

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

SC Court of Appeals

Appellate Case No. 2020-000669
Case No. 2016-CP-23-5905

Renewable Water Resources,..... Respondent,

v.

Insurance Reserve Fund, a Division of the
State Fiscal Accountability Authority of South Carolina,..... Appellant.

RECORD ON APPEAL - VOLUME 1 OF 5
(pp. 1-463)

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Index

Volume I

Order of Reference to Master-in-Equity, September 14, 2018	1
Findings of Fact and Conclusions of Law, filed March 18, 2020	3
Order, filed April 6, 2020	19
Order, filed April 9, 2020	22
Consent Order Depositing Funds into Court, April 17, 2020	25
Order Granting in Part Motion for Costs, filed May 21, 2020	29
Complaint, filed October 17, 2016	36
Amended Complaint, filed June 15, 2018	55
Answer to Amended Complaint, filed July 2, 2018	73
Consent Motion for Reference to Master-in-Equity, filed September 12, 2018	89
Plaintiff's Pre-Trial Brief, filed February 3, 2020	91
Defendant's Pre-Trial Brief, filed February 3, 2020	128
Notice of Motion and Motion for Judgment as a Matter of Law and/or Involuntary Nonsuit, Motion to Alter or Amend Judgment and/or Motion for Reconsideration, and Motion for New Trial, filed March 30, 2020 (with attachments)	147
Plaintiff's Responses to Defendant's First Set of Interrogatories	178
Emails, filed March 30, 2020	193
February 27, 2020 Andrew F. Lindemann Email to Judge Simmons	193

February 27, 2020 Judge Simmons Email to Andrew F. Lindemann	193
Plaintiff’s Motion for Costs, filed April 16, 2020	195
Defendant’s Return and Objections to Motion for Costs, filed April 23, 2020	198
Plaintiff’s Reply to Defendant’s Objections to Motion for Costs, April 24, 2020.....	203
Trial Transcript, January 28-30, 2020, ...	212
George William Fletcher	
Direct Examination by Mr. Stilwell	225
Cross-Examination by Mr. Devlin	286
Re-Direct Examination by Mr. Stilwell	309
Re-Cross Examination by Mr. Devlin.....	313
Examination by the Court.....	314
Joel Henry Jones	
Direct Examination by Mr. Stilwell	319
Cross-Examination by Mr. Lindemann.....	381
Ted Clark Vincent	
Direct Examination by Mr. Brown.....	409
Voir-Dire Examination by Mr. Lindemann	414
Continued Direct Examination by Mr. Brown.....	421

Cross-Examination by Mr. Lindemann.....	439

Volume II

Re-Direct Examination by Mr. Brown.....	464

Robert Glen McManus

Direct Examination by Mr. Stilwell	467

Cross-Examination by Mr. Lindemann.....	543

Re-Direct Examination by Mr. Stilwell	667

Patricia Dennis

Direct Examination by Ms. Towery.....	671

Cross-Examination by Mr. Devlin	718

Re-Direct Examination by Ms. Towery	764

Re-Cross Examination by Mr. Devlin.....	766

Kevin Finneran

Direct Examination by Mr. Devlin.....	778

Voir Dire Examination by Mr. Brown	782

Continued Direct Examination by Mr. Devlin.....	784

Cross-Examination by Mr. Brown	808

Examination by the Court.....	814

Re-Cross Examination by Mr. Brown.....	819

Re-Direct Examination by Mr. Devlin.....	823

Christopher Michael Lombard

Direct Examination by Mr. Lindemann 829

Cross-Examination by Mr. Brown 885

Volume III

Re-Direct Examination by Mr. Lindemann 913

Court's Exhibit #1 951

Plaintiff's Trial Exhibit #1: General Tort Liability Policy
Declaration Page..... 956

Plaintiff's Trial Exhibit #2: Building and Personal Property
Policy Declaration Page 964

Plaintiff's Trial Exhibit #4: Building and Personal Property
Policy Declaration Page 973

Plaintiff's Trial Exhibit #6: Building and Personal Property
Declaration Page..... 981

Plaintiff's Trial Exhibit #8: Building and Personal Property
Coverage Form..... 991

Plaintiff's Trial Exhibit #9: Causes of Loss - Special Form 998

Plaintiff's Trial Exhibit #10: Tort Liability Insurance Policy 1004

Plaintiff's Trial Exhibit #14: Notice of DHEC NDPES Permit
No. SC 0048381 1010

Plaintiff's Trial Exhibit #15: Notice of DHEC NDPES Permit
No. SC0033804 1061

Plaintiff's Trial Exhibit #18: SLED Bulletin..... 1102

Plaintiff's Trial Exhibit #29: DHEC Press Release with Regulation.....	1103
Plaintiff's Trial Exhibit #30: PCB Emergency Regulation.....	1109
Plaintiff's Trial Exhibit #32: ReWa Letter to EPA and DHEC re: Notification of PCB Plan	1113
Plaintiff's Trial Exhibit #33: DHEC Letter to ReWa re: Beltpress Filtrate Operation pursuant to Emergency PCB Regulation	1138
Plaintiff's Trial Exhibit #38: Charles Logue Email to DHEC re: Mauldin and Lower Reedy PCB clean-up.....	1139
Plaintiff's Trial Exhibit #42: DHEC Email re: PCB Regulation	1144
Plaintiff's Trial Exhibit #47: IRF Email to Patricia Dennis re: Claim	1152
Plaintiff's Trial Exhibit #48: Nelson Chandler Email to Patricia Dennis re: Coverage	1154
Plaintiff's Trial Exhibit #49: IRF Letter to ReWa re: Claim.....	1156
Plaintiff's Trial Exhibit #50: Young Report to IRF re: PCB Contamination	1160
Plaintiff's Trial Exhibit #51: Young Report to IRF re: PCB Contamination	1186
Plaintiff's Trial Exhibit #52: ReWa Email to Fred Young re: PCB Expenses.....	1187
Plaintiff's Trial Exhibit #53: ReWa Email to Fred Young re: PCB Expenses.....	1188
Plaintiff's Trial Exhibit #54: Patricia Dennis Email to IRF re: Coverage.....	1189

Plaintiff's Trial Exhibit #55: Fred Young Email to Jerry Anderson re: PCB Expenses	1191
Plaintiff's Trial Exhibit #60: Patricia Dennis Email re: PCB Expenses	1193
Plaintiff's Trial Exhibit #62: ReWa Email to Fred Young re: PCB Expenses	1199
Plaintiff's Trial Exhibit #63: ReWa Email to Fred Young re: PCB Expenses	1200
Plaintiff's Trial Exhibit #65: Patricia Dennis Email to Fred Young re: Coverage	1201
Plaintiff's Trial Exhibit #67: ReWa Email to Fred Young re: PCB Expenses	1203
Plaintiff's Trial Exhibit #68: Fred Young Email to Jerry Anderson re: PCB Expenses	1204
Plaintiff's Trial Exhibit #69: ReWa Email to Fred Young re: PCB Expenses	1205
Plaintiff's Trial Exhibit #71: Fred Young Email to Jerry Anderson re: PCB Expenses	1206
Plaintiff's Trial Exhibit #72: Fred Young Email to Jerry Anderson re: PCB Expenses	1207
Plaintiff's Trial Exhibit #73: Fred Young Email to Patricia Dennis re: PCB Expenses	1208
Plaintiff's Trial Exhibit #77: IRF Letter to ReWa re: Coverage Determination	1209
Plaintiff's Trial Exhibit #78: ReWa Email to Fred Young re: PCB Expenses	1218

Plaintiff's Trial Exhibit #83: ReWa Email to Fred Young re: PCB Expenses	1219
Plaintiff's Trial Exhibit #85: IRF Claim Notes	1220
Plaintiff's Trial Exhibit #89: FAQ on PCBs.....	1234
Plaintiff's Trial Exhibit #91: ReWa PCB Sampling Results.....	1236
Plaintiff's Trial Exhibit #94: AECOM Final Summary Report.....	1282
Plaintiff's Trial Exhibit #99: Summary of PCB Expenses.....	1338
Plaintiff's Trial Exhibit #100: PCB Expenses Spreadsheet	1344

Volume IV

Plaintiff's Trial Exhibit #101: Regular Cost of Processing Solids for Land Application	1388
Plaintiff's Trial Exhibit #106: Photographs.....	1389
Defendant's Trial Exhibit #8: Letter from W. Thomas Lavender, Jr. to Rob Byers, dated February 11, 2015.....	1398
Defendant's Trial Exhibit #9: Letter from W. Thomas Lavender, Jr. To John R. Devlin, Jr., dated July 28, 2016	1404
Defendant's Trial Exhibit #10: Letter from W. Thomas Lavender, Jr. To John R. Devlin, Jr., dated July 28, 2016	1406
Defendant's Trial Exhibit #12: Letter from Marcus Manos to John R. Devlin, Jr., dated October 7, 2016	1409
Defendant's Trial Exhibit #13: Letter from John R. Devlin, Jr. To Marcus Manos dated October 13, 2016	1418
Defendant's Trial Exhibit #16: Regular Cost of Processing Solids for Land Application	1422

Defendant’s Trial Exhibit #19: John B. Russell & Son Construction Invoices for Mauldin Road Facility Invoice Numbers 33312, 33274, 33326, 33407, 33406, 33437, 33340, 33341, 33481, 33501, 33511, 33502	1423
Defendant’s Trial Exhibit #20: HEPACO Invoice, Proposal and Emails for Lower Reedy Facility.....	1447
Defendant’s Trial Exhibit #23: Brenntag Vendor Documents.....	1455
Defendant’s Trial Exhibit #27: Invoice from A&B Environmental.....	1464
Transcript of Motion Hearing, May 13, 2020.....	1469
Deposition Designations for Frederick Young, July 23, 2018.....	1482
Deposition Designations for Robert Byers, July 24, 2018.....	1496
All designated and submitted pages and exhibits from Rule 30(b)(6) Deposition of Renewable Water Resources	1515

Volume V

All designated and submitted pages and exhibits from Rule 30(b)(6) Deposition of Renewable Water Resources-Continued	1714
Plaintiff’s Proposed Findings of Fact and Conclusions of Law.....	1923
Defendant’s Proposed Findings of Fact and Conclusions of Law	1933
February 17, 2020 Devlin Email to Hermann	1945
February 21, 2020 Hermann Email to All Counsel.....	1948
February 26, 2020 Hanks Email to All Counsel	1953
February 27, 2020 Andrew F. Lindemann Email to Judge Simmons	1956
Notice of Appeal, filed April 23, 2020.....	1958

Amended Notice of Appeal, filed June 22, 2020 1980

Certificate of Counsel

Certificate of Compliance

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER OF REFERENCE TO
	)	MASTER-IN-EQUITY
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	
	)	

BEFORE THE COURT is the joint request of all parties for a reference of this case to the Master-in-Equity for Greenville County. This request is made pursuant to Rule 53 of the South Carolina Rules of Civil Procedure.

IT APPEARING that all parties join in and consent to the request,

NOW, THEREFORE, it is hereby ordered that this case be referred to the Honorable Charles B. Simmons, Jr., the Greenville County Master-in-Equity, for all purposes. Any appeals from any Orders or Judgments entered by the Master-in-Equity shall be in accordance with Rule 53(e) of the South Carolina Rules of Civil Procedure.

IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

_____, 2018



Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al

Case Number: 2016CP2305905

Type: Order/Referred to Master or Special Referee

So Ordered

s/ Honorable Perry H. Gravely, #2755

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
vs.	)	
	)	
Insurance Reserve Fund, a Division of	)	<u>FINDINGS OF FACT AND</u>
the State Fiscal Accountability Authority	)	<u>CONCLUSIONS OF LAW</u>
of South Carolina,	)	
	)	
Defendant.	)	

FINDINGS OF FACT

Plaintiff Renewable Water Resources (“ReWa”) is a special purpose district that provides wastewater treatment services in the Upstate of South Carolina. (Joint Stip. of Facts, Ct.’s Ex. 1 at ¶¶ 1, 5.) At all times relevant hereto, ReWa maintained a Building and Personal Property Insurance Policy (“Building Policy”) and Tort Liability Insurance Policy (“Tort Policy”) with the Insurance Reserve Fund (“IRF”). (*See id.* at ¶¶ 3-4; Pl.’s Exs. 8, 9, 10.)

This case arises out of a polychlorinated biphenyl (“PCB”)¹ contamination that occurred in the Upstate of South Carolina beginning in 2013 as a result of vandalism by the illegal dumping of PCBs into ReWa’s system. (Ct.’s Ex. 1 at ¶¶ 5-6.) ReWa discovered the presence of PCBs at three of its facilities—Pelham Road, Mauldin Road, and Lower Reedy—in routine periodic testing of the wastewater sludge (also referred to as “biosolids”). (*Id.* at ¶¶ 8-9.)

ReWa provided formal notice to the Environmental Protection Agency (“EPA”) and South Carolina Department of Health and Environmental Control (“SCDHEC”) of the PCBs in its treatment facilities on July 26, 2013. (*Id.* at ¶ 12; Pl.’s Ex. 17.) ReWa’s Controller, Patricia Dennis, reported an insurance claim to the IRF on September 24, 2013, which was acknowledged by the IRF on October 11, 2013. (Ct.’s Ex. 1 at ¶¶ 13-14; Pl.’s Exs. 47, 49.)

¹ PCBs do not readily break down in the environment and cause a variety of significant adverse health effects, including cancer.

ReWa retained AECOM—an engineering firm with expertise in the remediation and removal of contaminants like PCBs—to develop and implement a plan for remediation and repair at the Pelham Road facility. (Ct.’s Ex. 1 at ¶ 15.) ReWa submitted a “Sludge Removal and Disposal Plan” to SCDHEC on October 17, 2013, which was approved by letter dated October 22, 2013. (*Id.* at ¶¶ 15-16; Pl.’s Exs. 32, 33.) The remediation and repair work, recommended by AECOM and approved with direction from SCDHEC, required ReWa first to remove the sludge contained in the contaminated equipment and fixtures, which process began in November 2013. (Pl.’s Exs. 27, 94.) The plan further required the cleaning of the contaminated facilities, equipment, and structures. PCBs had physically adhered to concrete, which is a porous surface, and had to be blasted off by pressure washers and cleaned with a special chemical solution. (*Id.*) Prior to this cleaning, while in their PCB-contaminated state, ReWa’s three facilities, and the equipment and machinery located there, were not able to be used for their normal operations. The repairs and remediation at the Pelham Road facility were completed in late February and early March of 2014. (*Id.*)

Once the repairs at the Pelham Road facility were complete, ReWa began remediation and repair work at its Mauldin Road and Lower Reedy facilities in April 2014. The Mauldin Road and Lower Reedy facilities required the same types of remediation and repair as the Pelham facility, and ReWa incurred the same categories of damages in this process. On April 15, 2014, ReWa submitted a “Summary Remediation Plan” for Mauldin Road and Lower Reedy to SCDHEC, which followed the same process that was done at Pelham Road. (See Ct.’s Ex. 1 at ¶ 17; Pl.’s Ex. 38.) This EPA prescribed decontamination process was needed at all three facilities. (Rule 30(b)(6) Depo. of ReWa at 158:10-21.)

No witness disputed that the PCB contamination inhibited or prevented the use of the contaminated structures. Also, all witnesses who addressed the issue agreed that the repair and decontamination of the structures at the three facilities could not occur unless and until the

contaminated sludge was first removed from the structures. This removal was a necessary first step in any repair efforts. Because of the PCB contamination at its three facilities, ReWa incurred millions of dollars in expenses to repair and restore its facilities, machinery, and equipment to usable condition, including the removal and disposal of contaminated material to be able to access the facilities. (Pl.'s Exs. 99, 100, 101.) ReWa kept the IRF apprised of its ongoing expenses related to the PCB remediation and repair by sending updated monthly expense reports. (See, e.g., Pl.'s Exs. 52, 53, 62, 63, 67, 69.) The IRF never notified ReWa that these expense reports should be submitted in a different form or that certain expenses were not covered or appropriate under ReWa's policies.

During the year after the claim was made, ReWa repeatedly requested a coverage decision. However, the IRF did not provide any determination until October 30, 2014, more than a year after the claim was submitted, and after ReWa had incurred millions of dollars in remediation costs. (See Pl.'s Exs. 54, 65, 77.) In this "Coverage Position Letter," the IRF acknowledged that vandalism was a covered cause of loss for primary coverage under the Building Policy, but did not provide any basis for its failure to provide primary coverage. (Pl.'s Ex. 77.) The IRF offered coverage of \$30,000 under an additional coverage provision for pollutant cleanup and removal. (*Id.*) Before suit, the IRF never provided a written determination of coverage to ReWa for the Tort Policy.

This matter came before the Court for trial on January 28-30, 2020. Pursuant to the evidence and testimony presented at trial, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

I. ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required.

On September 25, 2013, SCDHEC issued an emergency regulation ("Emergency Reg.") which specifically addressed the illicit dumping of PCBs at issue in this case. (Pl.'s Ex. 29.) The federal Toxic Substance Control Act ("TSCA") regulates remediation after contamination of

PCB levels equal to or greater than 50 parts per million (“ppm”). The Emergency Reg. imposed more stringent limits, prohibiting land application of sludge with *any* quantifiable amount of PCBs. The Emergency Reg. also provided that the processing facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has *no* quantifiable amount of PCBs. In addition, ReWa was prohibited under its National Pollutant Discharge Elimination System (“NPDES”) Permits from introducing pollutants into its pretreatment process.²

In light of the Emergency Reg. and ReWa’s NPDES Permits, the Court concludes that the remediation and repair processes undertaken by ReWa at its three facilities were reasonable and necessary. The IRF argues that ReWa’s costs and expenses at the Mauldin Road and Lower Reedy facilities were unwarranted because the PCB contamination levels at those facilities were below 50 ppm. However, the fact that ReWa’s remediation at those facilities did not take place until after the Emergency Reg. was lifted is immaterial. ReWa’s NPDES Permits prohibited the introduction of pollutants into its pretreatment process, and ReWa’s normal operations could not continue during the PCB contamination.³ The Court finds that PCB contamination necessitated action by ReWa to remediate and repair the three affected facilities.

II. Interpretation of Insurance Policies

Words in an insurance policy are to be given their “plain, ordinary and popular meaning.” *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). If a provision is susceptible to more than one interpretation, the Court must adopt the interpretation that favors coverage. *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143-44, 781 S.E.2d 137, 142 (Ct.

² ReWa maintained NPDES Sludge Permits and Surface Water Discharge Permits for the three facilities at issue. (Pl.’s Exs. 14, 15; Testimony of Joel Jones.)

³ In addition, since the Emergency Reg. was enacted to address the PCB contamination, it likely applied to all contaminated materials in ReWa’s possession at the time it was implemented.

App. 2015). Moreover, the insurer bears the burden of establishing that any exclusions apply, and such policy exclusions are to be construed most strongly against the insurer. *Id.*

III. ReWa's Remediation and Repair Efforts are Covered, and Not Excluded, by the Building Policy.

The Building Policy states: "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Building Policy ¶ A, Pl.'s Ex. 8.) Thus, to establish coverage under the Building Policy, the following factors must exist: (1) direct physical loss of or damage to property; (2) that property must be Covered Property at the premises described in the Declarations; and (3) the loss or damage must be caused by or resulting from a Covered Cause of Loss. The Court finds that each of these factors has been met,⁴ and that no exclusion alters or impinges on that coverage.

A. Covered Property at Premises in Declarations

The Building Policy states that "Covered Property" includes ReWa's buildings, together with the fixtures and permanently installed machinery and equipment at such locations. (Pl.'s Ex. 8 at ¶ A.1.a.) To repair its tanks, digesters, machinery and equipment, ReWa first had to remove and properly dispose of the biosolids held in the contaminated tanks and digesters before it could clean them. The IRF does not dispute that these tanks, digesters, machinery, and equipment at the three facilities are Covered Property. The three facilities are also listed on the declaration pages.⁵ (See Pl.'s Ex. 2.)

The IRF argues that ReWa's biosolids do not constitute "Covered Property," and therefore costs associated with removing and disposing of the contaminated biosolids are not

⁴ The IRF conceded that the PCB contamination was caused by vandalism, which is a Covered Cause of Loss. (See Causes of Loss-Special Form ¶ F, Pl.'s Ex. 9; Ct.'s Ex. 1 at ¶¶ 5-6.)

⁵ The amount of coverage provided in the declaration pages for each affected facility is greater than ReWa's total damages.

covered. The testimony, including from the IRF's expert, was that the tanks, structures, and equipment at the facilities could not be cleaned and made usable again until the contaminated sludge was removed. The Court concludes that removing and disposing of the sludge was necessary to remediate and repair the contaminated structures, machinery, and equipment at ReWa's three impacted facilities. The costs associated with remediating and repairing such Covered Property, including the removal and disposal of biosolids, are covered under the Building Policy.

B. "Direct Physical Loss of or Damage to"

The IRF contends that coverage does not apply under the Building Policy because "direct physical loss of or damage to" should be interpreted to mean only immediate structural changes to Covered Property.⁶ However, the Court finds that "direct physical loss of or damage to" property includes the type of contamination involved herein of Covered Property even in the absence of structural alteration. This finding is supported by jurisdictions across the country which have found that "direct physical loss of or damage to" property includes the contamination of such property even in the absence of structural damage or alteration.⁷

⁶ The IRF also argues that the words "direct" and "physical" modify both "loss" and "damage." While the policy does not specifically limit coverage to "direct physical loss" or "*direct physical damage*," the Court finds this distinction irrelevant, as the contamination that occurred at ReWa's facilities is covered under the Building Policy regardless of whether or not the Court interprets the words "direct" and "physical" to modify both "loss" and "damage."

⁷ See *Mellin v. N. Security Ins. Co., Inc.*, 115 A.3d 799, 803-4 (N.H. 2015) (cat urine odor emanating from another condominium unit caused "direct physical loss" to insured's unit); *Gregory Packaging, Inc. v. Travelers Property Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia discharge physically incapacitated insured's facility, and "property can sustain physical loss or damage without experiencing structural alteration"); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 708 (E.D. Va. 2010) (toxic gases released by drywall manufactured in China constituted "direct physical loss" to insured's property and noting that "[t]he majority of cases appear to support [the insured's] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825-27 (3d Cir. 2005) (bacteria contamination of well water constitutes direct physical loss to house if it

Furthermore, because the Building Policy does not include a definition of “damage,” the Court must apply the “plain, ordinary and popular meaning” of the word. See *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). Black’s Law Dictionary defines “damage” as “loss or injury to person or property.” *Black’s Law Dictionary* (11th ed. 2019). In analyzing the meaning of “damages” under a general tort policy, the South Carolina Supreme Court found in *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004) that “[t]he plain, ordinary meaning of ‘damages’ is monies paid on an insured’s loss, in this case, from property damage” and that “[a]n ‘ordinary’ meaning of the term is not a legalistic one....” *Id.* at 638, 594 S.E.2d at 458.

