,	: Case No. 17-597-GA-ATA
for Tariff Approval.	: Case No. 18-284-GA-ATA
	: Case No. 19-175-GA-ATA

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PROCEEDINGS

before Ms. Megan J. Addison, Attorney Examiner, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 9:00 a.m. on Tuesday, November 19, 2019.

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VOLUME II

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1 Tuesday Morning Session,
2 November 19, 2019.

3 - - -

4 EXAMINER ADDISON: At this time we will
5 go ahead and go on the record.

6 Good morning, everyone. This is the
7 second day of hearing that the Commission has
8 scheduled for case numbers 14-375-GA-RDR, et al.

9 I believe, Ms. Bojko, you are next to
10 cross-examine the witness.

11 MS. BOJKO: Thank you, your Honor.

12 - --

13 TODD L. BACHAND
14 being previously duly sworn, as prescribed by law,
15 was examined and further testified as follows:

16 - - -

17 CROSS-EXAMINATION

18 By Ms. Bojko:

19 Q. Good morning, Mr. Bachand.

20 A. Bachand.

21 Q. Bachand, got it.

22 A. Good morning. Yes.

23 Q. You are employed by Duke Energy Business
24 Services, correct?

25 A. That's correct.

1 Q. And as an employee of Duke Energy
2 Business Services, you do work for Duke Energy Ohio,
3 correct?

4 A. Yes.

5 Q. And you also do work for affiliates of
6 Duke Energy Ohio, correct?

7 A. Yes.

8 Q. And that would include unregulated
9 affiliates?

10 A. I work for my customer or what I would
11 consider to be my client, if you would, for -- in my
12 role. I am working on the MGP sites and that would
13 serve our gas business unit.

14 Q. And some of those gas business units may
15 be unregulated?

16 A. I'm not 100-percent positive of that. I
17 focus on the environmental.

18 Q. Okay. Fair enough. You are an
19 environmental specialist; is that correct?

20 A. I am a Lead Environmental Specialist
21 within the Remediation Group, yes.

22 Q. And your degree is in environmental
23 sciences?

24 A. That's correct.

25 Q. And you are not a VAP or Voluntary Action

1 Plan CP; is that correct?

2 A. That is correct.

3 Q. And you are not a VAP expert, correct?

4 A. That is correct.

5 Q. And you are not a lawyer; is that
6 correct?

7 A. That's correct.

8 Q. And prior to your work with Duke, isn't
9 it true you had not worked with remediating MGP plant
10 sites?

11 A. That is correct.

12 Q. And Duke is part of a consortium of
13 utilities that own MGP sites, correct?

14 A. Correct.

15 Q. And there are 28 members in that
16 consortium?

17 A. As of today, yes.

18 Q. And you believe that there are more than
19 28 utilities that have MGP sites, correct?

20 A. Yes.

21 Q. And how many utilities in Ohio have MGP
22 sites?

23 A. Within members of the consortium?

24 Q. Either.

25 A. There are at least three.

1 Q. And do you know how many MGP sites there
2 are, in Ohio?

3 A. Not off the top of my head, no.

4 Q. Have any of the utilities with MGP sites
5 in Ohio sought cost recovery to your knowledge?

6 A. Not to my knowledge.

7 Q. And you have filed six pieces of
8 testimony in the consolidated proceedings, correct?

9 A. I believe that's correct.

10 Q. And five of those testimonies would have
11 been annual filings for five years of remediation
12 costs; is that correct?

13 A. That is correct.

14 Q. And then you filed supplemental
15 testimony.

16 A. Correct.

17 Q. And the purpose of your supplemental
18 testimony was to respond to the two Staff Reports
19 filed in these cases; is that correct?

20 A. Correct.

21 Q. And you've read both Staff Reports in the
22 consolidated cases; is that correct?

23 A. Yes. The '18 and '19 reports.

24 Q. Mr. Fiore is the VAP CP working on the
25 Duke site; is that correct?

1 A. Yes.

2 Q. Did I pronounce his name correctly?

3 A. I believe so.

4 Q. You didn't speak to Mr. Fiore, the VAP
5 CP, prior to filing any of your testimony, about the
6 properties that should be referenced in your
7 testimony or the costs that should be included or not
8 included, correct?

9 A. I would say that specifically detailing
10 the costs, no, I didn't speak with Mr. Fiore, but I
11 do speak with Mr. Fiore on a routine basis as the
12 project manager managing MGP sites and Mr. Fiore
13 being our VAP CP. We routinely engage in discussion.

14 Q. Do you recall having your deposition
15 taken? I think you said you did yesterday, in
16 case -- in the consolidated proceedings on -- I don't
17 see a date. Oh, Monday, November 4?

18 A. Yes.

19 Q. And I believe Mr. Healey provided -- do
20 you have a copy up there?

21 A. Yes, I believe I am looking at it.

22 Q. Okay. In -- on page -- starts on 112,
23 line 25.

24 A. Page?

25 Q. 112, line 25. I asked you a question:

1 "And you didn't speak with Mr. Fiore, who is the VAP
2 CP, about this, the properties that should be
3 referenced in your testimony, or the costs that
4 should be included or not included?" And "Answer:
5 No." Did I read that correctly?

6 A. That is correct.

7 Q. Let's turn to your supplemental
8 testimony. Do you have that in front of you?

9 A. I believe so.

10 Q. The supplemental testimony has been
11 marked as Duke Energy Exhibit 14. Let's turn to
12 page 2, please.

13 A. I'm here.

14 Q. It's on the bottom of page 2, line 20 and
15 it goes over -- it starts with "My" and it goes over
16 to the top of page 3, lines 1 through 3. I will give
17 you a second to read that.

18 Here you explain that your testimony
19 explains that the costs that were incurred were
20 authorized for recovery by the Commission; is that
21 correct?

22 A. Our -- I believe it says they are
23 reasonable and consistent with what is previously
24 authorized.

25 Q. Okay. Did you read -- and when you are

1 referring to "previously authorized," you are
2 referring to the phrase "previously authorized for
3 recovery by the Commission" on page 3, lines 2 and 3,
4 you are referring in that sentence to the 2012
5 proceeding in which the Commission issued an Order in
6 2013?

7 A. Correct.

8 Q. And did you draw this conclusion
9 yourself?

10 A. Yeah. That is my conclusion after
11 reading that.

12 Q. Is it your understanding that the
13 Commission, in that 2012 case, granted recovery of
14 cleanup costs associated with the East End MGP site?

15 A. That's correct.

16 Q. And the Commission also disallowed the
17 recovery of certain costs; is that correct?

18 A. That is correct.

19 Q. And you are not an accountant either? I
20 forgot to ask you that.

21 A. No, I am not.

22 Q. Do you understand the difference between
23 a liability and recovery of costs?

24 A. In general, yes.

25 Q. Are you familiar with Ohio's ratemaking

1 formula?

2 A. No, I am not.

3 Q. And do you know what deferral is under
4 the Commission's proceedings?

5 A. I have a general understanding, yes.

6 Q. And that general understanding comes from
7 your reading of the 2012 case?

8 A. That and along with our annual filings
9 from the time I have been with Duke Energy.

10 Q. And do you know what carrying costs are?

11 A. Yes.

12 Q. What do you believe those are?

13 A. Cost of money. So when we defer the MGP
14 cleanups, all those expenses are -- we are carrying
15 all those costs until the decision is ultimately
16 made.

17 Q. Also -- I am still in -- I will be
18 probably in your supplemental testimony for all my
19 questions regarding testimony. So if you look at
20 page 3 of your supplemental testimony, line 14.

21 A. Yes.

22 Q. Here you actually cite to the 2012 case
23 on lines 14 through 16; is that correct?

24 A. That is correct.

25 Q. And you used the word "prudent" here. Do

1 you see that?

2 A. Yes.

3 Q. What is meant by "prudent" in this
4 sentence?

5 A. I -- I use it to mean that the work that
6 we're undertaking the costs, the pace at which we
7 work, are all being progressed in a manner which I
8 believe to be cost-effective and taking into account
9 the scope and magnitude of work aligning with what is
10 expected when it comes to VAP. It's -- it means that
11 we are not wasting time. We are not wasting dollars.
12 We are moving and progressing in an iterative process
13 aligning with what would particularly be expected
14 within our industry.

15 Q. And how does the -- so when you are
16 talking about prudent here, you are not talking about
17 cost recovery, correct?

18 A. Well, it's costs incurred which
19 ultimately would be recoverable.

20 Q. Right. But you are -- you are speaking
21 in the manner that Duke performs its activities,
22 correct? Your belief of how Duke performs its
23 activities.

24 A. Correct.

25 Q. And do you know how the PUCO defines

1 "prudent" for cost recovery purposes?

2 A. Not off the top of my head.

3 Q. You have attached TLB-6 to your testimony
4 and you talked about this yesterday with Mr. Healey.
5 When you created this attachment regarding costs, who
6 told you which invoices or which costs to include or
7 not include in this attachment?

8 A. May I pull it out, please?

9 Q. Please.

10 A. So -- so the -- the invoices that were
11 being attached to this table were focused on areas
12 that Staff identified in their 2018 and 2019 report,
13 focused on disallowance of costs and there seemed to
14 be two areas of focus. One was the Area West of the
15 West Parcel and the Ohio River work.

16 So the focus and the rationale behind
17 creating this table focused on the -- those specific
18 areas. And since the case goes back to 2013, I had
19 to research tens of thousands of pages of invoices to
20 come up with this table. Go ahead.

21 Q. So I just asked who. Who told you, and
22 what it sounds like is that you made the decision,
23 you were basically recording invoices?

24 A. It was my decision, after reading the
25 2018 and 2019 Staff Reports, to initiate this.

1 Q. Okay. And so you recorded invoices as
2 you believe you found them in your research. You did
3 not determine, for recovery purposes, the prudence of
4 the invoices that you were including.

5 A. So for invoices that I specifically did
6 not approve for payment so that would include 2013
7 and a portion of 2014, I reviewed those, felt that
8 they were prudent, but any invoice from the time I
9 have been employed with Duke until today and when I
10 process invoices, that is one of the key criteria
11 that I review an invoice for is prudence and making
12 sure that the costs are accurate and true and are
13 justifiable.

14 Q. Right. But when you created this chart
15 in response to Staff, you merely were recording all
16 the costs that were expensed. You were not reviewing
17 again and making determinations about whether it
18 should be included or not. You just recorded the
19 invoices you found.

20 A. That is true because I already
21 recorded -- I already reviewed the invoices to make
22 sure they were prudent at the time I received them.

23 Q. And you mean "prudent" with regard to you
24 were reviewing the invoices to make sure the
25 contractor did what they were told.

1 A. And that the costs were aligned with bid
2 events, unit rates, so on and so forth.

3 Q. You didn't make the determination about
4 whether customers should pay for that cost, correct?

5 A. I don't know if that's my job to decide
6 if a customer is -- is required to pay.

7 Q. Okay. Fair enough. The TBL-6 (sic) are
8 costs associated with the WOW Parcel, WOW, West of
9 the West Parcel; is that correct?

10 A. Yes.

11 Q. And it's your understanding that the 2012
12 Order distinguished between the WOW Parcel and the
13 East End site, correct? It separated out the WOW, it
14 gave it a name. It called it the WOW Parcel,
15 correct?

16 A. It's referred to in there, yes.

17 Q. And is evidence of tar in sediment in
18 an -- in and of itself evidence of MGP footprint?

19 A. It's evidence of impacts associated with
20 historical MGP operations.

21 Q. Only MGP?

22 A. If it -- the coal tar?

23 Q. The sediment, itself, is that associated
24 with MGP sites only?

25 A. Well, you said tar in sediment.

1 Q. I'm sorry. Tar in sediment.

2 A. At East End, yes, it is indicative of
3 historical MGP waste byproducts.

4 Q. I don't mean at the East End. I am
5 saying generally speaking, would we only find tar in
6 sediment at an MGP site?

7 A. I would imagine not.

8 Q. And could such sediment come up from up
9 the river?

10 A. Not in our case, no.

11 Q. Do you know where the Ohio River begins?

12 A. Yes.

13 Q. Where is that?

14 A. Pennsylvania.

15 Q. And Pittsburgh to be exact?

16 A. No.

17 Q. Where is it?

18 A. Upstate.

19 Q. Upstate. And where does it end?

20 A. It flows into the Mississippi.

21 Q. And are there impacts down the river?

22 A. Can you be more specific?

23 Q. Sure.

24 A. It's a 400-and-something-mile-long river.

25 Q. Are there impacts down the river from the

1 East End?

2 A. I can't answer that. I didn't
3 investigate downstream of East End other than the
4 West End site.

5 Q. And you wouldn't be able to know whether
6 there were impacts that flowed down the river from
7 other sites, would you?

8 A. I wouldn't -- I wouldn't be able to
9 verify or deny that at this time because typically in
10 the investigation world you would do background
11 sampling as well as downstream sampling, and we are
12 still in the process of investigating both sites, so
13 I don't have all the information so I really can't
14 respond to what's upgrading and what's downgrading of
15 the site.

16 Q. And does the river, near the MGP site,
17 contain sediment that originated in Lake Erie?

18 A. I cannot answer that question.

19 Q. I believe that you stated yesterday that
20 the only costs incurred in the -- in Kentucky on the
21 other side of the border had to do with lab analysis.
22 Am I remembering your testimony correctly?

23 A. The only work that was done across the
24 state line, that I am aware of, was the early
25 sediment screening assessment investigation that was

1 done at the West End site when the project was
2 managed by Ms. Bednarcik back in 2013. There were
3 several borings in the area of the proposed Brent
4 Spence Bridge that were on the Kentucky side of the
5 state line.

6 Q. So I think you used the word "lab
7 analysis" yesterday and --

8 A. Well --

9 Q. -- that's what I was trying to ask. It
10 included a sampling and it included you would have
11 had to take a sample before you did a lab analysis,
12 correct?

13 A. Correct. So the borings were completed.
14 Samplings would have been collected and those samples
15 would have gone to a laboratory for analysis.

16 Q. And in -- did you address the lab
17 analysis, the sampling and boring, in your testimony
18 in this case?

19 A. I would have to review my testimony. I
20 don't recall if I specifically discussed the lab
21 results.

22 Q. Did Duke ask its contractors to provide
23 multiple invoices or separate costs depending on the
24 property they were working on?

25 A. No, that was not -- that was not asked

1 nor is that typically an industry standard when it
2 comes to environmental site assess.

3 Q. Some of the invoices, as you discussed
4 with Mr. Healey yesterday, do in fact notate the
5 property or the area that the expense applied to,
6 correct?

7 A. On the remediation side at East End, that
8 is the case because the phases of construction were
9 broken out to -- to allow the gas plant to continue
10 operating and for our work to progress without
11 stopping and save costs associated with those modes.
12 So there are five phases in the original scope of
13 work, and the five phases were spread across the
14 Middle Parcel, sometimes referred to as the Central
15 Parcel, and the West of the West Parcel.

16 So the invoices from Haley & Aldrich on
17 the construction component, the remediation, within
18 the uplands for that sequence of work, were tracked
19 by phase because the bid event was set up such that,
20 instead of a holistic, large-scale remediation
21 project, we broke it out into the phases which
22 allowed the bid event to be broken out by phase and
23 subsequent unit costs, et cetera. So the remediation
24 we were able to track by phases.

25 Q. So on the invoices you looked at

1 yesterday, it actually said East End site or Middle
2 Parcel or West of the West Parcel, correct?

3 A. It actually says Middle and West of the
4 West Parcel. And then it would say the phase, so it
5 would say Phase 1, 2, 3, 4, 5 and 6.

6 Q. Some of the invoices said Purchased
7 Property and East End too, right?

8 A. Not for the remediation, that would not
9 have said that at all. Oh, let me back up. A task
10 is listed on there.

11 Q. A task referring to the East End or
12 Purchased Property?

13 A. Yes. And I believe there is reference to
14 a task where there was work done on what was referred
15 to as the DCI property as well.

16 Q. That was my next question. The DCI
17 property is listed on some of those invoices. What
18 would be the expense to Duke of asking a contractor
19 to provide two invoices, multiple invoices, or to
20 depict what area they are working on depending upon
21 which property they are on?

22 A. I don't know the answer to that.

23 Q. Let's go back to your supplemental
24 testimony on page 2, please. Line -- same lines
25 again from starting on 20 to go over to page 3 to

1 lines 1 and 3. You also stated here that the costs
2 incurred that were -- the costs incurred were
3 previously authorized for recovery by the Supreme
4 Court. Do you see that?

5 A. Yes, yes.

6 Q. And did you read that Supreme Court
7 Order?

8 A. I have read that in the past, yes.

9 Q. And do you see the phrase "original
10 footprint" or "footprint" in that Order?

11 A. I don't recall.

12 Q. Did you draw the conclusion that you
13 state on the bottom of page 2, up to page 3, did you
14 draw that conclusion yourself?

15 A. Yes.

16 Q. Did your counsel help with your
17 understanding of the Supreme Court case?

18 A. It's probably been discussed in various
19 meetings with counsel.

20 Q. And did you read the statutory law that
21 was referenced in the Supreme Court decision?

22 A. No, I did not.

23 Q. So your counsel helped you with that
24 understanding; is that correct?

25 A. Yes.

1 Q. And on the same page 3, lines 4 and 5,
2 you reference state and federal laws. Do you see
3 that?

4 A. Yes.

5 Q. Your reference here is to CERCLA and VAP,
6 I believe; is that correct?

7 A. Yes.

8 Q. And VAP is a Voluntary Action Plan?

9 A. Voluntary Action Program under the Ohio
10 EPA.

11 Q. And does fulfilling or completing a VAP
12 mean you do not have liability?

13 A. You go through the VAP process and
14 complete a cleanup, if you will, and pursue a none
15 further action, and at that point you have fulfilled
16 your obligations under the Ohio Voluntary Action
17 Program, applicable standards have been met, all
18 applicable standards have been met for variances
19 sought, et cetera, and at that point you can stop or
20 you can pursue a Covenant Not to Sue and have that
21 filed as well.

22 Q. So the answer is no. Going through the
23 VAP itself is not -- does not automatically or
24 guarantee you have no liability, correct?

25 A. It's a case-by-case situation so it's

1 evaluated on a case-by-case and throughout the
2 investigation and remediation process. Liability, I
3 don't know which liability you are referring to under
4 which program. But you address environmental
5 liabilities and you can't quantify the liability
6 until you fully are complete with your project.

7 Q. Right. But if you go through a VAP and
8 you complete all the applicable standards, you are
9 not guaranteed not to have liability, correct? You
10 have to go further and do the two more stages that
11 you said.

12 A. Well, the -- the none -- none further
13 action letter? That's a letter that's prepared by
14 the CP. So it's their documentation attesting to the
15 fact that the work was done and that applicable
16 standards were -- were achieved. And that the site
17 is suitable for closure.

18 Q. And then you have to go the next step to
19 actually get a Covenant Not to Sue, correct?

20 A. You can stop at a none further -- No
21 Further Action.

22 Q. So, in fact, there are Duke properties
23 that are gone through the VAP that have not received
24 either an NFA or the Covenant Not to Sue, correct?

25 A. There are two properties currently in VAP

1 and continue to move forward.

2 Q. Isn't it true that Duke has completed VAP
3 and has not received an NFA letter or covenant for
4 other properties or you don't know?

5 A. We did for the Riverside Drive Property
6 and we did receive a Covenant Not to Sue.

7 Q. So you are not aware of any VAP
8 completions that Duke has not received an NFA or
9 Covenant Not to Sue for?

10 A. That Duke has not received?

11 Q. Correct.

12 A. We have the East End and West End MGP
13 sites that are engaged in the VAP process. We closed
14 out the Riverside Drive Property through the VAP.
15 Those are the three sites that were in the VAP and
16 one of them has been closed.

17 Q. Okay. So maybe I will talk a little more
18 broadly. Let's go outside of Duke Energy Ohio which
19 I think you are answering in my question, I
20 apologize. Are you aware of any non-Duke Energy
21 Ohio, just Duke, the broader company, the parent
22 company, are you aware of any VAP completions that
23 have not resulted in an NFA?

24 A. Not under -- not under my program, I am
25 not aware of any.

1 Q. And isn't it true a VAP can require you
2 to do something more than what the law would require?

3 A. I am not a VAP expert so I don't feel as
4 though I can adequately respond to that.

5 Q. So I mentioned two -- on page 2, lines 3
6 and 4, you talk about state and federal environment
7 laws. I mentioned two, CERCLA and VAP. Are there
8 any other laws that you were referring to in this
9 comment?

10 A. Sure. I mean there is the Clean Water
11 Act. That would come into play for the Ohio River.
12 You know, there's certainly other programs. There's
13 emergency response if there was an incident that
14 needed to be addressed.

15 Q. On page 3, lines 4 and 5 of your
16 supplemental testimony, you conclude that Duke is
17 legally responsible for the impacts outside
18 boundaries under CERCLA. Do you see that?

19 A. Which line are you referring to?

20 Q. 4 to 5. I guess it goes on to -- it
21 starts on 4, goes down to 8. I'm sorry. Start on
22 line 8 and read that sentence. On page 3, line 8 of
23 your supplemental testimony, you conclude that Duke
24 is legally responsible for impacts outside boundaries
25 under CERCLA, correct?

1 A. Well, the sentence says "not only within
2 the boundaries of the historical MGP operations, but
3 also for any cleanup required of impacts linked to
4 the operations conducted...." You are on page 3?

5 Q. Yes. You state, under CERCLA, Duke is
6 legally responsible for impacts not only within the
7 boundaries.

8 A. Right.

9 Q. So you are meaning that they are also
10 responsible for any kind of impacts outside the
11 boundaries, correct?

12 A. That is -- that is true, correct.

13 Q. And have you read the CERCLA act?

14 A. I have read the CERCLA act.

15 Q. Do you know when it was enacted?

16 A. 1980.

17 Q. And you are not an expert on CERCLA,
18 correct?

19 A. No. I consider myself well knowledged in
20 CERCLA.

21 Q. Does CERCLA say anything about ratepayers
22 or cost recovery?

23 A. No, CERCLA does not say that.

24 Q. Does it say anything about state
25 jurisdiction over the regulations in CERCLA?

1 A. They are -- in CERCLA there are some
2 authorized state agencies to oversee Superfund which
3 is a fallout of CERCLA.

4 Q. Right. But does it talk about state
5 jurisdiction and who has the jurisdiction to enforce
6 CERCLA?

7 A. I don't believe it does.

8 Q. Under CERCLA, the strict liability
9 provisions apply to owners and operators; is that
10 correct?

11 A. That is correct.

12 Q. It does not apply to customers, correct?

13 A. That is correct.

14 Q. And based on your more than 30 years of
15 experience as an environmental remediation
16 professional, would CERCLA apply to DCI when DCI
17 owned the property?

18 A. No.

19 Q. Did Duke remediate the property sold to
20 DCI after it was sold to DCI?

21 A. On the West Parcel -- West of the West
22 Parcel, yes. Wait. Let me back up. Can you repeat
23 the question because that was a -- I was a little
24 confused.

25 Q. Did Duke remediate the property sold to

1 DCI after it was sold to DCI?

2 A. No. We remediated after we purchased it
3 back from DCI.

4 Q. After you repurchased it from DCI.

5 A. Correct.

6 Q. And that's because Duke cannot clean up
7 impacts on a property held by another without
8 consent, correct?

9 A. That is correct.

10 Q. Or permission?

11 A. Correct.

12 Q. Do you know if DCI did any remediation on
13 the property after it purchased it from Duke?

14 A. I do not know the answer to that. I was
15 not employed by Duke at that time.

16 Q. Is it your testimony that Duke is
17 obligated to remediate all areas contaminated by the
18 MGP plants regardless of where it's located?

19 A. Yes.

20 Q. But you're not testifying here today
21 whether cost recovery is authorized regardless of the
22 location, correct?

23 A. I have an opinion as it relates to that
24 after reading the Order.

25 Q. That was not in your testimony, correct?

1 Your prefiled testimony. That's all I am asking if
2 it's in your prefiled testimony.

3 A. I think -- I think in my testimony I say
4 that we are required to clean up the sites no matter
5 what the boundaries.

6 Q. And if you look at page 3, lines 14
7 through 15 of your testimony, where you reference the
8 12-685 case. Do you see that?

9 A. Yes.

10 Q. You didn't draft the testimony that you
11 reference here, the original testimony filed in
12 12-685, correct?

13 A. No, I did not.

14 Q. And did you read that testimony prior to
15 drafting your testimony?

16 A. I have read it, yes.

17 Q. And prior to drafting this testimony?

18 A. Throughout this entire process, yes.
19 Yes.

20 Q. You are not adopting their testimony
21 though, are you?

22 A. I don't believe I am, no.

23 Q. And you didn't participate in that 2012
24 case, correct?

25 A. No.

1 Q. You weren't even at Duke in 2012,
2 correct?

3 A. Correct.

4 Q. Look at line 14. I am still on the same
5 page. Here you discuss the prudence of Duke's
6 actions. Do you see that?

7 A. Yes.

8 Q. Although you weren't involved in the 2012
9 case, it is your understanding, from reading the
10 Order, that the current case is the case that is to
11 determine the prudence of the costs, correct?

12 A. Correct.

13 Q. And that -- and that process in the
14 annual filings is what is to determine the prudence
15 that was established in the 2012 Order; is that
16 correct?

17 A. Correct.

18 Q. And I think you mentioned to me earlier,
19 you reviewed the two Staff Reports filed in the
20 consolidated case?

21 A. Yes.

22 Q. Have you also read the 2012 Staff Report
23 issued in the 2012 case?

24 A. Yes, I believe I have, but it was some
25 time ago.

1 MS. BOJKO: Your Honor, I don't think
2 it's been marked, so at this time I would like to
3 mark, as OMAEG 2, the Staff Report filed on January
4 4, 2013, in case 12-1685-GA-AIR.

5 EXAMINER ADDISON: So marked.

6 (EXHIBIT MARKED FOR IDENTIFICATION.)

7 MS. BOJKO: May I approach?

8 EXAMINER ADDISON: You may.

9 MS. BOJKO: Anyone else need one?

10 Q. (By Ms. Bojko) Is this the Staff Report
11 that you believe that you have reviewed that was
12 filed in 12-1685?

13 A. Yes.

14 Q. Could you turn to -- first, let's go to
15 page 44. At the bottom of 44, starting with the --
16 well, the last paragraph on 44. It discusses
17 transmission -- electric transmission facilities and
18 electric distribution facilities. Perhaps it uses
19 that word.

20 A. Yes.

21 Q. In this -- the last sentence it appears
22 that Staff is recommending that electric transmission
23 facilities be excluded from recovery; is that
24 correct?

25 MR. McMURRAY: I am going to object to

1 this question. This is a Staff Report that
2 Mr. Bachand was not involved in preparing. It
3 involves the prior case in which the PUCO issued an
4 Opinion and Order that -- that considered this Staff
5 Report as well as a whole bunch of other testimony
6 and information. It doesn't seem relevant to me to
7 be walking through with Mr. Bachand who was not even
8 with the Company or involved to discuss what the
9 Staff Report said in relation to maybe what the
10 Commission ultimately ordered. The Commission's
11 Order speaks for itself.

12 EXAMINER ADDISON: Thank you. I will
13 allow Ms. Bojko a little bit of leeway.

14 MS. BOJKO: Thank you, your Honor.

15 THE WITNESS: Can you repeat the
16 question, please?

17 MS. BOJKO: Sure. Could you please have
18 it read back?

19 EXAMINER ADDISON: Thank you.

20 (Record read.)

21 A. What I am reading here is that Staff is
22 indicating that the costs to remediate the historical
23 MGP operation should not be approved because where
24 the work is being conducted is within an area of
25 Duke's electrical distribution and solely not on a

1 site that has natural gas distribution operations.
2 That's all it's saying.

3 Q. Well, it actually says that "the expenses
4 incurred were not related to operation, maintenance,
5 or repair of natural gas distribution facilities,"
6 correct?

7 A. But it also says "the remediation work"
8 in the beginning part of the sentence, so I would
9 assume that the expenses incurred are relating to the
10 remediation.

11 Q. But it says they were not related to the
12 distribution facilities, not to some site. You used
13 the word "MGP site" in your prior answer and this
14 does not say that. It says it's related to the
15 distribution facilities, correct?

16 A. Again, my interpretation of the sentence
17 says remediation work. The only remediation work
18 that was done at West End is relating to MGP, but
19 Staff goes on to say that, therefore, the expenses
20 incurred were not related to the operation,
21 maintenance, or repair of a natural gas distribution
22 facility -- facility -- and should not be recovered
23 in the natural gas distribution rates.

24 Q. Right. And then go down to the middle
25 paragraph in the next section that's -- it starts to

1 arrive at its recommended recovery amount.

2 A. Page 45.

3 Q. Yes. Here the Staff said it eliminated
4 all expenses incurred at the West End site, correct?
5 That's its recommendation?

6 A. That's what it says, yes.

7 Q. And if you could turn to page 9 of your
8 testimony, supplemental. On page 9, line 16 through
9 18, and then it goes over to the top of the next
10 page, here you seem to challenge Staff's disallowance
11 of costs associated with nitrogen tanks and new
12 stairs; is that correct? Are you challenging that?

13 A. Yes, I am.

14 Q. And you're -- are you saying you believe
15 these items are not capital costs?

16 A. Not as it relates to the work that we had
17 to do that's outlined in my supplemental. I don't
18 believe that is a capital cost.

19 Q. Okay. But all you say on page 10 is that
20 you don't think that you have enough detail to
21 understand exactly how or why the Staff is
22 recommending a disallowance, correct?

23 A. That's correct.

24 Q. And you are not saying that you don't
25 believe a tank and stairs are actual capital items,

1 are you?

2 A. I believe that when they were originally
3 installed, they were, yes.

4 Q. And you mention an iron tar tank in your
5 testimony. Do you recall that?

6 A. At the East End site, yes.

7 Q. Do you know when the tar tank was found?

8 A. It appeared on the historical Sanborn
9 maps so early 19th Century, late -- excuse me, late
10 18th Century, early 19th Century. Early 1900s, late
11 1800s.

12 Q. When it was found or when it was
13 installed?

14 A. We found it during the remediation of the
15 West Parcel which would have been, I believe, in
16 2010.

17 Q. That was my first question. And to
18 answer my second question, you believe it was
19 installed sometime in the -- in where? What time
20 period?

21 A. Early 1900s.

22 Q. Prior to the Sanborn maps.

23 A. I don't have the Sanborns directly in
24 front of me, chronological citation of them. But it
25 does appear -- it doesn't appear. It appears, and

1 then it is not there again, so there is a sequence of
2 Sanborn maps that show it and then don't show it.

3 Q. So you are not exactly sure when it was
4 installed?

5 A. I don't have the exact year, no, I do
6 not.

7 Q. And you've attached a photo of this tar
8 tank to your testimony; is that correct?

9 A. That is correct, the foundation of the
10 tar tank.

11 Q. And could you turn to the -- I think it's
12 Attachment 3. Are both of these pictures depicting
13 the tar tank?

14 A. The foundation, yes.

15 Q. And you did not take these photographs;
16 is that correct?

17 A. No, I did not.

18 Q. And they were taken by Haley & Aldrich;
19 is that correct?

20 A. That's correct.

21 MS. BOJKO: Your Honor, could I just have
22 a couple minutes? I am just trying to find a proper
23 citation.

24 EXAMINER ADDISON: Sure.

25 Let's go ahead and go off the record

1 (Discussion off the record.)

2 EXAMINER ADDISON: Let's go ahead and go
3 back on the record.

4 Ms. Bojko.

5 MS. BOJKO: Thank you.

6 Q. (By Ms. Bojko) Going back to TLB-3
7 Attachment, the photographs that we discussed.

8 A. Yes.

9 Q. There's no depiction on here with regard
10 to property boundaries, correct?

11 A. There's -- there's a picture of a fence
12 which is approximately the east -- the western
13 boundary of -- of the West of the West Parcel. It's
14 an approximation you can see it.

15 Q. So there's -- there's no legal boundary
16 identified on this picture?

17 A. There's no -- there's no monument
18 depicting a property line boundary in the photo.

19 Q. And that orange fence you are referring
20 to, appears to be a temporary construction fence; is
21 that correct?

22 A. Yes. But I was referring to the black
23 fence in the background.

24 Q. And that also appears to be a temporary
25 fencing?

1 A. No. The black fence is the Duke Energy
2 security fence around the entire plant.

3 Q. Okay. How many bids did you receive for
4 cleanup --

5 MR. McMURRAY: Objection. We need to be
6 more specific as to "cleanup."

7 Q. How many bids did you receive for the
8 East End cleanup, remediation?

9 A. For the Middle and the West of the West
10 Parcel?

11 Q. Yes.

12 A. I don't have our -- my evaluation in
13 front of me so I am going off of memory from 2014 and
14 '15. But I want to say -- well, there's two sets of
15 bids. Are you talking about the engineering design
16 phase or the construction phase?

17 Q. I was talking about the construction
18 phase.

19 A. So I believe there were four, possibly
20 five vendors who bid the -- what we would refer to as
21 yellow iron.

22 Q. And what about for the East End?

23 A. That was East End.

24 Q. Oh, I'm sorry. I thought you told me --
25 that's right. What about the West End?

1 A. The current remediation I believe there
2 was again approximately four yellow iron contractors
3 bidding the project.

4 EXAMINER ADDISON: What do you mean by
5 "yellow iron"?

6 THE WITNESS: The construction phase.
7 It's excavators, heavy equipment is usually yellow,
8 so in our industry we just refer to it as yellow
9 iron.

10 EXAMINER ADDISON: Terrific, thank you.

11 THE WITNESS: So the construction
12 component.

13 EXAMINER ADDISON: Thank you.

14 THE WITNESS: You're welcome.

15 Q. (By Ms. Bojko) We talked a little bit
16 about the Staff Report in the 12-1685 case, Staff
17 recommending disallowance with -- for costs
18 associated with electric facilities. Do you recall
19 that?

20 A. Yes.

21 Q. And isn't it true that the Commission
22 also disallowed costs associated with electric
23 facilities in the 12-1685 case?

24 A. I don't recall.

25 MS. BOJKO: That's all I have. Thank

1 you. Thank you, sir.

2 THE WITNESS: You are welcome.

3 EXAMINER ADDISON: Thank you, Ms. Bojko.
4 Ms. Whitfield.

5 MS. WHITFIELD: I have no questions for
6 this witness.

7 EXAMINER ADDISON: Ms. Kyler Cohn.

8 MS. COHN: None, your Honor.

9 EXAMINER ADDISON: Thank you.

10 Mr. McNamee.

11 MR. McNAMEE: Thank you, your Honor.

12 - - -

13 CROSS-EXAMINATION

14 By Mr. McNamee:

15 Q. Good morning, Mr. Bachand.

16 A. Good morning.

17 Q. My name is Tom McNamee. I am Staff
18 counsel. This is the easy part of your
19 cross-examination. I have got three data request
20 responses. I just need you to identify them.

21 A. Yes, sir.

22 MR. McNAMEE: So let's start with, your
23 Honor, I would ask to mark for identification as
24 Staff Exhibit 5, a document titled "Staff DR3
25 Request, West End, Revised Response: August 3, 2015."

1 EXAMINER ADDISON: It will be so marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 MR. McNAMEE: I have to take the long way
4 around, I'm afraid.

5 Q. (By Mr. McNamee) All right. Mr. Bachand,
6 do you have before you what's been marked for
7 identification as Staff Exhibit 5?

8 A. Yes, I have it.

9 MS. BOJKO: Do you have other copies?

10 MR. McNAMEE: I do. I do indeed. Here
11 they are.

12 Q. Mr. Bachand, have I copied this -- this
13 correctly?

14 A. Yes.

15 Q. Good. And you are familiar with this?

16 A. Yes.

17 Q. And it's true as far as you know?

18 A. Yes.

19 Q. See, that was very easy, wasn't it?

20 MR. McNAMEE: Now, your Honor, I would
21 ask to have marked for identification as Staff
22 Exhibit 6, a document captioned "Staff First Set of
23 Data Requests," excuse me, "Date Received: May 5,
24 2014. Staff-DR-01-001 Confidential." Although, I
25 understand that it's not confidential. That's right,

1 isn't it?

2 MR. McMURRAY: Correct.

3 MR. McNAMEE: Okay. Thank you.

4 EXAMINER ADDISON: Thank you very much
5 for that. It will be so marked.

6 MR. McNAMEE: Yeah, as Staff 6.

7 (EXHIBIT MARKED FOR IDENTIFICATION.)

8 Q. (By Mr. McNamee) All right. Mr. Bachand,
9 do you have before you what's been marked for
10 identification as Staff Exhibit 6?

11 A. Yes.

12 Q. Okay. Have I made a correct copy of
13 that?

14 A. I can't attest to that. I was not
15 employed by Duke Energy when this was produced.

16 Q. Okay. You are not familiar with that
17 one?

18 A. I may have reviewed it in the files but I
19 don't -- I can't attest that this is an accurate
20 copy.

21 Q. Okay. All right.

22 MR. McNAMEE: Then let's mark for
23 identification as Staff Exhibit 7, a document
24 captioned "Duke Energy Ohio, Case No. 15-452-GA-RDR,
25 Staff Seventh Set of Data Requests, Date Received:

1 August 4, 2015. Staff DR-07-001 Confidential." And,
2 again, I believe it's not confidential.

3 MR. McMURRAY: Correct.

4 EXAMINER ADDISON: Thank you.

5 MR. McNAMEE: I ask to have that marked
6 as 7, Staff 7.

7 EXAMINER ADDISON: Thank you. It will be
8 so marked.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 Q. (By Mr. McNamee) Okay. Mr. Bachand, you
11 have before you what's been marked for identification
12 as Staff Exhibit 7?

13 A. Yes, I do.

14 Q. Okay. I believe, in this instance, you
15 are listed as the responsible witness.

16 A. That is true.

17 Q. Good. Have I made a correct copy of this
18 data request?

19 A. I believe you have.

20 Q. Good.

21 MS. BOJKO: Your Honor, it's marked
22 confidential too. Has it been waived?

23 EXAMINER ADDISON: I believe -- Duke's
24 counsel indicated it has been waived. Thank you.

25 MS. BOJKO: Thank you.

1 Q. Okay. That's all I need from you,
2 Mr. Bachand. Thank you.

3 A. You're welcome.

4 EXAMINER ADDISON: Thank you,
5 Mr. McNamee.

6 Redirect, Mr. McMurray?

7 MR. McMURRAY: Thank you. Can I have one
8 minute and we will get going?

9 EXAMINER ADDISON: You may.

10 Please proceed, Mr. McMurray.

11 MR. McMURRAY: Thank you, your Honor.

12 - - -

13 REDIRECT EXAMINATION

14 By Mr. McMurray:

15 Q. Mr. Bachand, what I would like to do is
16 go over some points that were brought up in
17 cross-examination yesterday by Mr. Healey and today
18 by Ms. Bojko. I would like to start with the
19 discussion you had with Mr. Healey yesterday
20 concerning the in-situ solidification work at East
21 End. Do you recall that?

22 A. Yes, I do.

23 Q. And do we refer to in-situ solidification
24 as ISS?

25 A. Yes.

1 Q. Did Duke Energy perform ISS in the Area
2 West of the West Parcel in 2016?

3 A. Yes, we actually did.

4 Q. Were those costs included in your TLB-6
5 exhibit?

6 A. Yes, they were, but they are included in
7 the fiscal year -- or in the year 2017, not the
8 invoices listed on 2016.

9 Q. So are you indicating that you want to
10 make a correction to a response to Mr. Healey?

11 A. Yes. I would like to.

12 Q. And what is that correction?

13 A. I believe I stated to Mr. Healey
14 yesterday that there was an error in my table which
15 Mr. Healey asked me if there was ISS performed in
16 2016 in the West of the West Parcel. I responded
17 that there wasn't, but subsequent to that, in
18 reviewing the invoices, I was correct with my initial
19 statement that ISS activities commenced in the West
20 of the West Parcel in 2016. In fact, it was in
21 December. However, that work was not invoiced to
22 Duke Energy until an early March 2017 invoice from
23 Haley construction -- or Haley Aldrich.

24 Q. So were the ISS costs included in TLB-6?

25 A. Yes, they were.

1 Q. Can you identify where in the TLB-6
2 exhibit?

3 A. On page 2 of 5 and it is the invoice --
4 it's the March 2017 invoice so I believe it's -- I
5 can't remember the exact number which invoice it is
6 but I know it's the March 2017 invoice.

7 MR. McMURRAY: Your Honor, may I approach
8 the witness?

9 EXAMINER ADDISON: You may.

10 MR. McMURRAY: We would like to mark as
11 Duke Exhibit, I believe we are at 32. Do you know,
12 Diane? Duke Exhibit 32, which is an HCS Construction
13 invoice dated March 7, 2017.

14 EXAMINER ADDISON: So marked.

15 (EXHIBIT MARKED FOR IDENTIFICATION.)

16 Q. (By Mr. McMurray) So, Mr. Bachand, I have
17 handed you what I have marked as Duke Ohio Exhibit
18 32. Do you recognize this document?

19 A. Yes, I do.

20 Q. And what is this document?

21 A. This is the March 7, 2017, invoice from
22 Haley Aldrich for the remediation at the East End MGP
23 site. And --

24 Q. And does this invoice include work for
25 ISS?

1 A. Yes, it does.

2 Q. Can you point for us in the invoice where
3 it indicates that?

4 A. The pages aren't marked so it might be a
5 little difficult. On -- so on page -- I guess we
6 will have to count double siding, so page 1, 2, 3, 4,
7 and then on page 5. It starts on page 4. There's a
8 section called Remedial Construction Phase Roman
9 numeral II.

10 And then if you go over to page 5, where
11 it says "Subcontractors," you will see Geo-Solutions
12 and there's dollar amounts listed there less
13 retainage. That work is for the Phase 2 Area. That
14 would include in-situ solidification and other
15 remediation related tasks.

16 And then if you would go back through the
17 backup contained in this invoice, you will actually
18 see the Geo-Solutions invoices to Haley & Aldrich.
19 And if you flip through those which are on page --
20 start on pages -- so that's 5, 6, 7, 8, 9, start on
21 page 10.

22 If you go to page 13, there are
23 categories listed. They are denoted by item numbers.
24 Phase 1 Area would be those item numbers referred to
25 as the letter A followed by a digit. Phase 2 Areas

1 would be -- would be the letter B followed by a
2 digit.

3 And if you go to lines that are -- the
4 line that's contained on B21 on the Geo-Solutions
5 invoice, it says "Soil Solidification." And you'll
6 see that there are -- there's a -- a unit in there
7 for this period, 76 -- 7965 or 7988, that's cubic
8 yards of amount of soil solidified so that's ISS.

9 Q. And how do we know that work was in the
10 Area West of the West Parcel?

11 A. It is broken out in this invoice by areas
12 as I just stated. Line B21, the B represents Phase 2
13 Area and if you go to the sequence of work, you'll
14 refer to line B11, it references Phase 2 and so on
15 and so forth.

16 Q. So as you testified yesterday, Phase 2
17 means Area West of the West Parcel.

18 A. Phase 2 is contained within the West of
19 the West Parcel.

20 Q. Okay. Thank you.

21 Is the invoice that -- that you have in
22 front of you now, is that typical of the sort of
23 invoices that you would receive on this project?

24 A. Yes.

25 Q. So yesterday there was a lot of

1 discussion about Exhibit TLB-6. Do you recall that
2 discussion?

3 A. Yes, I do.

4 Q. And there was discussion in particular
5 about why you prepared that exhibit, correct?

6 A. That is correct.

7 Q. And why did you put together that
8 exhibit?

9 A. I decided to initiate the development of
10 this exhibit or this table, if you will, after I
11 received the 2019 Staff's report and it showed the
12 disallowance of another \$9.3 million for year 2018.
13 And after reading that, it was apparent that those
14 costs were being disallowed because they were being
15 labeled as work within the Area West of the West
16 Parcel and/or work within the Ohio River.

17 And I had provided a DR back to Staff, I
18 believe it was in April of the same year, for the '18
19 filing where I specifically stated there was no
20 remedial activities conducted within the West of the
21 West Parcel in 2018. And Staff was recommending this
22 disallowance of \$9.3 million.

23 And I felt it necessary to go through
24 this exercise of creating a history, if you will, of
25 all the work that was done on the West of the West

1 Parcel to the best of my ability as well as summaries
2 of work done within the Ohio River in 2017 through
3 2018.

4 It was not my intent to create this table
5 to be 100-percent accurate because I don't know if
6 that's even possible. Tens of thousands of pages of
7 invoices were reviewed by myself to generate the
8 information that you see here which, in my opinion,
9 represents a more realistic approach of the types of
10 dollars that were being spent within the Area West of
11 the West including the largest component of the work
12 which is deemed the remediation component, which took
13 place in 2017 and lasted approximately six months.

14 Q. So can you briefly walk through the
15 process of preparing TLB-6?

16 A. Sure. I basically went back to 2013 and
17 reviewed, excuse me, historical invoices, one by one.
18 Dissected the work scope that the invoice was
19 referencing and made determinations as to whether or
20 not that work was particularly associated with the
21 area being referenced as the West of the West Parcel.
22 So as you can imagine, there's thousands of invoices
23 that I had to go through. I started on it in August,
24 right after receiving the report, and finished in
25 September.

1 Q. Do you recall Mr. Healey asking you,
2 yesterday, about OCC Exhibit 6?

3 A. Can you be specific? I didn't label them
4 up here.

5 Q. OCC -- OCC Exhibit 6. Date received,
6 September 6, 2019.

7 A. Yes, I have it right here. Yes, I have
8 it.

9 Q. So I believe Mr. Healey indicated, you
10 know, he was flattered or honored Duke was able to
11 provide a breakdown of costs regarding the Purchased
12 Parcel in response to their discovery request but
13 wondered why you had not done that previously in
14 response to the Staff's request. Do you recall that?

15 A. Yes, I do.

16 Q. When was this Data Request received?

17 A. September 6, 2019.

18 Q. And why were you able to provide the
19 information reflected in this response?

20 A. Because I had spent the last two-plus
21 months working on this table, TLB-6. So I had more
22 of that information already compiled.

23 Q. And so prior to that time, you had not
24 attempted to segregate, correct?

25 A. No. The unraveling of the work contained

1 within those invoices was just extremely cumbersome
2 and, as I indicated, I spent many hours over the
3 course of three months trying to dissect thousands
4 of -- thousands and thousands of invoices. So the
5 projects were not set up in a manner to track costs
6 by parcel. It's just not typical in our industry.

7 Fortunately, for the remediation, it's
8 being tracked by phase -- phases, and those phases
9 are contained within multiple parcels, but it wasn't
10 designed to track by parcel. And going back and, you
11 know, as I indicated, dissecting, unraveling those
12 costs and the work and tying it all together, it just
13 took a tremendous amount of time.

14 Q. Did the PUCO Opinion and Order require
15 Duke to track the costs by parcel?

16 A. No, it did not.

17 Q. Is it customary, in the environmental
18 world, to track costs by parcel?

19 A. No, it's not.

20 Q. Why not?

21 A. Because the work is done on a -- on a
22 site-by-site basis, not on a parcel-by-parcel basis.

23 Q. So how long did it take to complete the
24 active remediation of the Phase 2 Area?

25 A. Approximately six months.

1 Q. And when was that work completed?

2 A. In June of 2017.

3 Q. Can you turn to your Attachment TLB-5 in
4 your supplemental testimony.

5 A. Yes.

6 Q. And what is this document?

7 A. This is DR-04-001 to Staff. We received
8 it on April 2, 2019 and it's for Case 19-0174-GA-RDR.
9 And it is a discovery -- or Data Request pertaining
10 to East End, Area West of the West Parcel.

11 Q. And you were the person responsible for
12 responding?

13 A. Yes.

14 Q. So what does this document indicate with
15 regard to work performed at the Area West of the West
16 Parcel in 2018?

17 A. In my response, I provided a narrative
18 description of the work that was completed in Area
19 West of the West Parcel by the categories listed and
20 it included investigation.

21 Under Investigation, the work that was
22 completed in 2018 resulted in the collection of
23 groundwater samples from the two wells over the four
24 quarters so there's eight groundwater samples
25 collected.

1 We continued to conduct ambient air
2 monitoring in support of our active remediation
3 across the entire site, the East End site. As such,
4 in the northern -- northwest corner of the West of
5 the West Parcel, we had an air monitoring station
6 that was dedicated to the remediation project to
7 monitor off-site air as it would leave the site
8 inside the perimeter fence.

9 Analytical Laboratory, as I state here,
10 Pace Laboratory performed the analysis of the eight
11 groundwater samples collected by Haley & Aldrich.

12 Contractor Support is listed. That is a
13 site-wide tool where I have a person at Altamont
14 Environmental supporting me on managing some of the
15 costs, if you will.

16 Construction Management and Detailed
17 Design. Here it's -- this is the -- where I would
18 reference the work being completed by Haley & Aldrich
19 and their contract -- subcontractor Geo-Solutions as
20 it pertains to remediation.

21 And my response to this DR is that "There
22 were no active remediation activities conducted in
23 the Area West of the West Parcel requiring
24 construction management/detailed design in 2018,"
25 referencing that there were no costs for that

1 particular line item.

2 If you flip over. Vibration monitoring.
3 I believe I touched on this at one point earlier.
4 This is remote vibration monitors on critical
5 infrastructure at the gas plant to ensure that the
6 work we were performing, as it relates to
7 remediation, did not impact our ability to serve our
8 customers on the gas business unit. So we would have
9 vibration monitors on pipelines, et cetera.

10 Q. Was that because there was no active
11 remediation being performed in that area?

12 A. Correct. My response is that there was
13 no vibration monitoring activities conducted in 2018
14 in the Area West of the West Parcel. Again, because
15 in bullet 5, there was no remediation.

16 In 7, Miscellaneous. Again, it's the
17 performance bond. I spoke to Mr. Healey about that
18 particular line item. That continues to be a
19 site-wide requirement.

20 Q. So was active remediation being performed
21 elsewhere at the East End site during that period?

22 A. Yes. It was being performed in phases --
23 in Phase 3. And I can continue to read this if you
24 would like but.

25 Q. Just the next one.

1 A. Okay. Soil disposal, landfill costs.
2 "Soils were not excavated from the Area West of the
3 West Parcel in 2018." Therefore, there would be no
4 cost.

5 Q. So skipping down under "Note" under the
6 questions you received from Mr. Healey. Do you see
7 the sentence that starts "Due to the site-wide
8 nature"?

9 A. Yes, I do.

10 Q. Can you read that sentence?

11 A. Sure. "Due to the site-wide nature of
12 many of the above tasks, it is impracticable to
13 segregate costs out by parcel."

14 Q. And what did you mean by that?

15 A. I meant that the costs to conduct this
16 work are spread across site-wide invoices, not
17 parcel-by-parcel invoices. And the amount of time
18 and the amount of effort needed to go through and
19 unravel those invoices is evident by what I just
20 indicated to you, how much time it took for me to
21 create TLB-6, the thousands and thousands of pages of
22 documents of invoices that I had to go through to
23 extract the information and segregate out what would
24 be assigned or contributed to the West of the West
25 Parcel.

1 Q. So even when you did that, would it be
2 100-percent accurate?

3 A. No, it is not 100-percent accurate.

4 Q. Is it possible to be 100-percent
5 accurate?

6 A. It's possible but highly unlikely.

7 Q. To your knowledge were all of the
8 invoices for the work reflected in these and other
9 DRs provided in discovery?

10 A. Yes.

11 Q. Do you recall discussing with Mr. Healey
12 the specific Rumpke landfill invoices?

13 A. Yes, I do.

14 Q. And my recollection is that he discovered
15 that an invoice had been omitted?

16 A. That's correct.

17 Q. Can you describe the process for
18 identifying the Rumpke invoices for the work at the
19 Area West of the West Parcel?

20 A. Yes. I went back and reviewed the daily
21 construction reports from Geo-Solutions to get a
22 definitive state of when we broke ground on Phase 2
23 and when we stopped working on Phase 2 regarding soil
24 excavation and off-site disposal. And then
25 cross-referenced that -- those dates within the

1 hundreds of Rumpke invoices that I have, multiple of
2 hundreds of invoices that I have from Rumpke and
3 tried to collect all of those invoices and segregate
4 them out and attach them in my TLB-6. That's proof
5 that it wasn't perfect because I missed a Rumpke
6 invoice that I shouldn't have but I did.

7 Q. Was it your intent to include all Rumpke
8 invoices?

9 A. That was my intent.

10 Q. What was the total cost of work in the
11 Ohio River at the East End site in 2018?

12 A. The work in 2018 is approximately
13 1.6 million, I am rounding up.

14 Q. Is that reflected in your supplemental
15 testimony?

16 A. I believe it is.

17 Q. And do you recall the amount that the
18 Staff is recommending be disallowed for 2018 at the
19 East End site?

20 A. Approximately 9.3 million.

21 Q. Is that reflected in your supplemental
22 testimony?

23 A. Yes.

24 Q. Do you have any idea how the Staff could
25 have come up with that number?

1 A. No, I do not.

2 Q. Do you recall discussing with Ms. Bojko,
3 earlier this morning, the photographs attached as
4 TLB-3?

5 A. Yes, I do.

6 Q. Do you know where those photographs were
7 taken?

8 A. Yes, I do.

9 Q. Do you have personal firsthand knowledge
10 of that area?

11 A. Yes, I do.

12 Q. And where were they taken?

13 A. They were taken at the East End MGP site,
14 in the Area West of the West Parcel, looking south
15 and looking southwest.

16 Q. Did you personally observe the foundation
17 of the iron tar tank?

18 A. Yes. I have been present on that site
19 since we broke ground in 2016 up until last week when
20 I came here to this hearing. That is -- that is
21 where I have been working.

22 Q. So turning back briefly to TLB-6, so is
23 it your testimony in this proceeding that
24 7.46 million should be excluded from recovery based
25 upon the calculations in that exhibit?

1 A. No, it is not.

2 Q. Why not?

3 A. I don't believe that any of the costs
4 that I have detailed in TLB-6 should be excluded from
5 cost recovery based on my interpretation and my
6 understanding of the PUCO Order.

7 Q. And so what was the purpose again of
8 preparing TLB-6?

9 A. I prepared TLB-6 to -- to help show that
10 there's a great disparity between what Staff is
11 disallowing in 2018 and 2019 for what they are
12 labeling as the East End, Area West of the West
13 Parcel, and the Ohio River work. That it is far
14 above and beyond a more realistic number of the -- of
15 what it costs to do the work in the Area West of the
16 West and what we have spent to date on the Ohio
17 River.

18 MR. McMURRAY: Thank you, Mr. Bachand. I
19 have no further questions.

20 EXAMINER ADDISON: Thank you very much,
21 Mr. McMurray.

22 Mr. Healey.

23 MR. HEALEY: Yes, your Honor.

24 - - -

25

1 Q. It looks like it, yeah. And you see this
2 says Application period, January 1 through January
3 31, 2017, correct?

4 A. That is correct.

5 Q. Let's turn -- keep turning until you get
6 to the next one that looks similar. It will be a
7 similar-looking page. I am not going to try to count
8 how far along it is. For the record, it is the 26th
9 page of this exhibit.

10 A. Can you just flip it so I can?

11 Q. Sure. It's -- it's Invoice 12-015.0 and
12 then, underneath that, 4 and then a Roman numeral II.

13 A. Yes.

14 Q. And this one also says Application
15 Period, January 1 through January 31, 2017, correct?

16 A. That's correct.

17 Q. And then flip a few more pages to page
18 what I believe is page 31, another Geo-Solutions.
19 This would be Invoice 12-015.05.

20 A. Yes.

21 Q. And that one similarly says Application
22 Period, February 1 through February 23, 2017,
23 correct?

24 A. Correct.

25 Q. You can put that down. Thank you.

1 Do you recall questions from your
2 counsel, asking you how you went about creating your
3 TLB-6 Attachment?

4 A. Yes.

5 Q. And you stated that you went back through
6 the historical invoices one by one, correct?

7 A. Yes.

8 Q. And that would include invoices from 2013
9 and 2014?

10 A. Yes.

11 Q. And some of those invoices would have
12 been from before you were working for Duke, correct?

13 A. Yes.

14 Q. And so would those be invoices that you
15 were seeing for the first time potentially?

16 A. Some of them, yes.

17 Q. And you did not ask Ms. Bednarcik, who
18 would have been the project manager at the time, to
19 assist you in reviewing those invoices to determine
20 which ones were for the West of the West, correct?

21 A. That is correct.

22 Q. Do you still have in front of you, your
23 counsel asked you some questions about OCC Exhibit 6
24 which was Interrogatory 02-010 Consolidated.

25 A. Yes.

1 Q. And I believe in response to your
2 counsel's questions, you said that following the
3 issuance of the Staff Report, you started to
4 calculate some of these numbers, correct?

5 A. Correct.

6 Q. That would have been the 2019 Staff
7 Report?

8 A. Yes.

9 Q. Okay. So after the 2018 Staff Report,
10 you didn't start doing any of this analysis, correct?

11 A. Correct.

12 Q. Now, help me out here, when I was asking
13 you questions yesterday, I asked you about this
14 document. And I asked you when the first time was
15 that you started calculating these numbers and you
16 said it was in response to this Data Request; is that
17 right?

18 A. I don't recall if I actually said that.

19 Q. Well, maybe let's take a look at your
20 deposition transcript. I don't have the trial
21 transcript but let's look at your deposition
22 transcript and maybe we can refresh your memory a
23 little bit. If you have that, you can turn to
24 page 76, please.

25 A. I am there.

1 Q. Sure. And then line 22, during your
2 deposition, I asked you "So you received this
3 interrogatory," which is the one we are talking about
4 here, "and then endeavored to calculate these numbers
5 and then provided them in response to the
6 interrogatory?" And you replied "Yes."

7 Now you told your counsel instead that
8 you had already been working on those after the Staff
9 Report came out and then provided them to OCC. So
10 which one is it?

11 A. Well, it's a combination of both. I had
12 been working on them and got your discovery request.
13 And then I am not sure of the actual date of my
14 response.