The evidence shows that ReWa suffered direct physical loss of or damage to its facilities as a result of the PCB contamination. PCBs physically adhered to concrete, and had to be blasted off by pressure washers and cleaned with a special chemical solution.⁸ Further, in the

rendered it unusable); *Yale Univ. v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 413 (D.Conn. 2002) (Yale suffered “physical loss of or damage to property” for the presence of asbestos or lead contamination in its buildings, and stating that the insurer “fail[ed] to even consider, let alone distinguish, the substantial body of case law in which a variety of contaminating conditions have been held to constitute ‘physical loss of or damage to property’”); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 9 Mass.L.Rptr. 41 (Mass. 1998) (carbon monoxide contamination, or the risk of carbon monoxide contamination, in plaintiffs’ apartment building constituted “direct physical loss of or damage to” the insured building); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (1998) (under the homeowner’s insurance policy, “[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property”); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995) (there was direct damage to sewage treatment structure because residue from pollutant covered and adhered to the interior of the structure causing destruction of the bacteria colony which was an integral part of the covered facility); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335-6 (Or. Ct. App. 1993) (the odor from a methamphetamine lab constituted “physical” damage because it damaged the house and the cost of removing the odor was a direct physical loss); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (when insured church had to close its building because of the infiltration of vapors from gasoline in the soil under and around the building, “direct physical loss” occurred).

⁸ The IRF’s expert admitted that the PCB contamination was physically adhered to the walls after the tanks were emptied.

contaminated state, ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations.⁹ In other words, the Covered Property was unusable in its contaminated state, which constitutes "damage" under the ordinary meaning. The damage from the PCBs was direct and physical. Thus, the Court concludes that the PCB contamination that occurred at ReWa's facilities caused "direct physical loss of or damage to" ReWa's Covered Property.

Additionally, coverage under the Building Policy extends to even "risks of" direct physical loss. The Causes of Loss-Special Form states that "Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS." (Pl.'s Ex. 9 at ¶ A.) Notably, this language has been directly addressed by the South Carolina Supreme Court. In *Ocean Winds Council of Co-owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002), the Supreme Court explained the significance of the word "risks" as it relates to the scope of coverage provided. The Court reasoned:

In our view, to construe the phrase "*risks of direct physical loss involving collapse*" as requiring actual collapse is too narrow an interpretation. This phrase is more expansive than the word "collapse" and appears to cover even the threat of loss from collapse. Further, as noted by courts rejecting the actual collapse standard, such an interpretation encourages an insured to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured's duty to mitigate damages.

Id. at 271, 565 S.E.2d at 208 (emphasis in original) (internal citations omitted).

Applying such interpretation to this case, the Court concludes the Building Policy covers not only direct physical loss of or damage to ReWa's Covered Property, but also the costs incurred by ReWa in addressing the risks of PCBs infiltrating deeper into its facilities, equipment, and machines, such as expenses related to sampling and prevention of contaminated hauled storage being introduced into ReWa's facilities and remediation of ReWa's collection

⁹ ReWa was processing thirty million gallons a day coming into its system.

lines that led into its facilities. Further, ReWa was directed by the policy to take all reasonable steps to protect its Covered Property from further damage. (See Pl.’s Ex. 8 at ¶ E.2.a.(4).)¹⁰ ReWa is therefore entitled to its reasonable costs and expenses incurred as a result of the PCB contamination, less ReWa’s regular ongoing costs of processing biosolids.

C. ReWa’s Remediation and Repair Efforts are Not Limited or Excluded Under the Building Policy.

The IRF argues that ReWa’s coverage is limited or excluded by various provisions of the Building Policy. For example, the IRF contends that the “debris removal” and “pollutant cleanup and removal” provisions limit ReWa’s coverage. (See Pl.’s Ex. 8 at ¶ A.4.) These provisions, however, are additional coverages under the Building Policy, and are not intended to limit the primary coverage provisions. The Court finds that ReWa’s remediation and repair efforts are not limited or excluded by any additional coverage or exclusion provisions under the Building Policy.

The primary exclusion claimed by the IRF was the Ordinance or Law Exclusion. The IRF contends that the Building Policy does not cover ReWa’s damages resulting from the PCB contamination because ReWa’s remediation and repair process was governed by EPA and SCDHEC regulations, and therefore the Ordinance or Law Exclusion applies. That Exclusion states the IRF “will not pay for loss or damage caused directly or indirectly by ... The enforcement of any ordinance or law: (1) Regulating construction, use or repair of any property; or (2) Requiring the tearing down of any property, including the cost of removing its debris.” (Pl.’s Ex. 9 at ¶ B.1.a.) The Court notes that no evidence was presented to indicate the environmental regulations at issue fall within the categories of ordinance and law specified in the

¹⁰ Expenses incurred in testing and remediating lines which flow into the facilities are covered expenses under this “protection of property” provision, even though this testing and remediation did not occur on the Covered Property.

policy.¹¹ The Court concludes that vandalism, not the enforcement of an ordinance or law, created ReWa's resulting loss. Any actions by the EPA and SCDHEC which could be deemed to be "enforcement" under this exclusion did not, either directly or indirectly, cause ReWa to suffer the damages claimed in this lawsuit. *See Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1st Dep't 1998) ("So long as extraneous forces cause physical damage to property, this type of exclusion does not defeat recovery when, as a result, a governmental body enforces an ordinance against the property."). Further, ReWa's mere compliance with the applicable regulations does not trigger this exclusion. *See, e.g., Haas v. Audubon Indem. Co.*, 722 So.2d 1022 (La. App. 1998) ("Compliance is not enforcement" and "it was the vandalism that caused damage to the [insured's] building, not the enforcement of any ordinance or law").

IV. ReWa's Remediation and Repair Efforts are Not Covered by the Tort Policy.

ReWa also made a claim under the Tort Policy. That policy states the IRF "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... Property Damage to which this applies caused by an occurrence." (Tort Policy ¶ I.B., Pl.'s Ex. 10.) An "occurrence" is defined as "an accident, including continuous related exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." (*Id.* at ¶ III.)

With respect to liability insurance, the South Carolina Supreme Court has ruled:

Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play, there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. *There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained.*

¹¹ The Court further notes that, in its Pre-Trial Brief, the IRF conceded that "Neither DHEC nor the EPA ever filed a complaint or an enforcement action," and that ReWa "was never even threatened with an enforcement action." *See* IRF Pre-Trial Brief at 8.

Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127, 129 (1970) (emphasis added). ReWa has not identified any suit or claim as defined by the Tort Policy filed by a third party against ReWa that was tendered to the IRF for a defense and indemnity. There was never even an enforcement action – nor the threat of one – from DHEC or the EPA. No consent order was issued, nor was one requested by DHEC or EPA. The EPA never advised ReWa that it was treating it as a “potentially responsible party” (“PRP”) under CERCLA. At no time did ReWa take the position that it was a PRP under CERCLA or had any responsibility for causing the PCB contamination. Without the institution of a suit, as *Howard* instructs, there is no duty to defend nor a duty to indemnify under the Tort Policy.¹²

Furthermore, the Tort Policy issued by the IRF includes an “Owned Property Exclusion” which provides as follows: “This insurance does not apply to property damage to property owned or occupied by or rented to the insured.” This Court concludes that ReWa is seeking to be indemnified for alleged property damage to its own property. That claim falls squarely within the scope of the Owned Property Exclusion. See *City of Abbeville v. South Carolina Ins. Reserve Fund*, 323 S.C. 60, 448 S.E.2d 579 (Ct. App. 1994).

Finally, Section VII.5 of the Tort Policy states: “No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured’s obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the complaint and the Fund.” With respect to ReWa’s claim, ReWa’s “obligation to pay” has not been established by a judgment after an actual trial or by a settlement agreement. As the record conclusively shows, there has not been a settlement agreement with a third-party, and certainly not a settlement to which the IRF agreed.

¹² ReWa’s witnesses conceded that no request for legal counsel was ever made to the IRF.

Based on these principles, the Court concludes ReWa was not legally obligated to pay for the damages caused by the PCB contamination, which resulted from intentional acts of vandalism by a third party. Thus, coverage is not triggered under the Tort Policy. On these bases, the Court finds in favor of the IRF on the causes of action alleging coverage under the Tort Policy.

V. Bad Faith

ReWa has also asserted a bad faith claim against the IRF based upon allegations that the IRF unreasonably delayed in making a coverage determination and failed to pay the amounts due under the policies. The covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed. *See Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002). The Supreme Court has recognized that a bad faith claim could be asserted against the IRF, and that such claim is a tort governed by the Tort Claims Act. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993).

The Court is troubled by the length of time the IRF took to deny the claim (thirteen months). However, the Court concludes that the unique facts presented in this matter do not rise to the level of bad faith, particularly in light of the significant delay by ReWa in initially notifying the IRF of its claim. The Court therefore finds in the IRF's favor on the bad faith claim. It is not necessary for the Court to address the other defenses raised by the IRF to the bad faith claim.

VI. Attorneys' Fees

On the issue of attorney's fees, the IRF argued that (1) the prayer for attorney's fees in the Amended Complaint was pled only as part of the bad faith causes of action, (2) ReWa cited only to Section 38-59-40 as a basis for attorney's fees and that requires a showing of unreasonableness or bad faith, and (3) that the IRF is not an "insurer" under the definitions

applicable to Title 38, so Section 38-59-40 cannot be used against the IRF. *See Davis v. State of S.C. Budget & Control Bd.*, 298 S.C. 135, 378 S.E.2d 604 (Ct. App. 1989). Furthermore, counsel for ReWa has conceded that if ReWa did not prevail on the bad faith claim, it could not obtain the attorneys' fees identified in its damages exhibits and a motion for attorneys' fees for the litigation under Section 38-59-40 could not be supported under any of the other claims.

VII. Damages

ReWa's response to the PCB contamination was both reasonable and necessary. ReWa was faced with the urgency of preventing the discharge of contaminated materials into public rivers or the land application of contaminated biosolids onto land owned by local farmers. Testimony was presented at trial by Joel Jones, ReWa's Chief Technical Officer, that ReWa processes approximately thirty million gallons of wastewater a day. The Court finds that under these unique circumstances, ReWa properly notified SCDHEC and the EPA and acted with the necessary sense of urgency to prevent the PCB contamination from further impacting its facilities or affecting the public-at-large.

ReWa retained AECOM, a firm experienced in remediation and removal of contaminants, to help it develop the best course of action. ReWa also used a competitive bid process in determining which vendor to use for solid waste removal. With the approval of SCDHEC and the EPA, ReWa developed a plan of action to safely dispose of over fifteen million gallons of wastewater impacted by the PCB contamination, some of which had to be transported to specially approved receiving facilities in Emelle, Alabama. During the remediation and repair process, ReWa provided monthly reports to the IRF setting out what had been done and the expenses related thereto. As ReWa's Controller, Patricia Dennis, testified at trial, ReWa established a two-step accounting system in order to monitor and track expenses related to the PCB remediation and repair efforts. The IRF never raised any concerns or

questions about ReWa's process of tracking these costs, nor stated any objection to ReWa's inclusion of any particular costs in its expense spreadsheets.

Pursuant to the above findings, the Court finds that the testimony of ReWa's witnesses and the evidence presented at trial establish that ReWa incurred \$8,751,949.60 in total expenses for the PCB remediation and repair. (See Pl.'s Exs. 99, 100.) After subtracting ReWa's regular costs of processing biosolids (\$2,516,054.27), ReWa's total damages are \$6,235,895.33. (Pl.'s Ex. 101.) The Court declines to award the following costs: \$249,572.00 to Greenville County Solid Waste due to lack of sufficient proof for outside technical support; \$4,246.25 to AECOM for lack of sufficient proof; \$1,320.00 which appears to be a double charge for pressure washing (see Def.'s Ex. 19); and \$155,832.59 in attorneys' fees and costs relating to environmental and coverage counsel.

The Court finds that all of ReWa's other costs and expenses are reasonable and recoverable under the Building Policy. Therefore, the Court finds that ReWa is entitled to an award of damages in the amount of \$5,824,924.49 against the IRF.

RULING

For these reasons, the Court concludes ReWa's damages resulting from the cleanup, repair, and remediation of its facilities, machinery, and equipment due to PCB contamination at its Pelham Road, Mauldin Road, and Lower Reedy facilities are covered under the Building Policy, and such costs and expenses incurred by ReWa were reasonable and necessary to remediate and repair its facilities and prevent further harm.

Pursuant to the testimony and evidence presented at trial, judgment is hereby entered, consistent with the findings herein, awarding ReWa the amount of \$5,824,924.49 under the Building Policy only.

AND IT IS SO ORDERED.

Judge's Electronic Signature to Follow



Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al
Case Number: 2016CP2305905
Type: Master/Master's Filing

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-03-18 14:09:02 page 16 of 16

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Renewable Water Resources,

Plaintiff,

vs.

Insurance Reserve Fund, a Division of
the State Fiscal Accountability Authority
of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C/A #: 2016-CP-23-05905

ORDER

The matter is before the Court pursuant to motions filed by Defendant on March 30, 2020. Based upon the Court's familiarity with the record, I find that a hearing is not necessary. See, *Pollard v. County of Florence*, 444 S.E.2d 534 (S.C. App. 1994). As will be more fully explained below, the motions are denied.

As set forth in the motion under Findings of Fact, items 1., 2. and 3. argue, in substance, that Plaintiff did not consult with Defendant on certain aspects of the remediation. However, the record is clear that Defendant was noticed of the PCBs contamination, provided monthly reports/expenses summaries, and never availed themselves of opportunities to consult with Plaintiff, approve or deny the plan or expenses, or take any other active role for some thirteen (13) months. Under the facts herein, it is too late to now argue Plaintiff acted improperly or without an offer of consultation with Defendant.

As to 5., the Court finds that Plaintiff submitted sufficient evidence to support its claims and the same is amply supported by the evidence. Again, and as noted above, the Defendant was

on actual notice of the ongoing remediation and ongoing and increasing expenses and took no action or participation therein.

The other issues and items raised under Findings of Fact have been sufficiently addressed in the Order filed March 18, 2020.

Under Conclusions of Law, while the Court appreciates the arguments raised by Defendant, the preponderance of the evidence established that Plaintiff acted in a reasonable and appropriate manner in its remediation and that the amounts awarded are reasonable.

Upon a review of the record, the Order of March 18, 2020 and Defendant's motions filed March 30, 2020, the Court is of the opinion that the Order of March 18, 2020 is appropriately and reasonably based upon the facts presented at trial and the applicable law.

As such, Defendant's motions are denied.

JUDGE'S SIGNATURE PAGE TO FOLLOW



Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al

Case Number: 2016CP2305905

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-04-06 08:50:02 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-05905
	)	
Plaintiff,	)	
vs.	)	
	)	
Insurance Reserve Fund, a Division of	)	<u>ORDER</u>
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	

Plaintiff Renewable Water Resources (“ReWa”) is a special purpose district that provides wastewater treatment services in the Upstate of South Carolina. ReWa brought this matter, naming as the sole defendant the Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina. When the lawsuit was initially entered in the court’s electronic filing system and public index, two defendant entities were listed: (1) Insurance Reserve Fund and (2) State Fiscal Accountability Authority of South Carolina. This was an inputting or scrivener’s error, because there was only one defendant, “Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina.”

This Order is merely intended to address the data entry or scrivener’s error, which incorrectly created two defendants in the court’s electronic filing system. It does not impact or alter the merits of any decision of the court and does not change the validity or enforceability of the judgment against the correct defendant, the Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina.

Therefore, it is ORDERED that the clerk shall correct the data entry error by removing or inactivating “State Fiscal Accountability Authority of South Carolina” as a separate entity in the court’s electronic filing system and renaming the only defendant as “Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina.”

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE TO FOLLOW

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Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al

Case Number: 2016CP2305905

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-04-09 14:14:03 page 3 of 3

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
 Renewable Water Resources,	)	
	)	Civil Action No. 2016-CP-23-5905
Plaintiff,	)	
	)	
v.	)	
	)	CONSENT ORDER
Insurance Reserve Fund, a Division of	)	DEPOSITING FUNDS INTO COURT
the State Fiscal Accountability	)	
Authority of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

This matter is before this Court on the motion of the Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (“Defendant”) pursuant to Rule 67, SCRCF, seeking leave of court to allow the Defendant to deposit a portion of the judgment, specifically the amount of \$1,450,000.00, plus accrued post-judgment interest, with the Court during the pendency of its appeal to be filed in the South Carolina Court of Appeals.

On April 8, 2020, a judgment was entered by the clerk of court based upon the March 18, 2020 Order of Judge Charles B. Simmons, Jr. in the amount of \$5,824,924.49 in favor of the Plaintiff Renewable Water Resources against the Defendant. The Defendant intends to file an appeal to the South Carolina Court of Appeals. The Defendant seeks to deposit the sum of \$1,450,000.00, plus accrued interest, with the Court in accordance with Rule 67, SCRCF, during the pendency of that appeal.

Rule 67, SCRCF, authorizes a party to deposit the sum of a judgment, or a portion thereof, into the court with leave of court. The South Carolina appellate courts have upheld the application of Rule 67, SCRCF, and have concluded that Rule 67 serves a beneficial purpose. *See, Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884

(Ct. App. 1998); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000). Specifically, in *Russo, supra*, the Supreme Court reasoned that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 454 S.E.2d at 896.

The Plaintiff has consented to the Defendant's motion. Based on the foregoing, this Court finds that a deposit of \$1,450,000.00, plus accrued interest upon this deposited amount until the deposit of the funds, pursuant to Rule 67, SCRPC, is appropriate. Because Defendant seeks to deposit only a portion of the judgment, statutory post-judgment interest shall continue to accrue from the date of the judgment, on all amounts of the judgment which are not deposited with the Court, at the rate set by the Order of the Supreme Court of South Carolina. See Order dated January 6, 2020 Re: Interest Rate on Money Decrees and Judgments. This Order does not impact any other interest or costs which may be added to the judgment pursuant to the South Carolina Rules of Civil Procedure or statute.

IT IS, THEREFORE, ORDERED that the Defendant Insurance Reserve Fund may deposit with the Court the sum of \$1,450,000.00, plus accrued interest. Any deposit pursuant to this Order shall be made to the Clerk of Court for Greenville County.

IT IS FURTHER ORDERED that the Clerk of Court for Greenville County shall deposit the funds with any bank or financial institution authorized to receive public funds in an interest bearing account, and the funds, including interest earned thereon, shall be withdrawn only upon further order of this Court after notice to all parties.

AND IT IS SO ORDERED.

CHARLES B. SIMMONS, JR.
Presiding Judge, Thirteenth Judicial Circuit

WE SO MOVE:

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Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al
Case Number: 2016CP2305905
Type: Order/Deposit Money

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-04-16 16:16:55 page 4 of 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
vs.	)	<u>ORDER GRANTING IN PART</u>
	)	<u>MOTION FOR COSTS</u>
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	

Plaintiff Renewable Water Resources’ (“ReWa”) Motion for Costs came before the Court for hearing, by consent done via Zoom, on May 13, 2020. William S. Brown appeared on behalf of ReWa. Andrew F. Lindemann and John R. Devlin, Jr. appeared on behalf of Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (“IRF”). Having heard the arguments and reviewed the submissions of the parties, ReWa’s Motion for Costs is hereby granted in part for the reasons set forth below.

Rule 54(d) of the South Carolina Rules of Civil Procedure provides that “[e]xcept when express provision thereof is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its offices, and agencies shall be imposed only to the extent permitted by law.” The South Carolina Supreme Court and Court of Appeals have held that costs may be assessed against the State as with any other Defendant. *See Dunn v. Dunn*, 298 S.C. 365, 369, 380 S.E.2d 836, 838 (1989); *Varn v. South Carolina Dept. of Highways & Public Transp.*, 311 S.C. 349, 354, 428 S.E.2d 895, 898 (Ct. App. 1993).

Rule 54(e), SCRCF, states that taxable costs include: (1) costs authorized by statute; (2) all filing and recording fees charged by the clerk of court in which the action is pending; (3) fees of the sheriff for service of the summons and complaint or subpoenas for trial; (4) fees incurred

in service of process, which include the fees incurred to subpoena the witness who testified at trial or for the production of documents and materials actually used at trial; (5) witness fees and mileage actually traveled and paid to persons who testified at trial; and (6) fees for exemplification and copies of papers necessarily obtained for trial.

ReWa submitted the Affidavit of William S. Brown in support of its Motion for Costs and also submitted invoice backup for these items in advance of the hearing. The Affidavit includes an itemization of costs that ReWa seeks to recover totaling Thirty-Two Thousand Five Hundred Twenty-Seven Dollars and Six Cents (\$32,527.06), which is further broken down by category and specific amount for each entry. ReWa seeks an award of the following costs pursuant to Rule 54, SCRCP and South Carolina statute:

- (1) Interest pursuant to S.C. Code Ann. § 15-37-30 in the amount of Twenty-Nine Thousand Three Hundred Twenty-Four Dollars and Nineteen Cents (\$29,324.19);
- (2) Filing and recording fees in the amount of Two Hundred Twenty-Five Dollars (\$225.00);
- (3) Fees incurred in service of process of the Complaint in the amount of Fifty Dollars (\$50.00); and
- (4) Costs of exemplifications and copies of papers necessarily obtained for trial, including foam board exhibits, trial exhibits, and original depositions in the amount of Two Thousand Nine Hundred Twenty-Seven Dollars and Eighty-Seven Cents (\$2,927.87).¹

¹ This original amount sought by ReWa included the deposition costs of Four Hundred Twenty-Eight Dollars and Seventy-Eight Cents (\$428.78) relating to Jerry Anderson. ReWa later conceded that this amount could be removed from ReWa's total claimed costs because Mr. Anderson did not testify as a live witness and, although portions of his deposition were originally designated, his deposition was not used or published to the Court during trial.

RULING

As an initial matter, the Court finds that ReWa's Motion for Costs is properly before the Court pursuant to Rule 54(d), SCRCPP, and is a matter which should be decided by the Court with the awarded costs entered by the clerk. Furthermore, the Court concludes that, in the interest of judicial economy, the taxation of costs should not be delayed until the IRF's appeal is completed. Ruling at this time in no way prejudices any rights of the IRF.

The Court finds that ReWa is "the prevailing party" under Rule 54. The IRF did not contest that issue in its submission on the motion. Therefore, ReWa is entitled to an award of costs. The issue before the Court is determination of the amount of that award of costs.

1. Interest under S.C. Code Ann. § 15-37-30

ReWa asserts that pursuant to Rule 54(e)(1), SCRCPP, it is entitled to recover costs allowed by statute. The statute at issue regarding interest is S.C. Code Ann. § 15-37-30, which states that "[w]hen the judgment is for the recovery of money, interest from the time of the verdict or report until judgment may be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto."