15 Q. Sure.

16 A. But it wasn't on the 6th. It was
17 probably late September, early October, if I am not
18 mistaken.

19 Q. That would be September 6th is when you
20 received the interrogatory?

21 A. Right. And then when did you receive the
22 Duke Energy response?

23 Q. It would have been several weeks after
24 that.

25 A. Right. So it's a combination of both. I

1 had already been working on it but this DR required
2 me to be more expeditious in getting it done because
3 this had a definitive deadline versus me working on
4 it as a result of my response to Staff Report.

5 Q. Maybe let's look at your deposition
6 transcript again in the same page, 18, I asked "And
7 when did you calculate these numbers for the first
8 time?"

9 "Answer: During the whole interrogatory
10 process."

11 Why didn't you say I was already working
12 on them after the Staff Report?

13 A. I don't know. I mean, it's been going
14 on.

15 Q. Sure.

16 Let's turn back to your TLB-5, please, to
17 your supplemental testimony. And your counsel asked
18 you, in looking at this, whether you could be
19 100-percent accurate in calculating the costs of
20 investigating and remediating the West of the West.
21 Do you recall that?

22 A. Yes.

23 Q. And you said it's possible but highly
24 unlikely. Do you recall that response?

25 A. Yes.

1 Q. Now, I think we established yesterday,
2 even if it's not possible to be 100-percent accurate,
3 it's certainly possible to be a lot more accurate
4 than you were in your TLB-6, correct?

5 A. I don't believe so.

6 Q. You don't believe so.

7 A. I believe that going through -- it's
8 literally tens of thousands of pages. I made it very
9 clear yesterday that there are costs omitted in
10 table -- in my attachment TLB-6 such as analytical
11 costs, internal -- Duke internal costs. Those -- to
12 unravel those costs, I don't know if that's possible
13 at all, so I'll --

14 Q. Sorry. Go ahead.

15 A. If I don't feel that that's possible then
16 I don't see how you can get to 100 percent.

17 Q. But my question was, it's possible to be
18 more accurate, right? If you had not missed the
19 Rumpke invoice that, you know, you are an
20 environmental professional, I am a lawyer, I found
21 it, you missed it, right? So you could have been
22 more accurate?

23 A. Let me -- let me say this, I'm human.
24 I'm not perfect. And this was a very good-faith
25 effort to go through tens of thousands of pages of

1 documents and if I missed one, I missed it. But that
2 again pretty much establishes what I have been
3 saying. It's impractical to go through all this and
4 try to be 100-percent accurate. So whether you're
5 50-percent accurate or 51-percent or 70-percent or
6 71-percent accurate, I think it's still below
7 100-percent accurate.

8 Q. Sure. And I'm not suggesting that you
9 shouldn't be human and that people don't make errors.
10 The point is you made errors. We really don't know
11 how many because we uncovered several of them here
12 today and there could be others, correct?

13 A. I could have missed others, absolutely.
14 There are also, if we are going to go down that road,
15 there are also costs included in here that are
16 outside the West of the West Parcel. So you can see
17 how difficult it is to unravel, and what I mean by
18 that is if you look on this figure, part of the
19 Phase 2 Area is actually contained in the West
20 Parcel. So there's a portion of the actual
21 remediation costs that are not even contained in the
22 West of the West Parcel but we've lumped them in
23 here. Again, the unraveling, the dissecting of all
24 of these invoices, it's impractical. It's not
25 100-percent accurate. It never will be.

1 Q. And you just said to the -- let me ask
2 you this: To the extent there were potentially any
3 Phase 2 costs that were not in the West of the West,
4 you didn't make any attempt to figure out how much,
5 correct?

6 A. I cannot do that. That's not possible.

7 Q. Do you recall questions from your counsel
8 about Staff's disallowance of costs from 2018? It
9 was a \$9 million number.

10 A. In the report, yes.

11 Q. And counsel asked do you know how Staff
12 arrived at that number, correct?

13 A. Correct.

14 Q. And you said you don't know.

15 A. I don't know how they calculated that
16 number.

17 Q. Did you read the Staff Report?

18 A. Yes, I did read the Staff Report.

19 Q. Did you read Ms. Crocker's testimony?

20 A. Yes, I did.

21 Q. And despite reading those, you don't
22 understand how that number was calculated?

23 A. No, I do not. I do not know which
24 invoices she was referring to. I do not know which
25 tasks she was referring to. So, no, I do not know

1 how she came up with that number.

2 Q. And not knowing how she came up with it,
3 you therefore wouldn't be in a position to dispute
4 it, would you?

5 A. I am disputing it based on the amount of
6 work which is -- what I deem was completed in 2018,
7 and if the biggest dollar item that would have been
8 completed has to do with remediation and there was no
9 remediation.

10 Q. But that opinion wouldn't be based on
11 your firsthand review of Staff's actual analysis,
12 correct?

13 A. No. That opinion is based on my
14 firsthand experience in actually doing the work on
15 the site during 2018.

16 MR. HEALEY: That's all, your Honor.

17 EXAMINER ADDISON: Thank you, Mr. Healey.

18 Ms. Bojko?

19 MS. BOJKO: No questions, your Honor.

20 Thank you.

21 EXAMINER ADDISON: Thank you.

22 Ms. Whitfield.

23 MS. WHITFIELD: No questions, your Honor.

24 EXAMINER ADDISON: Ms. Kyler Cohn.

25 MS. COHN: No questions.

1 EXAMINER ADDISON: Mr. McNamee.

2 MR. McNAMEE: Thank you, your Honor, yes.

3 - - -

4 RECROSS-EXAMINATION

5 By Mr. McNamee:

6 Q. Mr. Bachand, you have got before you
7 what's been marked for identification as Duke Exhibit
8 32. That's the HCS thing.

9 A. Oh, yes, sorry.

10 Q. Okay. Was that information provided to
11 the Staff?

12 A. It's my understanding that it was
13 provided to Staff, yes.

14 Q. Okay. Could you tell me -- that would be
15 through a data request response?

16 A. I believe one of the standing responses
17 is that we provide you with the invoices to support
18 the DR.

19 Q. Okay. Do you know what data request
20 response this would have been provided through?

21 A. Not off the top of my head, no.

22 Q. Can you find out?

23 A. While I am sitting here right now?

24 Q. Yes.

25 A. I -- possibly if we have all the DRs here

1 for the years in question.

2 Q. I would be interested in knowing when
3 this was provided to the Staff, yes, or how this was
4 provided to the Staff, yes.

5 EXAMINER ADDISON: I don't think he
6 knows.

7 MR. McNAMEE: Okay.

8 EXAMINER ADDISON: I don't think he can
9 tell you the --

10 A. Right. I would have to sit and go
11 through the documents.

12 Q. So you don't really have any basis for
13 knowing this was provided to the Staff, do you?

14 A. It's my understanding that invoices are
15 provided to Staff to support our filing.

16 Q. But you don't know if this was provided
17 to the Staff even though you just testified that it
18 was.

19 A. I believe it would have been provided.

20 Q. That's a guess; isn't that right?

21 A. It's what I'm stating. I don't know
22 factually.

23 MR. McNAMEE: Okay. Good enough. Thank
24 you.

25 THE WITNESS: You're welcome.

1 EXAMINER ADDISON: Is that all,
2 Mr. McNamee?

3 MR. McNAMEE: Oh, I'm sorry. Yes, that's
4 all.

5 EXAMINER ADDISON: Thank you very much.
6 I do have just some follow-up questions,
7 Mr. Bachand.

8 THE WITNESS: Got it.

9 EXAMINER ADDISON: Perfect.

10 - - -

11 EXAMINATION

12 By Examiner Addison:

13 Q. You've noted several times during your
14 testimony that it would be impracticable at this
15 point to segregate costs out by parcel; is that
16 correct?

17 A. That is correct.

18 Q. And you've indicated also that that is
19 industry practice not to do so, correct?

20 A. Correct.

21 Q. Would it have been more practicable to do
22 that had Duke instructed contractors and those
23 working below it on these investigatory and
24 remediation activities to do -- to segregate those
25 costs out at the beginning of these projects?

1 A. Since it doesn't conform to industry
2 standards, I think for us to have done that, it
3 probably would have been more aligned with a
4 directive versus us trying to come up with that on
5 our own because we were -- since the conception of
6 the work, we were dealing with industry standards.

7 Q. Thank you. And that would have been
8 considered an unusual request to make to these
9 contractors that were working --

10 A. Yes.

11 Q. -- at your direction?

12 A. Yes.

13 Q. Okay. Would making such a request -- and
14 I believe you've indicated you didn't know the
15 expense that would be associated with making that
16 request. Would making that request to segregate
17 costs out by parcel have impacted the cost of
18 conducting these activities in your opinion?

19 A. Yes.

20 Q. Can you explain how.

21 A. Tracking -- so fieldwork would start and
22 stop in the specific parcel and have to be logged and
23 tracked. So think of any time you start a project,
24 there is a mobilization, there is a demobilization.
25 So if we were doing that, we would move to a parcel

1 and have to do the work and then de-move off of that
2 parcel versus -- so there would be multiple move and
3 de-move charges versus one of each if you have
4 considered it site-wide.

5 There's the expenses associated with,
6 let's pick on the groundwater monitoring since that's
7 one we have been talking about routinely.

8 When we collect groundwater samples and
9 ship them to the lab, it's under one chain of
10 custody, it's one lab report for the 21 wells. If
11 now, all of a sudden, we are segregating that out by
12 parcel, there's what, about four lab reports. That's
13 more -- more expense incurred right there just from a
14 lab standpoint.

15 So there's QA, QC samples on each one of
16 those reports, so each -- each parcel would be a
17 designated report so, you know, more invoices to
18 process, to track, et cetera.

19 That not only adds more Duke internal
20 labor charges for myself and our central lab, as well
21 as time on our consultants to track and monitor those
22 costs, those project tasks, et cetera. Consider it
23 each parcel would be deemed a project versus the East
24 End site as one holistic project.

25 Q. Thank you.

1 A. You're welcome.

2 Q. And just to follow-up on some questions
3 that Ms. Bojko had for you regarding the Ohio River.
4 Would the existence of tar in the sediment, during
5 your sampling activities, trigger VAP requirements
6 regardless of -- perhaps you can just answer that
7 question. Would that trigger any VAP requirements?

8 A. Yes. It would trigger the need to
9 further investigate and delineate the tar impacts.

10 Q. Would there be any circumstances where
11 you would not have to remediate in the event that you
12 would discover tar in the sediment during that
13 sampling process?

14 A. I can't answer that sitting here today.
15 That requires a complete evaluation of all the data
16 that would be collected and we are still in the
17 process. So that's part of the remedial design
18 evaluation. And I can't -- I can't answer that
19 today.

20 Q. Thank you.

21 A. You're welcome.

22 Q. I believe in your testimony you've
23 indicated that the water has elevated since these MGP
24 facilities were in operation for the Ohio River; is
25 that correct?

1 A. Correct.

2 Q. And I'm guessing you did not treat the
3 area in which the water has elevated to cover those
4 original MGP areas, any differently than the rest of
5 the Ohio River, is that correct, where you have
6 conducted sampling?

7 A. Correct. The sampling that we have
8 conducted is -- in the Ohio River, was once -- as you
9 get closer to the shoreline, existing shoreline
10 today, prior to the completion of the Markland Dam,
11 those areas would have been -- where the water is
12 today, those areas would have been uplands. The dam
13 raised the river elevation and flooded portions of
14 what was once considered upland so.

15 EXAMINER ADDISON: Thank you. I believe
16 that's all my questions and you are excused. Thank
17 you very much.

18 Mr. McMurray, I believe you had
19 previously moved for admission of some Duke exhibits.
20 Are there any additional exhibits you would like to
21 move for admission at this time?

22 MR. McMURRAY: Yes, your Honor. We would
23 move for admission of Duke Energy Ohio Exhibit 32
24 which is the HCS invoice.

25 EXAMINER ADDISON: Thank you. And that's

1 in addition to Duke Exhibits No. 9, 10, 11, 12, 13,
2 and 14; is that correct?

3 MR. McMURRAY: Yes, correct, thank you.
4 Yes, Mr. Bachand's testimony, correct, thanks.

5 EXAMINER ADDISON: Thank you very much.

6 Are there any objections to the admission
7 of Duke Energy Ohio Exhibits Nos. 9, 10, 11, 12, 13,
8 14, or 32?

9 Hearing none, they will be admitted,
10 subject to that very limited motion to strike that
11 was granted previously.

12 (EXHIBITS ADMITTED INTO EVIDENCE.)

13 Mr. Healey.

14 MR. HEALEY: Yes, your Honor. OCC
15 Exhibits 3 through 17.

16 EXAMINER ADDISON: Any objections?

17 Hearing none, they will be admitted.

18 (EXHIBITS ADMITTED INTO EVIDENCE.)

19 EXAMINER ADDISON: Ms. Bojko.

20 MS. BOJKO: Thank you, your Honor. OMAEG
21 moves Exhibit 2 into the record.

22 EXAMINER ADDISON: Any objections?

23 It will be admitted.

24 (EXHIBIT ADMITTED INTO EVIDENCE.)

25 EXAMINER ADDISON: Mr. McNamee.

1 MR. McNAMEE: Your Honor, Staff would
2 move for the admission of Exhibits 5 and 7.

3 EXAMINER ADDISON: Any objections?

4 Hearing none, they will be admitted.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 MR. HEALEY: Your Honor, I would like to
7 make one more quick motion. I would also move for
8 the admission of Staff 4. I believe 4 is included in
9 7, but I did ask one of the witnesses several
10 questions about Staff 4. So for purposes of the
11 record, I think it would be helpful to have that
12 available. I had some questions about the various
13 project tasks on there.

14 EXAMINER ADDISON: Any objection to the
15 admission of Staff Exhibit No. 4?

16 Hearing none, it will be admitted.

17 (EXHIBIT ADMITTED INTO EVIDENCE.)

18 EXAMINER ADDISON: Thank you.

19 MR. McKENNEY: Your Honor, can we take 5
20 before the next witness?

21 EXAMINER ADDISON: Let's go off the
22 record.

23 (Discussion off the record.)

24 EXAMINER ADDISON: Let's go back on the
25 record.

1 Mr. McMurray.

2 MR. McMURRAY: Thank you, your Honor.

3 Duke Energy Ohio calls Shawn Fiore to the stand.

4 EXAMINER ADDISON: Welcome. Please raise
5 your right hand.

6 (Witness sworn.)

7 EXAMINER ADDISON: Please be seated. If
8 you could just turn on your microphone. Thank you
9 very much.

10 - - -

11 SHAWN S. FIORE

12 being first duly sworn, as prescribed by law, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 By Mr. McMurray:

16 Q. Hello, Mr. Fiore. Can you please state
17 your name for the record?

18 A. Shawn S. Fiore.

19 Q. Can you sit a little closer.

20 EXAMINER ADDISON: Thank you.

21 A. Shawn S. Fiore.

22 Q. And who are you employed by and in what
23 position?

24 A. Haley & Aldrich, Incorporated. My
25 position is Senior Vice President.

1 Q. And what is your business address?

2 A. 6500 Rockside Road, Suite 200, Cleveland,
3 Ohio or Independence, Ohio.

4 Q. Did you cause to be filed written
5 testimony in this proceeding on behalf of Duke Energy
6 Ohio?

7 A. I did.

8 Q. Do you have that written testimony in
9 front of you now which is marked as Duke Energy Ohio
10 Exhibit 15?

11 A. I do not.

12 MS. BOJKO: I'm sorry. What number did
13 you say?

14 MR. McMURRAY: 15.

15 MS. BOJKO: Operator error.

16 MR. McMURRAY: It seems like there is a
17 lot of paper involved in this proceeding.

18 Q. (By Mr. McMurray) Okay. Let's go over
19 that again. Mr. Fiore, do you have that written
20 testimony in front of you now which is marked as Duke
21 Energy Ohio Exhibit 15?

22 A. Yes, I do.

23 Q. Are there any changes or corrections you
24 would make to the testimony that you have filed?

25 A. No.

1 Q. Is that testimony true and accurate to
2 the best of your knowledge?

3 A. It is.

4 Q. Would your answers be the same if I asked
5 you the same questions today?

6 A. They would.

7 Q. Do you hereby adopt this written
8 testimony as your testimony in this proceeding?

9 A. Yes.

10 MR. McMURRAY: Duke Energy Ohio -- strike
11 that.

12 There are exhibits to Mr. Fiore's written
13 testimony. The -- both of those exhibits, I'm in
14 SSF-2 which is a Focused Remedial Alternatives
15 Analysis for the Phase 3 and Tower Areas and prepared
16 by CH2M, and a Focused Remedial Alternatives Analysis
17 prepared by Haley & Aldrich, they are marked
18 Confidential Proprietary Trade Secret.

19 Duke Energy no longer considers these
20 documents to be confidential and so, for purposes of
21 Mr. Fiore's testimony, we are treating these as not
22 confidential, public. Duke Energy intends to refile
23 his testimony as a public document.

24 EXAMINER ADDISON: Thank you,
25 Mr. McMurray. And while Duke Exhibit No. 15 was

1 previously marked, I would imagine that you've given
2 public versions to the court reporters as well?

3 MR. McMURRAY: Yes.

4 EXAMINER ADDISON: Thank you very much.

5 MR. McMURRAY: Duke Energy Ohio moves for
6 admission of Mr. Fiore's direct testimony which is
7 identified as Duke Energy Ohio Exhibit 15.

8 EXAMINER ADDISON: Thank you very much,
9 Mr. McMurray. I will reserve ruling on that motion
10 for admission upon completion of cross-examination.

11 Ms. Bojko

12 MS. BOJKO: Thank you, your Honor. Would
13 this be a good time for motions to strike?

14 EXAMINER ADDISON: Yes, it is.

15 MS. BOJKO: Your Honor, the first motion
16 to strike is on page 20, line 1 through 4. Your
17 Honor, OMAEG moves to strike page 20, lines 1 through
18 4 from Mr. Fiore's testimony inasmuch as it
19 constitute a legal conclusion for which Mr. Fiore
20 lacks a proper foundation and he is not qualified to
21 offer opinion testimony on what costs are reasonable
22 and prudent under Ohio law. He is not a lawyer. He
23 does not have a legal background or regulatory
24 background. As such, under evidence rule 701, 702
25 and 704, he cannot offer a legal opinion on this

1 matter.

2 Your Honor, this is a bit different than
3 some of the other motions we've had because this is
4 actually offering opinion on the prudence which is
5 the whole issue of this case and what the Commission
6 is to determine in this case. So it's a little
7 different than prior legal opinions regarding CERCLA
8 and the 2012 case and what the Opinion and Order
9 says. This is actually making a legal conclusion on
10 issues that are to be resolved by the proceeding
11 before us.

12 EXAMINER ADDISON: Thank you.

13 Mr. McMurray, response?

14 MR. McMURRAY: So Mr. Fiore is an
15 environmental professional with 30 years' experience
16 with site investigation and cleanups. Mr. Fiore has
17 been a certified professional under Ohio's Voluntary
18 Action Program since its inception. Mr. Fiore is
19 very experienced with the evaluation of liability and
20 the programs that are available to address liability
21 under environmental laws including Ohio VAP.

22 With regard to the comments concerning
23 the reasonableness and prudence, my interpretation of
24 Mr. Fiore's testimony is he's comparing, as the VAP
25 CP, the work that was performed during the 2013 to

1 2018 time period, which is the subject of this
2 proceeding, with the work that was done at the site
3 previously that the Commission, in its Opinion and
4 Order, deemed to be reasonable and prudent. And so
5 it is the comparison of that which he has first-hand
6 knowledge because he has been involved at the site,
7 particularly the East End site during the entire time
8 period. That's in line too with regard to the
9 Commission's Opinion and Order.

10 With regard to the balance, I think that
11 is not tied to necessarily the Commission Opinion and
12 Order but, rather, that's based upon his very
13 extensive experience under the VAP and under other
14 environmental programs to opine concerning what is a
15 reasonable approach to mitigating site risks and
16 addressing environmental liabilities.

17 MS. BOJKO: May I briefly respond, your
18 Honor?

19 EXAMINER ADDISON: You may.

20 MS. BOJKO: Again, this has nothing to do
21 with the environmental and his experience under VAP.
22 He is making a legal conclusion, under the Commission
23 Order, of the activities that occurred were prudent
24 in this case. "Prudency" has a very distinct meaning
25 to this Commission, and he is making an improper

1 legal conclusion as to the findings of this case. It
2 has nothing to do with the environmental and his
3 experience as an environmental person. It's very
4 prejudicial to this record and that's why it needs to
5 be struck.

6 EXAMINER ADDISON: Thank you, Ms. Bojko.

7 I am going to deny the motion to strike
8 but I believe you can bring out these particular
9 points during your cross-examination, and whether or
10 not the witness's use of "prudence," as used in his
11 testimony, has the same meaning as the Commission's
12 understanding of what that term means. Thank you.

13 MS. BOJKO: Thank you, your Honor.

14 The second motion to strike is on
15 page 14, lines 17 through 20. Your Honor, in this
16 part of his testimony he says "Based on the documents
17 that I have reviewed." This testimony should be
18 stricken as it lacks foundation and lacks personal
19 knowledge. Under rule 602 of the Ohio Rules of
20 Evidence, a witness may not testify to a matter
21 unless evidence is introduced sufficient to support a
22 finding that the witness has personal knowledge of
23 the matter.

24 Here, Mr. Fiore has no personal
25 knowledge. He reviewed documents and he cannot make

1 a statement as to something that he does not have
2 personal knowledge of.

3 EXAMINER ADDISON: Thank you.

4 Mr. McMurray?

5 MR. McMURRAY: Mr. Fiore is an expert on
6 environmental investigation remediation. Experts in
7 that profession review and rely upon environmental
8 reports. In this situation there's even more
9 reliability on the environmental reports because
10 these are environmental reports that are being
11 prepared pursuant to Ohio Voluntary Action Program.
12 And so it is customary and typical for an expert,
13 such as Mr. Fiore, to review and rely upon other
14 reports in rendering opinions. In this case, there's
15 added, you know, appropriateness to that because this
16 work is being performed under the Ohio Voluntary
17 Action Program.

18 MS. BOJKO: Your Honor, may I briefly
19 respond to that?

20 This is about the West End site.
21 Mr. Fiore is not the VAP expert or the VAP CP for the
22 West End site. Mr. Brown is. Mr. Brown is here to
23 testify. This is a statement about Mr. Brown's work.
24 So to the extent that it's about Mr. Brown's work,
25 it's -- he lacks the personal knowledge but also it's

1 cumulative and unnecessary to the record. Mr. Brown
2 is here to testify. He can testify to his
3 conclusions about the West End site. It should not
4 be for this VAP CP about the East End site, he was
5 hired only for the East End site, to make this
6 conclusion

7 EXAMINER ADDISON: Thank you, Ms. Bojko.

8 MR. McMURRAY: Your Honor, that's
9 incorrect.

10 EXAMINER ADDISON: Well, let me ask the
11 witness. Mr. Fiore, are you the VAP-certified
12 professional currently overseeing the MGP remediation
13 efforts for the East End site?

14 THE WITNESS: Yes.

15 EXAMINER ADDISON: You are.

16 THE WITNESS: For the East End site.

17 MS. BOJKO: What was his answer or can I
18 get the question again?

19 EXAMINER ADDISON: For the East End site.
20 For the East End site if he is the VAP CP. I am
21 getting to it. Hold on.

22 MS. BOJKO: No. I just didn't hear you.

23 EXAMINER ADDISON: Oh.

24 And the same question for the West End
25 site.

1 THE WITNESS: I've been providing --
2 excuse me -- I've been providing oversight and
3 support to the West End site, though they've had
4 other CPs work on the project.

5 EXAMINER ADDISON: So you have been
6 involved with --

7 THE WITNESS: I have been involved with
8 the West End site, providing information, providing
9 strategic consulting I guess is what I would say.

10 MS. BOJKO: Your Honor, it's my
11 understanding that that didn't occur until after his
12 testimony was drafted that he was -- his testimony
13 specifically says he was not hired for the West End
14 site.

15 EXAMINER ADDISON: Thank you, Ms. Bojko.
16 And Mr. Fiore, when did your work on the
17 West End site commence?

18 THE WITNESS: So I've been supporting the
19 West End site, providing support to Duke, for quite
20 some time. I haven't been the CP of record. When
21 they hire another company to do investigation, that
22 company has a certified professional on staff. They
23 hired CH2M HILL to do some work. CH2M HILL had a CP
24 overseeing that work. So I was providing consulting
25 services at a different level, not specific to the

1 work they were doing, but more strategic for the
2 whole project.

3 EXAMINER ADDISON: Can you roughly
4 estimate when you began working on the West End site?

5 THE WITNESS: That's -- boy, that's a
6 good question. I've been speaking with other -- with
7 Duke about it for quite some time. Again, I am
8 not -- I have not been the CP of record for those
9 specific documents, so my involvement has been
10 increasing after my testimony was filed, but I had
11 been involved previously. 2016 maybe.

12 EXAMINER ADDISON: And can you describe
13 just generally what your involvement has been, maybe
14 a little more -- a little more detail than what you
15 have already expressed?

16 THE WITNESS: Sure. I have reviewed work
17 plans and provided feedback. I've -- I've been asked
18 to provide -- on certain pieces of work I have been
19 asked to provide whether or not it's -- it meets
20 standards in my opinion or would meet standards or
21 it's appropriate under the VAP. Certain sampling
22 methods, are they appropriate or not. So I was maybe
23 checking or reviewing work of others.

24 EXAMINER ADDISON: And would you say that
25 that is pretty common in the industry? For

1 circumstances such as this when two different sites
2 are impacted?

3 THE WITNESS: So -- so the West End site
4 has had a number of CPs and a number of consultants.
5 So there's a lot of different people who have worked
6 on the project over the years. So I don't know if I
7 have worked on a number of other sites like that.

8 MR. McMURRAY: I think she was referring
9 to your involvement at the West End site.

10 THE WITNESS: Could you restate that? I
11 misunderstood completely.

12 EXAMINER ADDISON: Yeah. I am more
13 interested in your involvement in the West End site,
14 generally what -- what your involvement has been. If
15 you could kind of describe.

16 THE WITNESS: Right.

17 EXAMINER ADDISON: And if -- all right.
18 Take a step back. I think I was a question ahead of
19 myself. So my question was, is it common to
20 collaborate with other CPs --

21 THE WITNESS: Yeah.

22 EXAMINER ADDISON: -- on projects such as
23 this even if you weren't the official CP dedicated to
24 a certain site.

25 THE WITNESS: Correct. There's a

1 mechanism to that under the VAP. So under the VAP if
2 previous work had been done by a CP and then
3 ultimately you moved toward a No Further Action
4 letter, work done by the initial CPs or subsequent
5 CPs to that must be provided to the CP of record
6 under affidavit. And they would have a sample
7 affidavit in the rules for just such a case when CPs
8 work together on a project or a project extends over
9 a period and requires CPs to work together.

10 EXAMINER ADDISON: Thank you very much,
11 Mr. Fiore.

12 Based on the witness's responses to my
13 questions, I am going to deny the motion to strike.
14 However, I will provide you a great deal of latitude
15 as to this particular section of his testimony during
16 your cross.

17 MS. BOJKO: Thank you, your Honor.

18 My third motion to strike is on page 5,
19 at lines -- starting on line 15 and then it goes over
20 to page 8, line 14, the end of that section.

21 Your Honor, to the extent Mr. Fiore is
22 attempting to incorporate by reference his prior
23 written testimony in the 2012-16 case, OMAEG objects
24 and moves to strike. That testimony is not part of
25 the record in this proceeding. It was not attached

1 to his testimony in this proceeding. And it has not
2 been subject to discovery. Thus it is improper and
3 cannot be considered part of his testimony but he
4 heavily talks about how he is going to update that
5 testimony or add to that testimony. That testimony
6 is not part of the record. So this is inappropriate
7 and it should be stricken.

8 Also if you look at page 3, lines -- the
9 end of the sentence on -- or the beginning of the new
10 sentence on line 4, "My previous testimony," this
11 again points to the fact that he's trying to bring in
12 and adopt and incorporate by reference his previous
13 testimony which cannot and should not be the case.
14 He should have attached it to his testimony if that's
15 what he wanted to do, but it's apparent that's what
16 he is trying to do and that's improper.

17 EXAMINER ADDISON: Thank you.

18 Mr. McMurray.

19 MR. McMURRAY: Can I have one moment?

20 EXAMINER ADDISON: You may.

21 MR. McMURRAY: Your Honor, as to this, I
22 don't believe Mr. Fiore's intent is to incorporate
23 all of his prior testimony from the 2012 natural gas
24 rate case, although he did have written testimony.
25 He was subjected to cross-examination at that

1 hearing.

2 As I am reading through this testimony, I
3 think he's essentially -- I mean this testimony can
4 stand on its own and so if the issue is that there's
5 information that is trying to be brought in through
6 this testimony that related to his prior testimony,
7 we could stipulate that is not the intent.

8 As I am reading through this, I believe
9 that this stands on its own with regard to the
10 general descriptions concerning Ohio's Voluntary
11 Action Program and so on.

12 I would also say that, you know, the
13 parties had the opportunity to take Mr. Fiore's
14 deposition. They didn't do that. They could have
15 asked then. But it is not the intent, I believe, to
16 incorporate by reference the prior testimony.

17 MS. BOJKO: Your Honor, may I briefly
18 respond?

19 EXAMINER ADDISON: You may.

20 MS. BOJKO: You know, legal strategies of
21 choosing or not to choose to do a deposition or the
22 legal expenses associated therewith, have no bearing
23 on this case. The testimony actually says, several
24 times, what the record in the natural gas rate case
25 says and that is not proper. And to Mr. McMurray's

1 point, if we are going to bring in that testimony,
2 then we need to bring in the cross so we can see how
3 that testimony did not stand without
4 cross-examination and that there probably were
5 credibility issues, factual issues, all of those in
6 the case below.

7 So you can't bring in testimony and
8 assume it was adopted with no challenges because
9 that's not what happened. So if you are going to
10 include it there was no point in actually having
11 these statements and assertions if the testimony was
12 to stand on its own, then it should have stood on its
13 own and not been referred to. Every single question
14 in the pages that I mentioned, your Honor, reference
15 the natural gas rate case and summarize basically the
16 testimony in the natural gas rate case. That's not
17 proper for this proceeding.

18 EXAMINER ADDISON: Thank you.

19 I tend to agree that it seems the
20 testimony does stand on its own. This is Mr. Fiore's
21 attempt to describe the V-A-P, or VAP, Voluntary
22 Action Program, as well as the requirements to become
23 a certified professional under that program. As well
24 as the requirement to determine an N -- when an NFA
25 letter may be issued for a property. These are all

1 items that have been heavily discussed during this
2 proceeding already.

3 I don't believe there's anything that we
4 have to go through in the record of the 2012 case in
5 order to determine for this -- for what he is trying
6 to present in his testimony in this case.

7 Do I think the references to the record
8 in the natural gas rate case are the most
9 appropriate, probably not. But they are there. I
10 don't -- I don't believe that there's any issue to
11 have those statements remain. The testimony stands
12 on its own. And you can certainly cross-examine as
13 to whether or not the requirements set forth in his
14 testimony in this particular section is appropriate
15 or not.

16 MS. BOJKO: Well, your Honor, with that
17 ruling, maybe I could modify my motion and just ask
18 that the first sentence in each of the three first
19 three questions be removed so that there's no
20 implication that the record below is somehow
21 incorporated herein and that parties could rely upon
22 that without it being moved into evidence in this
23 case. I think your point is made if you delete the
24 first sentence in each of the first three questions
25 that reference the natural gas rate case -- or

1 strike, excuse me.

2 EXAMINER ADDISON: Mr. McMurray, any
3 response to that?

4 MR. McMURRAY: Yes, your Honor. So if we
5 look at the one that starts on page 5, the reference
6 is to the description that's in the Commission's
7 November 13, 2013, Opinion and Order. And so, there,
8 I don't see where there's any attempt to reference
9 his specific testimony and bring that in. It's a
10 reference to, you know, what is actually in the
11 Opinion and Order. So I don't see where there is any
12 potential prejudice or harm by that statement.

13 EXAMINER ADDISON: Yeah. And just for
14 appearance's sake, I believe doing that may -- may
15 make the questions a little bit more difficult to
16 ascertain what's actually being asked. If we
17 eliminate the entire first sentence of each question.
18 So I'm not sure if that makes the most sense in order
19 to move forward. But my prior ruling stands and the
20 motion to strike will be denied.

21 MS. BOJKO: Thank you, your Honor.

22 EXAMINER ADDISON: Thank you.

23 MS. BOJKO: And lastly, your Honor, I
24 would be remiss if I didn't make my last motion to
25 strike which would be to move to strike portions of

1 Mr. Fiore's testimony that talks about the Purchased
2 Parcel and the WOW Parcel testimony as well as the
3 Ohio River testimony. These are on pages 15, line 19
4 through page 16, line 7. And the Ohio River
5 testimony is page 16, lines 8 through 12.

6 These are for the same reason that we've
7 already argued with respect to Ms. Bednarcik and
8 Mr. Bachand -- Bachand's testimony respectively. We
9 understand your prior ruling regarding the collateral
10 estoppel issues that we've raised, but I would like
11 to just mention that and note it for the record to
12 preserve the issue.

13 EXAMINER ADDISON: Thank you very much,
14 Ms. Bojko. Your objection or motion to strike is
15 noted but, consistent with my prior rulings, it will
16 also be denied and I would invite you to raise that
17 issue on brief.

18 MS. BOJKO: Thank you.

19 EXAMINER ADDISON: Thank you.

20 MR. McKENNEY: Your Honor, I also had two
21 limited motions to strike.

22 EXAMINER ADDISON: Certainly. Proceed,
23 Mr. McKenney.

24 MR. McKENNEY: On page 11 of Mr. Fiore's
25 testimony, beginning about halfway through the

1 sentence with the word "I" through the end of the
2 sentence. He says "I understand that cost was one of
3 the factors that was considered in assessing remedial
4 alteratives at both sites."

5 EXAMINER ADDISON: Mr. McKenney, I'm
6 sorry, you said page 11. What line are you on?

7 MR. MCKENNEY: I'm sorry. Line 6, about
8 halfway through the sentence.

9 EXAMINER ADDISON: Thank you.

10 MR. MCKENNEY: An understanding is a lack
11 of personal knowledge. A lack of personal knowledge,
12 under rule 602 of the Ohio Rules of Evidence, a
13 witness may not testify to a matter unless evidence
14 is introduced sufficient to support a finding that
15 the witness has personal knowledge of the matter.

16 His indication here of an understanding
17 that cost was one of the factors considered is not
18 any personal knowledge that cost was considered. He
19 can't testify to the fact that it was if he doesn't
20 know it. There are other witnesses here that can
21 testify to that matter but, as for his testimony, we
22 think that line 6, starting with the word "I" through
23 the end of that sentence should be struck from the
24 record.

25 EXAMINER ADDISON: Mr. McMurray.

1 MR. McMURRAY: Yes, your Honor. Thank
2 you. So as to -- as to that item, in this case
3 Mr. Fiore, as the VAP certified professional and
4 through his role at Haley & Aldrich, actually
5 participated in the Focused Remedial Alternatives
6 Analysis which is reflected as one of the attachments
7 to his testimony.

8 And if you want to cross-examine him on
9 that particular report, you'll see where it does
10 identify that cost was a factor that was considered
11 in determining, you know, the remedial alternatives.
12 And so, he actually has firsthand knowledge with
13 regard to the East End site Focused Remedial
14 Alternatives Analysis.

15 With regard to the West End site, you
16 know, in his role as sort of the overseeing CP, he's
17 reviewed the other attachment which is the Focused
18 Remedial Alternatives Analysis for the West End site.
19 Going through that, it identifies that cost is one of
20 the factors in addition to the other items that are
21 considered here.

22 And so I think if you question him,
23 you'll find he actually has firsthand knowledge as to
24 the East End. And certainly, as an expert, he
25 reviewed a report that contained that evaluation that

1 was consistent with the evaluation of the East End
2 site. So I think he is qualified to make that
3 statement.

4 MR. McKENNEY: If I can just respond
5 briefly?

6 EXAMINER ADDISON: You may.

7 MR. McKENNEY: I don't think "qualified"
8 has to do with whether he has the knowledge or not.
9 I am not disputing his qualifications. Yes, he does
10 have the remedial alternatives analyses attached to
11 his testimony, but he is saying here he has an
12 understanding that cost was one of the factors
13 considered in those. That does not mean he has
14 knowledge or participated in those discussions
15 regarding cost. Further, he is not the creator of
16 either of these remedial alternatives or assessments.

17 So under rule 602, I would say any
18 understanding he has that costs are factors should be
19 struck because that's not his knowledge. And any
20 knowledge he does have, it sounds like it could very
21 well be hearsay, so. From the word "I" to the end of
22 the sentence, I mean I think -- I think I will stand
23 on what I said. It's lack of personal knowledge. It
24 should be struck.

25 EXAMINER ADDISON: Thank you,

1 Mr. McKenney. I believe that this would be more
2 appropriate to be vetted during cross-examination. I
3 would be happy -- I will be denying the motion to
4 strike at this time, but I'll be happy to reconsider
5 if it becomes evident that he has no personal
6 knowledge when you cross-examine him on this
7 particular portion of his testimony.

8 MR. McKENNEY: Thank you, your Honor.

9 And I have one more limited one. I don't
10 want to retread previous ground here, but I am going
11 to look at page 20 and line 3. This is the same --
12 now OMAEG just recently made a motion to strike on
13 this paragraph. I think mine is a little bit more
14 limited.

15 So on line 3, page 20, starting with the
16 word "to" ending with the word "liability." "To
17 address Duke Energy Ohio's liability." That's all I
18 would propose to strike. That is a legal conclusion.
19 I am not talking about potential liability. He is
20 declaring there is liability and this is being done
21 to address it. That's a legal conclusion.

22 So really a narrower motion to strike
23 than I think OMAEG made and was denied, just to
24 address that language there, "to address Duke Energy
25 Ohio's liability." That's a legal conclusion. He is

1 not an attorney. He is not qualified to make the
2 legal determination that they have liability. And,
3 to my knowledge, no liability has ever been found. I
4 think getting that out of the record clarifies the
5 record and certainly reduces any risk of prejudice
6 that Duke has liability and they are doing action to
7 resolve that liability.

8 EXAMINER ADDISON: Thank you.

9 Mr. McMurray.

10 MR. McMURRAY: Yes, thank you, your
11 Honor.

12 First, I would say it -- we believe that
13 it's already been determined that Duke Energy Ohio
14 has liability as established by the Commission's 2013
15 Opinion and Order.

16 But notwithstanding that, Mr. Fiore's
17 expertise in environmental investigation and
18 remediation, particularly under Ohio's Voluntary
19 Action program, makes him almost uniquely qualified
20 to render this sort of opinion because the purpose of
21 Ohio's Voluntary Action Program is to allow people to
22 investigate and remediate sites to address that
23 liability.

24 And so, this is very consistent with his
25 expertise as a certified professional and why he has

1 been engaged to assist Duke with regard to the work
2 at the two sites.

3 MR. McKENNEY: If I can respond briefly?

4 EXAMINER ADDISON: You may.

5 MR. McKENNEY: If you read the sentence
6 with the stricken language there, you will find that
7 it actually doesn't change the substance of the
8 sentence to what Mr. McMurray has just stated. The
9 sentence would still read the activities "were
10 reasonable and prudent to mitigate site risks and to
11 meet all applicable standards under the VAP."

12 I am not asking that his entire sentence
13 be stricken. I am not saying he's not qualified to
14 make some -- some statements as to whether site risks
15 were being mitigated or applicable standards were
16 attempting to be met. Just the limited nature of the
17 motion to strike is to address Duke Energy Ohio's
18 liability which is a legal conclusion that only an
19 attorney can make.

20 Mr. McMurray is stating that the
21 Commission pointed that out, then Mr. Fiore does not
22 need to be making that legal conclusion, so the
23 substance of the sentence would remain which is, I
24 think, what Mr. McMurray had just noted might not be
25 accurate. So by limiting those six words, I think

1 the sentence remains. He still makes his opinion
2 without the legal conclusion.

3 EXAMINER ADDISON: Thank you.

4 Any additional thoughts, Mr. McMurray?

5 MR. McMURRAY: Thank you, your Honor.

6 The -- from -- from Duke Energy's perspective, and
7 they can cross-examine Mr. Fiore on this, is that the
8 objective of this work is to address the
9 environmental liability that the Commission indicated
10 Duke has with regard to the former MGP operations.
11 And so the work that he is overseeing under the VAP
12 is expressly to address that liability. So I think
13 that's a very appropriate statement to be made. That
14 is the reason Duke is doing this VAP work.

15 EXAMINER ADDISON: Thank you.

16 I believe I am being consistent with our
17 prior two witnesses by denying the motion to strike
18 as to the usage of the word "liability." You can
19 certainly ask Mr. Fiore questions, during
20 cross-examination, as to what is meant by this
21 particular phrase and what his understanding of that
22 liability is.

23 MR. MCKENNEY: Thank you, your Honor.

24 EXAMINER ADDISON: Thank you.

25 Any additional motions to strike at this

1 time?

2 MR. McKENNEY: None from me.

3 EXAMINER ADDISON: All right.

4 Mr. McKenney, you may proceed.

5 - - -

6 CROSS-EXAMINATION

7 By Mr. McKenney:

8 Q. Good morning, Mr. Fiore.

9 A. Good morning.

10 Q. Am I saying that correctly, Fee-or or
11 Fee-or-a?

12 A. It's Fee-o-ree.

13 Q. Fee-o-ree. Thank you.

14 A. Thank you for asking.

15 Q. I am going to ask just a couple
16 preparatory questions that I think might make things
17 go a little bit easier. Can you define POGWMPUS for
18 us?

19 A. Yes. So I will attempt to define all the
20 lingo that I know I'll use and I apologize in advance
21 for doing so. POGWMPUS is Protection of Groundwater
22 Meeting Potable Use Standards. It's an acronym for
23 that phrase, I guess. And what that means it's -- it
24 means that waters of the state, groundwater of the
25 state that's currently unimpacted, must remain

1 unimpacted. That's a standard.

2 Q. And how about UPUS or UPUS?

3 A. UPUS is Unrestricted Potable Use
4 Standard.

5 Q. Thank you.

6 Now, Mr. Fiore, it looks like you began
7 work as the CP around 2009; is that correct?

8 A. Incorrect.

9 Q. What date -- what year did you begin work
10 for Duke?

11 A. The question was, I began work as a CP.
12 That was 1996.

13 Q. For Duke?

14 A. No. For Duke it's around 2009.

15 Q. So just to be clear, you began work as a
16 CP for Duke around 2009.

17 A. Yes.

18 Q. Okay. Softball question. You stopped
19 coaching baseball around 2010, didn't you?

20 A. I did actually.

21 Q. These sites caused you to put an end to
22 your baseball coaching career?

23 So you are the VAP-certified professional
24 for the East End site, correct?

25 A. Correct.

1 Q. Are you the VAP-certified professional
2 for the West End site currently?

3 A. I support Duke as a CP but I am not -- I
4 don't have any documents that I've prepared for that
5 site where I would sign them. So for the West End
6 site.

7 Q. So you are not the certified professional
8 for the West End site.

9 A. I've provided guidance to Duke and
10 overall strategy on the West End site as a CP, but I
11 am not doing any specific work on the West End site
12 currently.

13 Q. Is there another certified professional
14 that Duke has hired over the West End site?

15 A. I don't know if they have another
16 certified professional right now. I just don't know.

17 Q. And you were not the certified
18 professional for the West End site from 2013 to 2018
19 either, correct?

20 A. Correct.

21 Q. You have never been the certified
22 professional for the West End site.

23 A. So they've had a series of certified
24 professionals who worked and managed the individual
25 projects that have been done. I've been more of a

1 strategic advisor, as I said before, on VAP issues
2 and have provided review and feedback of documents
3 prepared by others.

4 Q. And you were hired by Duke, not the State
5 of Ohio, to be the CP for the East End site, correct?

6 A. Correct.

7 Q. You would agree that the VAP CP's role
8 generally is to determine if all applicable standards
9 for a site are met; is that accurate?

10 A. That's accurate.

11 Q. You do not remediate, correct?

12 A. I can.

13 Q. What do you mean you can remediate?

14 A. You asked if I do not remediate. I have
15 done remediation projects. It's in my CV.

16 Q. The VAP CP's role is not to do
17 remediation; is that accurate?

18 A. It may or may not, right. In some
19 projects, it may be; in others, it may not be.

20 Q. To make the determination of whether all
21 applicable standards have been met, you watch and
22 review the remediation as it's being conducted; would
23 you agree with that?

24 I can rephrase.

25 You do not oversee the remediation; Duke

1 would, correct?

2 A. So there's different -- different levels
3 of oversight. I would provide an oversight on the
4 VAP in the sense are we doing what is necessary to
5 meet all applicable standards. That's the specific
6 part that I would oversee.

7 Q. Okay. I can maybe tackle this another
8 way. You are not an employee of Duke, correct?

9 A. Correct.

10 Q. You are employed by Haley & Aldrich.

11 A. Correct.

12 Q. Duke pays Haley & Aldrich for the work
13 they do, correct? Does Duke -- who signs your
14 paychecks?

15 A. Haley & Aldrich.

16 Q. Thank you.

17 And so Haley & Aldrich is responsible for
18 both doing the remediation and for determining when
19 all applicable standards are met; is that accurate?

20 A. I'm responsible for determining when all
21 applicable standards are met; the CP is.

22 Q. And is Haley & Aldrich also responsible
23 for doing the remediation?

24 A. Haley & Aldrich is responsible for the --
25 I guess we are contracted to do the remediation, yes.

1 Q. Okay. So it's your testimony Haley &
2 Aldrich has been contracted by Duke to conduct the
3 remediation at Duke's East End site.

4 A. Correct.

5 Q. And you would say there's no conflict of
6 interest because the VAP CPs are required to follow a
7 code of conduct; is that correct?

8 A. That's correct.

9 Q. You are paid an hourly wage, correct?
10 You are paid hourly?

11 A. Yes.

12 Q. Is that right? So, generally speaking,
13 the longer remediation takes, the more you would get
14 paid; is that correct?

15 A. Correct.

16 Q. The more hours you would spend on --

17 A. Spend on it.

18 Q. -- the site -- right.

19 As you explained in your testimony, a
20 certified professional is a certification offered by
21 the Ohio EPA, correct? The --

22 A. Correct.

23 Q. And so since it is offered by the Ohio
24 EPA, the VAP is a state-specific program, correct?

25 A. Correct.

1 Q. There is no VAP -- other states may have
2 their own standards. The VAP is specific to Ohio.

3 A. That's correct.

4 Q. And it is a voluntary program in that a
5 site owner is not required to follow the VAP,
6 correct?

7 A. So remediation or mitigation of the
8 contamination is -- I don't -- is not -- following
9 this process to remediate or mitigate the
10 contamination is voluntary. Whether or not they
11 would need to remediate the contamination is a
12 different question.

13 Q. So my question is, the VAP is a voluntary
14 program, correct?

15 A. It's processes in Ohio, right. It's a
16 program with a number of processes that are followed
17 to remediate a site to meet all applicable standards.

18 Q. I think you're getting to what I am
19 struggling with. Is the VAP a process or is it a
20 standard?

21 A. The VAP is a program, Voluntary Action
22 Program. Within it, it has a number of standards.
23 Everything from how to do something, to what to
24 compare against, to how to write an NFA letter, to
25 how to request Covenant Not to Sue, so there are a

1 lot of processes in the program, and it is really the
2 only way in Ohio or the only method in Ohio to easily
3 get through an investigation or remediation of the
4 site and have a roadmap of how to do that. So it
5 gives you a process to get to it and then the point
6 of no further action.

7 Q. So I am going to go higher. The VAP is
8 actually a set of rules in the Ohio Administrative
9 Code; is that accurate?

10 A. The VAP is a set of rules in the Ohio
11 Administrative Code, that is an incomplete statement.
12 It is true but incomplete. It's also guidance, a
13 compendium of decisions made by the agency and a
14 number of other things that go into being the VAP.
15 The whole program isn't just the rules. You can't
16 just read the rules and understand what the VAP is.

17 The practicing CP has to understand
18 rules, understand the guidance, understand the agency
19 requirements, so it's a lot more than just reading
20 the rules.

21 Q. Okay. So there is a lot more than
22 reading the rules to be a VAP CP, but the VAP itself,
23 the VAP program is actually set forth in rules in the
24 Ohio Administrative Code, correct?

25 A. The VAP program is set forth, but it is

1 not inclusive of the entire program. The entire
2 program is those items I said and a CP has to follow
3 all of those things to follow the VAP.

4 Q. You mentioned just a minute ago that one
5 of the benefits of the VAP is to -- I am going to
6 strike.

7 One of the objectives of the VAP can be
8 to pursue an NFA which is a No Further Action letter;
9 is that --

10 A. Sorry about that. That's correct, a No
11 Further Action letter.

12 Q. Correct. And a No Further Action letter
13 is a letter that the VAP CP would apply for; is that
14 accurate?

15 A. That's incorrect.

16 Q. Okay. A No Further Action letter is a
17 letter issued by the Ohio EPA?

18 A. That's incorrect.

19 Q. Okay. Who issues the No Further Action
20 letter?

21 A. Once the CP determines that all
22 applicable standards have been met at a site, the CP
23 can prepare a No Further Action letter for that site.

24 Q. So the CP prepares the No Further Action
25 letter.

1 A. That is correct.

2 Q. It is not approved by Ohio EPA.

3 A. That is correct.

4 Q. But a CNS, which is known as a Covenant
5 Not to Sue, is a subsequent step that a site owner
6 can pursue; is that fair?

7 A. Let me add onto my last question.
8 Because the agency has certified the CP to act as an
9 agent of the agency, the NFA is actually, through us
10 acting as an agent of the Ohio EPA, accepted by the
11 agency. To get a further release of liability, you
12 request a Covenant Not to Sue from the director of
13 the Ohio EPA.

14 Q. So you're paid by Duke but an agent of
15 the State of Ohio; is that accurate?

16 A. The CP acts essentially as an agent of
17 the state -- of the Ohio EPA, correct, on these
18 matters to make one decision, whether a site meets
19 all applicable standards or not.

20 Q. And then what I was getting to before --
21 we will go back a step. The next step after the NFA
22 is a site owner could pursue a CNS which is a
23 Covenant Not to Sue and that is issued -- well, that
24 would be compound. Is that correct? A Covenant Not
25 to Sue; is that correct? I will rephrase.

1 The next step is a site owner could
2 pursue a Covenant Not to Sue from the Ohio EPA,
3 correct?

4 A. After an NFA is prepared, the responding
5 party or remediating party can request that the CP
6 submit that to the Ohio EPA and ultimately to the
7 director to receive a Covenant Not to Sue.

8 EXAMINER ADDISON: I know you said that
9 the Ohio EPA does not necessarily have to approve the
10 NFA as you are acting as an agent, you testified.
11 Has an NFA ever been rejected by the Ohio EPA? To
12 your knowledge?

13 THE WITNESS: So I can give you what I've
14 heard but I don't have direct knowledge of it. So
15 we -- as a part -- as a practicing CP, I need to go
16 to training every year, annual training. In that
17 training, the agency talks to us about, every once in
18 awhile, about things that happened and they will talk
19 about specific instances.

20 This -- in one -- I can recall in one of
21 those trainings they talked about an instance where a
22 CP didn't do all of the work that was necessary to
23 prepare the NFA. The NFA was submitted for a
24 Covenant Not to Sue, and it was denied. So
25 ultimately the CP had to rewrite the NFA. So I would

1 say, in effect, it was denied.

2 EXAMINER ADDISON: So it is possible for
3 the NFA to be rejected.

4 THE WITNESS: But it would have to be
5 submitted as a Covenant Not to Sue --

6 EXAMINER ADDISON: Thank you.

7 THE WITNESS: -- and the Covenant Not to
8 Sue would be rejected and potentially the NFA.

9 EXAMINER ADDISON: So you cannot recall
10 any instance in which an NFA has been rejected apart
11 from the next step when the entity is seeking a
12 Covenant Not to Sue.

13 THE WITNESS: I have not had an NFA ever
14 rejected.

15 EXAMINER ADDISON: Thank you.

16 Sorry, Mr. McKenney.

17 MR. McKENNEY: No.

18 EXAMINER ADDISON: Please proceed.

19 MR. McKENNEY: Thank you, your Honor.

20 Q. (By Mr. McKenney) You've only issued one
21 NFA; is that correct?

22 A. Incorrect.

23 Q. How many NFAs have you issued?

24 A. Five.

25 Q. How many of those NFAs have you issued

1 since the last time you testified regarding MGP
2 sites?

3 A. That's probably one.

4 Q. Okay.

5 A. Strike that. Three.

6 Q. I know what you meant.

7 A. Three.

8 Q. At the time you testified last time, you
9 had only issued one NFA; is that correct?

10 A. One Covenant Not to Sue.

11 Q. Okay.

12 A. We are getting our -- I have two
13 Covenants Not to Sue and five NFAs.

14 Q. Understood. Thank you.

15 A. Currently.

16 EXAMINER ADDISON: And that's total?

17 THE WITNESS: Total.

18 EXAMINER ADDISON: Okay.

19 Q. (By Mr. McKenney) A site owner is not
20 required to pursue a No Further Action letter; is
21 that correct?

22 A. That's correct.

23 Q. They can choose to remediate and then not
24 request an NFA from the CP.

25 A. That's correct.

1 Q. One of the reasons someone might do that
2 is because requesting an NFA can be costly and
3 onerous?

4 A. I can't attest to exactly why somebody
5 might not do it. I am sure there are a lot of
6 reasons.

7 Q. Would you say a Covenant Not to Sue is a
8 costly and onerous process?

9 A. I have had clients who have decided not
10 to proceed to a Covenant Not to Sue for purely cost,
11 not because it's onerous, but purely on a cost basis.

12 Q. On a cost basis. So you would agree a
13 Covenant Not to Sue can be an expensive proposition?

14 A. I am not going to define "expensive" but
15 certainly clients of mine have not wanted to spend
16 that money.

17 Q. And a piece -- or a site that has a
18 Covenant Not to Sue means that it is essentially
19 absolved of liability by Ohio EPA; would you agree
20 with that?

21 A. With some -- to the extent that the
22 conditions on the site have been fully evaluated. If
23 something comes to light in the future that wasn't
24 known, there are some provisions for additional work
25 that could be required or there are some reopeners.

1 Q. A piece of property or a site with a
2 Covenant Not to Sue generally would be more valuable
3 than a site with just an NFA; would you agree with
4 that?

5 A. I am not an expert on property value.

6 Q. Okay. Could a unremediated site be used
7 for residential purposes?

8 A. If it's not impacted, it could.

9 Q. So there are times where the impacts can
10 remain in the ground? Would you agree with that?

11 A. So my answer was if the site was not
12 impacted.

13 Q. Oh. Not impacted at all.

14 A. Right.

15 Q. When a site owner goes to remediate a
16 site, they have multiple tools at their disposable --
17 at their disposable -- at their disposal to meet the
18 VAP standards; is that accurate?

19 A. Yes.

20 Q. For example, engineering controls can be
21 used by a site owner; is that correct?

22 A. Correct.

23 Q. And engineering controls would be, for
24 example, asphalt, concrete, or soil caps?

25 A. Could be.

1 Q. Similarly, a site owner could use
2 institutional controls?

3 A. Yes.

4 Q. And institutional controls would include
5 land restrictions in the form of environmental
6 covenants?

7 A. Sure. That's correct. Generally a
8 remediation will include institutional controls as
9 well as other remedial technologies to meet all
10 applicable standards.

11 Q. In some instances, excavation is
12 necessary; would you agree with that?

13 A. Yes.

14 Q. Others might be in-situ stabilization?

15 A. Yes.

16 Q. And depending on the site, a site owner
17 could choose any combination of these so long as it
18 was necessary to meet all applicable standards,
19 correct?

20 A. As long as the CP agrees that applicable
21 standards have been achieved by whatever remedy is
22 chosen or, as you said, group of remedies, yes,
23 that's correct.

24 Q. It is not the VAP CP's responsibility to
25 declare what options must be used to remediate the

1 site; is that correct?

2 A. The VAP CP, as I've indicated, our job is
3 to make sure that we meet all applicable standards
4 and the technologies that are required to meet all
5 applicable standards are appropriate. That's what
6 our job is.

7 Q. Ultimately the site owner, in this case
8 Duke, has the decision regarding which remediation
9 techniques to follow, correct?

10 A. Within -- in concurrence with the
11 remediation engineer they hire and the VAP CP,
12 whatever, I would assume that's correct.

13 Q. They don't have to follow your advice, do
14 they?

15 A. Nope.

16 Q. All right. They could remediate any way
17 they want; is that correct?

18 A. I would assume that they would want to
19 remediate in a way in which they would make sure that
20 all applicable standards are achieved and there's
21 minimizing of the risk on the site to current and
22 future anticipated land users.

23 Q. But of the options we just noted
24 available to a site owner to remediate a site, they
25 all have different costs, don't they?

1 A. Yes.

2 Q. Generally, the more effective the
3 remediation, the higher the cost; would you agree?

4 A. It depends on the site.

5 Q. Okay. Excavation is more expensive than
6 in-situ stabilization generally; would you agree with
7 that?

8 A. It can depend on the site.

9 Q. Excavation is more expensive than
10 institutional controls; would you agree with that?

11 A. It depends on the site. If I have -- if
12 I only have to excavate 5 or 10 tons of soil to get a
13 complete un -- unrestricted closure of a site, that
14 would be really inexpensive, that would be less
15 costly than potentially implementing a
16 groundwater-use restriction or something.

17 Q. Excavation at Duke's East End site is
18 more expensive than implementing engineering
19 controls; would you agree with that?

20 A. Yes.

21 Q. Excavation at Duke's West End site would
22 be more expensive than implementing engineering
23 controls. How about that?

24 A. Correct.

25 Q. Same true for institutional controls?

1 Excavation would be more expensive?

2 A. Correct.

3 Q. Excavation is more expensive than in-situ
4 stabilization at either site; would you agree with
5 that?

6 A. It depends.

7 Q. Okay. You would agree then, wouldn't
8 you, that Duke can decide to remediate far above the
9 VAP standards if it decides to; is that correct?