In this case, the Court entered Findings of Fact and Conclusions of Law on March 18, 2020 which set forth the Court's finding and set the amount of the judgment to be entered in favor of ReWa. The judgment was entered by the clerk on April 8, 2020. Therefore, what is at issue is interest which accrued for the twenty-one (21) days between the Court's determination and the entry of judgment.

The IRF makes two principal arguments in opposition to the award of interest under S.C. Code Ann. § 15-37-30 as a cost. First, the IRF asserts that S.C. Code Ann. § 15-37-30 was

repealed by implication with the adoption of Rule 54(e). Second, the IRF contends that Rule 54(e) states the exclusive list of allowable costs. Because interest is not identified in Rule 54(e), the IRF contends that it cannot be awarded as a cost.

The Court does not believe that S.C. Code Ann. § 15-37-30 was repealed. When the Rules of Civil Procedure were adopted by 1985 S.C. Act 100, the General Assembly provided a long list of statutes which were repealed because they were replaced by the Rules. S.C. Code Ann. § 15-37-30 was not listed as repealed by the General Assembly in 1985 S.C. Act 100 or any subsequent Act. “In general, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation.” *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 135, 694 S.E.2d 213, 216 (2010). “The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them.” *Spectre, LLC v. South Carolina Dep't of Health & Envtl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). The Court finds that Rule 54(e) and S.C. Code Ann. § 15-37-30 can be applied without conflict, so that the IRF has failed to show that they are “incapable of any reasonable reconciliation.” The express language of Rule 54(e), SCRCP, permits recovery of “Costs Authorized by Statute” allowing for the award of costs authorized “in favor of the prevailing party under **any statute** or Rule of Civil Procedure.” Rule 54(e)(1), SCRCP (emphasis added); *see also* 7 S.C. JUR. COSTS § 42 (March 2020 Update). As such, the Court finds that S.C. Code Ann. § 15-37-30 has not been repealed and remains valid law.

The Court finds that ReWa is entitled to interest from the time this Court’s Findings of Fact and Conclusions of Law were entered on March 18, 2020 until such time as the judgment was entered by the clerk on April 8, 2020 under S.C. Code Ann. § 15-37-30. The interest for that twenty-one (21) day period has accrued at the post-judgment interest rate. *See* 7 S.C. JUR. COSTS

§ 42 (March 2020 Update). However, such interest is not a taxable cost under Rule 54(e), SCRCp. This amount should be treated with other interest on the award/judgment and be recoverable at the time of any collection on the judgment. Therefore, the Court denies ReWa's request for an award of Twenty-Nine Thousand Three Hundred Twenty-Four Dollars and Nineteen Cents (\$29,324.19)² as a taxable cost pursuant to Rule 54(e), SCRCp, and finds that this amount should be included as part of the post-judgment interest calculation.

2. Filing Fees and Service of Process

ReWa seeks filing and recording fees, as shown in the public record, for the filing of the Complaint and several motions in the amount of Two Hundred Twenty-Five Dollars (\$225.00). Rewa also seeks costs incurred in service of process of the Complaint in the amount of Fifty Dollars (\$50.00). The IRF did not oppose the award of these costs. The Court finds that these are proper under Rule 54(e), SCRCp.

3. Costs of Copies Obtained for Trial and Depositions

ReWa also seeks the costs of certain copies and depositions. Costs for exemplifications and copies of papers necessarily obtained for trial are recoverable under Rule 54(e)(6), SCRCp. ReWa incurred the expense of copying exhibits for trial. It seeks an award of costs for one full set of Plaintiff's trial exhibits submitted for the Court's use during trial in the amount of Six Hundred Forty-Seven Dollars and Thirty-Five Cents (\$647.35). During the trial, ReWa used a foam board blow-up of Plaintiff's Exhibit 107, which reflects ReWa's total damages calculation and seeks costs for this of Ninety Dollars and Ten Cents (\$90.10). These costs relate to copies of

² The parties also raise an issue regarding the proper daily accrual of interest. ReWa calculated the accrual on a standard 365-day year. The IRF contends that the calculation should use 366 days, to account for the fact that 2020 is a leap year. Neither party submitted authority for its position. Because the Court is delaying the award of this interest, it need not reach this issue.

papers and exemplifications that were necessarily obtained for the trial of this matter, and the Court finds that they are therefore recoverable under Rule 54(e)(6), SCRCPP.

ReWa also seeks the costs of certain depositions which were used during trial. The IRF opposes the award of the deposition costs and asserts that deposition costs are not properly recoverable as a cost under Rule 54. The Court finds that ReWa's costs in obtaining original depositions for use at trial are recoverable as taxable costs. The South Carolina Supreme Court upheld the award of deposition costs in *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 401-402, 618 S.E.2d 903, 908 (2005). Noting that the "trial judge has broad discretion to award costs to the prevailing party," the Supreme Court upheld the trial court's award of deposition costs pursuant to Rule 54(d), SCRCPP. *See also Register v. Duke*, 302 S.C. 195, 394 S.E.2d 718 (Ct. App. 1990); 7 S.C. JUR. COSTS § 31 (March 2020 Update). Therefore, the Court finds that deposition costs of Two Thousand One Hundred Ninety Dollars and Forty-Two Cents (\$2,190.42) should be awarded as costs.

For these reasons, the Court grants in part ReWa's Motion for Costs. The Court finds that ReWa is entitled to interest pursuant to S.C. Code Ann. § 15-37-30, but declines to award this interest as a taxable cost under Rule 54, SCRCPP. The Court grants ReWa's Motion for Costs as to the remaining items, and therefore awards ReWa taxable costs in the amount of Three Thousand Two Hundred and Two Dollars and Eighty-Seven Cents (\$3,202.87), which shall be added to and included as a part of the judgment.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE ON NEXT PAGE



Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant,
et al

Case Number: 2016CP2305905

Type: Order/Costs

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-05-20 15:29:58 page 7 of 7

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Renewable Water Resources,

Plaintiff,

vs.

Insurance Reserve Fund, a Division of the State
Fiscal Accountability Authority of South
Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. _____

SUMMONS

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint, herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Marcus A. Manos

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W. Thomas Lavender, SC Bar No. 3143
Joan W. Hartley, SC Bar No. 72735
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October 17, 2016

Columbia, South Carolina

Attorneys for Plaintiff
Renewable Water Resources

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Renewable Water Resources,
Plaintiff,

Case No. _____

vs.

COMPLAINT

Insurance Reserve Fund, a Division of the
State Fiscal Accountability Authority of South
Carolina,

(Jury Trial Demanded)

Defendant.

Plaintiff Renewable Water Resources ("ReWa"), by and through its undersigned counsel, states for its Complaint against Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina ("Fund"), the following:

PARTIES AND JURISDICTION

1. ReWa is a special purpose district authorized, organized, and existing pursuant to the laws of the State of South Carolina and doing business in the State of South Carolina, providing wastewater services to local governments in the upstate of South Carolina.

2. The Fund is a division of the South Carolina State Fiscal Accountability Authority doing business in South Carolina and subject to personal jurisdiction in the Greenville County, South Carolina.

3. Upon information and belief, by issuing policies, administering policies, and adjusting claims of insurance to governmental entities and quasi-governmental entities across South Carolina, the Fund acts as an insurance-market participant and insurer.

4. This Court has subject matter jurisdiction over this claim pursuant to Article V, Section 11, of the South Carolina Constitution.

FACTUAL BACKGROUND

5. ReWa realleges and incorporates the allegations of Paragraphs 1 through 4.

6. The Fund insured the buildings and personal property of ReWa. (Building and Personal Property Policies F130230114, F130230115, F130230116, and F130230116A are incorporated by reference). To the extent applicable, the Fund and ReWa entered into virtually identical insurance contracts in prior years as well.

7. The Fund also insured ReWa against third party tort claims under General Tort Liability Policies T130230114, T130230115, T130230116, and T130230116A incorporated by reference. To the extent applicable, the Fund and ReWa entered into virtually identical insurance contracts in prior years as well.

8. In 2013, ReWa discovered that one or more third parties illegally introduced polychlorinated biphenyl contaminated material ("PCBs") into ReWa's wastewater treatment system.

9. The third parties introduced the PCBs into ReWa's wastewater treatment system without ReWa's knowledge and in violation of law.

10. Upon discovering the PCBs in its treatment system, ReWa informed the United States Environmental Protection Agency ("EPA") and the South Carolina Department of Health and Environmental Control ("DHEC") as required by law.

11. ReWa also provided notice to the Fund under its insurance policies of a claim.

12. PCBs damaged the equipment, components, and facilities used by ReWa for wastewater treatment at three locations specifically named in and covered by the Building and Personal Property policy issued by the Fund and protecting ReWa's buildings and personal property used in business.

13. The three locations appear in the Policy as (a) Segment 90, Pelham Waste Treatment Plant; (b) Segment 130, Lower Reedy Plant; and (c) Segment 140, Mauldin Road Plant.

14. In response to the discovery of PCB contamination and with the approval of and at the direction of EPA and DHEC:

- (a) ReWa conducted sampling at the Pelham, Mauldin Road, and Lower Reedy facilities to determine the extent of the damage;
- (b) ReWa shut down all biosolids/sludge holding tanks contaminated and rendered unusable by the PCB;
- (c) ReWa implemented mitigation activities, including, *inter alia*, measures implemented for its hauled waste and FOG program to minimize the risk of further introduction of contamination into the Mauldin Road treatment facility where it operates its only hauled waste receiving tank; specifically, ReWa rented portable storage tanks (called "frac" tanks) and appurtenances and hired temporary staff to assist with the handling, segregation, and testing of incoming loads of hauled waste and FOG;
- (d) ReWa engaged contractors, utilized internal personnel, and incurred expenses to restore the tanks and other structures at its facilities to

usable condition.

15. Under the direction of the EPA and DHEC, ReWa expended in excess of \$8,000,000 to repair and restore the treatment machinery, components, and equipment at the three sites to usable condition, and to cleanup, remove, and dispose (according to law) of the resulting contaminated material.

16. ReWa has provided the Fund with a summary of these costs on an ongoing basis. The work required the removal and disposal of the PCB contaminated wastes in compliance with applicable laws and regulations.

17. Without the removal, repair, restoration, and cleaning work, the treatment components, machinery and equipment could not continue to be used in ReWa's business.

18. ReWa incurred legal and consulting fees and costs in responding to the demands of EPA and DHEC.

19. In correspondence dated October 30, 2014 to Patricia Dennis from Rob Byers, the Fund noted that the PCB contamination and damage resulted from vandalism, a specified covered cause of loss under the Building and Personal Property Policy.

20. ReWa undertook the repair, restoration, remediation, cleanup, and disposal of the PCB contamination at the direction of DHEC and EPA.

21. ReWa incurred legal fees, consulting fees, and expenses related to negotiation with DHEC and EPA, defense of the potential claim, and compliance with DHEC and EPA directives.

22. ReWa provided the Fund with information regarding the repair and restoration of its equipment and structures.

23. By letter dated October 30, 2014, the Fund informed ReWa that the only coverage the Fund would pay under any policy came from an additional coverage in the Building and Personal Property policy purchased by ReWa for pollutant cleanup and removal limited to \$10,000 per identified property arising out of the cleanup. The October 30, 2014 letter is incorporated by reference.

24. ReWa disagreed with this position believing that pollution caused by vandalism and repairs made necessary by it was covered by the full policy limits under the Building and Personal Property policy.

25. By letter of counsel dated October 7, 2016, ReWa renewed demand for coverage under both policies. The letter is incorporated by reference.

26. Counsel for the Fund responded to counsel for ReWa on October 13, 2016, again only offering the limited \$10,000 per segment pollutant cleanup coverage and denying any payment was due otherwise under either policy. The letter is incorporated by reference.

27. Plaintiff and Defendant (by written agreement) tolled the statute of limitations applicable through and including October 17, 2016.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment/Breach of Contract - Building and Personal Property Insurance Contract(s))

28. ReWa realleges and incorporates the allegations of Paragraphs 1 through 27.

29. ReWa and the Fund disagree on the meaning of the Building and Personal Property insurance contract.

30. ReWa believes coverage exists under the Building and Personal Property policy for all the costs incurred in the repair, remediation, restoration, cleanup, and disposal of

contaminated material related to the covered property. The Fund disagrees. This disagreement is significant and material, and ReWa seeks a declaratory judgment finding coverage pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and South Carolina Code Sections 15-53-10 through 15-53-140.

31. Alternatively, ReWa believes the facts establish a breach of contract by the Fund in failing to reimburse ReWa for the costs reasonably incurred to repair, remediate, restore, dispose of the contaminated material, and otherwise necessary to return the equipment, facilities, and components to an operating status where they can be used in waste-water treatment.

32. The Building and Personal Property policies referenced above constitute the terms of a binding contract between ReWa and the Fund.

33. ReWa paid its premiums and notified the Fund timely of the claim. ReWa performed all conditions precedent necessary to establish coverage under the Building and Personal Property policies.

34. ReWa demanded compensation from the Fund for all its expenditures related to the repair, remediation, restoration of the equipment, facilities and components at the three segments listed in the Building and Personal Property policies.

35. The Fund refused any payment other than \$30,000 from an additional coverage for pollutant cleanup.

36. The Fund's refusal to pay violates the terms of the contract between the parties and has damaged ReWa.

37. The most relevant portions of the Building and Personal Property policy state:

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations cause by or resulting from any Covered Cause of Loss.

1. Covered Property

* * *

b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 1,000 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property Separation of Coverage from:

- (1) Furniture and fixtures;
- (2) Machinery and equipment;
- (3) "Stock";
- (4) All other personal property owned by you and used in your business.

CAUSES OF LOSS – SPECIAL FORM

A. COVERED CAUSES OF LOSS

When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- 1. Excluded in Section B., Exclusions; or

* * *

B. EXCLUSIONS

- 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause

or event that contributes concurrently or in any sequence to the loss.

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

1. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss," we will pay for the loss or damage caused by that "specified cause of loss."

* * *

F. DEFINITIONS

"Specified Causes of Loss" means the following: Fire, lightning, explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

38. The Fund admitted that the contamination damage to the equipment, machinery, facilities, and components resulted from an act of vandalism.

39. The compliance with laws exclusion does not apply as these are not changes to the property to bring it into compliance with law but performing repairs and restoration caused by a specified covered loss and doing the work consistent with law

40. Vandalism is a Specified Cause of Loss listed in the Building and Personal Property policy.

41. This Court should enter a declaratory judgment finding that coverage exists for ReWa's reasonable and necessary expenditures to repair, restore, remediate, and otherwise bring back into operation the personal property consisting of equipment, machinery, components, and facilities damaged by the PCB contamination. Further, the cleanup, collection, and proper legal disposal of the contaminated material resulting from that repair, restoration, and remediation is a necessary and natural consequence and expense for repairing the equipment, facilities, and components and also covered by the policy.

42. The Fund breached the contract of insurance with ReWa and ReWa has been damaged in excess of \$5 million damages to be proved at trial.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgment/Breach of Contract - General Tort Liability Insurance Contract(s))

43. ReWa realleges and incorporates the allegations of Paragraphs 1 through 27.

44. ReWa and the Fund disagree on the meaning of the General Tort Liability insurance contract. ReWa believes the contract provides coverage and the Fund does not. This disagreement is significant and material and ReWa seeks a declaratory judgment finding coverage pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and South Carolina Code Sections 15-5310 through 15-53140.

45. Alternatively, ReWa believes the facts establish a breach of contract by the Fund in failing to reimburse ReWa for the costs reasonably incurred to negotiate with and respond to DHEC and EPA and potentially pay for removal, transportation, and disposal of contaminated material.

46. ReWa complied with laws and regulations requiring it to inform DHEC and EPA of the PCB contamination illegally introduced to its waste-water treatment system by a third

party.

47. DHEC and EPA required ReWa to inform them of the steps it would take to contain the contamination, remove the contamination from its waste-water treatment system, and dispose of the contamination in compliance with applicable regulations and laws.

48. ReWa knew that DHEC and EPA had legal authority to contain, remove, and dispose of the contaminated material should ReWa fail to do so and to seek all reasonable costs incurred in doing so from ReWa.

49. The demands for compliance with regulations and statutes by EPA and DHEC constitute a claim under the General Tort Liability insurance policy.

50. ReWa believes coverage exists under the General Tort Liability insurance contract for ReWa's reasonable expenses, including attorneys' fees and consultants' fees, incurred in responding to and complying with DHEC and EPA.

51. The General Tort Liability Insurance policies referenced above constitutes a legal and binding contract between ReWa and the Fund.

52. ReWa paid all premiums due under the General Tort Liability Insurance policies.

53. ReWa provided the Fund timely notice of the claim and kept the Fund informed of the legal requirements, negotiations, and communications between ReWa, DHEC, and EPA.

54. ReWa complied with all conditions precedent to establish coverage under the General Tort Liability Insurance policies.

55. The most relevant portions of the General Tort Liability policy are:

The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

* * *

B. Property Damage to which this applies caused by an occurrence.

* * *

DEFINITIONS

When used in this policy:

* * *

“Occurrence” means an accident, including continuous repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured.

* * *

“Property Damage” means:

- (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time result therefrom, or
- (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

* * *

EXCLUSIONS

This insurance does not apply:

* * *

- (f) to **personal injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;

* * *

56. ReWa incurred legal fees, consulting fees, and related costs in handling the claims by DHEC and EPA. These costs are ongoing as compliance is ongoing.

57. ReWa believes that the collection, transportation, and disposal of the contaminated material which damages its equipment, components, and facilities at the three locations as a necessary and covered expense under the Building and Personal Property policy. The Fund denies these expenditures can be covered. To the extent the Court agrees with the Fund, these expenses were incurred in response to a governmental demand and should be covered under the General Tort Liability policy. The Fund cannot have it both ways.

58. By letter dated October 30, 2014, the Fund denied any duty to pay under the General Tort Liability policy between the parties.

59. ReWa renewed its demand for payment under the General Tort Liability policy by letter of counsel dated October 7, 2016.

60. The Fund denied any duty to pay in response to that letter by letter of counsel dated October 13, 2016.

61. ReWa suffered damages in excess of \$100,000 as a result of the Fund's unreasonable refusal to pay under the General Tort Liability policy.

62. This Court should declare that coverage exists under the General Tort Liability policy for ReWa's reasonable and necessary legal fees, consulting fees, and other expenses incurred in responding and dealing with the claims by DHEC and EPA.

63. Further, should this Court find that the collection, transportation, and disposal of the PCB contaminated materials which damaged ReWa's equipment, components, and facilities is not covered under the Building and Personal Property policy, then such expenses incurred at

the direction of the government and with knowledge that the government could sue for those expenses if it had to perform the cleanup, removal, and disposal, this Court should declare those amounts covered under the General Tort Liability policy.

64. The Fund breached its contract with ReWa by failing to pay under the General Tort Liability policy and ReWa has been damaged by that breach.

65. ReWa seeks actual damages in excess of \$100,000 for the Fund's breach to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith/Bad Faith or Unreasonable Failure to Pay Insurance Claims - Building and Personal Property Insurance Contract(s))

66. ReWa realleges and incorporates the allegations of Paragraphs 1 through 42.

67. The language of the Building and Personal Property insurance policy plainly and unambiguously covers the cost to repair, restore, and remediate personal property damaged by pollution or contaminated materials caused by a Specified Covered Loss.

68. The Fund knew that the contamination damaging and making unusable the equipment, facilities, and components at the three segments listed in the policy came from an act of vandalism, a Specified Covered Loss under the policy.

69. As a result, the costs incurred by ReWa to repair, restore, remediate, and place back in service the damaged equipment, components, and facilities clearly and plainly falls within the coverage grant of the policies.

70. Even if the language is found ambiguous, the ambiguity must be construed against the insurer and in favor of coverage.

71. Upon information and belief, the Fund knew the meaning of the language and the rule of ambiguity.

72. Upon information and belief, the Fund knew that numerous courts in other states applying the same principles of insurance contract construction found that similar or identical policy language produced coverage.

73. The Fund's refusal to pay ReWa's reasonable and necessary expenses over and above the \$30,000 offered under the additional coverage constitutes an unreasonable or bad-faith failure to pay under the policy.

74. In this cause of action, ReWa only seeks its consequential damages. As a necessary prerequisite to this cause of action, liability must be found under the First Cause of Action, and the damages in that cause of action will be the payment of benefits due under the policy.

75. This cause of action seeks the additional expenditures made by ReWa in order to get the coverage to which it was entitled such as attorneys' fees and costs, consulting fees and costs, and any other extra contractual expenses it can prove at trial.

76. Further, should it be found that the Fund acting as an insurance market participant and an insurer is not subject to the South Carolina Tort Claims Act, then ReWa seeks punitive damages for the unreasonable and bad-faith refusal to pay amounts due under the policies.

77. The Fund acting as an insurer is subject to a claim for the breach of a covenant of good faith/bad faith or unreasonable failure to pay under an insurance contract just as any private insurer and is subject to liability for attorneys' fees and other expenses incurred

pursuant to S.C. Code Section 38-59-40.

78. ReWa seeks compensation for its attorneys' fees and expenses of litigation in finding coverage which the Fund unreasonably or in bad faith denied and for any other consequential damages it has incurred as a result of the Fund's unreasonable or bad faith refusal to pay under the contract as proved at trial.

FOR A FOURTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith/Bad Faith or Unreasonable Failure to Pay Insurance Claims – General Tort Liability Insurance Contract(s))

79. ReWa realleges and incorporates the allegations of Paragraphs 1 through 27 and Paragraphs 44 through 65.

80. The language of the General Tort Liability insurance policy plainly and unambiguously covers the cost to respond to and deal with EPA and DHEC as a covered claim. Further, the policy covers removal, transportation, and disposal of the PCB contamination material pursuant to DHEC and EPA instructions, regulations, and law.

81. The Fund knew that the DHEC and EPA directives regarding contamination constituted a covered claim under the policy.

82. As a result, the costs incurred by ReWa to negotiate with and respond to DHEC and EPA, as well as any cleanup costs and transportation and disposal costs not covered by the Building and Personal Property policy, clearly and plainly fall within the coverage grant of the policies.

83. Even if the language is found ambiguous, the ambiguity must be construed against the insurer and in favor of coverage.

84. Upon information and belief, the Fund knew the meaning of the language and the rule of ambiguity.

85. Upon information and belief, the Fund knew that South Carolina cases found that similar or identical policy language produced coverage.

86. The Fund's refusal to pay ReWa's reasonable and necessary expenses constitutes an unreasonable or bad-faith failure to pay under the policy.

87. In this cause of action, ReWa only seeks its consequential damages. As a necessary prerequisite to this cause of action, liability must be found under the Second Cause of Action, and the damages in that cause of action will be the payment of benefits due under the policy.

88. This cause of action seeks the additional expenditures made by ReWa in order to get the coverage to which it was entitled such as attorneys' fees and costs, consulting fees and costs, and any other extra contractual expenses it can prove at trial.