10 A. I would imagine anybody could do that.

11 Q. I just wanted to make sure I understand
12 your answer. Duke can decide to remediate far above
13 the VAP standards if it chooses to; is that accurate?

14 A. So you remediate to a standard based on
15 land use. If you decide to remediate to a different
16 standard, you could remediate to a standard above
17 what is required. One could do that.

18 MR. McKENNEY: Your Honor, can I approach
19 the witness?

20 EXAMINER ADDISON: You may.

21 Q. One question. Mr. Fiore, you did give
22 testimony in this case in 2012, correct?

23 A. Yes.

24 EXAMINER ADDISON: Mr. McKenney, do you
25 want to rephrase your question? I believe you asked

1 if Mr. Fiore gave testimony in this case in 2012.

2 MR. McKENNEY: Sorry.

3 Q. Mr. Fiore, you were cross-examined in the
4 12-1685 case, weren't you?

5 A. Correct.

6 EXAMINER ADDISON: Thank you.

7 MR. McKENNEY: I am going to hand the
8 witness the transcript from the 12-1685 case. And I
9 have one for everyone. There you are. Give you a
10 page number in just a minute.

11 MR. McMURRAY: Thank you.

12 EXAMINER ADDISON: Are you marking this
13 as an exhibit?

14 MR. McKENNEY: I don't know if I will
15 need to do that, your Honor.

16 Q. (By Mr. McKenney) Mr. Fiore, I am going
17 to ask you to turn to page 629, it's in the top
18 right-hand corner there, at line 23. And I am going
19 to read the question there. "And what if Duke
20 decides not to follow the VAP standards? Do you have
21 any ramifications for that?"

22 "Answer: They can -- they can decide to
23 remediate far above the VAP standards or meet all --
24 they can decide to meet all applicable standards and
25 not seek a no further action Letter."

1 Is that accurate?

2 A. I think I agreed with that with my
3 previous answer, yes.

4 Q. Okay. I wasn't clear on that.

5 A. Yeah.

6 Q. So they can decide to remediate far above
7 the VAP standards.

8 A. So VAP has a number of standards. They
9 can remediate above the -- they can remediate above
10 the standard that's appropriate for their property,
11 sure.

12 Q. Your only responsibility, as VAP CP, is
13 to say whether the standard has been met, correct?

14 A. So my responsibility -- there is not one
15 standard. There is all applicable standards. We
16 have to meet all of them, not just one or two.

17 Q. Understood.

18 A. So I meet all the standards. And those
19 standards have to be met for the land use and the
20 potential current and reasonably-anticipated future
21 land users or receptors. So those standards have to
22 be met for all of those. If they decide to remediate
23 above that, you know, it could happen, I suppose.

24 Q. They could choose to meet above that for
25 any individual standard as well, correct?

1 A. You can't look at any individual
2 standard. You have to meet all of them. If you miss
3 one, you haven't met them all.

4 Q. But you could far exceed them all,
5 couldn't you?

6 A. Sure. I think you could. What I am
7 looking at is if you met them all, right? Just meet
8 them all.

9 Q. Right.

10 A. You could far exceed half of them and
11 still fail to -- and not meet the other half and you
12 still don't meet all applicable standards.

13 Q. The VAP does not require consideration of
14 cost; is that correct?

15 A. The VAP doesn't -- doesn't impose a
16 remedy, right, they just impose that you need to meet
17 all applicable standards. As such, there is not --
18 not a definitive discussion of cost in the VAP.

19 Q. And it's your understanding cost was one
20 of the factors that was considered in assessing
21 remedial alternatives at both sites; is that correct?

22 A. Yes.

23 Q. You, yourself, did not conduct any cost
24 analyses, did you?

25 A. No. The team who prepared the

1 alternatives evaluation document did; engineers and
2 others who are more experienced in that than I.

3 Q. So you also did not conduct any cost
4 comparisons between different alternatives, correct?

5 A. No. The team who prepared the
6 alternatives evaluation document did.

7 Q. You are not on Duke's management team
8 that would have made that determination, correct?

9 A. I am not following.

10 Q. You are not on Duke's management team.

11 A. No.

12 Q. Mr. Fiore, you say in your testimony that
13 work conducted by Duke has been prudent and
14 reasonable. And if you want to, I have your
15 testimony, it's on pages 14 and 15, if that helps.

16 A. Right here?

17 Q. Is that your testimony?

18 A. Yes. 14 and 15? Which lines, please?

19 Q. Particularly line 19 on page 14. And
20 then you say the same thing on line 17 at page 15.
21 So line 14 is the West End -- or page 14 is the West
22 End site. Page 15 the East End site.

23 A. Uh-huh.

24 Q. Would you agree with that? When you use
25 the term "prudent and reasonable" here, you are

1 talking about for meeting the applicable VAP
2 standards, correct?

3 A. Correct.

4 Q. You are not talking about prudent and
5 reasonable from a ratemaking perspective, correct?

6 A. Correct. What I am talking about here is
7 prudent and reasonable in meeting all applicable
8 standards under the VAP to mitigate the liabilities.

9 Q. So you are not making any opinion on the
10 prudence and reasonableness of charging customers for
11 remediation, correct?

12 A. No.

13 Q. You are not an accountant.

14 A. I am not an accountant.

15 Q. You're an environmental engineer.

16 A. I am not an environmental engineer.

17 Q. You would not consider yourself an
18 environmental engineer.

19 I am going to get back to the remediation
20 options that Duke had available to it. You are
21 familiar with Urban Setting Designations?

22 A. Yes.

23 Q. And an Urban Setting Designation is a
24 designation that the given site meets a number of
25 criteria, the Ohio EPA would allow the remediating

1 party or CP or property owner to exclude
2 consideration of drinking water for potable purposes
3 in a risk analysis; is that correct? It's long but
4 it's your testimony from the last case.

5 A. Yes. I was going to say that was really
6 good.

7 Q. I do what I can.

8 A. Yeah. In general, an Urban Setting
9 Designation is a mechanism to remove from
10 consideration unrestricted potable -- or potable use
11 pathway from a site.

12 Q. That was my next question, thank you. It
13 would be up to Duke, the remediating party, whether
14 to request the Urban Setting Designation; is that
15 correct?

16 A. If they wanted to. I see no need or
17 reason to do that here.

18 Q. That wasn't my question.

19 A. Okay.

20 Q. I am going to restate the question.
21 It would have been Duke's decision
22 whether to pursue an Urban Setting Designation,
23 correct?

24 A. It would have been Duke's decision to
25 request and a CP to request. Duke cannot request it.

1 A CP must make that request, but they could get a CP
2 to make that request.

3 Q. Only a CP can request it, but the CP can
4 only request it if the site owner asks the CP to do
5 so.

6 A. That's incorrect.

7 Q. You can request an Urban Setting
8 Designation against the wishes of a site owner?

9 A. That is correct.

10 Q. Okay. Cincinnati, where these sites are
11 located, there is a city ordinance that already
12 requires that city water be used; is that correct?

13 A. That's my understanding.

14 Q. So, in Cincinnati, groundwater already
15 cannot be drawn for potable use, correct?

16 A. That's correct.

17 Q. And with an Urban Setting Designation
18 where groundwater couldn't be used for potable use,
19 testing for potable use only needs to be conducted at
20 either the end of the site boundary or up to 0.5
21 miles from the boundary. Let me rephrase this.

22 What is the boundary for a site that has
23 an Urban Setting Designation?

24 A. In this -- I don't -- it could be up to
25 one-half mile away.

1 Q. Okay. But there is a geographic boundary
2 that accompanies an Urban Setting Designation,
3 correct?

4 A. That's my understanding.

5 Q. And that can either be the site boundary
6 or up to one-half mile exceeding the site boundary,
7 correct?

8 A. That's my understanding.

9 Q. And you could combine a USD or Urban
10 Setting Designation with a land use restriction to
11 prohibit groundwater withdrawal; is that correct?

12 A. You don't need a USD to do that.

13 Q. You could combine a USD with a land use
14 restriction to prohibit groundwater flow.

15 A. The land use restriction could be done in
16 and of itself to do that.

17 Q. And a USD in and of itself would also do
18 that.

19 A. Incorrect.

20 Q. USD would not prohibit groundwater
21 withdrawal for potable use?

22 A. A USD would prohibit groundwater use,
23 groundwater withdrawal for potable use but not
24 groundwater withdrawal.

25 Q. So USD would prohibit withdrawal of

1 groundwater for potable use, correct?

2 A. Correct.

3 Q. Duke has not applied for -- let me
4 rephrase.

5 You have not applied for an Urban Setting
6 Designation; is that correct?

7 A. That's correct.

8 Q. Duke has not requested that you apply for
9 an Urban Setting Designation; is that correct?

10 A. That's correct, yeah.

11 Q. It is not your opinion that these sites
12 need an Urban Setting Designation, is it?

13 A. That is correct.

14 Q. I also want to talk to you about a
15 variance order to not completely remove a substance
16 from the ground. Ohio EPA allows site owners to
17 request a variance in the VAP rules; is that correct?

18 A. The variance discussion, there is a
19 variance. I don't know if you've described it
20 correctly.

21 Q. Okay.

22 A. But there is a variance process.

23 Q. Ohio EPA has a variance process if a site
24 cannot meet all applicable standards; is that
25 correct?

1 A. Not exactly.

2 Q. Can you please explain the variance
3 process.

4 A. There are two variance processes. One
5 allows you to remove a pathway and the other allows
6 you to remove a standard. There have never been any
7 variances granted.

8 Q. They aren't common, that was my next
9 question.

10 A. There has never been one granted ever
11 under the VAP.

12 Q. But you would agree Duke's sites are the
13 largest you've ever worked on.

14 A. The largest and most contaminated, yes.

15 Q. They also have the most complex geology,
16 chemistry, and operational period of any that you've
17 worked on; you would agree?

18 A. Correct. Geology and the chemistry and
19 the complexity are difficult, yes.

20 Q. And if a site owner were to obtain a
21 variance, it would shorten the amount of time to
22 conduct the remediation; is that --

23 A. I can't envision a variance being granted
24 that would shorten the amount of time.

25 Q. Mr. Fiore, I want to go back to how a

1 site is remediated. We talked about institutional
2 controls a minute ago. Institutional controls limit
3 people from accessing the property; is that -- or can
4 limit -- institutional controls can limit people from
5 accessing a property; is that correct?

6 A. Partially correct.

7 Q. So not just anyone can wander onto the
8 southern parcel of the West End site where the
9 electric substation is located, correct?

10 A. I think you're mixing engineering
11 control, a fence, with an institutional control.

12 Q. Okay.

13 A. That's deed restriction. I don't think
14 what you said is correct.

15 Q. Okay. So with an engineering control
16 such as a fence, a person could not just wander onto
17 the southern parcel at the West End site where the
18 electric substation is located, correct?

19 A. Correct.

20 Q. And would it be fair to say there are
21 institutional and engineering controls in place at
22 Duke's MGP sites?

23 A. I -- so there are fences. I don't know
24 if there are any engineering controls as they are
25 specified under the VAP or any institutional controls

1 at all. I don't know that there are.

2 Q. Okay. Before Duke began its remediation,
3 these sites were covered by concrete, asphalt, or
4 soil caps; is that correct? At least parts of them?
5 I'll rephrase.

6 Before Duke began its remediation at
7 East, a large part of these sites were covered by
8 asphalt, concrete, or soil; would you agree with
9 that?

10 A. I only recall one portion of the site,
11 higher remediation -- well, that's a difficult
12 question because it's kind of a compound question.
13 Before -- could you restate that?

14 Q. Let's break it down to just the West End
15 site.

16 A. Yes.

17 Q. And then let's just break it down to was
18 the West End site capped before remediation began?

19 A. The West End site, at least portions of
20 it had an asphalt parking lot on it.

21 Q. And the East End site was also covered by
22 asphalt, concrete, or soil; is that correct?

23 A. It was -- it had gravel or something on
24 it. I'm not sure.

25 Q. Would you consider gravel an engineering

1 control?

2 A. It would be if it was placed
3 appropriately.

4 Q. If you visited the sites before they were
5 remediated, it would look much similar to a parking
6 lot or an open field; is that correct? Let me
7 rephrase that.

8 The East End site in particular, apart
9 from a single building, would look nothing much more
10 than a parking lot or soil field?

11 A. East End site. There's a lot going on at
12 the East End site, way more than just a parking lot.
13 There's propane storage and facilities, one building,
14 and then a shed and then parking area and there's a
15 lot going on. I don't -- could you restate that?

16 Q. I will just withdraw it. That's okay.

17 You are the VAP CP -- being the VAP CP
18 for the East End site, you are also then the
19 certified professional for the West of the West
20 Parcel?

21 A. The East End site, that's how we look at
22 it, if that's included in the East End site.

23 Q. Do you include the West of the West
24 Parcel in your definition of the East End site?

25 A. So I don't -- my definition of the site

1 is I define it as the VAP does. It's either on
2 property or off property. On property is what Duke
3 owns, and off property is beyond what Duke owns.
4 Both -- you have a requirement to remediate both.
5 The on property part is generally the source area
6 where the tar is, where the operations were done.
7 The off property is usually where the material had
8 migrated to. You have requirements under the VAP to
9 investigate, remediate, or both, to comply with the
10 standards on property and off property.

11 Q. Mr. Fiore, you are not aware of any Order
12 from Ohio EPA that Duke must remediate these sites,
13 are you?

14 A. I am not aware of any Order, that is
15 correct.

16 MR. McKENNEY: Okay. I have nothing
17 further, your Honor.

18 EXAMINER ADDISON: Thank you,
19 Mr. McKenney.

20 Let's go off the record for just a
21 moment.

22 (Discussion off the record.)

23 EXAMINER ADDISON: Let's go back on the
24 record.

25 At this time we will take a break for

1 lunch. I will see everyone back around 1:30.

2 (Thereupon, at 12:32 p.m., a lunch recess
3 was taken.)

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1 Tuesday Afternoon Session,
2 November 19, 2019.

3 - - -

4 EXAMINER ADDISON: At this time we'll go
5 back on the record.

6 We'll continue the cross-examination of
7 Duke Witness Fiore.

8 Ms. Bojko.

9 MS. BOJKO: Thank you, your Honor.

10 - - -

11 SHAWN S. FIORE

12 being previously duly sworn, as prescribed by law,
13 was examined and further testified as follows:

14 CROSS-EXAMINATION

15 By Ms. Bojko:

16 Q. Good afternoon, Mr. Fiore. You stated
17 earlier that you are a VAP CP; is that correct?

18 A. Correct.

19 Q. And you are or have been hired to be the
20 VAP CP for Duke's East End site, correct?

21 A. Correct.

22 Q. And to clarify something you said
23 earlier, were you hired by Duke to investigate,
24 remediate, or both for the East End site?

25 A. To take the site through the VAP process

1 which includes investigation, remediation as
2 necessary, and all the documentation related to that
3 no Further Action letter.

4 Q. Okay. Because you did explain previously
5 to counsel that there are instances where a VAP CP
6 can be hired to just investigate; is that correct?

7 A. You -- a VAP CP can be -- a CP and their
8 firm can be hired to investigate or do portions of
9 the -- it's not the most efficient thing to do
10 sometimes but you can get a number of VAP CPs
11 involved and the VAP process does, as I indicated
12 previously, understand that that happens. It has a
13 mechanism to allow for that.

14 Q. Okay. So you have been the VAP CP for
15 the East End site since 2006, I think you said? '12.

16 A. '9.

17 Q. '9. In the middle. So you have been the
18 VAP CP since 2009 on the East End site, correct?

19 A. Correct.

20 Q. Okay. And you mentioned that there have
21 been several VAP CPs for the West End site, correct?

22 A. Correct. When Duke bids the work out, my
23 company didn't win those, so other companies won that
24 work and there have been other CPs employed by those
25 winning companies to do that work.

1 Q. But as you just mentioned, that's kind of
2 unusual because then the VAP CP changes throughout
3 the process and you don't have the same VAP CP from
4 investigation to remediation, which I believe you
5 used words, is the most efficient.

6 A. I think you can take it to an inefficient
7 point but I also mentioned that the VAP has processes
8 in place to allow for the hiring of several VAPs,
9 certified professionals, during the course of a
10 project. They have specific processes in place to
11 allow that.

12 Q. And the reason why you are saying there
13 is a specific process in place, because you could not
14 issue an NFA as a VAP CP until you were the VAP CP on
15 that particular site, correct?

16 A. You have to be the CP hired to ensure at
17 the end of the project, or whatever portion of the
18 project, to ensure that the site meets all applicable
19 standards. That's what you do as the CP. Once that
20 determination is made, however iterative that process
21 is and however lengthy it is, whenever that's done,
22 the CP would write the NFA.

23 If there were other CPs involved
24 previously, part of the NFA would be affidavits from
25 those previous CPs. That's part of the whole VAP

1 process. It's allowed in there. It's included in
2 it.

3 Q. Because you can basically only certify,
4 an issue in an NFA-type letter, you can only certify
5 the parts of the project you actually worked on and
6 ensured the remediation was complete, correct?

7 A. I certify the part of the project I know.
8 And if it includes previous work, that is allowed
9 under the VAP. It is completely allowed. And it's
10 industry standard to allow the CP to review, rely,
11 and use previous work. Exactly right.

12 Q. And you testified in the 2012 case, also
13 in the capacity of Duke's VAP CP for the East End
14 site, correct?

15 A. Correct.

16 Q. And you also mentioned earlier today that
17 you have been in a supporting role, I'll say, for the
18 West End site, correct?

19 A. I have been consulting -- providing, as a
20 consultant, Duke support on the West End site for
21 quite some time. And in the last several months I
22 have been working as the CP on some portions of the
23 investigation work undergoing, underway.

24 Q. So Duke has hired you separately to be a
25 consultant on the West End site, correct?

1 A. Correct.

2 Q. Okay. And then as I just heard you for
3 the first time say, you are an actual VAP CP for
4 portions of the West End site, correct?

5 A. Correct. And I may have -- yes, that's
6 correct.

7 Q. And you would be hired separately to be
8 the VAP CP for the West End site?

9 A. I don't know what "separately" means.

10 Q. Well, it's in addition to your consulting
11 contract that you just referenced or is it the same?

12 A. It could be the same.

13 Q. But it would definitely be in addition to
14 the East End site VAP CP relationship that you had.

15 A. In addition to the VAP CP? Can you ask
16 that again?

17 Q. Sure. Any consulting work or CP -- VAP
18 CP work that you've done on the West site is in
19 addition to what you were hired to do on the East End
20 site, correct?

21 A. Correct, yeah. So just like any site,
22 you can be hired to do subsequent projects in
23 different locations, yes.

24 Q. And there can be multiple VAP CPs on a
25 particular site at the same time?

1 A. There can be. The CP -- really, again,
2 the CP makes the determination at the end of the day,
3 the end of the project, that it meets all applicable
4 standards. That's the CP of record. That's the most
5 important position at the end of the project to make
6 that determination whether an NFA is appropriate, all
7 applicable standards have been met and the project is
8 complete. There can be a number of CPs that can work
9 on the project before that, yes.

10 Q. You said before that. I am asking if you
11 can have -- if it would be a usual thing to have
12 multiple VAP CPs simultaneously.

13 A. I've seen it before.

14 Q. Well, isn't that the case right now with
15 the West End site?

16 A. Yes. I have seen it on a number of
17 sites.

18 Q. I thought you told me previously that you
19 didn't know who the VAP CP was for the West End?

20 A. I don't know who it is. I am assuming --
21 I don't know who it is, correct. I don't know
22 specifically who it is.

23 Q. Well, if there are two VAP CPs on the
24 same site, wouldn't you have to coordinate the
25 projects that you are doing to determine which VAP CP

1 is responsible for which piece of the investigation
2 or remediation?

3 A. So when -- when Duke prepares or any
4 client prepares a request for proposal, the
5 consulting firm, the engineering firm, looks through
6 that, prepares a proposal and includes a staff, a
7 staffing plan. Particularly that proposal has a
8 scope of work that's defined it. It's not undefined.
9 It's a defined scope of work. There can be many,
10 multiple scopes of work going on at the site where
11 the people don't have to interact.

12 Q. And that's the case with you and
13 Mr. Brown who is the West End -- or whoever might be
14 the West End VAP CP, you would have different scopes
15 of work so you would not interact with each other.

16 A. So the person I was talking about was my
17 understanding that CH2M HILL, who did an
18 investigation out there, had a VAP CP at that time.
19 That investigation is complete.

20 EXAMINER ADDISON: I'm sorry, Ms. Bojko.
21 May I interrupt just briefly?

22 MS. BOJKO: Please.

23 EXAMINER ADDISON: How many VAP CPs are
24 certified in Ohio?

25 THE WITNESS: Oh, I have no idea. The

1 running number -- so -- so you get a number for your
2 CP. I am 154 which means I was fairly early in the
3 process. I have seen numbers as high as 350, but I
4 don't know -- if you drop out they don't reassign the
5 number so I don't know how many are practicing. And
6 a lot of people will get their certification and,
7 after a couple of projects, drop out. So I don't
8 know is the right number -- right answer.

9 EXAMINER ADDISON: Thank you.

10 And just very quickly, you noted that
11 some CPs may be required to submit an affidavit in
12 the event that an entity -- as part of the NFA
13 process. In your opinion would you be -- do you
14 believe that you would be required to submit an
15 affidavit certifying to your work on the West End
16 site once an NFA is requested?

17 THE WITNESS: Yes, absolutely. And
18 there's -- so as a part of the NFA process, the CP
19 who writes the NFA also has to submit an affidavit.
20 There is just a lot of affidavits involved. All the
21 laboratory reports, all the work done by different
22 companies or CPs, yes, there is a lot of that.

23 EXAMINER ADDISON: Thank you very much.

24 Thank you, Ms. Bojko. I'm sorry.

25 Q. (By Ms. Bojko) So if an entity hires a

1 VAP CP and they don't like the VAP CP's
2 recommendations or conclusions, an entity could hire
3 a different VAP CP to produce the result that they
4 would prefer?

5 A. I would think that a VAP CP would follow
6 the code of conduct by VAP CPs, and meet all
7 applicable standards. So our goal is to meet all
8 applicable standards. And through the incredibly --
9 incredible amount of training we are required to go
10 through under the VAP, the rules, the guidance, the
11 training, the interaction, the practice, we would all
12 come to a similar end for the process and come to a
13 similar conclusion on how to meet all applicable
14 standards. They could -- a company could hire or
15 fire me at will. That's just the nature of the
16 process.

17 Q. Right. And they could hire a new VAP CP
18 to replace you --

19 A. They could.

20 Q. -- during the remediation process.

21 A. They could, yes.

22 Q. You -- you state that you're an agent of
23 this state. Even though you state that you are an
24 agent of the state, you or your firm are actually
25 hired by Duke, correct?

1 A. Correct. The VAP process is a privatized
2 remediation process. And the Ohio EPA has made CPs
3 agents of the state. Sue Kroeger, of the Ohio EPA,
4 recently indicated that, confirmed it, that they look
5 at us as agents of the state. And one respect, and I
6 mentioned this before, is determining -- maybe I
7 mentioned it too many times, making the determination
8 that all applicable standards have been met. That's
9 the one determination we can make as an agent of the
10 state.

11 Q. So it goes beyond just pure licensure.
12 You think you are an agent of the state to determine
13 whether the applicable standards are met.

14 A. I've been told by the State of Ohio that
15 I am an agent of the state to make one -- one
16 decision, whether all applicable standards have been
17 met.

18 Q. But even though you are an agent of the
19 state, you are not hired by the state. You are hired
20 by private entities like Duke, correct?

21 A. That is the nature of the VAP, yes.

22 Q. Okay. And you are hired by Duke to
23 provide testimony in this case, correct?

24 A. That's correct.

25 Q. And are you being compensated for your

1 testimony here today?

2 A. I'm sure I am, yes.

3 Q. You don't know?

4 A. Oh, I am.

5 Q. And it was Duke that asked you to
6 investigate the East End site or the West End site.
7 It's Duke who actually requests an investigation, not
8 the state, correct?

9 A. So Duke put out a request for proposal to
10 get bids from contractors and vendors and engineers
11 to do that, yes, and we were selected to do that.

12 Q. I guess to close the loop, I asked you if
13 you were compensated for your testimony today. You
14 are compensated by Duke, correct?

15 A. I'm compensated by my company. My
16 company is compensated by Duke.

17 Q. And on page 3 of your supplemental
18 testimony and at the top on lines 4 to 6 and then
19 it's later throughout your testimony --

20 A. Supplemental testimony?

21 Q. I'm sorry. Oh, I'm sorry, you just had
22 direct testimony. My apologies.

23 A. Page 3 of the direct testimony.

24 Q. I'm sorry. Habit.

25 A. Yes.

1 Q. That's a good point to note for the
2 record. You didn't file any annual filings or annual
3 updates. You've only filed one piece of testimony in
4 this case, correct?

5 A. Correct.

6 Q. On page 3 of that testimony, and then
7 again you heard us discuss it's on pages 5 through 8
8 of your testimony, you refer to your 2012 testimony;
9 is that correct?

10 A. Specifically where?

11 Q. One indication is on page 3, lines 4 to
12 6.

13 A. Yes.

14 Q. And then again you do it in the questions
15 starting on page 5. It goes through page 8. You
16 talk about your previous testimony and whether
17 anything should be added.

18 A. Okay.

19 Q. Your -- you didn't attach your previous
20 testimony, correct?

21 A. That is correct.

22 Q. And you're not intending to incorporate
23 that previous testimony into this testimony, correct?

24 A. I don't have that intention currently.

25 Q. The majority of your testimony filed in

1 this case describes generally the VAP requirements
2 and the CP responsibilities; is that fair?

3 A. I haven't counted the words or lines. I
4 don't know.

5 Q. I just didn't hear your answer, I'm
6 sorry.

7 A. I'm sorry. I haven't counted words or
8 lines.

9 Q. You don't know what "majority" means?

10 A. Majority, minority.

11 Q. So you do spend a significant number of
12 pages talking about generally -- generally about the
13 VAP process, the VAP requirements, and the CP
14 responsibilities, correct?

15 A. I spend a lot of time talking about that
16 in this, yes.

17 Q. On -- if you could turn to page 8. First
18 of all, at the top of page 8, line -- let's go to
19 page 8, line 17. Here you talk about the NFA being
20 desirable. Do you see that in?

21 A. Yes.

22 Q. It's true that entering into the VAP
23 process does not preclude liability under CERCLA,
24 correct?

25 A. I don't know if I'm -- I can't answer

1 that.

2 Q. And you would also agree with me that
3 entering into the VAP process does not prevent the
4 Ohio EPA from investigating, correct?

5 A. Could you restate that?

6 Q. Sure. By going through the VAP process,
7 that would not prevent the Ohio EPA from
8 investigating itself.

9 A. I don't even -- I don't understand the
10 question. I don't understand the question.

11 Q. Well, if you go through the VAP process
12 and you get an NFA, there's still no guarantee that
13 you could not be found liable or sued, correct?

14 A. So -- so the VAP has a couple of
15 mechanisms. It's colloquially called the
16 "enforcement shield" which, if you are going through
17 the VAP and you meet some certain standards that are
18 written in the rules, the agency generally won't
19 enforce on you or come after you as long as you are
20 proceeding through the VAP.

21 Once you are done with the VAP, if you
22 obtain a Covenant Not to Sue, that's their
23 concurrence that the site meets applicable standards.

24 If something comes up and -- this is also
25 discussed in the rules and in guidance -- if

1 something comes up where the standards -- where the
2 site is different than something seen in the NFA
3 report, if the conditions are different, the state
4 could come after you at that point.

5 Q. But you used the word "generally" and
6 that's also on page 9, line 4 of your testimony.

7 A. Page 9. Yes.

8 Q. But my question to you was, either going
9 through the VAP or getting an NFA, you're not
10 guaranteed that you will not get an enforcement order
11 issued against you, correct?

12 A. Correct. As I said, generally if you are
13 following the rules, they are not going to enforce on
14 you. They can -- they do withhold that right. I
15 have not ever seen it with somebody, a company, or
16 remediating party proceeding through the VAP, but I
17 guess that's not out of the realm of possibility.

18 Q. And on page 8, line 17, I directed you to
19 the word "desirable" there and then you also use that
20 same word on page 9, line 1 about liability relief.
21 You say "if desired."

22 A. Correct.

23 Q. Why would an entity not desire liability
24 relief? I think everybody would want to desire
25 liability relief.

1 A. That -- I can't speak for all the
2 entities that don't, but a number of entities will
3 have an NFA prepared by their VAP CP and not submit
4 that for a Covenant Not to Sue. Rules -- and the
5 rules allow that.

6 Q. On page 9, line 12, you use the word
7 "typically" and you talk about a number of remedial
8 options are considered. Do you see that?

9 A. Yes.

10 Q. Is selecting the least-costly viable
11 option required?

12 A. Can you restate that?

13 Q. Sure. If you -- you did consider
14 remedial options, correct? You evaluated --

15 A. Yes.

16 Q. -- different remedial options?

17 A. Yes.

18 Q. And when an entity evaluates remedial
19 options, the VAP does not require them to select the
20 least-costly viable option, correct?

21 A. The -- typically there is not just one
22 option. Typically there is a number of options
23 selected. The cost is considered, as I've testified
24 otherwise in here, but what the focus is is choosing
25 the alternative or alternatives that meet all

1 applicable standards. That's what the VAP looks at.

2 Q. So the answer to my question is no, there
3 is no requirement that the least-costly option be
4 selected.

5 A. The requirement is not that the
6 least-costly option to be selected but rather the
7 option that meets all applicable standards.

8 Q. And if there are two options that meet
9 all applicable standards, the VAP does not require
10 the entity to select the most -- the least-cost
11 option, correct?

12 A. The VAP doesn't specify a remedy.

13 Q. And the most-costly option is acceptable
14 under the VAP, correct? Selecting the most-costly
15 option is acceptable, correct?

16 A. I believe any option that meets all
17 applicable standards is acceptable under the VAP.

18 Q. And you stated previously that Duke has
19 the ultimate decision regarding which option and
20 which remedial process to follow, correct?

21 A. In working with their -- I believe I said
22 working with their remedial engineers and VAP CP,
23 they make that decision. They ultimately have that
24 responsibility.

25 Q. And Duke can decide not to follow the VAP

1 standards for remediation as well, correct?

2 A. They can.

3 Q. And there are no ramifications if Duke
4 decides not to follow the VAP standards, correct?

5 A. Well, I think there are. And if you look
6 at page 9, line 4, you'll see "The Ohio EPA generally
7 will not issue an enforcement order for properties on
8 which work is being undertaken in conformance with
9 the VAP." Alternatively if you are -- if there are
10 impacts and obviously work isn't being done, you can
11 have a higher potential.

12 Q. Sure. But until the EPA issues an
13 enforcement action, there is no ramification for Duke
14 not following the VAP standards, correct?

15 A. I don't think I agree with "no
16 ramification."

17 Q. No -- no liability I guess with regard to
18 the Ohio EPA until they issue an enforcement action.

19 A. So there -- there -- the projects are
20 said to be all applicable standards as I have said.
21 All applicable standards in -- in a fashion to ensure
22 that the impacts of the site are impact -- are
23 remediated.

24 Q. There's been no Ohio EPA enforcement
25 action against Duke to date, correct?

1 A. I know of none.

2 Q. And you have the authority to issue an
3 NFA letter to Duke regarding the East End site; is
4 that correct?

5 A. Incorrect.

6 Q. You do not have the authority?

7 A. It doesn't meet applicable standards. I
8 would lose my certification if I did.

9 Q. Thank you for that clarification.

10 Assuming that the remediation was
11 completed and applicable standards were met, then you
12 would have that authority, correct?

13 A. I would have that authority as a
14 certified professional, yes.

15 Q. And as I understood your testimony to me
16 earlier today, you believe that you would also have
17 that authority for certain projects conducted under
18 the West End, if all applicable standards were met,
19 because you did participate as a CP in some of those
20 projects.

21 A. So as we've discussed, I -- when the work
22 is complete at the West End site and the site meets
23 all applicable standards, I could issue, if Duke
24 requested that of me, I could issue, if the site met
25 all applicable standards, an NFA for that entire

1 site.

2 Q. Oh, you could for the entire site?

3 A. Yes. That's -- yes.

4 Q. Even if you have not done work on the
5 entire site. You are saying after reviewing other
6 people's work, then you could make that decision?

7 A. And having them provide that work to me
8 under affidavit, indicating that it was done
9 appropriately within the auspices of the VAP.

10 Q. And isn't it true that, although the VAP
11 establishes applicable standards, it's up to the
12 remediating party to determine how best to achieve
13 those standards following the VAP regulations?

14 A. Correct. The remediating party has a
15 number of responsibilities including evaluating land
16 use that the applicable standards are based on. So
17 yes.

18 Q. In my question about the remediating
19 party and it's in your testimony, you are referring
20 to Duke, not the VAP CP, correct?

21 A. As the remediating party? Any -- yeah,
22 any -- yes, that's correct.

23 Q. Can you -- can you turn to page 11 of
24 your testimony, please.

25 A. Sure.

1 Q. Line 12. I just want to confirm, you say
2 "based on the reports I have reviewed...." You're
3 talking about the remedial activities performed at
4 the East and West End sites were selected based on
5 evaluation of factors that you list?

6 A. Uh-huh.

7 Q. That's because you have no personal
8 knowledge. You weren't involved in that review and
9 selection process, correct?

10 A. I was involved in certain of the review
11 and selection processes.

12 Q. But not all.

13 A. But not all.

14 Q. And if you turn to page 14 of your
15 testimony, lines -- it starts on line 17. "Based on
16 the document I reviewed...." Again, you don't have
17 personal knowledge of all the work that was completed
18 on the West End site because you were not always
19 involved, correct?

20 A. As allowed under the VAP, the documents I
21 reviewed are sufficient but I do not have personal
22 knowledge of them. It's sufficient for the work I
23 need to do.

24 Q. Now, let's turn to page 20, please, in
25 your testimony. Looking at lines 1 through 4 at the

1 top. You're talking about activities that you
2 believe were consistent with the Commission's Opinion
3 and Order. Do you see that?

4 A. Yes.

5 Q. And that Opinion and Order you are
6 referencing is to the 2012 Opinion and Order?

7 A. Yes.

8 Q. Isn't it true that that Order did not
9 preapprove what expenses were deemed to be
10 reasonable?

11 A. So it preapproved certain activities
12 under the VAP as reasonable and prudent.

13 Q. But it did not preapprove what expenses
14 were reasonable, correct?

15 A. It preapproved which activities and that
16 following the VAP was reasonable, prudent. That's
17 what this sentence, I think, discusses here.

18 Q. So I'm asking about expenses. You're not
19 trying to say that the Commission somehow preapproved
20 expenses, correct?

21 A. I don't believe I said that here. I said
22 these activities which are the remediation
23 activities.

24 Q. Okay.

25 A. Are consistent with determining

1 reasonable and prudent.

2 Q. And you also don't believe that the Order
3 preapproved expenses as prudent, correct?

4 A. Again, the activities conducted are
5 consistent with past activities which were determined
6 to be prudent and reasonable and -- and they followed
7 the VAP rules, employing a VAP CP, which were all
8 determined by the Order.

9 Q. Well, isn't it true that the case we are
10 in today is to determine which expenses are
11 reasonable and prudent and recovered from customers?

12 A. I'm -- I think I indicated I am not
13 talking about expenses. I am talking about the
14 activities we've completed.

15 Q. Okay. I am just making sure you are not
16 trying to opine on that issue; is that correct?

17 A. I am opining on what exactly it says here
18 which is the activities we conducted were reasonable
19 and prudent and consistent with the Order.

20 Q. And so you do understand there is a
21 difference between liability and recovery of costs?

22 A. Can you restate that?

23 Q. Sure.

24 Are you -- do you believe that there is a
25 difference between a liability and recovery of costs?

1 A. I am not an expert on recovery of costs.

2 Q. But -- I wasn't asking if you were an
3 expert. You are not opining on it in your testimony,
4 correct?

5 A. That's correct.

6 Q. And it's true that there has not been an
7 NFA letter issued for the Duke MGP sites, correct?

8 A. There has not. They don't meet
9 applicable standards as of yet.

10 MS. BOJKO: That's all I have, your
11 Honor. Thank you, Mr. Fiore.

12 EXAMINER ADDISON: Thank you.

13 Ms. Whitfield

14 MS. WHITFIELD: I have no questions for
15 this witness, your Honor.

16 EXAMINER ADDISON: Ms. Kyler Cohn.

17 MS. COHN: Just a little, little bit.

18 EXAMINER ADDISON: Please proceed.

19 - - -

20 CROSS-EXAMINATION

21 By Ms. Cohn:

22 Q. I am just following up. I am just
23 curious honestly. You mentioned earlier, in response
24 to Mr. McKenney, that you had clients who didn't seek
25 a Covenant Not to Sue because it was too costly.

1 A. Uh-huh.

2 Q. Was any legal action ultimately taken
3 against them for failure to meet all applicable
4 standards under the VAP?

5 A. So they -- they -- I believe what we were
6 discussing is I had clients who went through the VAP
7 process for a property and met all applicable
8 standards and got an NFA. What they didn't do was go
9 for the Covenant Not to Sue. You can stop at an NFA
10 and meet all applicable standards. To get an NFA,
11 you have to meet all applicable standards and they
12 just didn't go the next step which is not required.

13 Q. Right, right. So no -- at that point,
14 once they got the NFA, no legal action was taken
15 against them after that step?

16 A. Correct. No -- no legal action and their
17 sites meet all applicable standards under the VAP.
18 So it's, in my opinion, unlikely.

19 MS. COHN: All right. Thank you.

20 EXAMINER ADDISON: Thank you.

21 Mr. McNamee?

22 MR. McNAMEE: No questions, your Honor.

23 Thank you.

24 EXAMINER ADDISON: Thank you.

25 Mr. McMurray, redirect?

1 MR. McMURRAY: I am just going to ask a
2 few just to try to maybe clean up a few things.

3 - - -

4 REDIRECT EXAMINATION

5 By Mr. McMurray:

6 Q. Mr. Fiore, in follow-up to some of the
7 questions from Mr. McKenney where he was inquiring
8 about engineering controls and institutional
9 controls, and I want to ask you a few questions.

10 So would the use of institutional
11 controls by themselves meet all applicable standards
12 under the Ohio VAP at the East End site?

13 A. No.

14 Q. Would the use of institutional controls
15 by themselves meet all applicable standards under the
16 Ohio VAP at the West End site?

17 A. No.

18 Q. What if an Urban Setting Designation was
19 also utilized?

20 A. Well, I believe I testified that I
21 wouldn't get an Urban Setting Designation. It would
22 be kind of a waste of money. If you did get an Urban
23 Setting Designation, it still wouldn't meet all
24 applicable standards.

25 Q. And why would it not meet all applicable

1 standards?

2 A. A number of reasons. There are standards
3 including protection of ecological resources, surface
4 water standards, POGWMPUS, my favorite acronym, and
5 other standards that would not be achieved through an
6 Urban Setting Designation.

7 The only thing an Urban Setting
8 Designation gives you is to ignore the unrestricted
9 potable use standard which at this site there are
10 no -- either site there's no potable use of the water
11 so it's -- it could be handled much more efficiently
12 and effective with a land use restriction so that's
13 why.

14 Q. Thank you.

15 So let's turn to engineering controls.
16 Would the use of engineering controls by themselves
17 meet all applicable standards under the Ohio VAP at
18 the East End site?

19 A. No.

20 Q. Would engineering controls by themselves
21 meet all applicable standards under the Ohio VAP at
22 the West End site?

23 A. No.

24 Q. Let's add the two together since I think
25 you testified that most sites involve the use of

1 multiple tools, correct?

2 A. Correct.

3 Q. So would the use of institutional
4 controls and engineering controls in combination meet
5 all applicable standards at the East End site?

6 A. No.

7 Q. Would use of institutional controls and
8 engineering controls, in combination, meet all
9 applicable standards under the Ohio VAP at the West
10 End site?

11 A. No.

12 Q. Is Duke remediating the East End or West
13 End site just to meet the direct contact soil
14 standards?

15 A. No. Duke is remediating them in order to
16 meet all applicable standards, not just some.

17 Q. How many applicable standards apply at
18 the East End and West End sites?

19 A. Maybe seven.

20 Q. Can you describe those for me?

21 A. Sure. You have to meet the direct
22 contact standards certainly. We have to meet
23 POGWMPUS is another one. There is a background
24 standard you have to meet which we do. We have to
25 meet site-wide risk standards, that's another one.

1 We have to meet ecological -- protection of
2 ecological sources, that's another one. There is a
3 vapor intrusion standard as well. And in addition to
4 the non-potable use are the potable use standard,
5 UPUS. You also have to meet non-potable use
6 standards irrespective if you get a groundwater use
7 restriction, you still have to meet the non-potable
8 use standard.

9 Q. Are there standards applicable to
10 protecting the Ohio River?

11 A. There are, yeah; the ecological standards
12 that I mentioned.

13 Q. So that's one of the standards that Duke
14 is remediating toward?

15 A. Yeah. The material, the coal tar oil, we
16 call it oil-like material or tar-like material, is
17 very mobile and moving in that direction, so
18 remediating that is important to protect that asset,
19 that ecological asset.

20 Q. Okay. Final question. There was some
21 question of you earlier about, you know, the level at
22 which Duke was remediating the sites. So based on
23 your experience, is Duke seeking to remediate either
24 the East End site or West End site to a standard
25 higher than the VAP would require?

1 A. No. We are seeking to meet, not really
2 exceed those, all applicable standards.

3 MR. McMURRAY: Thank you.

4 Thank you. I have nothing further.

5 EXAMINER ADDISON: Thank you.

6 Mr. McKenney?

7 MR. MCKENNEY: I'm not going to ask any
8 questions. Thanks.

9 EXAMINER ADDISON: Thank you.

10 Ms. Bojko?

11 MS. BOJKO: No questions.

12 EXAMINER ADDISON: Ms. Whitfield?

13 MS. WHITFIELD: No, thank you.

14 EXAMINER ADDISON: Ms. Kyler Cohn?

15 MS. COHN: No, thank you.

16 EXAMINER ADDISON: Mr. McNamee.

17 MR. MCNAMEE: It's unanimous. No, thank
18 you.

19 - - -

20 EXAMINATION

21 By Examiner Addison:

22 Q. Mr. Fiore, if I could just quickly ask
23 when you noted seven applicable standards that apply
24 to the East End site and the West End site, that's --
25 that's not just seven different requirements. Each

1 standard imposes several various requirements under
2 each different standard; is that correct?

3 A. So certain standards impose more
4 requirements, so a direct contact standard for
5 industrial end use just imposes a standard that you
6 have to meet the applicable or generic numeric
7 standard or risk standard at a depth of 2 feet, so
8 the upper 2 feet would be clean but that's just that
9 one standard.

10 Protection of groundwater, meaning
11 potable use standards, the POGWMPUS standard -- I
12 know -- that is a much more difficult standard to
13 meet at this site because we have extremely mobile
14 coal tar that's already moved down to over 100 feet
15 deep and continuing to move.

16 The POGWMPUS standard says -- it's an
17 anti-degradation standard which means groundwater
18 that's currently clean cannot be contaminated in the
19 future. And when you have this dense coal tar that
20 continues to move downward and outward, it's really
21 hard to meet that standard. So that -- that tells
22 you that some are easy to meet; some are much more
23 difficult to meet.

24 Q. Thank you.

25 And I believe in your testimony you

1 provide the initial certification requirements to
2 become a CP?

3 A. Yes.

4 Q. During cross-examination, you noted that
5 you have to undergo annual training; is that correct?

6 A. Correct, yes.

7 Q. Are there any other continuing
8 certification requirements that you have to comply
9 with to renew your certification?

10 A. Yes. There is an annual recertification
11 process. So you have to pay your money. That's
12 important. And you have to have a very specified
13 training, 12 hours a year, but six of it has to be
14 provided by the Ohio EPA because they want to make
15 sure that they are communicating with the CPs what
16 the requirements are. And six could be other
17 preapproved courses that help you through. You also
18 have to attest that you -- you know, you haven't --
19 your moral character is unchanged basically. There
20 is a number of questions about that.

21 Q. Thank you.

22 And I believe on page 11 of your
23 testimony, you note on line 6 -- I will give you a
24 minute to find the citation.

25 A. Yes.

1 Q. Page 11, line 6, you note that the VAP
2 does not require consideration of cost; is that
3 correct?

4 A. That's correct.

5 Q. But just in a -- in reality, cost is
6 considered by any entity engaging in these types of
7 activities, correct?

8 A. Correct. The VAP is very flexible. It
9 doesn't specify a remedy. So it has pushed that
10 evaluation of costs onto the remediating party to
11 come up with whatever is the most efficient and
12 effective remedial method to achieve all applicable
13 standards.

14 EXAMINER ADDISON: Thank you very much.
15 I have no additional questions. You are excused.

16 THE WITNESS: Thank you.

17 EXAMINER ADDISON: Mr. McMurray, I
18 believe you previously moved for the admission of
19 Duke Energy Ohio Exhibit 15; is that correct?

20 MR. McMURRAY: I did.

21 EXAMINER ADDISON: Thank you.

22 Are there any objections to the admission
23 of this exhibit at this time?

24 MR. McKENNEY: Just subject to our
25 motions to strike that were denied. Just noting

1 that.

2 MS. BOJKO: Yes.

3 EXAMINER ADDISON: Thank you very much.
4 Yes, all of the motions to strike that were
5 previously denied are noted for the record.

6 MR. McKENNEY: Thank you.

7 EXAMINER ADDISON: Hearing no additional
8 objections, this exhibit will be admitted.

9 (EXHIBIT ADMITTED INTO EVIDENCE.)

10 EXAMINER ADDISON: Let's go ahead and
11 take a quick break while we prepare for our next
12 witness.

13 Let's go off the record.

14 (Discussion off the record.)

15 EXAMINER ADDISON: At this time we will
16 go ahead and go back on the record.

17 Mr. McMurray.

18 MR. McMURRAY: Thank you, your Honor.

19 Duke Energy Ohio calls Dan Brown to the stand.

20 EXAMINER ADDISON: Welcome, Mr. Brown.

21 (Witness sworn.)

22 EXAMINER ADDISON: Thank you. Please be
23 seated and if you could just turn on your microphone.

24 Please proceed.

25 - - -

1 DAN B. BROWN

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Mr. McMurray:

6 Q. Hello, Mr. Brown. Can you please state
7 your name for the record?

8 A. Dan B. Brown.

9 Q. And who are you employed by and in what
10 position?

11 A. Partners Environmental Consulting,
12 Incorporated. I am the president and owner of that
13 firm.

14 Q. And what is your business address?

15 A. 31100 Solon Road, Suite G, Solon, Ohio
16 44139.

17 Q. Did you cause to be filed written
18 testimony in this proceeding on behalf of Duke Energy
19 Ohio?

20 A. Yes, I did.

21 MR. McMURRAY: Your Honor, may we
22 approach the Bench -- or the witness?

23 EXAMINER ADDISON: You may.

24 MR. McMURRAY: We are bringing up what's
25 been marked Duke Energy Ohio Exhibit 16.

1 Q. (By Mr. McMurray) You've had a chance to
2 look at the document?

3 A. Yes, I have.

4 Q. Do you have that written testimony that
5 you prepared in front of you now which is marked as
6 Duke Energy Ohio Exhibit 16?

7 A. Yes, I do.

8 Q. Are there any changes or corrections you
9 would make to the testimony that you have filed?

10 A. Yes, I have one.

11 Q. And what is that?

12 A. On the copy I have, the page numbers have
13 been cutoff. Bear with me. I'm on page 8 of my
14 testimony. In a paragraph beginning on line 18 and
15 extending to line 21, at the time that I filed this,
16 it was my belief that the film training course was
17 being used by the agency, but as it turns out, the
18 agency since has changed that procedure and they
19 conduct all the training themselves now. They
20 don't -- they don't use this film training which was
21 previously. So I would make a correction in line 20
22 where I say the words "is used to this day," I would
23 change that to read "was used."

24 Q. Okay. Do you have any other corrections
25 or changes?

1 A. I do not.

2 Q. So with that one change, is your
3 testimony true and accurate to the best of your
4 knowledge?

5 A. Yes, it is.

6 Q. Would your answers be the same if I asked
7 you the same questions today?

8 A. Yes, they would be.

9 Q. Do you hereby adopt this written
10 testimony, as corrected, as your testimony in this
11 proceeding?

12 A. Yes, I do.

13 MR. McMURRAY: Duke Energy moves for
14 admission of Mr. Brown's direct testimony which is
15 identified as Duke Energy Ohio Exhibit 16.

16 EXAMINER ADDISON: Thank you,
17 Mr. McMurray, and I will reserve ruling on the motion
18 for admission subject to completion of
19 cross-examination.

20 Let's go off the record for a moment
21 (Discussion off the record.)

22 EXAMINER ADDISON: Let's go ahead and go
23 back on the record.

24 Mr. Brown, Ms. Watts just handed you a
25 copy of Duke Energy Exhibit 16 with the page numbers

1 included; is that correct?

2 THE WITNESS: That is correct.

3 EXAMINER ADDISON: Thank you.

4 MR. McKENNEY: Your Honor, I am going to
5 try and jump in front of counsel, I'm sorry. Are you
6 still doing page numbers?

7 MS. BOJKO: Yes. I have a question on
8 page numbers.

9 EXAMINER ADDISON: Let's go off the
10 record.

11 (Discussion off the record.)

12 EXAMINER ADDISON: Let's go back on the
13 record.

14 Any motions to strike?

15 MR. McKENNEY: I am going to try and go
16 first on the motions to strike, your Honor.

17 EXAMINER ADDISON: Certainly. Please
18 proceed.

19 MS. BOJKO: Try? I'll allow.

20 MR. McKENNEY: Okay. So my motion to
21 strike is going to be under the relevance rule under
22 rule 401 of the Ohio Rules of Evidence. And then as
23 we walk through these, so a couple different areas
24 that he provides information that's not relevant to
25 this case but, under rule 403, even some evidence

1 that is relevant can be excluded and is not
2 admissible if its probative value is potentially
3 outweighed by the danger of prejudice, and so I am
4 going to try and demonstrate how this could be
5 prejudicial to the Commission, and so even if you
6 were to find that it is relevant, it should still be
7 struck from his testimony. I would hate for the
8 Commission to be prejudiced.

9 So as we start, I will start on page 32
10 of his testimony, line 18. Starting with the
11 beginning of the sentence, a 2009 report by PG&E
12 identified anticipated annual costs for cleanup
13 activities at its sites. PG&E is Pacific Gas and
14 Electric out in California. That's not relevant to
15 the cost of this site.

16 The next example is on the next page,
17 page 33, line 3, where he begins, as another specific
18 example, U.S. EPA announced its preferred plan for
19 cleanup of the Portland Harbor Superfund Site. And
20 the cost -- estimated costs for that site.

21 I don't think what happened in Portland
22 or at PG&E are relevant to this proceeding. We
23 certainly don't have a lot of information about those
24 sites, and I think there is a serious concern that
25 any costs for sites in California and in Portland

1 could be prejudicial to what costs should be in this
2 site or for whatever purpose they are using them for.

3 I would recommend that -- or propose that
4 it be struck through line 10, halfway through line 10
5 after the comma there, and capitalize and then just
6 the conclusion be stated "The costs for cleanup of
7 complex sites can be substantial." I don't have a
8 problem with the conclusion as a matter of his
9 testimony. It's the examples which are not relevant
10 to this proceeding.

11 The next one is on page 34, line 6, he
12 starts "A few of such examples are summarized below"
13 and then we have got more. In New York City, the
14 Gowanus Canal. On line 16, in Pawtucket, Rhode
15 Island, the cleanup of the former Tidewater facility.
16 That paragraph as well.

17 The next page, starting with line 5

18 EXAMINER ADDISON: Mr. McKenney, if you
19 could just slow down a second.

20 MR. McKENNEY: I'm sorry. I am on a
21 roll. Are you ready?

22 EXAMINER ADDISON: I believe I am all
23 caught up. Please continue.

24 MR. McKENNEY: And then on page 34,
25 starting with line 6, "A few of such examples are

1 summarized below," discussing New York City, the
2 Gowanus Canal. And on page 34, line 16, Pawtucket,
3 Rhode Island, the cleanup of the former Tidewater
4 facility.

5 Page 35, the next paragraph starts on
6 line 5. In Kingston, New York, the site of the
7 former National Grid facility.

8 The next paragraph is on line 12, Utica,
9 New York, another National Grid site.

10 I recommend or propose that they be
11 struck through, halfway through line 19 after the
12 comma, and capitalize "the cleanup of MGP sites can
13 be substantial even when sites are not further
14 complicated by ongoing utility operations." That's
15 his conclusion. If he wants to leave it in here, we
16 can cross him on that. It's the examples that I
17 don't believe belong in this record.

18 And then page 36, the paragraph starting
19 on line 8. U.S. EPA report from May 1999. Costs for
20 soil removal. In the next paragraph, as well, is an
21 example of costs of soil disposal.

22 And that is the conclusion of what I --
23 the paragraphs I recommend be struck. These are not
24 relevant. This is an assortment of sites from across
25 the country. They are not Ohio sites. They are not

1 being paid or proposed to be paid by Ohio ratepayers.
2 They are a mix of utility/nonutility sites. The
3 costs are across the board and for different types of
4 remediation. We have already covered in this hearing
5 that remediation can be done in different ways. Also
6 the VAP is an Ohio-specific program and these are not
7 Ohio sites, so I think there is a real relevance
8 problem here.

9 But even if it were to be found relevant,
10 I think there's a serious problem that undue
11 prejudice could be caused because they support a
12 proposition which I don't think this Commission
13 should be relying on which is the cost for sites in
14 other states in other years. So, for those reasons,
15 I ask that these be struck.

16 EXAMINER ADDISON: Thank you,
17 Mr. McKenney.

18 Mr. McMurray.

19 MS. BOJKO: Your Honor, I'm sorry. I
20 have additional -- the same exact paragraphs, I have
21 a couple additional rules I would like to add. It
22 might just be more efficient if I go ahead and then
23 allow Duke to respond to both if that's fine with
24 you.

25 EXAMINER ADDISON: Certainly.

1 MS. BOJKO: I would agree and join in
2 support of the motion to strike based on irrelevancy.
3 The VAP is an Ohio-specific voluntary program, which
4 we've been told numerous times throughout this
5 hearing, and so Mr. Brown is testifying about the
6 Ohio-specific voluntary program. Any general
7 out-of-state or Superfund sites are not relevant to
8 this proceeding.

9 In addition to being irrelevant, there
10 are hearsay concerns within his testimony. He
11 references various information from various sources.
12 He has no citations. He has not attached any of
13 these alleged reports. We have no ability to review
14 them and we have no ability to cross-examine him on
15 them because he is not the author of those reports.

16 So his references to out-of-court
17 statements and to various sources without citation or
18 attaching them is improper and he is doing so to
19 prove the truth of the matters asserted therein which
20 is clear hearsay and inadmissible and should be
21 stricken under rule 801(C).

22 Mr. Brown's relying on these out-of-court
23 statements to prove the truth of the matters he
24 asserts. It's classic hearsay. There are no
25 exceptions when he does not attach and we have no

1 ability to determine the foundation or the
2 reliability of those documents. So they do not fall
3 within an exception under rule 803.

4 Third, even if the above testimony is not
5 considered inadmissible hearsay, it should be
6 stricken for lack of foundation and lack of personal
7 knowledge. Under rule 602 of the Ohio Rules of
8 Evidence, a witness may not testify to a matter
9 unless evidence is introduced sufficient to support a
10 finding that the witness has personal knowledge of
11 the matter.

12 Mr. Brown did not author these documents.
13 He do not work for the EPA, Pacific Gas and Electric
14 Company, or the North Carolina Department of
15 Environmental and Natural Resources. Thus, he cannot
16 speak to these items for lack of personal knowledge.

17 So in addition to the motion for
18 irrelevance, we would like to add those reasons for
19 striking the testimony. Thank you.

20 EXAMINER ADDISON: Thank you very much.

21 Mr. McMurray.

22 MR. McMURRAY: Okay, thank you, your
23 Honor. I am going to try to summarize and there
24 is -- various arguments have been raised.

25 You know, as to relevance, I think the --

1 first of all, I would say that as opposed to a motion
2 to strike, the appropriate approach ought to be for
3 the other parties to engage in cross-examination of
4 Mr. Brown in order to determine whether this is
5 relevant or not. From our perspective, the
6 information in Mr. Brown's testimony is highly
7 relevant.

8 Mr. Fiore testified earlier, the two
9 Cincinnati MGP sites, the Duke Energy sites are the
10 largest, most-complex MGP sites that he's been
11 involved with. There are not other sites in Ohio
12 that would be similar to the two Duke Energy sites in
13 Cincinnati.

14 I think, through cross-examination,
15 counsel could inquire whether it's common for an
16 expert, such as Mr. Brown who is not only an expert
17 in the VAP but also is an expert in environmental
18 investigation and remediation including MGP sites, to
19 determine whether it is a common approach to, you
20 know, in the absence of being able to compare to
21 sites that are similar to your sites that are, you
22 know, in your particular locale, do you look at, you
23 know, other sites across the country.

24 Yes, this work is being done under the
25 VAP, but as prior testimony in the hearing so far has

1 indicated the -- the approach of investigation and
2 remediation of these sorts of sites are, you know,
3 fairly customary across the country. And so the
4 types of work that are being done at the other sites,
5 you know, are not dissimilar to the work that's being
6 done at the Duke sites.

7 Moreover, I think through
8 cross-examination it could be inquired that Mr. Brown
9 gathered this information on these other sites. It
10 was all publicly-available information on the sites
11 that he's noted here.

12 The EPA publication from 1999, my
13 understanding is that may be the most-current version
14 or edition of the MGP Site Characterization
15 Remediation guidance that U.S. EPA has. It's all
16 publicly available. They could have looked at it
17 themselves.

18 They could have chose to take Mr. Brown's
19 deposition. They did not. They could cross-examine
20 here to determine, you know, whether this is in fact
21 relevant here. But from Duke's perspective this is
22 very appropriate and very relevant to be using
23 information that you can gather across the country
24 for similar types of investigation and cleanup.