89. Further, should it be found that the Fund acting as an insurance market participant and an insurer is not subject to the South Carolina Tort Claims Act, then ReWa seeks punitive damages for the unreasonable and bad faith refusal to pay amounts due under the policies.

90. The Fund acting as an insurer is subject to a claim for the breach of a covenant of good faith/bad faith or unreasonable failure to pay under an insurance contract just as any private insurer and is subject to liability for attorneys' fees and other expenses incurred pursuant to S.C. Code Section 38-59-40.

91. ReWa seeks compensation for its attorneys' fees and expenses in finding coverage which the Fund unreasonably or in bad faith denied and for any other consequential damages it has incurred as a result of the Fund's unreasonable or bad faith refusal to pay under the contract as proved at trial.

THEREFORE, the Plaintiff prays that this Court enter its judgment against the Defendant:

A. Declaring that the Building and Personal Property insurance contracts between the parties provides coverage for the repair, restoration, and remediation of equipment, components, and facilities located at the three covered sites including the collection, transportation, and disposal of the contaminated material as required by law;

B. Finding that the Fund breached the Building and Personal Property insurance contracts with ReWa and awarding actual damages for breach of contract as found by the trier of fact;

C. Declaring that the General Tort Liability insurance contracts between the parties provide coverage for the expenses incurred by ReWa in responding to and, abiding by DHEC and EPA requirements with knowledge that DHEC and EPA could enforce such requirements by legal action and collect any expenses incurred;

D. Finding that the Fund breached the General Tort Liability contracts of insurance by failing to pay the legal fees, consulting fees, and expenses incurred by ReWa in responding to the claims and directives of DHEC and EPA awarding actual damages in excess of \$100,000 (and should it be found that the collection, transportation, and disposal of the contaminated material pursuant to law was not covered under the Building and Personal Property contracts, awarding damages in the reasonable amounts incurred for those activities pursuant to the

General Tort Liability contracts);

E. The Fund's failure to pay the expenses incurred by ReWa in repairing, restoring, and remediating the equipment, machinery, components, and facilities damaged by the contamination is unreasonable or in bad faith and awarding ReWa's its attorneys' fees and expenses incurred in this litigation and any other consequential damages in addition to the benefits paid under the policy;

F. The Fund's failure to pay the legal fees and expenses incurred by ReWa in negotiating with and responding to DHEC and EPA as well as any other consequential costs under the General Tort Liability policies, unreasonable and in bad faith and awarding ReWa its attorneys' fees and expenses incurred in this litigation and any other consequential damages in addition to the benefits under the policy; and

G. Such other and further relief as this Court may deem just and proper.

s/ Marcus A. Manos

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October 17, 2016

Columbia, South Carolina

Attorneys for Plaintiff
 Renewable Water Resources

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED COMPLAINT
	)	
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	
	)	

Plaintiff Renewable Water Resources (“ReWa”), by and through its undersigned counsel, states for its Complaint against Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (“Fund”), the following:

PARTIES AND JURISDICTION

1. ReWa is a special purpose district authorized, organized, and existing pursuant to the laws of the State of South Carolina and doing business in the State of South Carolina, providing wastewater services to local governments in the upstate of South Carolina.
2. The Fund is a division of the South Carolina State Fiscal Accountability Authority doing business in South Carolina and subject to personal jurisdiction in Greenville County, South Carolina.
3. Upon information and belief, by issuing policies, administering policies, and adjusting claims of insurance to governmental entities and quasi-governmental entities across South Carolina, the Fund acts as an insurance-market participant and insurer.
4. This Court has subject matter jurisdiction over this claim pursuant to Article V, Section 11, of the South Carolina Constitution.

FACTUAL BACKGROUND

5. ReWa realleges and incorporates the allegations of Paragraphs 1 through 4.

6. The Fund insured the buildings and personal property of ReWa. (Building and Personal Property Policies F130230114, F130230115, F130230116, and F130230116A are incorporated by reference). To the extent applicable, the Fund and ReWa entered into virtually identical insurance contracts in prior years as well.

7. The Fund also insured ReWa against third party tort claims under General Tort Liability Policies T130230114, T130230115, T130230116, and T130230116A incorporated by reference. To the extent applicable, the Fund and ReWa entered into virtually identical insurance contracts in prior years as well.

8. In 2013, ReWa discovered that one or more third parties illegally introduced polychlorinated biphenyl contaminated material (“PCBs”) into ReWa’s wastewater treatment system.

9. The third parties introduced the PCBs into ReWa’s wastewater treatment system without ReWa’s knowledge and in violation of law.

10. Upon discovering the PCBs in its treatment system, ReWa informed the United States Environmental Protection Agency (“EPA”) and the South Carolina Department of Health and Environmental Control (“DHEC”) as required by law.

11. ReWa also provided notice to the Fund under its insurance policies of a claim.

12. PCBs damaged the equipment, components, and facilities used by ReWa for wastewater treatment at three locations specifically named in and covered by the Building and Personal Property policy issued by the Fund and protecting ReWa’s buildings and personal property used in business.

13. The three locations appear in the Policy as (a) Segment 90, Pelham Waste Treatment Plant; (b) Segment 130, Lower Reedy Plant; and (c) Segment 140, Mauldin Road Plant.

14. In response to the discovery of PCB contamination and with the approval of and at the direction of EPA and DHEC:

- A. ReWa conducted sampling at the Pelham, Mauldin Road, and Lower Reedy facilities to determine the extent of the damage;
- B. ReWa shut down all biosolids/sludge holding tanks contaminated and rendered unusable by the PCB;
- C. ReWa implemented mitigation activities, including, inter alia, measures implemented for its hauled waste and FOG program to minimize the risk of further introduction of contamination into the Mauldin Road treatment facility where it operates its only hauled waste receiving tank; specifically, ReWa rented portable storage tanks (called “frac” tanks) and appurtenances and hired temporary staff to assist with the handling, segregation, and testing of incoming loads of hauled waste and FOG;
- D. ReWa engaged contractors, utilized internal personnel, and incurred expenses to restore the tanks and other structures at its facilities to usable condition.

15. Under the direction of the EPA and DHEC, ReWa expended in excess of \$8,000,000 to repair and restore the treatment machinery, components, and equipment at the three sites to usable condition, and to cleanup, remove, and dispose (according to law) of the resulting contaminated material.

16. ReWa has provided the Fund with a summary of these costs on an ongoing basis. The work required the removal and disposal of the PCB contaminated wastes in compliance with applicable laws and regulations.

17. Without the removal, repair, restoration, and cleaning work, the treatment components, machinery and equipment could not continue to be used in ReWa's business.

18. ReWa incurred legal and consulting fees and costs in responding to the demands of EPA and DHEC.

19. In correspondence dated October 30, 2014 to Patricia Dennis from Rob Byers, the Fund noted that the PCB contamination and damage resulted from vandalism, a specified covered cause of loss under the Building and Personal Property Policy.

20. ReWa undertook the repair, restoration, remediation, cleanup, and disposal of the PCB contamination at the direction of DHEC and EPA.

21. ReWa incurred legal fees, consulting fees, and expenses related to negotiation with DHEC and EPA, defense of the potential claim, and compliance with DHEC and EPA directives.

22. ReWa provided the Fund with information regarding the repair and restoration of its equipment and structures.

23. By letter dated October 30, 2014, the Fund informed ReWa that the only coverage the Fund would pay under any policy came from an additional coverage in the Building and Personal Property policy purchased by ReWa for pollutant cleanup and removal limited to \$10,000 per identified property arising out of the cleanup. The October 30, 2014 letter is incorporated by reference.

24. ReWa disagreed with this position believing that pollution caused by vandalism and repairs made necessary by it was covered by the full policy limits under the Building and Personal Property policy.

25. By letter of counsel dated October 7, 2016, ReWa renewed demand for coverage under both policies. The letter is incorporated by reference.

26. Counsel for the Fund responded to counsel for ReWa on October 13, 2016, again only offering the limited \$10,000 per segment pollutant cleanup coverage and denying any payment was due otherwise under either policy. The letter is incorporated by reference.

27. Plaintiff and Defendant (by written agreement) tolled the statute of limitations applicable through and including October 17, 2016.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Building and Personal Property Insurance Contract(s))

28. ReWa realleges and incorporates the allegations of Paragraphs 1 through 27.

29. ReWa and the Fund disagree on the meaning of the Building and Personal property insurance contract.

30. ReWa believes coverage exists under the Building and Personal Property policy for all the costs incurred in the repair, remediation, restoration, cleanup, and disposal of contaminated material related to the covered property. The Fund disagrees. This disagreement is significant and material, and ReWa seeks a declaratory judgment finding coverage pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and South Carolina Code Sections 15-53-10 through 15-53-140.

31. The most relevant portions of the Building and Personal Property policy state:

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

- b. Your Business Personal Property** located in or on the building described in the Declarations or in the open (or in a vehicle) within 1,000 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property Separation of Coverage from:

- (1) Furniture and fixtures;
- (2) Machinery and equipment;
- (3) "Stock";
- (4) All other personal property owned by you and used in your business.

CAUSES OF LOSS – SPECIAL FORM**A. COVERED CAUSES OF LOSS**

When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- 1. Excluded in Section B., Exclusions; or

B. EXCLUSIONS

- 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
- 2. We will not pay for loss or damage caused by or resulting from any of the following:

- l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself is caused

by any of the “specified causes of loss.” But if the discharge, dispersal, seepage, migration, release or escape of “pollutants” results in a “specified cause of loss,” we will pay for the loss or damage caused by that “specified cause of loss.”

F. DEFINITIONS

“Specified Causes of Loss” means the following: Fire, lightning, explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

32. The Fund admitted that the contamination damage to the equipment, machinery, facilities, and components resulted from an act of vandalism.

33. The compliance with laws exclusion does not apply as these are not changes to the property to bring it into compliance with law but performing repairs and restoration caused by a specified covered loss and doing the work consistent with law.

34. Vandalism is a Specified Cause of Loss listed in the Building and Personal Property policy.

35. This Court should enter a declaratory judgment finding that coverage exists for ReWa’s reasonable and necessary expenditures to repair, restore, remediate, and otherwise bring back into operation the personal property consisting of equipment, machinery, components, and facilities damaged by the PCB contamination. Further, the cleanup, collection, and proper legal disposal of the contaminated material resulting from that repair, restoration, and remediation is a necessary and natural consequence of expense for repairing the equipment, facilities, and components and also covered by the policy.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract – Building and Personal Property Insurance Contract(s))

36. ReWa realleges and incorporates the allegations in Paragraphs 1 through 35.

37. ReWa believes the facts establish a breach of contract by the Fund in failing to reimburse ReWa for the costs reasonably incurred to repair, remediate, restore, dispose of the contaminated material, and otherwise necessary to return the equipment, facilities, and components to an operating status where they can be used in waste-water treatment.

38. The Building and Personal Property policies referenced above constitute the terms of a binding contract between ReWa and the Fund.

39. ReWa paid its premiums and notified the Fund timely of the claim. ReWa performed all conditions precedent necessary to establish coverage under the Building and Personal Property policies.

40. ReWa demanded compensation from the Fund for all its expenditures related to the repair, remediation, restoration of the equipment, facilities and components at the three segments listed in the Building and Personal Property policies.

41. The Fund refused any payment other than \$30,000 from an additional coverage for pollutant cleanup.

42. The Fund's refusal to pay violates the terms of the contract between the parties and has damaged ReWa.

43. The Fund breached the contract of insurance with ReWa and ReWa has been damaged in excess of \$5 million damages to be proved at trial.

44. ReWa is entitled to prejudgment interest pursuant to S.C. Code Section 34-31-20(A).

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment – General Tort Liability Insurance Contract(s))

45. ReWa realleges and incorporates the allegations of Paragraphs 1 through 44.

46. ReWa and the Fund disagree on the meaning of the General Tort Liability insurance contract. ReWa believes the contract provides coverage and the Fund does not. This disagreement is significant and material and ReWa seeks a declaratory judgment finding coverage pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and South Carolina Code Sections 15-53-10 through 15-53-140.

47. ReWa complied with laws and regulations requiring it to inform DHEC and EPA of the PCB contamination illegally introduced to its waste-water treatment system by a third party.

48. DHEC and EPA required ReWa to inform them of the steps it would take to contain the contamination, remove the contamination from its waste-water treatment system, and dispose of the contamination in compliance with applicable regulations and laws.

49. ReWa knew that DHEC and EPA had legal authority to contain, remove, and dispose of the contaminated material should ReWa fail to do so and to seek all reasonable costs incurred in doing so from ReWa.

50. The demands for compliance with regulations and statutes by EPA and DHEC constitute a claim under the General Tort Liability insurance policy.

51. ReWa believes coverage exists under the General Tort Liability insurance contract for ReWa's reasonable expenses, including attorneys' fees and consultants' fees, incurred in responding to and complying with DHEC and EPA.

52. The most relevant portions of the General Tort Liability policy are:

The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

B. Property Damage to which this applies caused by an occurrence.

DEFINITIONS

When used in this policy:

“Occurrence” means an accident, including continuous repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured.

“Property Damage” means:

- (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time result therefrom, or
- (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

EXCLUSIONS

This insurance does not apply:

- (f) to **personal injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;

53. ReWa believes that the collection, transportation, and disposal of the contaminated material which damages its equipment, components, and facilities at the three locations as a necessary and covered expense under the Building and Personal Property policy. The Fund denies these expenditures can be covered. To the extent the Court agrees with the Fund, these expenses were incurred in response to a governmental demand and should be covered under the General Tort Liability policy. The Fund cannot have it both ways.

54. This Court should declare that coverage exists under the General Tort Liability policy for ReWa's reasonable and necessary legal fees, consulting fees, and other expenses incurred in responding and dealing with the claims by DHEC and EPA.

55. Further, should this Court find that the collection, transportation, and disposal of the PCB contaminated materials which damaged ReWa's equipment, components, and facilities is not covered under the Building and Personal Property policy, then such expenses incurred at the direction of the government and with knowledge that the government could sue for those expenses if it had to perform the cleanup, removal, and disposal, this Court should declare those amounts covered under the General Tort Liability policy.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract – General Tort Liability Insurance Contract(s))

56. ReWa realleges and incorporates the allegations of Paragraphs 1 through 55.

57. ReWa believes the facts establish a breach of contract by the Fund in failing to reimburse ReWa for the costs reasonably incurred to negotiate with and respond to DHEC and EPA and potentially pay for removal, transportation, and disposal of contaminated material.

58. The General Tort Liability Insurance policies referenced above constitutes a legal and binding contract between ReWa and the Fund.

59. ReWa paid all premiums due under the General Tort Liability Insurance policies.
60. ReWa provided the Fund timely notice of the claim and kept the Fund informed of the legal requirements, negotiations, and communications between ReWa, DHEC, and EPA.
61. ReWa complied with all conditions precedent to establish coverage under the General Tort Liability Insurance policies.
62. ReWa incurred legal fees, consulting fees, and related costs in handling the claims by DHEC and EPA. These costs are ongoing as compliance is ongoing.
63. By letter dated October 30, 2014, the Fund denied any duty to pay under the General Tort Liability policy between the parties.
64. ReWa renewed its demand for payment under the General Tort Liability policy by letter of counsel dated October 7, 2016.
65. The Fund denied any duty to pay in response to that letter by letter of counsel dated October 13, 2016.
66. ReWa suffered damages in excess of \$100,000 as a result of the Fund's unreasonable refusal to pay under the General Tort Liability policy.
67. The Fund breached its contract with ReWa by failing to pay under the General Tort Liability policy and ReWa has been damaged by that breach.
68. ReWa seeks actual damages in excess of \$100,000 for the Fund's breach to be determined by the trier of fact.
69. ReWa is entitled to prejudgment interest pursuant to S.C. Code Section 34-31-20(A).

FOR A FIFTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith/Bad Faith or Unreasonable Failure to Pay Insurance Claims – Building and Personal Property Insurance Contract(s))

70. ReWa realleges and incorporates the allegations of Paragraphs 1 through 69.

71. The language of the Building and Personal Property insurance policy plainly and unambiguously covers the cost to repair, restore, and remediate personal property damaged by pollution or contaminated materials caused by a Specified Covered Loss.

72. The Fund knew that the contamination damaging and making unusable the equipment, facilities, and components at the three segments listed in the policy came from an act of vandalism, a Specified Covered Loss under the policy.

73. As a result, the costs incurred by ReWa to repair, restore, remediate, and place back in service the damaged equipment, components, and facilities clearly and plainly falls within the coverage grant of the policies.

74. Even if the language is found ambiguous, the ambiguity must be construed against the insurer and in favor of coverage.

75. Upon information and belief, the Fund knew the meaning of the language and the rule of ambiguity.

76. Upon information and belief, the Fund knew that numerous courts in other states applying the same principles of insurance contract construction found that similar or identical policy language produced coverage.

77. The Fund's refusal to pay ReWa's reasonable and necessary expenses over and above the \$30,000 offered under the additional coverage constitutes an unreasonable or bad-faith failure to pay under the policy.

78. In this cause of action, ReWa only seeks its consequential damages. As a necessary prerequisite to this cause of action, liability must be found under the First and Second Causes of Action, and the damages in those causes of action will be the payment of benefits due under the policy.

79. This cause of action seeks the additional expenditures made by ReWa in order to get the coverage to which it was entitled such as attorneys' fees and costs, consulting fees and costs, and any other extra contractual expenses it can prove at trial.

80. Further, should it be found that the Fund acting as an insurance market participant and an insurer is not subject to the South Carolina Tort Claims Act, then ReWa seeks punitive damages for the unreasonable and bad-faith refusal to pay amounts due under the policies.

81. The Fund acting as an insurer is subject to a claim for the breach of a covenant of good faith/bad faith or unreasonable failure to pay under an insurance contract just as any private insurer and is subject to liability for attorneys' fees and other expenses incurred pursuant to S.C. Code Section 38-59-40.

82. ReWa seeks compensation for its attorneys' fees and expenses of litigation in finding coverage which the Fund unreasonably or in bad faith denied and for any other consequential damages it has incurred as a result of the Fund's unreasonable or bad faith refusal to pay under the contract as proved at trial.

FOR A SIXTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith/Bad Faith or Unreasonable Failure to Pay Insurance Claims – General Tort Liability Insurance Contract(s))

83. ReWa realleges and incorporates the allegations in Paragraphs 1 through 82.

84. The language of the General Tort Liability insurance policy plainly and unambiguously covers the cost to respond to and deal with EPA and DHEC as a covered claim.

Further, the policy covers removal, transportation, and disposal of the PCB contamination material pursuant to DHEC and EPA instructions, regulations, and law.

85. The Fund knew that the DHEC and EPA directives regarding contamination constituted a covered claim under the policy.

86. As a result, the costs incurred by ReWa to negotiate with and respond to DHEC and EPA, as well as any cleanup costs and transportation and disposal costs not covered by the Building and Personal Property policy, clearly and plainly fall within the coverage grant of the policies.

87. Even if the language is found ambiguous, the ambiguity must be construed against the insurer and in favor of coverage.

88. Upon information and belief, the Fund knew the meaning of the language and the rule of ambiguity.

89. Upon information and belief, the Fund knew that South Carolina cases found that similar or identical policy language produced coverage.

90. The Fund's refusal to pay ReWa's reasonable and necessary expenses constitutes an unreasonable or bad-faith failure to pay under the policy.

91. In this cause of action, ReWa only seeks its consequential damages. As a necessary prerequisite to this cause of action, liability must be found under the Third and Fourth Causes of Action, and the damages in those causes of action will be the payment of benefits due under the policy.

92. This cause of action seeks the additional expenditures made by ReWa in order to get the coverage to which it was entitled such as attorneys' fees and costs, consulting fees and costs, and any other extra contractual expenses it can prove at trial.

93. Further, should it be found that the Fund acting as an insurance market participant and an insurer is not subject to the South Carolina Tort Claims Act, then ReWa seeks punitive damages for the unreasonable and bad faith refusal to pay amounts due under the policies.

94. The Fund acting as an insurer is subject to a claim for the breach of a covenant of good faith/bad faith or unreasonable failure to pay under an insurance contract just as any private insurer and is subject to liability for attorneys' fees and other expenses incurred pursuant to S.C. Code Section 38-59-40.

95. ReWa seeks compensation for its attorneys' fees and expenses in finding coverage which the Fund unreasonably or in bad faith denied and for any other consequential damages it has incurred as a result of the Fund's unreasonable or bad faith refusal to pay under the contract as proved at trial.

THEREFORE, the Plaintiff prays that this Court enter its judgment against the Defendant:

- A. Declaring that the Building and Personal Property insurance contracts between the parties provides coverage for the repair, restoration, and remediation of equipment, components, and facilities located at the three covered sites including the collection, transportation, and disposal of the contaminated material as required by law;
- B. Finding that the Fund breached the Building and Personal Property insurance contracts with ReWa and awarding actual damages for breach of contract as found by the trier of fact;
- C. Declaring that the General Tort Liability insurance contracts between the parties provide coverage for the expenses incurred by ReWa in responding to and, abiding by DHEC and EPA requirements with knowledge that DHEC and EPA could enforce such requirements by legal action and collect any expenses incurred;

- D. Finding that the Fund breached the General Tort Liability contracts of insurance by failing to pay the legal fees, consulting fees, and expenses incurred by ReWa in responding to the claims and directives of DHEC and EPA awarding actual damages in excess of \$100,000 (and should it be found that the collection, transportation, and disposal of the contaminated material pursuant to law was not covered under the Building and Personal Property contracts, awarding damages in the reasonable amounts incurred for those activities pursuant to the General Tort Liability contracts);
- E. The Fund's failure to pay the expenses incurred by ReWa in repairing, restoring, and remediating the equipment, machinery, components, and facilities damaged by the contamination is unreasonable or in bad faith and awarding ReWa's its attorneys' fees and expenses incurred in this litigation and any other consequential damages in addition to the benefits paid under the policy;
- F. The Fund's failure to pay the legal fees and expenses incurred by ReWa in negotiating with and responding to DHEC and EPA as well as any other consequential costs under the General Tort Liability policies, unreasonable and in bad faith and awarding ReWa its attorneys' fees and expenses incurred in this litigation and any other consequential damages in addition to the benefits under the policy;
- G. Finding that ReWa is entitled to prejudgment interest pursuant to S.C. Code Section 34-31-20(A); and
- H. Such other and further relief as this Court may deem just and proper.