25 If, at the end of the cross-examination,

1 you would determine that, you know, that it ought not
2 be given the same amount of weight, that's a decision
3 that you can make but it seems to me this is not
4 appropriate for a motion to strike just whole cloth.
5 This is what expert witnesses in Mr. Brown's position
6 do when they are asked to evaluate costs associated
7 with investigating and remediating sites,
8 particularly ones that are this large and complex.

9 MR. McKENNEY: Can we respond, your
10 Honor?

11 EXAMINER ADDISON: I don't know if you
12 had responded to Ms. Bojko's hearsay basis for --

13 MR. McMURRAY: I may not have. Let me.

14 EXAMINER ADDISON: Thank you.

15 MR. McMURRAY: Yeah. So I think two
16 responses to that. One is, you know, as an expert
17 witness, the basis of the expert's opinion, you know,
18 includes evidence and information that, you know,
19 could be gathered from a variety of sources such as
20 this.

21 As to the hearsay specifically, Rule
22 803.6 provides an exception for records of
23 regularly-conducted activities. The documentation we
24 are talking about here is publicly-available
25 information with regard to the investigation of

1 remediation of sites that are specified in
2 Mr. Brown's testimony, that anyone could go and look
3 up the -- they would be free to challenge why that is
4 not relevant, that it's not probative, but this is
5 what experts -- this is how experts go about
6 determining whether costs or the scopes of work are
7 appropriate is they look to compare it with other
8 sites.

9 I think I'm further advised that experts
10 are entitled to rely on hearsay if that is the sort
11 of information that they ordinarily rely upon in
12 performing the work that they do.

13 EXAMINER ADDISON: Mr. McKenney.

14 MR. MCKENNEY: I don't want to take your
15 thunder.

16 MS. BOJKO: Okay.

17 MR. MCKENNEY: So regarding the
18 relevance, your Honor, these sites are in other
19 states. They are -- they were not, to the best of
20 our knowledge, not remediated under the VAP. And I
21 think there is a real concern that if the Commission
22 were to look at these and determine that these are
23 the approximate costs to remediate a site, we would
24 then compare these out-of-state sites to the Duke VAP
25 sites, some number that cannot be supported by the

1 record.

2 Mr. McMurray seems to latch onto the
3 Commission's common practice of allowing people to
4 cross-examine a witness on a matter or to give it the
5 weight it deserves which is a rather common ruling.
6 But I don't think that's actually a remedy here. We
7 have little opportunity to actually review these
8 sites or understand New York law. Certainly nobody
9 is an expert here on -- well, maybe someone other
10 than myself, I am not an expert on New York law or
11 California law or Portland, Oregon law beyond
12 ratemaking. There is a difference between a
13 vertically-integrated utility and
14 non-vertically-integrated utilities.

15 There are so many variables that
16 differentiate these other sites from Duke's MGP sites
17 that cannot be explored today in this hearing, that
18 these sites should really be struck from the record.

19 If it makes it easier, we could also
20 separate the sites we've proposed to strike from the
21 EPA's soil remediation costs. Mr. McMurray has noted
22 that EPA's soil cost from 1999 might be relevant in
23 some way or that the 2013 public notice for the
24 Kingston manufactured site by the North Carolina
25 Department of Environmental Resources might be

1 relevant.

2 If we want to separate those EPA reports
3 as something he relied upon from these other sites,
4 then we could do that, but at least these sites in
5 other states, remediated under other programs, in
6 other ways, with other costs, other ratemaking
7 proceedings, if they were even recovered in
8 ratemaking proceedings, should be struck from the
9 record.

10 And much like the hearsay rule which we
11 are going to hear from Ms. Bojko in a minute, an
12 expert can rely on hearsay and form opinions. It
13 doesn't mean it can be admitted into the record, it
14 doesn't mean he can't look at these and form maybe an
15 opinion. It does not mean it should be admitted into
16 the record. It should not be admitted into the
17 record. It should not be included in his testimony.
18 And they should be struck.

19 I'll defer now to Ms. Bojko.

20 EXAMINER ADDISON: Thank you.

21 MS. BOJKO: Thank you, your Honor. It's
22 interesting that counsel states that we can easily go
23 find these. There is no links. Historically in
24 Commission proceedings it's the practice to make a
25 citation to certain documents that you rely on. You

1 put a link if you want people to go obtain it
2 themselves. You attach them as testimony. None of
3 that was done here. So there -- even though there
4 could be a hearsay exception, there's not in this
5 case for multiple reasons.

6 One, there's been no foundation laid. We
7 have no foundation for each of these documents that
8 this witness is a person that can tell where it came
9 from, that he can authenticate it, that he can state
10 with certainty what it says.

11 He's offering these for the truth of the
12 matter asserted without even producing the documents.
13 That's improper and the Commission has historically
14 struck either documents attached to people's
15 testimony that are dumping irrelevant, other state
16 proceedings into the cases, or even references to
17 other states' proceedings into the cases.

18 I also find it interesting that when I
19 tried to ask Ms. Bednarcik about things outside of
20 the Ohio EPA, there were objections and it was stated
21 that these Ohio EPA cases are what is relevant in
22 this proceeding and that other remediation efforts
23 beyond the Ohio VAP is not relevant. And now we're
24 saying anything in the nation is relevant as long as
25 Mr. Brown is here to testify to what he believes.

1 That's just not true. It has to be
2 relevant to the case. There is no comparison for
3 many of the reasons Mr. McKenney stated. These -- we
4 don't know which utilities. We don't know their
5 regulatory structure. We don't know their ratemaking
6 structure. We don't know if they have MGP riders.
7 We don't know the cost recovery mechanisms. We don't
8 know how they are being remediated under the
9 Superfund.

10 Putting one paragraph in here does not
11 explain to us how they are relevant and how they can
12 be even close to being comparable to the remediation
13 efforts that occurred in the instant cases.

14 Lastly, I would just note on the hearsay,
15 you can have hearsay to formulate an expert opinion,
16 but you are -- and to rely on that to formulate your
17 expert opinion, but you are not allowed to get the
18 actual hearsay information admitted into the record
19 which is exactly what they are trying to do, get
20 prices per cubic yard in the record, when we have no
21 foundation and no ability to cross-examine the person
22 that actually made those statements. Thank you.

23 EXAMINER ADDISON: Thank you very much.

24 Mr. Brown, were you personally involved
25 in the remediation activities for any of the examples

1 listed in your testimony?

2 THE WITNESS: I read the documents
3 associated with them, so I was involved in that way
4 directly but not in terms of handling the cleanup
5 work itself in those sites.

6 EXAMINER ADDISON: And when you say you
7 read the documents associated with them, that was
8 purely in order to prepare your testimony in this
9 case, correct? You had no underlying involvement in
10 those example projects?

11 THE WITNESS: That's correct. If the
12 Court would allow, can I elaborate briefly?

13 EXAMINER ADDISON: Please.

14 THE WITNESS: So one of the complicating
15 factors here was that to find relevant information
16 here in the state of Ohio was very limited and very
17 difficult, partly because the sites are somewhat
18 unique in their size and scale and complexity and in
19 the area that they deal with MGP sites.

20 And so, while I conducted a thorough
21 analysis to try and identify other sites within the
22 State of Ohio for which there would be
23 publicly-available nonconfidential information about
24 costs and figures and remediation types and things
25 like that, it was very difficult to locate anything

1 that was of any comparable nature which is why I
2 relied on these other documents where I was able to
3 find them.

4 EXAMINER ADDISON: And were any of these
5 example projects remediated under VAP or a comparable
6 program?

7 THE WITNESS: Not under VAP but I would
8 say yes, under comparable programs in that
9 environmental regulatory programs are comparable both
10 across states and across federal regulations which
11 are underlying all of those.

12 While there are differences state to
13 state, the vast majority of the management and
14 handling, and the structure of environmental programs
15 are similar. There are nuances that are different
16 state to state, but the federal program is the same
17 everywhere, and state programs are mostly the same.

18 EXAMINER ADDISON: And have you
19 personally been involved in any other MGP-related
20 remediation projects in Ohio or otherwise?

21 THE WITNESS: Yes, I have.

22 EXAMINER ADDISON: And are you -- don't
23 disclose any confidential information obviously but
24 are you authorized to speak as to specific costs
25 related to those projects as you sit here today?

1 THE WITNESS: In one instance I would
2 believe the investigative aspects of the project
3 would be considered in the public record.

4 EXAMINER ADDISON: One instance?

5 THE WITNESS: Yes.

6 EXAMINER ADDISON: I am going to take
7 just a few minutes to review. This is a pretty
8 lengthy motion to strike. I am going to take a few
9 minutes just to review the portions of the testimony
10 that are subject to the motion to strike, and we'll
11 come back on the record in about 5 or 7 minutes.
12 Thank you.

13 (Recess taken.)

14 EXAMINER ADDISON: At this time we will
15 go back on the record.

16 I will be granting the motion to strike
17 in part. However, Mr. McKenney, I would like to
18 confer with you as to where the motion to strike
19 should begin as to the relevancy basis. If you look
20 at page 32, line 12, beginning with the word
21 "Therefore," in that sentence, I believe, you
22 previously moved to strike starting on line 16
23 beginning with the word "the." But I believe the
24 line starting with the word "Therefore" the sentence
25 starting with the word "Therefore" on line 12 is

1 also -- it would also apply; is that not correct?

2 MR. McKENNEY: Yes. Yeah, line 12, the
3 word "Therefore" I think is where we would --

4 EXAMINER ADDISON: Through the end of
5 that paragraph; is that correct?

6 MR. McKENNEY: Yes. The next one was
7 examples -- I started with line 18 example, but, yes,
8 that's where the motion to strike would start.

9 EXAMINER ADDISON: Thank you.

10 MR. McNAMEE: It would be 12 through the
11 end of the page?

12 EXAMINER ADDISON: Yes. So the motion to
13 strike applies to line 12, beginning with the word
14 "Therefore," through page 33 to line 10, ending with
15 the word "examples" and the comma, and we will
16 capitalize the word "the." So line 10 now reads
17 "The cost for cleanup of complex sites can be
18 substantial" through line 11.

19 Continuing on to page 34, line 6, the
20 motion to strike will be granted through page 35,
21 line 19, and we again will capitalize the word "the."
22 So line 19 begins "The cleanup of MGP sites."

23 The motion to strike will also be granted
24 as to page 36, lines 13 through 17.

25 However, I will be denying the motion to

1 strike as it applies to page 36, lines 8 through 12.
2 The Commission is not strictly bound by the Ohio
3 Rules of Evidence and I do believe that this
4 information listed here will be beneficial for the
5 Commission's consideration of these applications.

6 I would also note that I will encourage
7 Mr. Brown to cite to his prior work on MGP --
8 particularly the one MGP-related project that he
9 referred to upon my questioning as well as any other
10 projects that he has been involved with, particularly
11 with Ohio VAP as a certified professional.

12 And I believe that addresses all of your
13 motions to strike, is that correct, Mr. McKenney?

14 MR. MCKENNEY: Those were my only motions
15 to strike, your Honor.

16 EXAMINER ADDISON: Thank you.

17 Does anyone need clarification on how the
18 motion to strike applies to Mr. Brown's testimony?

19 I apologize for the delay. I just wanted
20 to make sure my references were correct.

21 Any additional motions to strike at this
22 time?

23 MS. BOJKO: Yes, your Honor. Just, not
24 surprising, I will make a similar motion to strike
25 the various portions of Mr. Brown's testimony that

1 discuss the Purchased Parcel including the WOW Parcel
2 and the Ohio River for the same reasons that we've
3 already argued with respect to Ms. Bednarcik's
4 testimony and Mr. Bachand's testimony and I believe
5 Mr. Fiore's testimony.

6 EXAMINER ADDISON: Thank you, Ms. Bojko.
7 And consistent with my prior rulings, the motion to
8 strike as to -- as to that basis will be denied.
9 However, you are more than welcome to make those
10 arguments in your brief.

11 MS. BOJKO: Thank you, your Honor.

12 EXAMINER ADDISON: Thank you.

13 Any additional motions to strike?

14 Okay. All right. Mr. McKenney.

15 MR. MCKENNEY: Thank you, your Honor.

16 - - -

17 CROSS-EXAMINATION

18 By Mr. McKenney:

19 Q. Good morning, Mr. Brown. Not morning.
20 Good afternoon.

21 A. Good afternoon to you too.

22 Q. Mr. Brown, you are a VAP-certified
23 professional by the Ohio EPA; is that correct?

24 A. That's true.

25 Q. You are not the VAP CP for Duke's East

1 End site, are you?

2 A. I am not.

3 Q. You are not the VAP CP for Duke's West
4 End site either, are you?

5 A. I am not.

6 Q. In fact, you have only been to Duke's
7 MGP's site once; is that correct?

8 A. I have been to the East End site once. I
9 have been to the West End site once.

10 Q. For clarity of the record, is that one
11 day at each site or both sites on one day?

12 A. I went to both sites on one day.

13 Q. While you were at the sites, you did not
14 complete any pumping tests, did you?

15 A. I did not complete any pumping tests
16 while I was at the site.

17 Q. In your testimony you say you were
18 trained in slug tests. You did not complete any slug
19 tests at any of those sites, did you?

20 A. I did not.

21 Q. You did not complete any hydrogeologic
22 studies at any of those sites, did you?

23 A. From the standpoint that I've reviewed
24 technical reports related to hydrogeology,
25 hydrogeological studies relative to both those sites,

1 but while there on those two days, I did not conduct
2 a hydrogeologic study.

3 Q. You have only studied the work done by
4 other professionals; is that correct?

5 A. It's very typical in the environmental
6 field is that you utilize the work done by the
7 professionals and evaluate it and assess it and
8 validate it and that's what I have done at this site.

9 Q. Would you say you evaluated the work of
10 Mr. Fiore?

11 A. I've evaluated the work conducted by
12 Haley & Aldrich. I don't necessarily know
13 specifically which work may have been attributable
14 directly to Mr. Fiore versus other people.

15 Q. You say in your testimony you advanced
16 your abilities through the design of and the
17 supervision during installation of soil and
18 groundwater remediation systems. You did not do that
19 here, did you?

20 A. Could you ask that question again? I'm
21 sorry.

22 Q. I can limit that down. You did not
23 install any soil or groundwater remediation systems
24 here, correct?

25 A. I did not personally install any soil or

1 groundwater remediation systems here. I did observe
2 soil remediation occurring when I was at the site, at
3 the East End site in particular.

4 Q. Mr. Brown, you are not a utility
5 ratemaking expert, correct?

6 A. Could you clarify what you mean by that?

7 Q. You have no expertise in utility
8 ratemaking, do you?

9 A. I mean, as it relates to my testimony
10 here, I have expertise. I am not sure, you know,
11 whether you are asking for something more broad, you
12 know, broader than that.

13 Q. Have you ever testified before the PUCO
14 before?

15 A. I have not.

16 Q. Have you ever testified in a utility rate
17 case before?

18 A. I have not.

19 Q. Do you know the utility ratemaking
20 formula?

21 A. Not specifically.

22 Q. Your testimony today is regarding Duke's
23 efforts to comply with the Ohio VAP's stand --
24 application -- the applicable standards under the
25 Ohio VAP; is that correct?

1 A. Are you paraphrasing or are you asking
2 me --

3 Q. I am paraphrasing, yes.

4 A. So that is one of the aspects of my
5 testimony today.

6 Q. Mr. Brown, you did not conduct any cost
7 analyses -- strike that.

8 You did not review all the invoices for
9 costs incurred by Duke to remediate these sites, did
10 you?

11 A. That's not correct.

12 Q. Did you review all of the invoices
13 incurred by Duke to remediate these sites?

14 A. I did not review all of the invoices. I
15 looked at many of the invoices related -- provided to
16 Duke for this site. I should say for the East End
17 site and for the West End site.

18 Q. Mr. Brown, at page 7 of your testimony,
19 at line 7, you say you've overseen thousands of
20 individual projects. You did not oversee these
21 individual projects though, did you?

22 A. Could you tell me the line and the page
23 again? I'm sorry.

24 Q. Yes, page 7, line 7. My question is, you
25 did not oversee these projects; is that correct?

1 A. That's not correct.

2 Q. Were you the site manager for these
3 sites?

4 A. My testimony indicates the situation
5 which was that I either oversaw them directly or
6 indirectly meaning that I had some knowledge,
7 awareness involvement, peer review process, some
8 aspect of the project I was involved with in some
9 manner.

10 MR. McMURRAY: I am not objecting but we
11 may need clarification when you say "these sites."

12 EXAMINER ADDISON: Yes, I think there is
13 a little --

14 MR. McKENNEY: I will do that.

15 EXAMINER ADDISON: -- disconnect.

16 Q. (By Mr. McKenney) So is it your testimony
17 that giving your opinion here is considered
18 overseeing Duke's MGP sites?

19 A. Could you ask that question again?

20 Q. Would you consider testifying here today
21 as overseeing Duke's -- the individual projects at
22 Duke's MGP sites?

23 A. No.

24 Q. Did you investigate and design
25 remediation alternatives for Duke's MGP sites?

1 A. I evaluated that information.

2 Q. In your testimony at page 7, line 11, you
3 say your experience includes the investigation and
4 design of remediation alternatives for MGP sites, but
5 you didn't do that here, did you?

6 A. There's aspects of the work that I did to
7 provide my testimony that involved investigating and
8 evaluating remediation alternatives at these -- at
9 the MGP sites, the East End site and the West End
10 site. That's part of the work I had to do to come to
11 the conclusions in my testimony.

12 Q. You investigated work done by others,
13 correct?

14 A. I evaluated work done by others, correct.

15 Q. You did not design any remediation
16 alternatives for Duke's MGP sites, correct?

17 A. I feel like we are just caught up on
18 semantics and I just want to be clear. I am not
19 trying to be argumentative. I evaluated the design
20 and I came to my own conclusion about the designs of
21 what remedies might or might not work relative to
22 this site. If you are referring to that, then that
23 is something that I've done. If that's not what you
24 are asking, then please ask again.

25 Q. Okay. Did Duke consult you on how to

1 remediate these sites?

2 A. I mean, I have advised Duke, through the
3 course of my testimony, about what I -- you know, how
4 I would -- well, I think you can read it here, it's
5 clear. So, you know, from that standpoint, Duke
6 consulted with me about it.

7 Q. Do you know when the investigation and
8 remediation of the East End site began?

9 A. Loosely.

10 Q. Do you know when the investigation or
11 remediation of the West End site began?

12 A. Roughly.

13 Q. Does that mean you do not know the years
14 that those investigations began?

15 A. Well, I would just want to be accurate
16 and correct so I would just want to refer to that to
17 know it specifically.

18 Q. You were not hired by Duke when the
19 investigation or remediation of either the East End
20 site or West End site began; is that correct?

21 A. That is correct.

22 Q. You were not hired by Duke as a
23 consultant on any of the remediation between the
24 years '13 -- 2013 through 2018; is that correct?

25 A. I don't recall exactly the date in which

1 I was first hired by Duke. I believe it was in 2018.
2 It could have been as early as 2017. I don't recall,
3 but certainly in 2018 I was being retained by Duke.

4 Q. So you were retained by Duke after the
5 work sought for recovery -- I will rephrase.

6 You were retained by Duke after the
7 majority of the work sought for recovery in this case
8 had been concluded; is that accurate?

9 A. I am not sure I heard you clearly. Could
10 you just read it back or repeat it? I'm sorry.

11 Q. I will rephrase.

12 Duke did not consult you for how to
13 remediate during the remediation process in years '13
14 through '18, correct?

15 A. So, again, I just want to be clear. I've
16 been involved with the project since at least 2018
17 and, during that time remediation, has occurred and
18 more remediation is going to occur at the East End
19 and West End sites, and I have been providing
20 testimony and input to Duke, so in some -- at some
21 level that's consulting with them about these
22 matters, but I would say that did not happen prior to
23 roughly -- again, I would have to go back and look at
24 the records to find out exactly -- but roughly when I
25 first became engaged with Duke in 2018.

1 Q. To the best of your knowledge, were you
2 hired by Duke specifically for this proceeding?

3 A. Not specifically for this proceeding.

4 Q. You were not hired by Duke --

5 A. Excuse me. Not exclusively for this
6 proceeding.

7 Q. Okay. You had no involvement in the
8 annual MGP Rider update cases, correct?

9 A. That's correct.

10 Q. Just to walk through -- I am not going to
11 walk through those.

12 You were not involved in any of them in
13 years '13 through '18, so none of them, correct?

14 A. Correct.

15 Q. On page 8 of your testimony, lines 1
16 through 3, you say your experience has included
17 negotiations, settlement and litigation specifically
18 related to regulatory agency interpretation and
19 rules. That regulatory agency would primarily be the
20 Ohio EPA; is that accurate?

21 A. No, it's not.

22 Q. What would the primary regulatory agency
23 in which you have been involved in interpretation of
24 rules been?

25 A. There's been several. There's various

1 agencies within the state of Ohio. Would you like me
2 to list some of those that come to mind?

3 Q. I can narrow this.

4 Your experience with negotiations,
5 settlement and litigation is not primarily in front
6 of the Public Utilities Commission of Ohio; is that
7 correct?

8 A. That is correct.

9 Q. And you were one of the original -- you
10 were chair on the original rule-writing subcommittee,
11 selected by the Ohio EPA, when the VAP program was
12 created; is that right?

13 A. That's correct.

14 Q. Have you ever been consulted on a PUCO
15 rulemaking?

16 A. I don't believe so.

17 Q. And you were one of the original VAP CPs,
18 correct?

19 A. I'm --

20 Q. First 10, we will say. You were one of
21 the first 10 VAP CPs, how's that?

22 A. Yes, that is correct.

23 Q. And you have provided input on subsequent
24 five-year rule reviews of the VAP program; is that
25 correct?

1 A. That's correct.

2 Q. Can you explain to me -- giving you an
3 open question here because I just don't know, what --
4 when the Ohio EPA takes input on amending or revising
5 its rules, are comments provided in a public docket
6 or how do they take comments or input to amend the
7 rules? How do you do that?

8 A. There's a couple processes that are used.
9 The VAP rules, I believe it's the statute, requires
10 that every five years the rules be reviewed for
11 revisions. And that process is generally two parts.
12 There may be others but it's generally two parts.
13 One part is public comment so that the rules are open
14 for public comment. And public comment is requested
15 in the same way that Ohio EPA does that with all of
16 their rulemaking.

17 And within the VAP program, it's very
18 typical and common and has been the case, and I and
19 others in my company have participated in each of the
20 rule revisions, is that they establish committees
21 that focus on specific details of the rules. And
22 those committees in the experience that I have had,
23 the Ohio EPA is on the committee with several people
24 including legal and then there's usually certified
25 professionals, several on the committee, and then the

1 other interested parties as desired on the committee.

2 And then that committee takes under
3 advisement both things that -- well, not both, but
4 things that have been brought up by -- through public
5 comment, as well as interests on behalf of the
6 director, as well as typographical things that have
7 been identified by agency staff. Those are all
8 examples of things that then get considered by the
9 committee. The committee then makes a recommendation
10 with staff that goes to the director.

11 Q. By "staff" you mean Ohio EPA staff.

12 A. Ohio EPA staff, thank you.

13 Eventually that process goes to JCARR for
14 rulemaking approval, and ultimately I think -- well,
15 I'm not certain of exactly the process between JCARR
16 and the director, like when it would be signed into
17 rule, I am not sure of the exact legal process there
18 myself.

19 Q. Okay. I am going to go ahead and move
20 on. Thank you for your answer, Mr. Brown.

21 On page 9, line 15, you say on several
22 occasions you have been brought into a VAP project
23 with the specific purpose of assessing and
24 maintaining compliance with the rules of Sufficient
25 Evidence. Did you do that here?

1 A. No, I have not.

2 Q. And then on page 10, you have not been
3 involved in the investigation and remediation of Duke
4 Energy Ohio's two other former MGP sites, have you?

5 A. Did you say two other? I'm sorry.

6 Q. Two Ohio former MGP sites. Sorry.

7 A. Are we speaking about the East End and --
8 what are commonly known as the East End site and the
9 West End site?

10 Q. We are speaking about the two in your
11 testimony on line 5.

12 A. Yeah. My testimony, no, I have not.

13 Q. I am going to now move to page 11 of your
14 testimony. Lines -- the paragraph on line 6 through
15 8, on line 8, you say Duke has responsibility for the
16 cleanup and liability for the contamination on or
17 emanating from those sites. You are not an attorney,
18 are you?

19 A. I am not an attorney.

20 Q. Same thing with the paragraph on page 11,
21 on line 13, you say is likely that Ohio EPA would
22 have ordered the Company to proceed with the cleanup
23 under its Surface Water and/or Emergency and Remedial
24 Response programs. But you're speculating as to what
25 Ohio EPA might do; is that correct?

1 A. I have a great deal of experience working
2 with Ohio EPA and understanding what it is that they
3 might do. In fact, that's what I'm hired for is to
4 anticipate and interpret what it is Ohio EPA might
5 do. So this testimony is relevant in that regard
6 because I have firsthand experience of this process.

7 Q. Mr. Brown, do you know when these, we
8 will say the MGP East End site, stopped being
9 operational?

10 A. Well, it's still operating today as a
11 facility.

12 Q. Do you know when the plant stopped
13 operating?

14 A. Do you mean -- what do you mean?

15 Q. The MGP plant, do you know what year the
16 MGP plant stopped operating?

17 A. If my recollection is correct, and I
18 would be happy to look this up specifically, I
19 believe it was in 1962 or '3.

20 Q. Do you know when the West End MGP plant
21 stopped operating?

22 A. Again, I would like to reflect to get it
23 accurate but I -- my recollection is around the
24 1920s.

25 Q. Do you remember what year Duke began its

1 remediation of these sites? I think we established
2 that already. You are a little unclear on that; is
3 that correct?

4 A. Yeah. I mean, I know that that occurred
5 sometime around 2009 at one site and sometime around
6 2011 at the other site.

7 Q. Between sometime in the 1960s and around
8 2009, Ohio EPA never ordered the Company to proceed
9 with cleanup under its Surface Water and/or Emergency
10 Remedial Response programs, did it?

11 A. Ohio EPA didn't exist in the 1960s. So
12 no.

13 Q. Okay. So the EPA or its predecessor has
14 never ordered the Company to proceed with a cleanup
15 under its Surface Water and/or Emergency Remedial
16 Response programs, has it?

17 A. No, I am not aware that that's occurred.

18 Q. Similarly, Duke has never been subjected
19 to fines and penalties in addition to cleanup costs
20 from EPA or the Attorney General's Office, has it?

21 A. I mean maybe they have at some point. I
22 don't know if Duke has ever been assigned fines or
23 penalties.

24 Q. So the answer to my question is you don't
25 know of any fines or penalties have been assessed to

1 Duke by the Ohio EPA or the Ohio Attorney General's
2 Office, correct?

3 A. I am not aware personally as I sit here
4 today.

5 Q. I am going to turn forward in your
6 testimony to page 17. You say both sites are
7 active -- I will give you a minute to get there.
8 Sorry.

9 A. Thank you. I am on page 17.

10 Q. Look at the last three words, four words.
11 "In addition, both sites are active" and then onto
12 the next page "utility operations...that will likely
13 remain active for the foreseeable future." But you
14 are not a utility expert, correct?

15 A. I would just ask if you could just
16 clarify what you mean by that.

17 Q. Have you ever worked for a utility,
18 Mr. Brown? I will rephrase.

19 Have you ever been an employee of a
20 utility?

21 A. No, I have not.

22 Q. Do you have any experience managing a
23 utility?

24 A. No, I do not.

25 Q. Have you ever forecasted future utility

1 operations before?

2 A. Are you asking me if I have done that for
3 a utility company?

4 Q. Yes.

5 A. I have not.

6 Q. But it's your testimony that active
7 utility operations, likely to remain active for the
8 foreseeable future, complicate the cleanup in this
9 case, correct?

10 A. That is correct.

11 Q. Now, I want to move on just a little bit
12 and I will try to be quick here. On page 20, we
13 talked about -- you talk about an Urban Setting
14 Designation. An Urban Setting Designation as
15 generally applied, not necessarily to these sites but
16 as generally applied, does not require compliance
17 with certain potable use standards; is that accurate?

18 A. If you could rephrase, I just don't think
19 you described that accurately.

20 Q. How about this, I will let you phrase it.
21 Explain to me what an Urban Setting Designation is.

22 A. And Urban Setting Designation, in its
23 simplest form, is a demonstration that groundwater is
24 not used for a potable purpose within a defined area.

25 Q. But it's in Cincinnati, so city ordinance

1 groundwater cannot be used for potable purposes
2 anyway, correct?

3 A. That is a true statement but it's -- that
4 is not the same as an Urban Setting Designation.

5 Q. Mr. Brown, I am going to move on in your
6 testimony. Page 20, on line 23, you say there was
7 the presence of COCs above applicable standards, and
8 you have in parenthesis, "i.e., soil, groundwater,
9 settlement" and then on the next page, that first
10 word, you say "possibly surface water." To your
11 knowledge, COCs above applicable standards have not
12 yet been found in surface water, have they?