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Greenville, South Carolina
June 15, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	
	)	Civil Action No. 2016-CP-23-05905
Plaintiff,	)	
	)	
v.	)	
	)	
Insurance Reserve Fund, a Division of the	)	ANSWER TO AMENDED COMPLAINT
State Fiscal Accountability Authority of	)	
South Carolina	)	
	)	
Defendant.	)	
_____	)	

The Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (hereafter “IRF”), answers the Plaintiff’s Amended Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendant IRF denies each and every allegation of the Plaintiff’s Amended Complaint not hereinafter expressly admitted, qualified, or explained.
2. The allegations set forth in Paragraph 1 of the Plaintiff’s Amended Complaint are admitted.
3. As to the allegations set forth in Paragraph 2 of the Plaintiff’s Amended Complaint, the Defendant admits only that the South Carolina Insurance Reserve Fund is a division of the South Carolina State Fiscal Accountability Authority, which is an agency of the State of South Carolina created and administered under the state statutory law.
4. The allegations set forth in Paragraph 3 of the Plaintiff’s Amended Complaint are denied.
5. The allegations set forth in Paragraph 4 of the Plaintiff’s Amended Complaint are jurisdictional matters to which no response is required.

6. As to the allegations set forth in Paragraph 5 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein.

7. As to the allegations set forth in Paragraph 6 of the Plaintiff's Amended Complaint, the Defendant IRF admits that it issued a Building and Personal Property Insurance Policy to the named insured Renewable Water Resources ("ReWa") bearing Policy Number F130230114. Further answering said paragraph, the Defendant IRF would admit that it had issued such policies to ReWa in years previous to those in issue here.

8. As to the allegations set forth in Paragraph 7 of the Plaintiff's Amended Complaint, the Defendant IRF admits that it issued a Tort Liability Insurance Policy to named insured Renewable Water Resources bearing Policy Number T130230114. Further answering said paragraph, the IRF would admit that it had issued such policies to ReWa and its predecessors in years previous to those in issue here.

9. As to the allegations set forth in Paragraphs 8 through 10 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

10. As to the allegations set forth in Paragraph 11 of the Plaintiff's Amended Complaint, the Defendant IRF admits that the Plaintiff reported a loss under the Building and Personal Property Insurance Policy on or about October 11, 2013.

11. As to the allegations set forth in Paragraphs 12 through 15, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

12. As to the allegations set forth in Paragraph 16 of the Plaintiff's Amended Complaint, the Defendant IRF admits only that the Plaintiff has provided summaries of costs it has allegedly incurred.

13. As to the allegations set forth in Paragraphs 17 and 18 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

14. The allegations set forth in Paragraph 19 of the Plaintiff's Amended Complaint are denied.

15. As to the allegations set forth in Paragraph 20 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

16. As to the allegations set forth in Paragraph 21 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

17. As to the allegations set forth in Paragraph 22 of the Plaintiff's Amended Complaint, the Defendant IRF admits only that the Plaintiff has provided summaries of costs it has allegedly incurred.

18. As to the allegations set forth in Paragraph 23 of the Plaintiff's Amended Complaint, the Defendant IRF crave references to the letter dated October 30, 2014, as the best evidence of the contents of that letter.

19. As to the allegations set forth in Paragraph 24 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

20. As to the allegations set forth in Paragraph 25 of the Plaintiff's Amended Complaint, the Defendant IRF crave references to the letter dated October 7, 2016, as the best evidence of the contents of that letter.

21. As to the allegations set forth in Paragraph 26 of the Plaintiff's Amended Complaint, the Defendant IRF crave references to the letter dated October 13, 2016, as the best evidence of the contents of that letter.

22. The allegations set forth in Paragraph 27 of the Plaintiff's Amended Complaint are admitted only in part and reference is craved to the Tolling Agreement and subsequent amendments for the specific language of those agreements. Further answering, the Tolling Agreement and subsequent amendments provided only for the tolling of claims for coverage under Policy F130230114. The parties did not enter into any tolling agreements with respect to claims brought pursuant to any Tort Liability Insurance Policy identified in Paragraph 7 of the Amended Complaint.

23. As to the allegations set forth in Paragraph 28 of the Plaintiff's Amended Complaint, the IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein.

24. The allegations set forth in Paragraph 29 of the Plaintiff's Amended Complaint are, upon information and belief, admitted.

25. As to the allegations set forth in Paragraph 30 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

26. As to the allegations set forth in Paragraph 31 of the Plaintiff's Amended Complaint, the Defendant IRF craves reference to the Building and Personal Property Insurance Policy, including the insuring agreement, exclusions, terms, and limitations of that policy as the best evidence of its provisions.

27. The allegations set forth in Paragraph 32 of the Plaintiff's Amended Complaint are denied as stated. Further answering, the Defendant IRF admits that the introduction of the PCBs into ReWa's Wastewater treatment system constitutes an act of vandalism.

28. The allegations set forth in Paragraph 33 of the Plaintiff's Amended Complaint are denied.

29. As to the allegations set forth in Paragraph 34 of the Plaintiff's Amended Complaint, the Defendant IRF craves reference to the Building and Personal Property Insurance Policy, including the insuring agreement, exclusions, terms, and limitations of that policy as the best evidence of its provisions.

30. Paragraph 35 of the Plaintiff's Amended Complaint is a prayer for relief, to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

31. As to the allegations set forth in Paragraph 36 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant IRF objects to the jumbling of causes of action.

32. As to the allegations set forth in Paragraph 37 of the Plaintiff's Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof. To the extent that Paragraph 37 alleges a breach of the insurance policy or any contractual provisions contained therein, the allegations are denied.

33. The allegations set forth in Paragraph 38 of the Plaintiff's Amended Complaint are admitted as to the Building and Personal Property Insurance Policy issued to the named insured Renewable Water Resources bearing Policy Number F130230114.

34. The Defendant IRF admits so much of Paragraph 39 of the Plaintiff's Amended Complaint as alleges that the Plaintiff paid its premiums timely. The Defendant IRF is without

sufficient information to admit or deny the remaining allegations of Paragraph 39 and therefore denies those allegations.

35. The allegations set forth in Paragraph 40 of the Plaintiff's Amended Complaint are admitted.

36. The Defendant IRF admits so much of Paragraph 41 of the Plaintiff's Amended Complaint as alleges that the IRF has sought to pay the Plaintiff the limits of the coverage it has determined to be applicable and has denied payment for uncovered claims.

37. The allegations set forth in Paragraphs 42, 43, and 44 of the Plaintiff's Amended Complaint are denied.

38. As to the allegations set forth in Paragraph 45 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant IRF objects to the jumbling of causes of action.

39. The allegations set forth in the first two sentences of Paragraph 46 of the Plaintiff's Amended Complaint are, upon information and belief, admitted. The Defendant IRF is without sufficient information to admit or deny the remaining allegations of Paragraph 46 and therefore denies those allegations.

40. As to the allegations set forth in Paragraphs 47 through 49 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

41. The allegations set forth in Paragraph 50 of the Plaintiff's Amended Complaint are denied.

42. As to the allegations set forth in Paragraph 51 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

43. As to the allegations set forth in Paragraph 52 of the Plaintiff's Amended Complaint, the Defendant IRF craves reference to the Tort Liability Insurance Policy, including the insuring agreement, exclusions, terms, and limitations of that policy as the best evidence of its provisions.

44. As to the allegations set forth in Paragraph 53 of Plaintiff's Amended Complaint, the Defendant IRF is without information sufficient to form a belief as to what the Plaintiff may believe, and therefore denies those allegations. Further answering Paragraph 53, the Defendant IRF admits that it has advised the Plaintiff of its positions as to what expenditures are covered. The remaining allegations set forth in Paragraph 53 are denied.

45. Paragraphs 54 and 55 of the Plaintiff's Amended Complaint constitute a prayer for relief, to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

46. As to the allegations set forth in Paragraph 56 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant IRF objects to the jumbling of causes of action.

47. As to the allegations set forth in Paragraph 57 of the Plaintiff's Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof. To the extent that Paragraph 57 alleges a breach of the insurance policy or any contractual provisions contained therein, the allegations are denied.

48. The allegations set forth in Paragraph 58 of the Plaintiff's Amended Complaint are admitted as to the Tort Liability Insurance Policy issued to the named insured Renewable Water Resources bearing Policy Number T130230114.

49. The allegations set forth in Paragraph 59 of the Plaintiff's Amended Complaint are admitted.

50. The allegations set forth in Paragraphs 60 and 61 of the Plaintiff's Amended Complaint are denied.

51. As to the allegations set forth in Paragraph 62 of the Plaintiff's Amended Complaint, the Defendant IRF is without sufficient information to admit or deny those allegations with certainty and demands strict proof thereof.

52. The allegations set forth in Paragraph 63 of the Plaintiff's Amended Complaint are denied. Further answering, the Defendant IRF craves references to the letter dated October 30, 2014, as the best evidence of the contents of that letter.

53. As to the allegations set forth in Paragraph 64 of the Plaintiff's Amended Complaint, the Defendant IRF craves references to the letter dated October 7, 2016, as the best evidence of the contents of that letter.

54. As to the allegations set forth in Paragraph 65 of the Plaintiff's Amended Complaint, the Defendant IRF craves references to the letter dated October 13, 2016, as the best evidence of the contents of that letter.

55. The allegations in Paragraph 66 of the Plaintiff's Amended Complaint are denied.

56. Paragraphs 67, 68, and 69 of the Plaintiff's Amended Complaint constitute a prayer for relief, to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

57. As to the allegations set forth in Paragraph 70 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant IRF objects to the jumbling of causes of action.

58. As to the allegations set forth in Paragraph 71 of the Plaintiff's Amended Complaint, the Defendant IRF craves reference to the Building and Personal Property Insurance Policy,

including the insuring agreement, exclusions, terms, and limitations of that policy as the best evidence of its provisions.

59. The allegations in Paragraph 72 of the Plaintiff's Amended Complaint are denied.

60. The allegations in Paragraph 73 of the Plaintiff's Amended Complaint are denied.

61. The allegations set forth in Paragraph 74 of the Plaintiff's Amended Complaint are legal conclusions to which no response is required.

62. The allegations set forth in Paragraph 75 of the Plaintiff's Amended Complaint are too vague and uncertain to respond with any certainty, and as a result, these allegations are denied. Further answering, the Plaintiff does not specify the "language" to which it refers. The Defendant IRF denies, however, that any policy language on which the Plaintiff is relying is ambiguous.

63. The allegations set forth in Paragraph 76 of the Plaintiff's Amended Complaint are too vague and uncertain to respond with any certainty, and as a result, these allegations are denied. Further answering, the Plaintiff does not specify the "policy language" to which it refers. The Defendant IRF denies, however, that any policy language on which the Plaintiff is relying is ambiguous.

64. The allegations set forth in Paragraph 77 of the Plaintiff's Amended Complaint are denied.

65. The allegations set forth in Paragraphs 78 and 79 of the Plaintiff's Amended Complaint are legal conclusions and/or prayers for relief to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

66. The allegations set forth in Paragraphs 80 and 81 of the Plaintiff's Amended Complaint are denied.

67. The allegations set forth in Paragraph 82 of the Plaintiff's Amended Complaint are legal conclusions and/or prayers for relief to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

68. As to the allegations set forth in Paragraph 83 of the Plaintiff's Amended Complaint, the Defendant IRF reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant IRF objects to the jumbling of causes of action.

69. As to the allegations set forth in Paragraph 84 of the Plaintiff's Amended Complaint, the Defendant IRF craves reference to the Tort Liability Insurance Policy, including the insuring agreement, exclusions, terms, and limitations of that policy as the best evidence of its provisions.

70. The allegations set forth in Paragraph 85 and 86 of the Plaintiff's Amended Complaint are denied.

71. The allegations set forth in Paragraph 87 of the Plaintiff's Amended Complaint are legal conclusions to which no response is required.

72. The allegations set forth in Paragraph 88 of the Plaintiff's Amended Complaint are too vague and uncertain to respond with any certainty, and as a result, these allegations are denied. Further answering, the Plaintiff does not specify the "language" to which it refers. The Defendant IRF denies, however, that any policy language on which the Plaintiff is relying is ambiguous.

73. The allegations set forth in Paragraph 89 of the Plaintiff's Amended Complaint are too vague and uncertain to respond with any certainty, and as a result, these allegations are denied. Further answering, the Plaintiff does not specify the "policy language" to which it refers. The Defendant IRF denies, however, that any policy language on which the Plaintiff is relying is ambiguous.

74. The allegations set forth in Paragraph 90 of the Plaintiff's Amended Complaint are denied.

75. The allegations set forth in Paragraphs 91 and 92 of the Plaintiff's Amended Complaint are legal conclusions and/or prayers for relief to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

76. The allegations set forth in Paragraphs 93 and 94 of the Plaintiff's Amended Complaint are denied.

77. The allegations set forth in Paragraph 95 of the Plaintiff's Amended Complaint are legal conclusions and/or prayers for relief to which no response is required. To the extent that a response should be deemed necessary, all allegations therein are denied.

78. The allegations and relief as set forth in the prayer for relief are denied.

FOR A SECOND DEFENSE

79. The Plaintiff's Amended Complaint fails to state cause of action upon which relief can be granted. The Defendant IRF reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCF.

FOR A THIRD DEFENSE

80. The Plaintiff's Amended Complaint fails to set forth a claim that is ripe for adjudication.

FOR A FOURTH DEFENSE

81. The Defendant IRF is immune from suit pursuant to the South Carolina Tort Claims Act, § 15-78-10, *et. seq.*, specifically S.C. Code Ann § 15-78-60(1), (2), (4), (5), (17), and (20).

FOR A FIFTH DEFENSE

82. The Defendant IRF asserts the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act as well as pursuant to the common law, including but not limited to the damages cap set forth in S.C. Code § 15-78-120 and the bar on the recovery of attorney's fees, pre-judgment interest, and punitive damages.

FOR A SIXTH DEFENSE

83. The Plaintiff is not a “person” under S.C. Code § 15-78-50(b) of the South Carolina Tort Claims Act and thus lacks capacity to bring a claim under the South Carolina Tort Claims Act.

FOR A SEVENTH DEFENSE

84. The Defendant IRF is absolutely immune pursuant to S.C. Code § 15-78-50(b) of the South Carolina Tort Claims Act with respect to the Fifth and Sixth Causes of Action.

FOR AN EIGHTH DEFENSE

85. The Plaintiff’s claims are, in whole or in part, barred by the doctrine of sovereign immunity including the Plaintiff’s prayer for attorney’s fees, pre-judgment interest, and punitive damages.

FOR A NINTH DEFENSE

86. The Defendant IRF reserves its right to file a motion pursuant to Rule 12(b)(3), SCRCF, or a motion to change venue to Richland County.

FOR A TENTH DEFENSE

87. The Building and Personal Property Coverage Form issued to Renewable Water Resources provides that “covered property” does not include the following: “land (including land on which the property is located)” and “water”. The sludge and biosolids at issue do not satisfy the definition of “covered property.”

FOR AN ELEVENTH DEFENSE

88. The Building and Personal Property Coverage Form issued to Renewable Water Resources specifically excludes coverage for loss or damage caused directly or indirectly by “[t]he enforcement of any ordinance or law (1) [r]egulating construction, use, or repair of any property; or,

(2) [r]equiring the tearing down of any property including the cost of removing its debris.” The Defendant IRF craves reference to Exclusion B.1.a of the “Causes of Loss-Special Form.”

FOR A TWELFTH DEFENSE

89. The Building and Personal Property Coverage Form issued to Renewable Water Resources specifically excludes coverage for loss or damage caused by or resulting from “[d]ischarge, dispersal, seepage, migration, release or escape of ‘pollutants’ unless the discharge, seepage, migration, release or escape is itself caused by any of the ‘specified causes of loss.’” The Defendant IRF craves reference to Exclusion B.2.1 of the “Causes of Loss-Special Form.”

FOR A THIRTEENTH DEFENSE

90. The Defendant IRF alleges that coverage under the Tort Liability Insurance Policy issued to Renewable Water Resources is excluded by the Pollution Exclusion, which is Exclusion VI-f.

FOR A FOURTEENTH DEFENSE

91. The Defendant IRF alleges that coverage under the Tort Liability Insurance Policy issued to Renewable Water Resources is excluded by the Care, Custody and Control Exclusion, which is Exclusion VI-j including subparts (1) through (3).

FOR A FIFTEENTH DEFENSE

92. The Defendant IRF alleges that coverage under the Tort Liability Insurance Policy issued to Renewable Water Resources is excluded by the Contractual Exclusion, which is Exclusion VI-a.

FOR A SIXTEENTH DEFENSE

93. The Defendant IRF alleges that there is no coverage under the Tort Liability Insurance Policy issued to Renewable Water Resources because alleged damages do not qualify as

"property damage" caused by an "occurrence" as those terms are defined in the Tort Liability Insurance Policy.

FOR A SEVENTEENTH DEFENSE

94. The Plaintiff's claim for attorney's fees have no legal basis and should be stricken and/or dismissed.

FOR AN EIGHTEENTH DEFENSE

95. To the extent that the Court finds "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss" pursuant to Section A of the Building and Personal Property Coverage Form, the Defendant IRF submits that the amount of any direct physical loss or damage to be paid by the Defendant IRF shall be determined in accordance with the process and procedures mandated by S.C. Code Ann. § 10-7-180 and as set forth in Section E.2 of the Building and Personal Property Coverage Form.

FOR A NINETEENTH DEFENSE

96. The Defendant IRF alleges that the Plaintiff failed to provide notice of a claim or suit by any third party nor make a tender of that claim or suit for a defense and indemnity prior to any settlement or resolution, thereby barring the Plaintiff's claim for a defense or indemnity under the Tort Liability Insurance Policy issued to Renewable Water Resources. Moreover, the Plaintiff is barred from recovery by its failure to comply with the following policy provision: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident."

FOR A TWENTIETH DEFENSE

97. The Third Cause of Action, the Fourth Cause of Action, and the Sixth Cause of Action as alleged in the Plaintiff's Amended Complaint are barred by the applicable statute of limitations.

The parties did not enter into any tolling agreements with respect to claims brought pursuant to any Tort Liability Insurance Policy identified in Paragraph 7 of the Amended Complaint.

FOR A TWENTY-FIRST DEFENSE

98. The Defendant IRF alleges that the Plaintiff has not satisfied the condition precedent for commencing this action against the Insurance Reserve Fund under the Tort Liability Insurance Policy issued to Renewable Water Resources. Specifically, the Plaintiff has not complied with Section VII.5 of the Tort Liability Insurance Policy which states: “No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured’s obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the claimant and the Fund.”

WHEREFORE, the Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina, prays that the Plaintiff’s Amended Complaint be dismissed with prejudice, for the denial of all declaratory and monetary relief as sought, for the costs of this action, and for such other and further relief as to the Court seems just and proper.

s/ Andrew F. Lindemann

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*Counsel for Defendant Insurance Reserve Fund,
a Division of the State Fiscal Accountability
Authority of South Carolina*

Dated: July 2, 2018
Greenville, SC

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
	)	
vs.	)	CONSENT MOTION FOR
	)	REFERENCE TO
Insurance Reserve Fund, a Division of	)	MASTER-IN-EQUITY
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	
	)	

Plaintiff Renewable Water Resources (“ReWa”), by and with the consent of Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (“IRF”), hereby moves this Court for an Order referring this case to the Honorable Charles B. Simmons, Jr., the Greenville County Master-in-Equity. This Motion is brought pursuant to Rule 53 of the South Carolina Rules of Civil Procedure and is appropriate for reference because all parties consent. ReWa requests the Order of Reference direct the Master-in-Equity to hear the testimony arising under the pleadings and to make his findings of fact and conclusion of law with authority to enter a final judgment in the case. Additionally, ReWa requests the Order of Reference provide that any appeal that may be taken from the final judgment and order of the Master-in-Equity shall be made directly to the South Carolina Court of Appeals or Supreme Court as provided by the South Carolina Appellate Court Rules.

[SIGNATURE PAGE FOLLOWS]

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Dated: September 10, 2018

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
vs.	)	
	)	<u>PLAINTIFF'S PRE-TRIAL BRIEF</u>
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	
	)	

Renewable Water Resources ("ReWa") respectfully submits this Pre-Trial Brief pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure.

PRELIMINARY STATEMENT

This case arises out of a polychlorinated biphenyl ("PCB") contamination that occurred in the Upstate of South Carolina in 2013 as a result of vandalism by a third party illegally introducing the contaminants into ReWa's system. ReWa, a special purpose district that provides wastewater treatment services in the Upstate, discovered the presence of PCBs at three of its facilities¹ during routine testing practices. Upon discovery of the PCBs in its treatment system, ReWa properly notified the United States Environmental Protection Agency ("EPA") and South Carolina Department of Health and Environmental Control ("SCDHEC").

In response to the contamination, ReWa incurred millions of dollars in expenses to repair and restore its facilities, machinery, and equipment to usable condition, and in removing and disposing of the resulting contaminated material. At all times relevant hereto, ReWa maintained

¹ The three facilities are (1) the Pelham Road Plant, (2) the Lower Reedy Plant, and (3) the Mauldin Road Plant.

a Building and Personal Property Policy (“Building Policy”) and General Tort Liability Policy (“Tort Policy”) issued by the Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (the “IRF”). ReWa properly and timely notified the IRF of its damages, and kept the IRF apprised of its ongoing efforts to repair the damage and eradicate the PCB contamination to prevent any further harm.

The IRF refused to provide a coverage determination for over a year and then denied coverage under the Building Policy, other than \$30,000 under an additional coverage provision for pollutant cleanup and removal. Before suit, the IRF never provided a written determination of coverage to ReWa for the Tort Policy.

ReWa commenced this action against the IRF seeking, among other things, a declaration by the Court that, as ReWa’s insurer, the IRF is liable for costs and expenses incurred by ReWa for remediation and repairs necessitated by the presence of PCBs illegally dumped into ReWa’s sanitary sewer system by a third-party. ReWa alleges causes of action for (1) declaratory judgment, (2) breach of contract, and (3) bad faith. ReWa seeks an award of damages equal to the costs of remediation and repair, as well as damages associated with the IRF’s bad faith in failing to make a justifiable and timely claim determination.

For the reasons set forth below, this Court should reject the IRF’s narrow policy interpretation and find that ReWa’s costs and expenses incurred in response to the PCB contamination at its three plants are covered under the Building Policy and/or the Tort Policy.

I. STATEMENT OF FACTS

On May 14, 2013, an oily waste was observed in the influent at the Pelham Road facility. Testing confirmed that PCBs had contaminated biosolids holding tanks, grease mats, and solids and storage at the Pelham Road, Mauldin Road, and Lower Reedy facilities. The source of the

contamination was traced back to grease interceptors and through hauled waste brought to ReWa's facilities.

Once testing confirmed the presence of PCBs at its facilities, ReWa promptly contacted the EPA and SCDHEC and put its emergency action plan into place. ReWa engaged to oversee the technical and engineering side of the project and develop a detailed plan for removing and disposing of the PCB-contaminated waste, as well as repairing and restoring the ReWa facilities. ReWa promptly notified the IRF of its claim on September 24, 2013 and sought coverage under any and all policies.