13 A. I've not seen any specific samples
14 indicating that yet.

15 Q. I am going to turn now --

16 A. If you would allow me to just elaborate,
17 I could clarify the nature of that statement if you
18 would like. If not --

19 Q. I think you answered my question.

20 A. Okay.

21 Q. Your counsel, I'm sure, will take you up
22 on that offer.

23 On page 22, you were asked about the
24 complexities relative to both the East and West End
25 sites. You say, on line 3, Duke Energy Ohio

1 proceeded to evaluate possible cleanup options. You
2 were not employed by Duke when they proceeded to --
3 proceeded to evaluate those options, correct?

4 A. Yeah. I've reviewed the documents
5 related to that, but I wasn't hired by Duke at the
6 time that they were developed.

7 Q. Okay. And you say, as a public utility
8 -- there on line 5 -- as a public utility, Duke
9 Energy needed to remain in control of the cleanup,
10 correct?

11 A. That's correct.

12 Q. But even private owners of sites need to
13 remain in control of the cleanup, correct?

14 A. Not necessarily.

15 Q. Aren't the VAP rules de -- designed so
16 that the site owner has control of the cleanup?

17 A. It's actually not an accurate
18 representation of how the rules work.

19 Q. Okay. Please explain to me how the rules
20 work.

21 A. In what regard? I'm sorry.

22 Q. Who has control of the cleanup under the
23 VAP program?

24 A. The volunteer.

25 Q. Who do you mean "the volunteer"?

1 A. The volunteer is the party, under the
2 VAP, that is implementing the rules.

3 Q. Would that be the VAP CP?

4 A. That is not the VAP CP. The VAP CP is
5 the certified professional that is hired by the
6 volunteer to direct the investigation and cleanup in
7 regard to applicable standards.

8 Q. By "volunteer" do you mean remediating
9 party or the party that has volunteered to follow the
10 Voluntary Action Program?

11 A. So just to be clear because this would be
12 far from the first time that the word "volunteer" has
13 tripped people up within the context of the Voluntary
14 Action Program, but the rules define the party
15 requesting the NFA as the volunteer. So that tends
16 to be the party that leads the investigation, that
17 conducts the work, but it does not necessarily mean
18 it's the property owner. It does not necessarily
19 mean it's even one party. You can have
20 co-volunteers. But it's the entity that is
21 requesting the Covenant Not to Sue and for -- and the
22 entity for which the No Further Action letter is
23 prepared.

24 Q. Is Duke the volunteer for the East End
25 site?

1 A. That would be my understanding of the
2 arrangement in that -- in the East End site.

3 Q. That's your understanding. So are you
4 not certain?

5 A. Since there has not been a No Further
6 Action letter prepared at this point, it's still an
7 open-ended question as to exactly what party or what
8 entity might be a volunteer as it relates to
9 submitting the NFA.

10 I work on many, many sites and the nature
11 of the actual volunteer can change during the course
12 of a project, can vary. Sometimes sites are bought
13 or sold. There's a lot of reasons.

14 So I think for plain understanding, Duke
15 is serving as the volunteer as we sit here today, but
16 in terms of what entity is actually and ultimately
17 the volunteer, that will be determined by the party
18 for which the NFA is prepared and then submitted.

19 Q. And the NFA was prepared by the Certified
20 Professional for the site; is that correct?

21 A. The NFA is prepared by the Certified
22 Professional, that's a correct statement. It's
23 prepared relative to a property. "Property" is
24 defined in the NFA as a surveyed piece of land that's
25 determined in the NFA and that's the subject of the

1 NFA.

2 Q. Because this is getting to my question so
3 I am going to try to put it plainly speaking so we
4 can get right down to it. Does the CP, hired by the
5 volunteer, have to be the CP that issues the NFA? If
6 you would like me to clarify what I am trying to get
7 at, maybe it will make this easier.

8 A. Yes, please.

9 Q. Is there more than one CP that can write
10 an NFA for any particular site?

11 A. So you've asked a somewhat complicated
12 question. So a CP typically writes an NFA for a
13 property. However, I have experience with properties
14 for which multiple CPs have written separate,
15 standalone NFAs.

16 The example, just to clarify, would be
17 you have one NFA for a larger property for which a
18 second NFA is done for some subset of that property.
19 In the case that I am thinking of because of a change
20 of use.

21 So technically, and I'm sorry to make
22 this sound complicated, it's just in the way you
23 asked it, you could have more than one CP write an
24 NFA. Traditionally, one CP writes a NFA for a
25 volunteer for a specific piece of property.

1 Q. Thank you for bearing with my question.
2 So does that mean you could have more than one NFA
3 for a geographic piece of property?

4 A. In that context, yes. You could write
5 multiple NFAs, contiguous or not contiguous, that
6 relate to a geographic area.

7 Q. Is that also true for CNSs?

8 A. So the CNS ties to the NFA. So whatever
9 property is defined in the NFA, if it's then
10 requested for a Covenant Not to Sue, the Covenant Not
11 to Sue ties for that specific piece of property.

12 Q. When issuing the NFA, the VAP CP's role
13 is just to determine all applicable standards have
14 been met; is that right?

15 A. So I was here while -- during the
16 testimony of Mr. Fiore and we heard that many times.
17 I think that that's a simplistic way to think about
18 it and it is certainly at the core of what a
19 Certified Professional is required to do. But that,
20 I think, sort of simplifies all that goes into being
21 able to get to the point to establish that a site
22 meets all applicable standards.

23 There is a great deal of underlying work
24 and assessment and analysis that's necessary to be
25 able to say that at the end, but I think it's true

1 and fair and accurate to say that that is the essence
2 of the role of the Certified Professional.

3 Q. Thank you, Mr. Brown.

4 Now I am going to go back to line 5 of
5 your testimony on page 22. You say, as a public
6 utility, Duke needed to remain in control of the
7 cleanup. And then you go on to say so that it could
8 continue to reliably deliver critically-necessary
9 utility services. My question is, you are not an
10 expert on utility reliability, correct?

11 A. My testimony today is about the, you
12 know, prudence and the applicability of the VAP
13 program, that's what I have been testifying about.
14 But, as part of that, I am aware that one of the
15 critical aspects of Duke's cleanup was its role as a
16 public utility and its need to continue to deliver
17 that service.

18 Q. So I am going to ask the inverse of the
19 question. If Duke did not remain in control of the
20 cleanup, would it not be able to reliably deliver
21 critically-necessary utility services?

22 A. I think it's possible that that could
23 have disrupted the situation if they did not remain
24 in control of the site.

25 Q. Do you have any experience in utility

1 distribution design?

2 A. Not specifically that I can recall as I
3 sit here.

4 Q. I am going to move down on that same
5 page. You talk about site complexities at the East
6 End site. One of those complexities, in line 16, is
7 the proximity of the state boundary. That state
8 boundary does not create any complexities for removal
9 of any substances on the sites, does it?

10 A. That's -- I don't agree with that.

11 Q. That state boundary is just a geographic
12 boundary; would you agree with that?

13 A. Yes.

14 Q. Similarly, down below, on the West End
15 site, you said one of the complexities is the Brent
16 Spence Bridge expansion. That bridge has not been
17 built yet, has it?

18 A. There was certainly quite a bit of work
19 done in preparation. You know, you just don't build
20 a bridge overnight so there has been a considerable
21 amount of assessing and evaluating for the relocation
22 of the Brent Spence Bridge which is all part of its
23 relocation and ultimate construction and much of that
24 work has been done.

25 Q. Then once again you say below, "the

1 proximity of the state boundary." You are talking
2 about the same state boundary with the state of
3 Kentucky on the other side of the Ohio River,
4 correct?

5 A. Yes. And it has a significant bearing on
6 the remediation aspects of the property.

7 Q. Mr. Brown, I want to turn to page 30 of
8 your testimony. And you say the measures conducted
9 by Duke, or performed, were reasonable and prudent.
10 You were talking here about prudent for protecting
11 human health and the environment, not prudent for
12 ratemaking purposes; is that correct?

13 A. Could you direct me to the line? I'm
14 sorry.

15 Q. Sure. Page -- it's actually the
16 question, but line 9 is where you state that,
17 page 30. I can repeat the question. You are talking
18 about reasonable and prudent for protecting human
19 health, not for ratemaking purposes, correct?

20 A. I'm sorry. What page are we on?

21 Q. Page 30.

22 A. And you are in line 9?

23 Q. Yes.

24 A. Thank you.

25 Q. 9 to 10.

1 A. Yes, I see it. Thank you. So when I
2 prepared this testimony, I was, you know, speaking
3 about reasonableness and prudence I think in the, you
4 know, commonly understood sense of that. But since
5 that time, you know, I've read the Order and I've
6 seen how that term was defined by the Commission in
7 that Order and I find that that's very consistent
8 with how I interpreted it for purposes of my
9 testimony.

10 Q. What you mean by that is the definition
11 of "prudent" as what a reasonable person would do
12 under like circumstances; is that a fair
13 approximation of your understanding of the meaning of
14 "prudent"?

15 A. I understand that to be one aspect of the
16 definition, but actually the Order, there's a summary
17 where the Commission spells out those things that
18 Duke did that they consider to be prudent in support
19 of the case and those -- those are also aspects that
20 I'm talking about.

21 Q. Okay. So let's look at the question then
22 here on page 30. "Were the security measures, air
23 monitoring, and vibration monitoring that were
24 implemented and performed during remediation
25 reasonable and prudent?" When those were implemented

1 and performed, Duke did not then seek recovery at
2 that time, did they?

3 A. I don't know that I am entirely clear
4 about that, whether I know the answer to that
5 question or not, whether they did seek recovery or
6 not. They were deferring costs and that work was
7 subject before -- you know, some of that work was
8 done in -- under the order that was -- where that was
9 previously issued and some of that work was done in
10 the intervening time so --

11 Q. So is it your testimony that the security
12 measures, air monitoring, and vibration monitoring
13 were not done to protect human health and the
14 environment?

15 A. No, that was not my testimony.

16 Q. Your testimony is that they were done to
17 protect human health and the environment and that's
18 why they were prudent; is that accurate?

19 A. That's one aspect of it, yes.

20 MR. MCKENNEY: One minute, your Honor.

21 Nothing further, your Honor.

22 EXAMINER ADDISON: Thank you.

23 Ms. Bojko.

24 MS. BOJKO: Yes, your Honor. Thank you.

25 - - -

CROSS-EXAMINATION

By Ms. Bojko:

Q. Good afternoon, sir.

A. Good afternoon.

Q. You explained to Mr. McKenney that you were first hired by Duke in 2018; is that correct? Or thereabouts?

A. Yeah. I am not 100-percent certain but roughly.

Q. And you stated you were not exclusively hired for this proceeding. What was -- what is the scope of your work for Duke?

A. I also supported work that was related to the insurance cost recovery case.

Q. Which case is that?

A. That the -- that Duke was involved with relative to the insurance costs recovery that was tied to this ratemaking case.

Q. Right. Do you -- is this a specific case you are referencing?

A. I guess I don't know the case number as I sit here, but I could -- I could have that determined.

Q. So did you file testimony in that case?

A. I filed an expert report.

1 Q. And that was in the Hamilton County
2 Common Pleas Court to your recollection?

3 A. I don't recall right now which court that
4 it actually was filed in. I'm sorry.

5 Q. So earlier today you said that you have
6 filed testimony for Duke, and you implied it was more
7 than just this one piece we've discussed in this
8 case. So were you referencing the expert report that
9 you filed?

10 A. So if I said testimony or implied there
11 was testimony in something else, then that was a
12 misstatement.

13 Q. Okay.

14 A. The other work was related to expert
15 reports associated with that litigation matter, and
16 probably it would be more accurately referred to that
17 way, so I either misunderstood the question or
18 misstated that.

19 Q. Or I misheard you. So thank you for that
20 clarification. So other than the two litigation
21 proceedings, so to speak, this one and the one in
22 Hamilton County, there -- you are doing no other work
23 for Duke; is that correct?

24 A. That is correct.

25 Q. And as you explained in your testimony,

1 you were trained as a hydrogeologist; is that
2 correct?

3 A. Among other things, yes.

4 Q. And you were trained primarily as a
5 hydrogeologist primarily at retail gasoline service
6 stations; is that correct?

7 A. No, that's not. I have worked as a
8 hydrogeologist through much of my career which has
9 involved many other sites than just retail gasoline
10 service stations. Those are -- that is a group of
11 types of projects that I worked on quite extensively
12 early on in my career, but I've worked as a
13 hydrogeologist throughout my entire career.

14 Q. I am referring to page 1 of your
15 testimony filed in this case, lines 12 to 13. You
16 stated "I was trained as a hydrogeologist installing
17 soil borings and monitoring wells, primarily at
18 operating retail gasoline service stations." Is that
19 statement correct?

20 A. Yes. I think what it's relating to is
21 during that time in my career, so the beginning of
22 that sentence is "Starting in late 1988 and early
23 1999." So what I was reflecting was that that was
24 the time at which I was -- during my tenure at that
25 particular company, was trained as a hydrogeologist.

1 Q. And you have primarily -- worked
2 primarily installing remediation systems at retail
3 gasoline service stations; is that correct?

4 A. I mean, I have been involved with
5 installation of remediation systems at much more than
6 retail gasoline stations throughout my career.

7 Q. On -- I'm looking at page 4 of your
8 testimony, lines 15 through 18. What funding -- what
9 state and local funding are there, state and local
10 brownfield funding programs are you referring to?

11 A. There are any number of state programs
12 that fund environmental cleanups. I have been with
13 programs that provided money for roof reconstruction
14 on sites that were the subject of brownfield
15 properties. I've been involved with money that's
16 been allocated to projects through the Great Lakes
17 Initiative.

18 So -- and then I have been involved with
19 many local initiatives that have been associated with
20 brownfield funding through different city and county
21 resources that established different funds to try and
22 promote economic development, so I -- I don't know.
23 There's been any number of them.

24 Q. And you state that you have pursued
25 funding for these brownfield cleanups. Who did you

1 obtain funding for? Who are you in hot pursuit for?

2 A. So that's ranging anywhere from
3 private-sector companies to public-sector companies
4 and others that, you know, I didn't -- I wasn't
5 always hired, you know. I mean, sometimes I was, as
6 I said, pursuing funding for folks that either wasn't
7 awarded or I wasn't chosen or something along those
8 lines, but it's been for a wide range of entities of
9 land banks, utility companies, metro parks, city and
10 county government, private-sector developers, and
11 large industries, small industry, just all sorts of
12 entities.

13 Q. Have you ever obtained funding for Duke?

14 A. I have not.

15 Q. On lines 20 and 21 on that same page, you
16 talk about you honed your skills in evaluation of
17 applicable regulatory programs for manufactured gas
18 plant sites. What reg -- are you talking about VAP
19 here?

20 A. Not exclusively. This -- this would also
21 include dealing with the RCRA program, the CERCLA
22 program, UST programs, and, you know, all -- many of
23 which get involved, even asbestos program, lead paint
24 programs. These are all different regulations that
25 tend to show up at some point in brownfield projects,

1 and so it's been a fairly wide array that you
2 typically deal with on brownfield sites.

3 Q. And on page 5, lines 10, you reference
4 state and federal regulations. What -- are you
5 referring to VAP and CERCLA here or -- and all the
6 other ones you just mentioned or what are you
7 referencing here?

8 A. Let me take a moment and just read this
9 section if I can. Thank you.

10 So I think as it relates to this
11 statement, what I'm identifying are various
12 regulatory programs that I may have reflected on or
13 looked at in conjunction with my testimony. I would
14 say it would be true. I mean, it's called out there
15 that the Ohio VAP was the primary one, but I also
16 looked at, you know, regulations that relate to
17 surface water, regulations that relate to CERCLA,
18 regulations that relate to RCRA, because these all
19 are intertwined when you start talking about
20 environmental cleanups.

21 Q. And I can't remember if you were asked,
22 are you an attorney?

23 A. I am not an attorney.

24 Q. On page 5, going down there's a reference
25 to -- line 13, start on line 13, with regard to the

1 purpose of your testimony and Duke's compliance with
2 VAP requirements beginning in 2013. Do you see that?

3 A. Yes, I do.

4 Q. And this is the discussion you were
5 having with Mr. McKenney that you -- you --
6 McKenna --

7 MR. MCKENNEY: Bryce McKenney.

8 Q. McKenney, I did say it right. These are
9 the programs that you stated that you reviewed after
10 the fact. You reviewed what had been done by other
11 Certified Professionals, correct?

12 A. Yes, that's correct.

13 Q. And you weren't a witness for Duke in the
14 prior 2012 case, correct?

15 A. I was not a witness for Duke in that
16 case.

17 Q. And you are not familiar with that case?

18 A. I'm familiar with that case; you know, I
19 read a bunch of the documentation related to it.

20 Q. The 2012, the 12-1685 case?

21 A. Well, I am not sure how you are
22 referencing that, but the rate case and the Opinion
23 of the Commission and the various certain aspects of
24 the testimony, certain people's testimony, so there's
25 underlying reports and documents that were reviewed.

1 I looked at a lot of that information, yes.

2 Q. So you've reviewed the information, but
3 you were not involved in creating the testimony that
4 was submitted or Duke's application in that case
5 below, correct?

6 A. That is correct.

7 Q. And you are not here today to opine on
8 the cost recovery of any of the remediation expenses
9 or efforts that have occurred, correct?

10 A. I don't agree with that.

11 Q. You're talking about compliance with the
12 VAP requirement. You are not suggesting you are
13 making a recommendation on -- with regard to
14 customers paying for the underlying expenses,
15 correct?

16 A. I don't agree with that.

17 Q. Okay. And for -- with regard to your
18 reference to 2003, you are not testifying -- or 2013,
19 you are not testifying to any compliance or costs
20 that were incurred prior to 2013, correct?

21 A. So what my testimony is saying here is it
22 is specific to the compliance with the VAP beginning
23 in 2013 but there are activities that occurred prior
24 to 2013, studies and reports and investigation and
25 data that I have also looked at and evaluated.

1 So relative to VAP compliance, I'm
2 speaking 2013 and beyond. But relative to many other
3 aspects of what's occurred there, I'm also
4 considering the information prior to 2013.

5 Q. So look on page 6 of your testimony,
6 please. At the top of page 6 you list six items that
7 you are addressing in your testimony; is that
8 accurate?

9 A. Yes.

10 Q. And you are not addressing anything in
11 your testimony beyond those six items, correct?

12 A. Well, I think that would be too limiting.
13 I mean, my testimony is all the documents that you
14 see here. It's, you know, 30-some pages of
15 testimony, so it's not limited to only six items.
16 It's all the information you see in front of you.

17 Q. Do you know how or what -- strike that.

18 On line 2 you talk about the long
19 history -- still on page 6, the long history of
20 ownership and operation of MGP facilities. Do you
21 see that?

22 A. Yes, I do.

23 Q. And that long history, was that told to
24 you from counsel or Duke employees? How did you
25 learn of that long history?

1 A. I think that was provided to me both --
2 well, in a number of places. The Phase 1s that have
3 been conducted on the East and West End sites
4 included a great deal of information about -- as they
5 are required to do, about site history and site
6 ownership. And then Duke employees also provided
7 some of that information and I also reviewed a great
8 deal, you know, the testimony and the Opinions of the
9 Commission and the other information that had been
10 provided in this case, primarily the 2012-2013 case
11 where a lot of that was reiterated. So it was a
12 combination of all those things.

13 Q. Did you say Opinions of the Commission
14 plural? Are there multiple Opinions that you
15 reviewed?

16 A. So the Opinion. Thank you.

17 Q. Do you know what a deferral is?

18 A. I understand it generally as it relates
19 to this matter.

20 Q. And you have not worked for a regulatory
21 agency; is that correct?

22 A. Not directly.

23 Q. Is it my understanding that in 25 years
24 as a VAP CP, you've authored 10 NFA letters?

25 A. That's correct.

1 Q. And the extent of your investigation on
2 page 10, the extent of your investigation and
3 remediation of Duke's specific Ohio two MGP sites are
4 a review of reports and documents and the one visit
5 to the MGP sites and conversations with Duke
6 employees or -- or VAP CPs?

7 A. Yeah. The only maybe amendment to that
8 is I have also seen information, since the time I
9 prepared this testimony, related to technical reports
10 at the East End and West End sites and, you know, the
11 intervening period between when this testimony was
12 filed and today.

13 Q. And who did you specifically have
14 conversations with that's referenced on line 10?

15 A. Well, it goes on to say with Todd Bachand
16 and Shawn Fiore.

17 Q. It was with those two individuals?

18 A. Those Duke employees that I am
19 specifically referring to.

20 Q. Could you turn to page 11 of your
21 testimony, please, on line 6. You refer to -- or you
22 have to look at 5, I guess. You are talking about --
23 you are talking about property currently owned by
24 Duke that are directly related to the Company's use
25 of the East End and West End sites. Do you see that?

1 A. Yes.

2 Q. And what is the Company's use of the East
3 End and West End sites that you are referencing?

4 A. Well, I should point out you are kind of
5 taking out of context one portion of the sent -- you
6 know, this paragraph and sentence which is describing
7 all of the things in combination, not just any one
8 individually, but in combination result in
9 responsibility for this cleanup. But in this
10 particular instance, I think what I'm speaking to in
11 this narrow single component is whether the Company
12 is using the properties.

13 Q. And using them in which manner?

14 A. To conduct their business.

15 Q. You are not trying to state a specific
16 use that Duke is currently endeavoring on the East
17 and West End sites, are you?

18 A. I mean, the purpose of this section is to
19 describe why Duke has responsibility for cleaning up
20 the sites. So what I'm doing is trying to lay out
21 the various reasons there would be responsibility,
22 one of which could be use of the site because
23 environmental regulatory obligations travel to owners
24 and operators, people that use sites.

25 Q. So how does Duke currently use the East

1 End and West End sites?

2 A. I would say I have general knowledge
3 about that, and I don't know whether -- you know,
4 what's considered to be confidential or not
5 confidential, but I'll just in generalities. The
6 East End site is primarily a gas transmission and
7 peaking station, and the East End site is primarily
8 an electrical transmission station. I believe that
9 there are also gas transmission lines that exist at
10 the West End site and travel across the West End
11 site, but I am not explicitly aware of all the
12 individual operations that may occur at each of these
13 sites.

14 MS. BOJKO: Could I have the beginning
15 part of that sentence reread?

16 EXAMINER ADDISON: Of course.

17 MS. BOJKO: Or question -- answer.

18 (Record read.)

19 Q. One, you were referring to the -- you
20 said East End twice.

21 A. I'm sorry. East End was the gas
22 transmission and peaking station, and the West End
23 site is primarily the electrical transmission
24 statement -- station as far as I'm aware, although I
25 know there are gas transmission lines on that site as

1 well.

2 Q. And if you look at page 12, lines 14
3 through 17, that's what you were referencing when you
4 stated the continued operations? Is that what you
5 were referencing, those operations?

6 A. Could you just restate that? I'm sorry.

7 Q. Yeah.

8 A. I'm in the spot, but I just wasn't sure
9 what your question was.

10 Q. You talk about that the sites are
11 continuing to operate certain facilities. Is that
12 exactly what you were just explaining to me, your
13 understanding of what they are doing on the property?

14 A. Yeah. And I should explain, you know,
15 that was gathered by my, you know, time at the site
16 and what I have read in other various reports, and it
17 may or may not be -- include every -- you know, every
18 aspect of what activities Duke performs there. I
19 don't know that I am privy to that.

20 Q. And are you privy whether those
21 facilities that may be -- exist are actually in
22 operation or not?

23 A. They appeared to be to me when I was
24 there.

25 Q. But you don't know for sure.

1 A. Well, I know for sure when I was there.
2 As I -- I don't know exactly what operations are
3 occurring at those -- at the East End site or West
4 End site on this day. I have no reason to believe
5 they are any different.

6 Q. You explain -- first of all, you've
7 explained you are not hired to be the VAP CP for
8 either of the West End or East End sites, correct,
9 for the Duke facilities?

10 A. Yes. I just simply want to clarify that
11 a decision about who ultimately will be the VAP CP
12 will be known by all parties when they prepare the
13 NFA letter and that will be the answer. So, no, as I
14 sit here today, I have not been hired by Duke to
15 serve as their CP on the East End site or the West
16 End site.

17 Q. And you describe in your testimony
18 somebody called a TA, a technical assistance, that --
19 assistant that -- or technical assistance that can be
20 offered by the Ohio EPA. Do you know whether Duke
21 has or is using that technical assistance?

22 A. I'm sorry. Just to clarify, it's not a
23 somebody. It's a procedure or a process that you can
24 obtain technical assistance and it's customary and
25 typical that that's -- not that it couldn't be done

1 at any time but it's customary and typical that it's
2 done in one of two circumstances. Either because
3 there's some highly complicated technical aspect that
4 has not been covered under the VAP or through its
5 technical guidance or there's some way you would
6 already see there's some record of how that issue was
7 handled before so you would know how to go about it.
8 So you might approach them for technical assistance
9 to help with something like that.

10 Or, very typically at the time you are
11 ready to submit the NFA, just prior to that, you
12 often submit the full set of documents for technical
13 assistance such that you avoid the potential of a
14 denial by just simply turning everything in and
15 seeing what the agency has to say.

16 Q. Page 16 of your testimony, line 22, you
17 use very similar language as Mr. Fiore used that
18 states "Ohio EPA generally will not issue an
19 enforcement order." I want to ask you the same
20 question I asked him.

21 It's not a guarantee. The EPA could
22 still issue an enforcement letter while conformance
23 with the VAP or the VAP is being remediated pursuant
24 to -- the properties are being remediated pursuant to
25 VAP, correct?

1 A. So I want to answer that a little
2 differently than Mr. Fiore did and a little
3 differently than your question asked. So I don't
4 agree exactly with what you've said.

5 The -- one of the major advantages and
6 one of the driving factors behind the VAP program
7 when it was developed, and I was there for those
8 conversations, was to offer protection to volunteers
9 that entered the program such that they would not be
10 overrode by Ohio EPA with enforcement and so there is
11 a very specific aspect of the rule called "Sufficient
12 Evidence" which you may invoke as a volunteer if, in
13 fact, you are in the VAP and the EPA shows up and
14 tries to enforce on you.

15 So you absolutely have protections
16 against enforcement by operating under the VAP which
17 is, I think, one of the primary reasons -- it would
18 be my presumption one of the primary reasons why Duke
19 has endeavored to retain coverage under the VAP such
20 that they would be protected if, in fact, Ohio EPA
21 wandered in unknowingly with some form of an
22 enforcement action.

23 Q. But under those circumstances, the
24 remediating party would have to make a claim that
25 Sufficient Evidence to override the EPA's decision to

1 issue an enforcement action during the VAP, correct?

2 A. "Claim" would not be the right term, but
3 the volunteer would have to submit a response to EPA
4 under the rules of Sufficient Evidence demonstrating
5 that they were effectively within the Voluntary
6 Action Program at the time the agency came to issue
7 the order.

8 Q. I apologize. I was using claim on -- as
9 you used it on line 4 was how I was stating it.

10 A. I'm sorry. What page are you on?

11 Q. You said "claim" wasn't the right word,
12 and I was merely restating your testimony where you
13 said the party issued the order can make a claim of
14 Sufficient Evidence and that that party, meaning, I
15 think you are calling them the volunteer party, would
16 have to demonstrate that they were already proceeding
17 under the VAP; is that correct?

18 A. If you could just direct me to the line,
19 I'm sorry, and the page.

20 Q. It's 4.

21 A. Which page?

22 Q. Page 17.

23 A. Sorry. I was on the wrong page. So I
24 think I was using the term "claim" in a more sort of
25 traditional understood English, you know,

1 interpretation and not specifically as it relates to
2 the orders of Sufficient Evidence. Under the rule, I
3 think I was indicating the party could claim that
4 they are, you know, following the VAP and pursue a
5 demonstration of Sufficient Evidence.

6 So you were accurate in stating that that
7 is the word that I have there, and I apologize for
8 any confusion on that point.

9 EXAMINER ADDISON: Ms. Bojko, if I could
10 just interrupt briefly. You know, we are getting
11 very close to -- I promised my -- I did not stick to
12 my promise yesterday. Would now be a good stopping
13 point for the evening and we could reconvene tomorrow
14 morning?

15 MS. BOJKO: Yes, your Honor. I was
16 trying to be done.

17 EXAMINER ADDISON: I appreciate your
18 effort.

19 MS. BOJKO: I think I have a few more
20 minutes, so yes.

21 EXAMINER ADDISON: Thank you very much,
22 Ms. Bojko.

23 At this time we will adjourn for the
24 evening, and we will reconvene tomorrow at 9:00 a.m.

25 Thank you, all.

1 (Thereupon, at 4:52 p.m., the hearing was
2 adjourned.)

3 - - -

4 CERTIFICATE

5 I do hereby certify that the foregoing is a
6 true and correct transcript of the proceedings taken
7 by me in this matter on Tuesday, November 19, 2019,
8 and carefully compared with my original stenographic
9 notes.

10
11 _____
Karen Sue Gibson, Registered
Merit Reporter.

12
13 _____
Carolyn M. Burke, Registered
Professional Reporter.

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15 (KSG-6844)

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Summary: Transcript in the matter of the Duke Energy Ohio, Inc. hearing held on 11/19/19 - Volume II electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.