In September of 2013, SCDHEC issued an emergency regulation which specifically addressed the illicit dumping of PCBs at issue in this case and managing the contaminated sludge created in the illicit discharges. The federal Toxic Substance Control Act ("TSCA") regulates PCB levels equal to or greater than 50 parts per million. The emergency regulation imposed limits on wastewater treatment facilities dealing with sludge from the illicit dumping more stringent than TSCA. The emergency regulation prohibited land application of the sludge at issue if it had any quantifiable amount of PCBs using an EPA approved testing methodology. The emergency regulation also provided that the processing facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has no quantifiable amount of PCBs using an EPA approved testing methodology.

ReWa provided a Sludge Removal and Disposal Plan to the EPA and SCDHEC on October 17, 2013. Pursuant to that plan, processing to remove contaminated sludge at the Pelham Road facility began in November 2013 and the repairs and remediation were completed in February 2014. Once the process at the Pelham Road facility was accomplished, ReWa then began the

processes at its Mauldin Road and Lower Reedy facilities in April 2014. Remediation and repairs at the Mauldin Road and Lower Reedy facilities were completed about a year later.

ReWa kept the IRF apprised of its damages and decontamination efforts through monthly reports during this period. The total damages and expenses are \$6,148,284.09.

It was not until October 30, 2014, more than a year after the claim was submitted, that ReWa received a coverage determination on any policy (the Building Policy) from the IRF. The IRF offered to pay \$10,000 per facility on an additional coverage for pollution clean-up costs under the Building Policy. In that same letter, the IRF acknowledged that vandalism was a covered cause of loss for the primary coverage under the Building Policy, but did not provide a basis for its failure to provide coverage on the primary coverage under the policy. Prior to suit, the IRF never provided any coverage determination under the Tort Policy.

II. LEGAL ISSUES

Based upon the policy language and supporting case law discussed in detail below, ReWa believes that its damages relating to the PCB contamination are covered under the Building Policy and/or the Tort Policy.

Before analyzing coverage under each of these policies, the basic principles and rules for interpreting insurance policies must first be addressed. Words in an insurance policy are to be given their “plain, ordinary and popular meaning.” *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). If a provision is susceptible to more than one interpretation, then it is deemed ambiguous. *Padgett v. South Carolina Insurance Reserve Fund*, 340 S.C. 250, 531 S.E.2d 305 (Ct. App. 2000). If the Court finds that the operative language is ambiguous, then the Court must adopt the interpretation that favors coverage. *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143-44, 781 S.E.2d 137, 142 (Ct. App. 2015) (stating that “this court must construe

ambiguities or conflicting terms in an insurance policy ... liberally in favor of the insured and strictly against the insurer”). Moreover, the insurer bears the burden of establishing that any exclusions apply, and such policy exclusions are to be construed most strongly against the insurer.

Id.

A. Building Policy

1. Coverage

At all times relevant herein, ReWa was insured under a Building Policy issued by the IRF. The relevant coverage language states: “We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” (Building Policy ¶ A.)

Therefore, in order to establish coverage under the Building Policy, the following factors must exist: (1) direct physical loss of or damage; (2) to Covered Property; (3) resulting from any Covered Cause of Loss. Each of these factors is discussed below.

a. Covered Property

The Building Policy states that “Covered Property” includes ReWa’s buildings, including fixtures and permanently installed machinery and equipment. (Building Policy ¶ A.1.a.) As stated previously, ReWa suffered direct physical loss of or damage to its three facilities, and equipment and machines located at each of those facilities. Specifically, ReWa’s biosolids holding tanks, digesters, and beltpresses were contaminated by PCBs. ReWa underwent an extensive repair and remediation process in order to dissipate the contaminants and return to normal operations at its three facilities.

The Building Policy further provides that Covered Property does not include land or water. (Building Policy ¶ A.2.h.) However, no land or water was remediated as a result of the PCB

contamination. Certainly, sewage does not constitute “land” or “water.” While neither term is defined in the policy, “water” should be interpreted to mean a naturally occurring body of water, such as a river, pond, stream, lake, etc. *See, e.g., Ruffin Rd. Venture Lot IV v. Travelers Prop. Cas. Co. of Am.*, No. 10-CV-11-JMWVG, 2011 WL 2463291, at *7 (S.D. Cal. June 20, 2011) (“The ordinary and most reasonable reading of this language is that the provision is targeted at pollutants that have contaminated the natural surroundings of the insured property—for example, chemicals that have leached into the soil, or waste that has been discharged into a nearby stream. Although the alleged ‘pollutants’ in this case are technically found in water, it is the water that moves through the man-made closed circuit of the HVAC system, and that is not part of or in contact with any naturally occurring body of water.”).

Thus, it is clear that ReWa’s damaged property, including its facilities and the equipment and machines located therein, constitute Covered Property under the Building Policy.

b. Covered Cause of Loss

The Causes of Loss – Special Form defines “Specified Causes of Loss” as including vandalism. (Causes of Loss – Special Form ¶ F.1.) The IRF does not dispute that the PCB contamination was caused by acts of vandalism.

c. Direct Physical Loss of or Damage to

ReWa asserts that it suffered direct physical loss of or damage to facilities, equipment, and machinery as a result of the PCB contamination. PCBs adhere to concrete, which is a porous surface, and penetrate the concrete such that it must be blasted off by pressure washers and cleaned with a special chemical solution in order to extract it from the concrete. Further, in the contaminated state, the facilities, equipment, and machinery were not able to be used for their

normal operations. These constitute direct physical loss of or damage to ReWa's Covered Property.

The IRF now takes the position that coverage does not exist because "direct physical loss of or damage to" should be interpreted to mean only immediate structural physical damage to Covered Property. However, the overwhelming majority of jurisdictions have concluded that "direct physical loss of or damage to" includes the contamination of Covered Property even in the absence of structural damage or alteration.

For example, *Western Fire Insurance Company v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), was one of the first cases to address the issue of what constitutes "direct physical loss." In that case, the insured church had to close its building because of the infiltration of gasoline in the soil under and around the building, which vapors infiltrated and contaminated the foundation and halls and rooms of the church, making it uninhabitable and making use of the building dangerous. *Id.* at 54. The central issue in the case involved whether the insured suffered "direct physical loss." The court noted that while loss of use of the church premises, standing alone, did not in and of itself constitute a "direct physical loss," this particular loss of use was the consequential result of the accumulation of gasoline in and around the building. *Id.* at 55. The premises became so infiltrated and saturated that it was uninhabitable. *Id.* All of which the court held "equates to direct physical loss within the meaning of that phrase" as used in the policy. *Id.*

In *Azalea, Ltd. v. American States Insurance Company*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995), the plaintiff operated a mobile home park that had its own sewage treatment facility on site. *Id.* at 600. The plaintiff maintained a commercial property and liability insurance policy for the mobile home park with American States Insurance Company, which stated: "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations

caused by or resulting from any Covered Cause of Loss.” *Id.* During the policy period, an unknown substance was dumped into the sewage treatment facility servicing the mobile home park. *Id.* at 601. The plaintiff immediately took steps necessary to prevent discharge of the unknown pollutant into the river. *Id.* The court noted that “the chemical residue from the dumped substance adhered to the interior and caused the destruction of a bacteria colony which was part of the sewage treatment process.” *Id.* As a result, the plaintiff was required to completely drain the system, steam clean the entire interior of the sewage treatment plant, and by hand chiseling remove the chemical residue. *Id.* American State Insurance Company denied coverage on the grounds that there was no direct physical loss to the sewage treatment facility. *Id.* The court found that coverage did in fact exist because there was direct damage to the sewage treatment structure, as “the residue from the dumped substance actually covered and adhered to the interior of the structure causing destruction of the bacteria colony which was an integral part of the covered facility.” *Id.* at 602.

In *Farmers Insurance Company of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993), a homeowner’s insurer brought an action seeking declaration from the court that the policy did not cover losses incurred by the insured as a result of a subtenants’ illegal methamphetamine operation. The insurance policy at issued covered “accidental direct physical loss” to the premises, and the court found that the odor from the methamphetamine lab was “physical” because it damaged the house. *Id.* at 1335. In other words, the court found that “the house was physically damaged by the odor that persisted in it” and “[t]he cost of removing the odor is a direct physical loss.” *Id.* at 1335-36.

In the more recent case of *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), the insured moved for partial

summary judgment on the issue of whether it incurred “direct physical loss of or damage to” property when ammonia was released inside one of its facilities. *Id.* at *1. In response, Travelers asserted that “physical loss or damage” necessarily involves a physical change or alteration to the insured’s property requiring repair or replacement. *Id.* at *2. The court noted that the insured put forth substantial evidence that the ammonia discharge physically incapacitated its facility, while Travelers failed to put forth any evidence that contradicted the conclusion that the facility was incapacitated until the ammonia was dissipated. *Id.* at *4. The court ultimately found that “property can sustain physical loss or damage without experiencing structural alteration.” *Id.* at *5. The ammonia discharge inflicted “direct physical loss of or damage to” the insured’s facility because the ammonia physically rendered the facility unusable for a period of time. *Id.* at *6.

Similarly, in *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799 (N.H. 2015), the insureds brought an action against their homeowners insurer for a declaration from the court that cat urine emanating from another condominium unit caused “direct physical loss” to their unit, and therefore they were entitled to coverage. *Id.* at 802. The court concluded “that ‘physical loss’ need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell.” *Id.* at 803. The court noted that this holding was “supported by a substantial body of case law in which a variety of contaminating conditions, including odors, have been held to constitute physical loss to property.” *Id.* at 803-4. Thus, the court found that physical loss to property may exist in the absence of structural damage. *Id.* at 805.

The case law cited above demonstrates that “direct physical loss of or damage to” property includes the contamination of such property even in the absence of structural damage or alteration. *See also TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 708 (E.D. Va. 2010) (finding that toxic

gases released by drywall manufactured in China constituted “direct physical loss” to insured’s property and noting that “[t]he majority of cases appear to support [the insured’s] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces.”); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding that odor caused by defective carpeting in building, and the resulting loss of use, “can constitute physical injury to property under Massachusetts law”); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825-27 (3d Cir. 2005) (finding that bacteria contamination of well water would constitute direct physical loss to house if it rendered it unusable); *Yale University v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 413 (D.Conn. 2002) (finding that Yale had sustained its burden of demonstrating that it suffered “physical loss of or damage to property” for the presence of asbestos or lead contamination in its buildings, and stating that the insurer “fail[ed] to even consider, let alone distinguish, the substantial body of case law in which a variety of contaminating conditions have been held to constitute ‘physical loss of or damage to property’”); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 9 Mass.L.Rptr. 41 (Mass. 1998) (finding that carbon monoxide contamination, or the *risk* of carbon monoxide contamination, in plaintiffs’ apartment building constituted “direct physical loss of or damage to” the insured building); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (1998) (finding that under the homeowner’s insurance policy, “[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property”).

ReWa believes the Court should find, as the majority of case law across the country has found, that direct physical loss or damage is not restricted to tangible, structural alteration. The PCB contamination that occurred at ReWa’s facilities caused physical loss and damage to its

Covered Property, and therefore the Building Policy provides coverage for ReWa's resulting damages.

In addition, even if this Court was uncertain as to whether the PCB contamination constitutes "direct physical loss of or damage to" ReWa's Covered Property, it is important to note that coverage extends to even "risks of" direct physical loss. The Causes of Loss-Special Form includes a definition of Covered Causes of Loss. It states that "Covered Causes of Loss means **RISKS** OF DIRECT PHYSICAL LOSS." (Causes of Loss – Special Form ¶ A (emphasis added).) Thus, the Building Policy covers even the mere threat of physical loss.

Notably, this language has been directly addressed by the South Carolina Supreme Court. In *Ocean Winds Council of Co-owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002), the South Carolina Supreme Court was asked to answer a certified question to interpret a property insurance policy providing coverage for "risks of direct physical loss" involving a collapse of a building or any part of a building. The Supreme Court explained the significance of the word "risks" as it relates to the scope of coverage provided. The Court reasoned:

In our view, to construe the phrase "*risks of direct physical loss involving collapse*" as requiring actual collapse is too narrow an interpretation. This phrase is more expansive than the word "collapse" and appears to cover even the threat of loss from collapse. Further, as noted by courts rejecting the actual collapse standard, such an interpretation encourages an insured to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured's duty to mitigate damages.

Id. at 271, 565 S.E.2d at 208.

Thus, the South Carolina Supreme Court has interpreted the word "risks" to expand coverage from actual loss to measures taken to prevent the loss from occurring in the first instance. Applying such interpretation to this case means that the Building Policy covers not only direct physical loss of or damage to ReWa's Covered Property, but also the costs incurred by ReWa in

addressing the risks of PCBs infiltrating deeper into its facilities, equipment, and machines. When the threat of a covered loss is certain and imminent, expenses incurred in preventing the loss or minimizing the extent of the loss are covered under the Building Policy which insures against such “risks.”

In short, ReWa suffered direct physical loss of or damage to its equipment and machines when its Pelham, Mauldin Road, and Lower Reedy facilities were contaminated with PCBs. Persuasive case law establishes that coverage under the Building Policy includes coverage for the contamination of Covered Property even in the absence of structural damage or alteration. Given that the policy extends coverage to “risks” of direct physical loss, it is clear that ReWa’s damages are covered by the Building Policy.

d. Additional Coverages

The Building Policy contains a section on additional coverages, and provides that the IRF will also pay for the expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss. (Building Policy ¶ 4.a.) This provision serves as *additional* coverage for ReWa’s expenses—not as a limitation to coverage.

This principle was demonstrated in *Montana Rail Link v. Lexington Insurance Company*, 175 F. Supp. 2d 1248 (D. MT 2001), a case in which a railroad company sought reimbursement for costs of removing and disposing of asphalt, beer cans, and other debris that was spilled into the river when a rail car derailed. *Id.* at 1249. The court found that the cost of removing the debris from the river was covered by the policy. *Id.* at 1251. The additional coverage relating to debris removal did not restrict coverage for such costs to those associated with removing property from the insured’s premises, but instead extended coverage for debris removal from that already provided in the policy. *Id.* at 1251-52.

In addition, the Building Policy's additional coverages section contains a provision for "Pollutant Clean Up and Removal." The Policy states as follows:

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period.

(Building Policy ¶ 4.d.)

Based on this additional coverage, the IRF tendered \$30,000 to ReWa and maintains that this is the total amount of coverage provided under the Building Policy. However, as set forth above, ReWa's remediation process did not constitute the extraction of pollutants from "land or water." Therefore, ReWa's coverage is not limited to this additional coverage provision.

2. Exclusions

a. Ordinance or Law Exclusion

The Building Policy contains an Ordinance or Law Exclusion which states as follows:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance or Law

The enforcement of any ordinance or law:

- (1) Regulating construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

(Causes of Loss – Special Form ¶ B.1.a.)

The Ordinance or Law Exclusion requires, by its very nature, the enforcement of an ordinance or law that creates the resulting loss. In this case, it was vandalism, not the enforcement of an ordinance or law, that caused the damage to ReWa's three treatment facilities.

Case law is clear that mere *compliance* with a law does not fall within this exclusion. For example, in *Townsend of Arkansas, Inc. v. Millers Mutual Insurance Company*, 823 F. Supp. 233,

235–36 (D. Del. 1993), a poultry operation discovered that its poultry contained residues of heptachlor, a chemical pesticide characterized as a toxin. Townsends sought to recover its property damage and business interruption losses through its property insurance policy. *Id.* at 236. The policy contained an ordinance or law exclusion, and the insurer claimed that the losses were excluded under this provision of the policy. *Id.* at 241. The insurer argued that the recall of dressed poultry products by Townsends was in response to the federal Food Safety and Inspection Service’s regulations and requests. *Id.* However, the United States District Court for the District of Delaware found “that since neither the FDA or the USDA ordered Townsends or Townsend Farms to close the Batesville operations, the Policy exclusions relied upon by Defendant [were] not applicable to the facts of this case.” *Id.* Furthermore, “the claimed loss did not result from the enforcement of a statute,” and therefore the ordinance or law exclusion did not apply. *Id.*

Likewise, in *Haas v. Audubon Indemnity Company*, 722 So.2d 1022, 1023–24 (La. App. 1998), *aff’d in part, rev’d in part*, 737 So.2d 736 (1999), unknown persons broke into a large vacant building and caused damage to its interior. The intruders removed pipes from the building, which caused flooding. *Id.* After the flood, the floors had to be removed and replaced. *Id.* The flooring contained asbestos, which had previously been contained and was safe prior to the flooding event. *Id.* However, because the flooring was loosened by the water, the floor had to be treated as asbestos containing materials. *Id.* Haas’ policy with Audubon included an ordinance or law exclusion that contains exactly the same language included in ReWa’s Building Policy. *Id.* at 1028. Audubon claimed that the ordinance or law exclusion applied, and therefore it was not liable for the increased costs of abatement of asbestos in the flooring which was required by EPA regulations concerning asbestos. *Id.* The Louisiana Court of Appeals found that “it was the vandalism that caused damage to the Haas’ building, not the enforcement of any ordinance or law.”

Id. at 1029. Therefore, “[t]he costs of asbestos abatement were necessary because of the flooding which arose out of the vandalism to the building.” *Id.* The Court determined that because “[c]ompliance is not enforcement,” the ordinance or law exclusion did not apply, and Audubon was responsible for these costs, including the removal of the debris and the disposal of it. *Id.*; see also *Mason v. Shelter Mutual Ins. Co.*, 209 So.3d 860, 870-71 (La. App. 2016) (finding that “the costs necessitated in the flooring’s removal clearly resulted from the plumbing failure. It did not result from the ‘enforcement of any ordinance or law’ regulating the repair as is required for application of the exclusion.”).

Furthermore, the Ordinance of Law Exclusion does not apply in this case because any “enforcement” merely served as confirmation of the circumstances surrounding the actual cause of loss—vandalism that resulted in the presence of PCBs at ReWa’s treatment facilities. In other words, any actions by the EPA and SCDHEC deemed to be “enforcement” under this exclusion did not cause, either directly or indirectly, for ReWa to suffer the damages claimed in this lawsuit. The court in *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1st Dep’t 1998), dealt with this same issue. In that case, the plaintiff owned and operated a bagel store in a leased premises. *Id.* at 67. An accident between an automobile and a gas truck occurred at the intersection where the building was located, resulting in 1,500 gallons of gas being spilled into the street and ignited. *Id.* This catastrophe resulted in five deaths and destroyed three stores located nearby. *Id.* While the bagel shop was damaged by smoke and water, it was not consumed in the blaze. *Id.* However, the Department of Buildings immediately issued a Peremptory Vacate Order directing that all persons occupying the building vacate until it was declared safe. *Id.* The plaintiff filed a claim under a business owners’ policy which provided for coverage for losses resulting from fire or explosion. *Id.* at 67-68. The policy contained an ordinance or law exclusion

with the same language as ReWa's Building Policy. *Id.* The insurer denied coverage based on this exclusion. *Id.* at 68-69. The insurer argued that "it does not matter whether the fire was, in the first instance, the efficient cause of the losses, since the policy excludes coverage for losses caused, either directly or indirectly, by ordinance or law." *Id.* at 71. The court found, however, that the Vacate Order from the Department of Buildings "served merely as a confirmation of the circumstances regarding the actual cause of loss, i.e., the fact that the premises had been rendered structurally unsound and unfit for continued use as a result of the fire." *Id.* "On the contrary, when the order was served, the need to vacate the premises and all the immediate and consequential losses stemming from the fire and explosion, both direct and indirect, had already been 'caused.'" *Id.* at 71-72. The court noted that "[t]o hold that the law or ordinance exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy." *Id.* at 72; *see also Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 302 (Minn. Ct. App. 1997) (holding that "[s]o long as extraneous forces cause physical damage to property, this type of exclusion does not defeat recovery when, as a result, a governmental body enforces an ordinance against the property.").

As demonstrated by this case law, the Ordinance or Law Exclusion does not apply because it was vandalism, not the enforcement of an ordinance or law, that caused the damage to ReWa's three treatment facilities. ReWa's resulting damages are therefore covered under the Building Policy.

b. Pollution Exclusion

The Building Policy contains a Pollution Exclusion, which states that the IRF "will not pay for loss or damage caused by or resulting from ... the discharge, dispersal, seepage, migration, release or escape of pollutants...." (Causes of Loss – Special Form ¶ B.2.l.) However, the

pollution exclusion contains an exception in circumstances where “the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the ‘specified causes of loss.’” (*Id.*) Vandalism is a specified cause of loss, and therefore the pollution exclusion does not apply. In short, if damage is caused by contaminants or pollutants resulting from vandalism, then there is coverage under the Building Policy.

B. Tort Policy

1. Coverage

At all times relevant herein, ReWa was also insured under a Tort Policy issued by the IRF. The relevant coverage language states that the IRF “will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... Property Damage to which this applies caused by an occurrence.” (Tort Policy ¶ I.B.) An “occurrence” is defined as “an accident, including continuous related exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured.” (Tort Policy ¶ III.) The Tort Policy provides that “Property Damages” means either “physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom,” or “loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.” (*Id.*)

a. Legally Obligated to Pay as Damages

ReWa was legally obligated to conduct remediation and repair efforts at its three facilities that were contaminated by PCBs. While ReWa voluntarily undertook remediation and cleanup efforts without direct orders from the EPA or SCDHEC, ReWa was legally obligated to clean up

and properly dispose of the PCBs. A review of relevant case law reveals that affirmative government action is not required to create liability under the Tort Policy.

In *Helena Chemical Company v. Allianz Underwriters Insurance Company*, 357 S.C. 631, 637-38, 594 S.E.2d 455, 458 (2004), the South Carolina Supreme Court held that affirmative government action is not required to trigger coverage. In that case, Helena was in the business of formulating, distributing, and selling agricultural chemicals, including pesticides, in the farming industry. *Id.* at 634, 594 S.E.2d at 456. In conjunction with the EPA and SCDHEC, Helena had to conduct extensive cleanups of polluted soil at three of its sites. *Id.* In determining whether Helena's environmental cleanup costs constitute "damages" under the policy, the Court relied on *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (Md. App. 1993). The *Bausch & Lomb* court found that environmental statutes imposed strict liability upon owners of polluted property, and affirmative government action was not required before the owner of polluted property was "legally obligated to pay." *Id.* at 637, 594 S.E.2d at 458. The South Carolina Supreme Court stated that "[t]he *Bausch & Lomb* court held that the ordinary and accepted meaning of damages was not a narrow, technical one, but instead was a broad one, encompassing environmental response costs, even when those costs are incurred **without** a government directive. ... We agree with the reasoning of the *Bausch & Lomb* court." *Helena Chemical*, 357 S.C. at 637-38, 594 S.E.2d at 458 (emphasis in original).

Thus, in *Helena Chemical* the South Carolina Supreme Court established that environmental cleanup costs constitute "damages." *Id.* at 638-41, 594 S.E.2d at 458-60. Furthermore, an insured can become legally obligated to pay such damages without a government directive. *Id.* at 637, 594 S.E.2d at 458. Thus, based on these principles, ReWa was legally

obligated to pay for the damages caused by the PCB contamination, and thus coverage is triggered under the Tort Policy.

b. Occurrence

The PCB contamination was an accident which resulted in property damage that was neither expected nor intended by ReWa. In *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), the South Carolina Court of Appeals interpreted a policy with the same coverage language as ReWa's Tort Policy with the IRF. In *Braswell*, a lessee who was in the business of cleaning fuel oil tanks abandoned certain leased property owned by Braswell, and left storage tanks of chemicals on the premises. *Id.* at 339, 387 S.E.2d at 708. The corrosive chemicals ate through a valve on one of the storage tanks and 1,000 gallons of chemicals spilled onto a field adjacent to the tank. *Id.* SCDHEC issued a consent order requiring the cleanup of the property. *Id.* The Court of Appeals analyzed whether the chemical spill constituted an "occurrence," and ultimately found that it did. *Id.* at 343, 387 S.E.2d at 709-10. The Court reasoned that the spill happened as a result of the valve rupturing and releasing liquid from the tank, which was a sudden event that was neither expected nor intended by the lessee or Braswell. *Id.* Thus, the chemical spill constituted such an "occurrence." *Id.*

The same is true in this case. Certainly, ReWa did not expect or intend for PCBs to enter its treatment facilities. Thus, the contamination of ReWa's three treatment facilities constitutes an "occurrence" under the Tort Policy.

2. Exclusions

a. Pollution Exclusion

The Tort Policy does not apply if the property damage arose out of the discharge, dispersal, release, or escape of pollutants. (Tort Policy ¶ VI.f.) However, there is an exception to this exclusion if the discharge, dispersal, release or escape was sudden and accidental. (*Id.*)

Even if the Pollution Exclusion was triggered in this instance, the exception to the exclusion clearly applies because the PCB contamination was both unexpected and accidental.

In interpreting a policy with the exact language as the Tort Policy at issue in this case, the South Carolina Supreme Court held in *Greenville County v. Insurance Reserve Fund* that the term “sudden” is to be interpreted as “unexpected.” 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994). Certainly, ReWa did not expect for its three facilities to be contaminated with PCBs, and the discovery of PCBs in its system was completely unanticipated.

South Carolina courts have also interpreted the meaning of “accidental” in identical pollution exclusions. For example, in *Helena Chemical Company v. Allianz Underwriters Insurance Company*, the South Carolina Supreme Court found that the exception to the pollution exclusion did not apply because “the contamination at the various sites was caused by Helena’s routine business operations and was, therefore, not unexpected and accidental.” *Id.* at 642, 594 S.E.2d at 460.

Likewise, in *South Carolina Insurance Reserve Fund v. East Richland County Public Service District*, 417 S.C. 149, 152, 789 S.E.2d 63, 64 (Ct. App. 2016), Coley Brown filed a complaint against the District because the District installed a sewage force main and an air relief valve on Brown’s street, and the valve released offensive odors multiple times a day. The Court of Appeals found that the release of the odors was not accident and unexpected, and thus that the

exception to the pollutant exclusion did not apply. *Id.* at 163, 789 S.E.2d at 70. The air release valve was essential to the operation of the sewer line because it prevented the lines from exploding. *Id.* The District was aware that when the sewer pumps turned on, the valves would release odors into the air. *Id.* “Despite the District’s efforts to make or limit the odors at this particular location, the release of the valve gases was a routine and expected function of the system.” *Id.* at 164, 789 S.E.2d at 70.

The discharge of pollutants that occurred in the instant case is distinguishable from that which occurred in the *Helena* and *East Richland* cases. The PCB contamination did not occur as a result of ReWa’s routine business operations. Instead, the contamination occurred as a result of vandalism.

Courts in other jurisdictions have held that the discharge of pollutants that occurs because of vandalism falls within the meaning of “sudden and accidental.” In *Lansco, Inc. v. Department of Environmental Protection*, 350 A.2d 520, 521 (N.J. Super. 1975), an unknown person or persons opened the valves on two of Lansco’s storage tanks during the night, causing around 14,000 gallons of oil to leak from the tanks and onto Lansco’s property, which eventually led to the oil’s release into the Hackensack River. Lansco claimed coverage under a general liability provision. *Id.* at 523. The New Jersey Superior Court held that “whether the occurrence is accidental must be viewed from the standpoint of the insured, and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.” *Id.* at 524.

Likewise, in *American States Insurance Company v. Maryland Casualty Company*, the Court differentiated between the actions described in *Lansco* and certain intentional actions of the insured. The Court stated:

In *Lansco*, in an act of vandalism, an unknown person opened valves at the insured's business allowing gasoline to flow out onto neighboring lands. Certainly this action can be said to be sudden and accidental as contrasted with the direct and allegedly continuous acts of [the insured] in unlawfully disposing, or contracting to dispose, of toxic waste.

587 F. Supp. 1549, 1553 (E.D. Mich. 1984).

These cases “indicate that release due to vandalism constitutes the classic, garden variety case of ‘sudden and accidental’ discharge.” *Upjohn Co. v. Aetna Cas. & Sur. Co.*, No. 4:88-CV-124, 1994 WL 1029337, at *18 (W.D. Mich. 1994).

In conclusion, even if the Pollution Exclusion is triggered in this case, the exception to the exclusion applies and thus coverage is still provided. The contamination of three of ReWa facilities was both unexpected and accidental. The PCB contamination was not caused by ReWa's ordinary business operations, but instead was caused by an unexpected act of vandalism.

b. Owned Property Exclusion

The Tort Policy does not provide coverage if the property damaged was owned by or rented to ReWa, used by ReWa, or in the care, custody or control of ReWa. (Tort Policy ¶ VI.j.) However, the Owned Property Exclusion does not apply when the insured remediates its own property to avoid potential liability to third parties as well as when mandated by law. This is especially applicable when there is an imminent threat. Thus, the Owned Property Exclusion does not apply in this case because (1) ReWa was complying with legal guidelines to remediate the PCB contamination and/or (2) ReWa was ensuring that PCB contamination did not spread to any third parties.

In *Aetna Casualty & Surety Company v. Dow Chemical Company*, the Court held that “in order for an insured to escape the owned property provision's bar to coverage in the context of environmental remediation occurring on its own property, the insured must show either (1)

governmental demand to perform environmental remediation, or (2) damage or imminent damage to a third party's property." 28 F. Supp. 2d 448, 451, 456 (E.D. Mich. 1998).

Compliance with Government Regulations

In the landmark case of *Patz v. St. Paul Fire & Marine Insurance Company*, the insured sought to recover its costs in cleaning up groundwater and soil that was contaminated by paint. 15 F.3d 699 (7th Cir. 1994). The insurer argued that the policy excluded coverage for property damage to property that was owned by the insured. *Id.* at 705. No third-party property had been harmed by the paint contamination; instead, only the insured's own land was contaminated. *Id.* However, the Court found that the insured was "not attempting to obtain an insurance award for a reduction in the value of, or other damage to, their land." *Id.* Instead, the insured sought "to recover the cost of complying with a government order to clean up a nuisance ... [and] [t]he fact that the clean up occurred on their land [was] irrelevant." *Id.* Thus, the Court held that because the insured was "seeking to recover the cost of the liability that the Department of Natural Resources imposed on them for maintaining a nuisance", the owned property exclusion did not apply. *Id.*

Governmental mandates to clean up environmental contamination constitute third-party liability. *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 28 F. Supp. 2d 448, 455–56 (E.D. Mich. 1998). Insurance coverage should be provided for liability imposed by the government because, "[a]fter all, the State does not require cleanup of environmental contamination solely to benefit the insured. The State is concerned with the health and welfare of the public at large." *Id.*

The fact that ReWa voluntarily complied with EPA and DHEC regulations does not bar the applicability of the holding in *Patz* and similar cases. For example, in *Anderson Development Company v. Travelers Indemnity Company*, the court held that the owned property exclusion did

not apply to government imposed environmental clean-up costs. 49 F.3d 1128, 1129 (6th Cir. 1995). The insurer argued that the only clean-up mandated by the EPA was for contamination on the insured's own property, and therefore since the insured was not obligated to clean up anyone else's property, the owned property exclusion applied. *Id.* at 1133. The Court found that "in environmental contamination clean-up cases, an independent governmental interest [] supersedes any 'owned property' exclusion in the policies." *Id.* at 1134. Ultimately, the Court held that "[a]lthough ADC **cooperated voluntarily**, it was under a government mandate to conduct the environmental clean-up. Thus, ... there was indeed liability to a third party—the EPA." *Id.* (emphasis added). *See also Maryland Cas. Co. v. Wausau Chem Corp.*, 809 F. Supp. 680, 696 (W.D. Wis. 1992) ("The majority of courts addressing this issue have held that costs incurred when an insured engages voluntarily in cleanup activities in advance of litigation are covered under comprehensive general liability policies.").

Possibility of Third-Party Contamination

In addition to complying with government regulations, the Owned Property Exclusion also does not apply because ReWa was protecting against the possibility that third-party property could be contaminated if it did not undergo efforts to remove PCBs from its own property.

Courts have held that where there is a chance environmental contamination will spread to third parties, the owned property exclusion does not apply to the costs incurred to contain and clean up the contamination on the insured's own property. *See, e.g., Whittaker Corp v. American Nuclear Insurers*, 671 F. Supp. 2d 242, 253–54 (D. Mass. 2009) (owned property exclusion did not bar coverage even though there was only a possibility that the insured could be found liable for a claim); *Redevelopment Auth. of City of Philadelphia v. Ins. Co. of North America*, 450 Pa. Super. 256, 675 A.2d 1256, 1259 (1996) (owned property exclusion inapplicable if there is "an

imminent threat of substantial harm to the property of others”); *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 28 F. Supp. 2d 448, 454–56 (E.D. Mich. 1998) (“imminent damage to groundwater or to other third-party property, without a showing of existing damage, is sufficient to avoid the owned property exclusion”); *Patz v. St. Paul Fire & Marine Ins. Co.*, 817 F. Supp. 781, 783–74 (E.D. Wis. 1993), *aff’d*, 15 F.3d 699 (7th Cir. 1994) (although the only property damage had been to the insured’s property, the owned property exclusion did not apply because “the contamination ... posed a threat to off-site property”).

The Court in *Aetna* detailed that “an insured need not show actual damage to avoid the owned property provision, so long as the insured can establish the need for remediation to prevent imminent harm to a third party.” *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 28 F. Supp. 2d 448, 454–55 (E.D. Mich. 1998). “To require actual damage would create bad public policy because it would encourage insureds to wait for contamination to migrate before taking action. There is no logical or just reason why an insured should allow a condition on his land to result in damage to others simply to assure and secure coverage when preventative measures could prevent not only substantial damage or loss to the property of others, but also prevent sizable claims for damages against the insured and his insurer.” *Id.* (citing *Consolidated Rail Corp. v. Certain Underwriters at Lloyd’s*, 1998 WL 6547, at *5 (E.D. Pa. June 5, 1986), *aff’d*, 853 F.2d 917 (3d Cir. 1988)).

Again, ReWa’s voluntary efforts to clean up its property does not mean that the Owned Property Exclusion automatically applies. As the Court summarily stated in *Aetna*, “the owned property provision does not bar coverage of costs to remediate third-party property even when the remediation was done voluntarily without government mandate.” *Id.* at 457 (citing *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 720, 444 N.W.2d 813 (1989), *rev’d on other grounds*, 438 Mich. 197, 476 N.W.2d 392 (1991)).

In conclusion, the Owned Property Exclusion does not apply because there was a governmental demand for ReWa to clean up its property. In addition, ReWa's clean-up efforts ensured that the PCB contamination did not spread to third party properties and cause further harm to the environment.

C. Bad Faith

ReWa has also asserted a claim against the IRF for bad faith refusal to promptly pay its damages under the Building and Tort Policies. ReWa asserts that the IRF improperly delayed in making a coverage determination, and then unreasonably failed to pay the amounts due under the policies. As demonstrated by the case law and timeline below, the IRF's actions constitute bad faith which resulted in damage to its insured.

The elements of a cause of action for bad faith under an insurance contract are: (1) the existence of a mutually binding contract of insurance; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured. *See Crossley v. State Farm Mutual Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396-97 (1992). The South Carolina Supreme Court has held that the IRF may be liable under a claim of bad faith failure to pay an insurance claim. *Charleston Cnty. School Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993). Generally, if there is a reasonable ground for contesting a claim, there is no bad faith in the denial of it. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 398, 562 S.E.2d 659, 661 (Ct. App. 2002). However, an insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case. *Id.* at 400, 562 S.E.2d at 662.

To establish a claim for bad faith, an insured can also demonstrate unreasonable action by the insured in the processing of a claim. See *Temple v. Mutual of Omaha Ins. Co.*, No. 4:11-cv-00128-RBH, 2013 WL 314750, at *4 (D.S.C. Jan. 28, 2013) (citing *Tadlock Painting Co. v. Md. Cas. Co.*, 332 S.C. 498, 501, 473 S.E.2d 52, 53 (1996)). South Carolina courts have held that “the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also the manner in which it is processed.” *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002).

ReWa notified the IRF of its claim on September 24, 2013. For the following year, ReWa provided monthly reports updating the IRF on its damages and continued efforts to eradicate PCBs from its three facilities. The evidence presented at trial will demonstrate that the IRF had internally made a coverage determination shortly after the claim was made. However, despite numerous emails from ReWa’s controller inquiring as to whether a decision had been made regarding coverage, the IRF failed to provide a coverage determination to ReWa until October 30, 2014. At that time, the IRF offered to pay \$10,000 per segment under the Building Policy—totaling \$30,000—but did not provide its reason for denying the claim under the general coverage provision. The IRF did not provide a coverage determination under the Tort Policy until after this lawsuit was filed. In short, the evidence presented at trial will reveal that the IRF breached its duty of good faith and fair dealing to ReWa by failing to make a claim determination in a timely manner, and failing to provide the coverage clearly provided for under the Building and Tort Policies, as detailed in the sections above.

III. EXHIBITS AND WITNESSES

Exhibits

ReWa's Exhibit List is attached hereto as **Exhibit A**. The parties will exchange Exhibit Lists and will submit to the Court any exhibits on which there is disagreement.

Witnesses

- A. Patricia Dennis
Renewable Water Resources
Controller
- B. George Fletcher
Renewable Water Resources
Former Board Member
- C. Kevin James
Renewable Water Resources
Director of Water Resource Recovery
- D. Joel Jones
Renewable Water Resources
Chief Technical Officer
- E. Glen McManus
Renewable Water Resources
Director of Operations
- F. Ted V. Clark, P.E.
AECOM
- G. Ray Orvin
Renewable Water Resources
Former Executive Director

Deposition Designations (if these witnesses are not called at trial)

- A. Jerry B. Anderson, Sr.
Former IRF Senior Claims Adjuster
- B. Robert Byers
IRF Senior Claims Representative

- C. Chris Lombard
Insurance Reserve Fund Director of Claims
- D. Frederick Young
Quality Claim Services Adjuster

IV. EVIDENTIARY ISSUES

None known at this time.

V. SETTLEMENT NEGOTIATIONS

The parties participated in a mediation before Attorney Steven Farrar on April 26, 2018 and again on September 30, 2019. The parties were unable to reach a resolution, and Mr. Farrar declared an impasse. ReWa remains willing to consider any earnest offers from the IRF.

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Attorneys for Renewable Water Resources

Greenville, South Carolina
 January 17, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT

Renewable Water Resources,) Civil Action No. 2016-CP-23-5905
)

Plaintiff,)

vs.)

Insurance Reserve Fund, a Division of)
 the State Fiscal Accountability Authority)
 of South Carolina,)

Defendant.)
)

PLAINTIFF'S TRIAL
EXHIBIT LIST

Trial Exhibit No.	Date	Description	Identifier
1.	4/2/2014	General Tort Liability Policy Declaration Page	REWA v. IRF_041102-41109
2.	4/2/2015	Building and Personal Property Policy Declaration Page	REWA v. IRF_041110-41118
3.	4/2/2015	General Tort Liability Policy Declaration Page	REWA v. IRF_041119
4.	7/1/2015	Building and Personal Property Policy Declaration Page	REWA v. IRF_041120-41127
5.	7/1/2015	General Tort Liability Policy Declaration Page	REWA v. IRF_041128
6.	7/1/2016	Building and Personal Property Policy Declaration Page	REWA v. IRF_041129-41138
7.	7/1/2016	General Tort Liability Policy Declaration Page	REWA v. IRF_041139-41147
8.	N/A	Building and Personal Property Coverage Form	SCBCB 001422-1428
9.	N/A	Causes of Loss – Special Form	SCBCB 001429-1434
10.	N/A	Tort Liability Insurance Policy	SCBCB 000287-292
11.	2009	Policyholder's Manual	REWA v. IRF_041148-41188
12.	2015	Policyholder's Manual	REWA v. IRF_041189-41227
13.	11/2013	Tort Manual	REWA v. IRF_041228-41232
14.	1/27/2011	Notice of DHEC NDPES Permit No. SC0048381	REWA v. IRF_041347-41397

Trial Exhibit No.	Date	Description	Identifier
15.	5/20/2013	Notice of DHEC NPDES Permit No. SC0033804	REWA AECOM_007834-7874
16.	7/26/2013	DHEC Email to Charles Logue re: ReWa Pelham WWTF biosolids PCB	REWA v. IRF_011718-11719
17.	7/26/2013	Logue Email to DHEC re: Pelham Adverse Impact	REWA v. IRF_011720-750
18.	7/26/2013	SLED Bulletin	REWA006315
19.	8/1/2013	Joel Jones Email to DHEC re: Temporary Approval – ReWa Pelham WWTP	REWA v. IRF_007875-7876
20.	8/5/2013	Logue Email to DHEC re: Pelham WWTF situation	REWA005133-5135
21.	8/13/2013	DHEC Letter to American Waste re: Septic Tank Service	REWA v. IRF_011752-11808
22.	8/19/2013	Nexsen Pruet Letter to DHEC and EPA re: American Waste	REWA v. IRF_011854-11863
23.	8/23/2013	DHEC Email re: 3ppb and EPA	REWA v. IRF_0011867
24.	8/28/2013	Hartley Letter to DHEC and EPA	REWA v. IRF_011868-11897
25.	8/28/2013	Lavender Email to DHEC re: ReWa biosolids filtrate	REWA v. IRF_011898-11901
26.	9/5/2013	Tommy Lavender Email to DHEC re: ReWa operations	REWA v. IRF_011905
27.	9/20/2013	ReWa Letter to EPA and DHEC re: Notification of PCB Detection	REWA v. IRF_011906-12060
28.	9/24/2013	ReWa Letter to DHEC re: Pelham WWTP WW Solids Letter	REWA016791-16793
29.	9/25/2013	DHEC Press Release with Regulation	REWA v. IRF_012062-12067
30.	9/25/2013	PCB Emergency Regulation	REWA v. IRF_020077-20080
31.	9/26/2013	DHEC Memo re: PCB Handling and Disposal Guidelines for Grease Traps	REWA v. IRF_012068-12071
32.	10/17/2013	ReWa Letter to EPA and DHEC re: Notification of PCB Plan	REWA AECOM_007881-7905
33.	10/22/2013	DHEC Letter to ReWa re: Beltpress Filtrate Operation pursuant to Emergency PCB Regulation	REWA v. IRF_012077
34.	10/23/2013	Lavender Letter to DHEC re: Draft sampling protocol	REWA v. IRF_012078-012092
35.	12/11/2013	Lavender Letter to EPA re: Draft Sampling Protocol	REWA v. IRF_012098

Trial Exhibit No.	Date	Description	Identifier
36.	1/28/2014	DHEC Email to Lavender re: PCB Notifications	REWA v. IRF_012103-12106
37.	1/28/2014	EPA Email to ReWa re: Frac tank at Mauldin	REWA v. IRF_012107-12109
38.	4/15/2014	Charles Logue Email to DHEC re: Mauldin and Lower Reedy PCB clean-up	REWA v. IRF_012129-12132, 041321
39.	5/2/2014	Jones Email to EPA and DHEC	REWA v. IRF_012134-12142
40.	5/8/2014	Jones Email to EPA and DHEC	REWA v. IRF_012154-012155
41.	5/8/2014	Lavender Email to EPA and DHEC	REWA v. IRF_012156-12166
42.	5/27/2014	DHEC Email re: PCB regulation	REWA v. IRF_012197-12204
43.	5/29/2014	Jones Email to EPA and DHEC	REWA v. IRF_012205-12216
44.	7/17/2014	Jones Email to EPA and DHEC	REWA v. IRF_012217-12224
45.	9/9/2014	Jones Email to EPA and DHEC	REWA v. IRF_012227-12241
46.	N/A	IRF Memo to Fred Young re: ReWa Property Claims	SCBCB 001353-1354
47.	9/25/2013	IRF Email to Patricia Dennis re: Coverage	REWA v. IRF_040843-40844
48.	10/10/2013	Nelson Chandler Email to Patricia Dennis re: Coverage	SCBCB 001348-1349
49.	10/11/2013	IRF Letter to ReWa re: Claim	REWA v. IRF_012311-12314
50.	10/15/2013	Young Report to IRF re: PCB Contamination	SCBCB 000035-60
51.	10/18/2013	Young Report to IRF re: PCB Contamination	SCBCB 000061
52.	1/10/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0001
53.	2/4/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0002
54.	2/5/2014	Patricia Dennis Email to IRF re: Coverage	FYoung 0010-11
55.	2/5/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0005-6
56.	2/5/2014	Fred Young Email to Patricia Dennis re: PCB Expenses	FYoung 0007-9
57.	2/5/2014	Fred Young Email to ReWa re: PCB Expenses	FYoung 0013
58.	2/5/2014	Young Report to IRF re: PCB Contamination	SCBCB 00139-185

Trial Exhibit No.	Date	Description	Identifier
59.	2/11/2014	Patricia Dennis Email to Fred Young re: PCB Expenses	FYoung 0018-21
60.	2/12/2014	Patricia Dennis Email to Fred Young re: PCB Expenses	FYoung 0023-28
61.	2/12/2014	Fred Young Email to Jerry Anderson re: ReWa Approval	FYoung 0022
62.	3/12/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0029
63.	4/2/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0030
64.	4/3/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0031
65.	4/10/2014	Patricia Dennis Email to Fred Young re: Coverage	FYoung 0040-41
66.	4/23/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	SCBCB 001376-1377
67.	5/5/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0045
68.	5/9/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0046
69.	6/4/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0047
70.	6/6/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0048
71.	8/4/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0052
72.	8/20/2014	Fred Young Email to Jerry Anderson re: PCB Expenses	FYoung 0053
73.	9/11/2014	Fred Young Email to Patricia Dennis re: PCB Expenses	FYoung 0056
74.	10/6/2014	Fred Young Email to Rob Byers re: Coverage	SCBCB 001357
75.	10/27/2014	Rob Byers Email to Patricia Dennis re: PCB claim	SCBCB 001358-1362
76.	10/28/2014	Rob Byers Email to Patricia Dennis re: PCB claim	SCBCB 001363-1367
77.	10/30/2014	IRF Letter to ReWa re: Coverage Determination	REWA v. IRF_012315-12323
78.	11/5/2014	ReWa Email to Fred Young re: PCB Expenses	FYoung 0060
79.	11/6/2014	Young Report to IRF re: PCB Contamination	SCBCB 000072-74
80.	11/10/2014	Young Invoices to IRF	SCBCB 001402-07
81.	12/4/2014	Proof of Loss	SCBCB 000077-78

Trial Exhibit No.	Date	Description	Identifier
82.	1/30/2015	Rob Byers Email to Patricia Dennis re: Proof of Loss	SCBCB 001372
83.	2/9/2015	ReWa Email to Fred Young re: PCB Expenses	FYoung 0016
84.	5/13/2015	Claim Data Sheet	SCBCB 000001-2
85.	N/A	IRF Claim Notes	SCBCB 001388-1401
86.	N/A	Damage definition from Dictionary.com	N/A
87.	N/A	Damage definition from Oxford Dictionaries	30(b)(6) Deposition of IRF Exhibit 14
88.	N/A	Timeline of PCB-Related Activities	REWA023999-24004
89.	09/13/2013	FAQ on PCBs	REWA v. IRF_012688-012689
90.	N/A	ReWa Land Application and Landfill Information	REWA v. IRF_041315-41320
91.	N/A	ReWa PCB Sampling Results *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary of voluminous underlying data. The underlying data is admissible into evidence, and has been either produced (<i>see</i> REWA v. IRF_020138-40844) or made available for examination by the IRF.	REWA v. IRF_012741-12786
92.	N/A	Sampling Reports	REWA AECOM_006749-6812
93.	N/A	Sampling Reports	REWA005099-5123
94.	04/25/2014	AECOM Final Summary Report	REWA AECOM_009519-9574
95.	N/A	Ted Clark Curriculum Vitae	REWA AECOM_009668-9669
96.	8/8/2013	Logue Email to Welch re: Pelham Sludge Related issues	REWA AECOM_006208-6217
97.	8/30/2013	Welch Email to Clark re: Status of work	REWA AECOM_005942-5943
98.	9/16/2013	Welch Email to Lavender and Logue re: PCB Calculations at Mauldin Road	REWA AECOM_007081-7082
99.	N/A	Summary of PCB Expenses Spreadsheet	REWA v. IRF_041051-41056

Trial Exhibit No.	Date	Description	Identifier
100.	N/A	PCB Expenses Spreadsheet *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary of voluminous underlying data. The underlying data is admissible into evidence, and has been either produced (<i>see</i> REWA v. IRF_000661-011715, REWA v. IRF_012787-19989) or made available for examination by the IRF.	REWA v. IRF_041060-41100
101.	N/A	Regular Cost of Processing Solids for Land Application *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary or voluminous underlying data. The underlying data is admissible into evidence, and has been either produced (<i>see</i> REWA v. IRF_041323-41346) or made available for examination by the IRF.	REWA v. IRF_041322
102.	N/A	Nexsen Pruet Invoices	REWA v. IRF_041233-41296
103.	05/06/2014	ReWa Presentation	REWA v. IRF_020081-20102
104.	02/24/2015	ReWa Presentation	REWA v. IRF_020106-20137
105.	N/A	ReWa Presentation	REWA v. IRF_000381-410
106.	N/A	Facility and Remediation Work Photographs	REWA v. IRF_ 000001, 000004, 000012, 000019, 000026-27, 000029, 000056, 000099, 000105, 000112, 000117, 000159, 000165-167, 000176, 000182, 000209, 000216, 000225, 000261, 000271, 000276-277, 000280, 000285, 000293-294, 000298, 000305-6, 000452, 000445, 000447, 000449, 020087, 020091, 020095, 020123, REWA AECOM_009237-009293

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January 17, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
 Renewable Water Resources,	)	
	)	Civil Action No. 2016-CP-23-5905
Plaintiff,	)	
	)	
v.	)	
	)	DEFENDANTS' PRE-TRIAL BRIEF
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability	)	
Authority of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

INTRODUCTION

This is an action brought by the Plaintiff Renewable Water Resources ("ReWa"), which is a special purpose district and hence a governmental entity, against the Defendant South Carolina Insurance Reserve Fund (IRF"), which is a division of the State Fiscal Accountability Authority. The Insurance Reserve Fund issued a Building and Personal Property Insurance Policy to the named insured, Renewable Water Resources, bearing Policy Number F130230114, with the effective dates of April 2, 2013 through April 2, 2014. According to its Amended Complaint, the Plaintiff has made a property and casualty claim for losses allegedly suffered at three of its wastewater treatment plants arising from the dumping of PCBs into the Plaintiff's system by a third-party (Timothy Howard).

The IRF also issued a Tort Liability Insurance Policy to ReWa. Just prior to the commencement of this litigation, ReWa also made a claim under that policy.

In its Amended Complaint, the Plaintiff has alleged causes of action for declaratory relief and breach of contract with respect to both policies. In addition, the Plaintiff has alleged that the IRF's handling of this claim was conducted in bad faith and seeks unspecified consequential damages. Punitive damages have not been pled nor are they recoverable against the IRF by operation of the Tort Claims Act.

STATEMENT OF FACTS

The parties intend to file a Joint Stipulation of facts for trial which contains many of the basic background facts. Other facts necessary to the disposition of this insurance coverage dispute will be developed through witnesses and exhibits to be presented at trial.

LEGAL ISSUES

I. Building and Personal Property Insurance Policy

A. South Carolina Rules of Construction of Insurance Policies

“The purpose of all rules of construction is to ascertain the intention of the parties to the contract.” *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012). “The construction and enforcement of an unambiguous contract is a question of law for the court.” *Id.* Likewise, “[w]hether language is ambiguous is a question of law for the Court.” *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 743 S.E.2d 827, 829 (2013).

“A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.” *Southern Glass*, 732 S.E.2d at 209. “Additionally, a contract is only ambiguous when it may fairly and reasonably be understood in more than one way. *Id.* “In construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity.” *Id.*

“Insurance policies are subject to general rules of contract construction. This Court must give policy language its plain, ordinary and popular meaning. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.” *Diamond States Ins. Co. v. Homestead Industries Inc.*, 318 S.C. 231, 456 S.E.2d 912, 915 (1995).

“The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.” *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764, 769 (D.S.C. 2004).

B. Insuring Agreement

The insuring agreement for the Building and Personal Property Coverage Form states as follows: **“We will pay for direct physical loss of or damage to Covered**

Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” (Emphasis added). Thus, the Building and Personal Property Coverage Form is read in conjunction with the form entitled “Causes of Loss – Special Form.” In the “Special Form” the “Covered Causes of Loss” are all “risks of direct physical loss” which are not limited to the “specified causes of loss” which is a defined term. Instead, if the loss is caused by or resulting from “risks of direct physical loss,” then there is a covered loss unless otherwise excluded or limited. In this case, one of the causes of loss is vandalism, as previously conceded by the IRF, which is a covered cause of loss.

The insuring agreement may be broken into components. The insured has the burden of showing: (1) “direct physical loss of or damage, (2) to “Covered Property”; (3) the loss occurred at the premises; and (4) the loss was caused by or resulted from a Covered Cause of Loss. In addition, the form entitled “Causes of Loss – Special Form” includes limitations and exclusions. The first and second components, as well as the applicable Ordinance or Law Exclusion, are addressed in detail below.

1. “Direct Physical Loss or Damage”

The first issue is whether there is “direct physical loss or damage,” and if so, to what extent. These are not defined terms in the policy, and as a result, the Court will apply the plain ordinary meaning of the terms. The IRF submits that “direct physical loss or damage” means a loss or damage that is immediate, material, tangible and not consequential or economic in nature. That is consistent with existing South Carolina authorities. For instance, in *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), the court addressed “direct physical loss or damage” and explained that “[t]he use of the term ‘physical’ to define property damage negates the possibility that the policy intended to include consequential or intangible damages.” 337 F.Supp.2d at 769. The court relied on the decision of the South Carolina Supreme Court in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003), where the Court concluded that economic damages do not constitute “physical injury” to property. 588 S.E.2d at 115. Thus, the IRF takes the position, consistent with existing South Carolina law, that “direct physical loss of or damage” includes only the immediate physical damage to the covered property and does not include any consequential, intangible or economic damages, costs or expenses.

It is anticipated that the Plaintiff will attempt to argue that the phrase “direct physical loss or damage” is ambiguous and should be construed in favor of coverage. The Plaintiff will attempt to argue that the modifiers “direct” and “physical” modify only “loss” and not “damage,” and as a result, the policy covers any “damage” including consequential and economic damages. That grammatical interpretation has been rejected by a number of courts, as discussed below. Moreover, it is well settled that “[t]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.” *Campbell*, 337 F.Supp.2d at 769. When considering the policy as a whole, it is clear that the terms “direct” and “physical” modify both “loss” and “damage” for several reasons. First, as stated in the form entitled “Causes of Loss – Special Form,” the Covered

Cause of Loss is described as “risks of direct physical loss” which means any risk that can result in direct physical loss. That indicates that the risk must result in a loss or damage that is “direct” and “physical.” In addition, the Plaintiff’s construction would make the term “direct physical loss” meaningless because, if all “damage” is covered, why include a more restricted term of “direct physical loss” in the definition and use the disjunctive “or.” That is illogical and an unreasonable construction. Additionally, the Building and Personal Property Coverage Form includes a number of “Additional Coverages” in Section A.4, including debris removal, preservation of property, and pollutant clean up and removal. If “damage” is construed as broadly as the Plaintiff suggests, then those “additional coverages” would be unnecessary and meaningless because all damage would be covered. That is obviously not the intent of that policy language. Finally, if there is a covered loss, the policy includes a section captioned “Loss Payment” which provides as follows: “In the event of loss or damage covered by the Coverage Form, at our option, we will either: ... (2) pay the cost of repairing or replacing the lost or damaged property.” That provision makes no reference to payment of economic or consequential damages. In fact, the “Loss Payment” section does not authorize payment of any economic or consequential damages. Thus, a reasonable reading of “direct physical loss of or damage” requires that the words “direct” and “physical” apply to both “loss” and “damage.”

As indicated above, numerous courts have addressed this particular issue and agreed with the IRF’s reading. For instance, the court in *Ward General Ins. Services v. Employers Fire & Ins. Co.*, 7 Cal Rptr. 3d 844 (Cal. App. 4th 2003), wrote as follows:

Although plaintiff has not argued the point, we have considered whether the phrase “direct physical loss of or damage to Covered Property” should be interpreted to mean that coverage is afforded both for a “direct physical loss of Covered Property” and for damage to Covered Property,” whether the “damage” is physical or nonphysical, direct or indirect. We do not adopt this interpretation, however, because it constitutes a strained and clumsy meaning, not an ordinary and popular meaning. Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears. For example, if a writer were to say, “The orphanage relies on donors in the community to supply the children with used shirts, pants, dresses, and shoes,” the reader expects the adjective “used” to modify each element in the series of nouns, “shirts,” “pants,” “dresses,” and “shoes.” The reader does not expect the writer to have meant that donors supply “used shirts,” but supply “new” articles of the other types of clothing. Thus, we construe the words “direct physical” to modify both “loss of” and “damage to.”

7 Cal Rptr. 3d at 849. Similarly, in *Fountainbleu v. United States Fire Ins. Co.*, 2010 WL 11597704 (N.D. Ga. 2010), the court held that “the plain meaning of ‘direct physical loss or damage’ indicates that ‘direct physical’ is intended to modify both ‘loss’ and ‘damage.’ ... This is the most natural reading of the phrase, and courts may not strain the construction of the policy so as to discover an ambiguity.” 2010 WL 11597704, *6. See also, *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 581 S.E.2d 317 (plain reading of “direct

physical loss or damage” is that “direct physical” modifies both “loss” and “damage”); *Classic Laundry & Linen Corp. v. Travelers Cas. Ins. Co.*, 2017 WL 4350610, *4 (S.D.N.Y. 2017) (“[d]irect’ and ‘physical’ plainly modify both ‘loss’ and ‘damage’”).

In applying the requirement of “direct physical loss and damage” to the Plaintiff’s claim, the IRF takes the position that consequential and economic losses are not covered. Numerous categories of expenses claimed by the Plaintiff are consequential or economic and are not covered, including testing or sampling expenses;¹ expert consultant fees as well as attorney’s fees and costs incurred in responding to requirements of the South Carolina Department of Environment Control (“DHEC”) and the U.S. Environmental Protection Agency (“EPA”); expenses incurred in investigating the cause of the PCB contamination; expenses incurred to continue the operation of the waste water facilities,² and others.

In addition, subject to applicable exclusions, the IRF would cover only the expense related to the repair of “direct physical loss and damage” to the structures themselves. However, in its Rule 30(b)(6) deposition, the Plaintiff’s witnesses have confirmed that no testing of the structures was even performed until *after* the cleaning was completed. As a result, the Plaintiff cannot sustain its burden of proving that the structures, including any digesters or holding tanks at the three facilities, were actually damaged. In fact, as the Plaintiff’s Rule 30(b)(6) testimony already concedes, the levels of PCB contamination in all but three holding tanks at Pelham did not exceed the 50 ppm threshold. None of the PCB levels at the Mauldin and Lower Reedy facilities even approached that threshold. In fact, as the Plaintiff readily concedes, the biosolids at the Mauldin and Lower Reedy facilities could have been land applied as was its ordinary method of disposal, although the Plaintiff chose not to do so. Moreover, there was no reason to perform the cleaning that the Plaintiff engaged in at the Mauldin Road facility and the digesters there were never even cleaned. The same is also true with respect to the Lower Reedy facility.

2. “Covered Property”

¹ In *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), the South Carolina Court of Appeals ruled that “[s]ampling and the performance of chemical tests do not constitute ‘physical injury to or destruction of tangible property.’” 387 S.E.2d at 710.

² It is important to note that the Plaintiff did not purchase the Business Income Coverage Form (and Extra Expense) coverage which would have provided coverage for expenses incurred to continue operations of the facilities. Under that endorsement, “extra expense” is defined as “necessary expenses you incur during the ‘period of restoration’ that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.” The insured would be entitled to “any Extra Expense to avoid or minimize the suspension of business and to continue ‘operations’ at the described premises.” The fact that there is an additional endorsement that provides such consequential and economic damages further supports the IRF’s interpretation that the Building and Personal Property Coverage Form does not cover those types of damages or expenses.

The next component that requires close analysis is the term “covered property.” “Covered property” is a defined term in Section A.1 of the Building and Personal Property Coverage Form and is divided into the buildings or structures (including fixtures and permanently installed machinery and equipment) and the business personal property that is also described in a list of items covered. The Form also includes an illustrative but not exhaustive list of “property not covered” which includes “land” and “water.”

As stated above, the IRF takes the position that only “direct physical loss or damage” to the structures and installed equipment is covered. That would include the costs of decontaminating the digesters at the Pelham facility to the extent that the Plaintiff can provide a breakdown of those specific costs, which to date it has not -- either because of an unwillingness or inability to do so. *See, Sunex International, Inc. v. Travelers Indemnity Co.*, 185 F.Supp.2d 614, 617 (D.S.C. 2001) (“[t]he burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract”).

As for the business personal property, the Building and Personal Property Coverage Form provides no coverage for Pelham, Mauldin Road and Lower Reedy facilities. The declaration pages show no contents coverage was purchased by the Plaintiff for those facilities. Patricia Dennis, who is the Plaintiff’s controller, acknowledged this point in her 30(b)(6) testimony. Thus, no claim can be made for the loss or damage of personal property.

Additionally, the IRF takes the position that the sludge or biosolids after the sludge is processed do not constitute “covered property.” The evidence from the Plaintiff itself will show that the sludge in the digesters was 1-3% solids, meaning that it was 97-99% water. The policy form shows “water” and “land” are examples of property that is not covered. That listing is illustrative and not exhaustive (the operative phrase is “covered property does not include”). *See, Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600, 603 (Ct. App. 1991) (use of word “include” is illustrative and not one of limitation). Thus, the term “covered property” does not include sludge and biosolids. Those materials do not fit any aspect of the definition of “covered property.” Thus, the costs for decontamination or removal of sludge and water from the digesters, the subsequent storage, processing, and disposal of those materials are not “covered property.”

C. Ordinance or Law Exclusion

The Causes of Loss – Special Form includes an “Ordinance or Law Exclusion” which provides no coverage for a loss caused “directly or indirectly” by the “enforcement of any ordinance or law ... (1) regulating construction, use or repair of any property or (2) requiring the tearing down of any property, including the cost of removing the debris.” Importantly, this section of exclusions includes an anti-concurrent causation clause that reads: “Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”

The South Carolina Supreme Court has addressed the impact of an anti-concurrent causation clause in the case of *South Carolina Farm Bureau Ins. Co. v. Durham*, 380 S.C.

506, 671 S.E.2d 610 (2009). The anti-concurrent causation clause in that case read as follows: “Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” Thus, it is identical to the anti-concurrent causation clause in the IRF Policy. The Supreme Court explained the effect of the anti-concurrent causation clause as follows:

The majority of jurisdictions follow the efficient proximate cause doctrine which provides that in circumstances with two or more identifiable causes, the court looks to the cause which is determined to have set the chain of events in motion. If this “efficient proximate cause” is covered under the terms of the policy, then the loss is covered. The minority rule is the concurrent cause rule, which asks whether one of the causes of a loss is covered. If so, then the loss is covered notwithstanding the fact that there is also an excluded cause in the chain of causation. In the instant case, neither doctrine applies since the policy contains an anti-concurrent causation clause. The exclusion provides that “[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” Consequently, though the underground water pressure was not the sole cause of the loss or even the efficient proximate cause, it was a cause of the loss and so, the exclusion applies.

671 S.E.2d at 613. (Citations omitted).

In sum, where the policy includes an anti-concurrent causation clause, the Supreme Court has held that neither the efficient proximate cause rule nor the concurrent clause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss, such as vandalism, that is covered. Here, one of the causes for the loss is the enforcement by the EPA and DHEC of its regulations governing the remediation of PCBs. The IRF submits that the loss claimed by the Plaintiff was directly or at least indirectly caused by the enforcement of EPA and DHEC regulations governing a PCB remediation. That was a cause for the loss, and like in *Durham*, the exclusion applies. The Plaintiff’s claim is thus excluded under the Ordinance or Law Exclusion.

D. Additional Coverages

The Building and Personal Property Coverage Form includes Additional Coverages for such activities as “debris removal” and “pollutant clean up and removal.” The IRF has tendered the coverage for “pollutant clean up and removal” to the Plaintiff, which consisted of \$10,000 for each of the three facilities. That tender was not accepted. The Plaintiff has instead taken the position that additional coverage is not applicable.

The reference to the additional coverage for “debris removal” is significant because it demonstrates the intent that the expenses for debris removal do not fall within the scope of “direct physical loss or damage”; otherwise, the additional coverage would be unnecessary and meaningless. However, it is noted that the additional coverage for debris

removal does not apply to an environmental contamination loss as in this case. Section A.4.a.3 provides that “[t]his addition Coverage does not apply to costs to (a) extract ‘pollutants’ from land or water; or (b) remove, restore, or replace polluted land or water.”

II. Tort Liability Insurance Policy

There are a variety of reasons why the Plaintiff is not entitled to coverage or any benefit under the Tort Liability Insurance Policy. Any one of those reasons, as set forth below, is alone sufficient to deny coverage.

A. No Suit or Claim by Third-Party to be Covered

The Plaintiff cannot point to any suit or claim as defined by the Tort Liability Insurance Policy that was brought by any third party. There was never a complaint filed against the Plaintiff. Neither DHEC nor the EPA ever filed a complaint or an enforcement action. As the Plaintiff’s Rule 30(b)(6) witnesses confirm, it was never even threatened with an enforcement action. No consent order was issued, nor was one requested by DHEC or EPA. The EPA never advised the Plaintiff that it was treating it as a “potentially responsible party” under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). Indeed, at no time did the Plaintiff take the position that it was a “potentially responsible party” under CERCLA.

In *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970), the South Carolina Supreme Court ruled that “[b]oth the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play, there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained.” 176 S.E.2d at 129. *See also, Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 193 S.E.2d 527 (1972); *Evanston Ins. Co. v. R&L Dev. Corp.*, 2014 WL 1389803, *5 (D.S.C. 2014).

In sum, in the case at bar, there was never a complaint filed by a third party against the Plaintiff that was tendered to the IRF for a defense and indemnity. There was never even an enforcement action – nor the threat of one – from DHEC or the EPA. No one asserted that the Plaintiff was a “potentially responsible party” under CERCLA, and certainly no action to that effect was brought or even threatened. Without the institution of a suit, there is no duty to defend nor a duty to indemnify under the Tort Liability Insurance Policy.

B. Plaintiff Made No Tender for Defense or Indemnity

The Plaintiff, by its own admission, never made a tender to the IRF under the Tort Liability Insurance Policy. When the Plaintiff required legal assistance to address the PCB contamination, it hired an environmental lawyer, Tommy Lavender of Nexsen Pruet.

According to the Rule 30(b)(6) witnesses, there was never a request made to the IRF to provide a defense. The duty to defend was never triggered, and as a result, the Plaintiff cannot claim the duty to defend under the Tort Liability Insurance Policy was breached or that it is entitled to recover the legal expenses incurred in addressing the PCB contamination under the Tort Liability Insurance Policy. In fact, the very first mention made by the Plaintiff of a claim under the Tort Liability Insurance Policy was a letter dated October 7, 2016 from their counsel (Marcus Manos), and this litigation was commenced just ten days later on October 17, 2016.

C. Helena Chemical Does Not Support Plaintiff's Position

It is anticipated that the Plaintiff may rely in part on the case of *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004), to pursue its third-party claim. In that case, a chemical company brought an insurance coverage suit seeking reimbursement from various primary and excess insurers for its environmental cleanup costs. The Supreme Court's opinion states that EPA sent Helena a letter stating that the EPA considered Helena to be a "potentially responsible party" (PRP) under CERCLA for a hazardous and contaminated site. As to two additional sites, DHEC sent PRP letters. Helena subsequently entered into a settlement agreement with the EPA. The insurers denied coverage.

The Supreme Court first addressed whether the costs incurred by Helena were "damages" under a liability policy. The Court ruled in Helena's favor and concluded that "damages" under a general liability policy include environmental clean up costs. The Court nonetheless upheld the denial of coverage based upon application of the pollution exclusion.

The *Helena Chemical* case is easily distinguishable from the present case in that Helena received letters from the EPA and DHEC advising that it was a PRP. There is no such letter in this case. In addition, it is undisputed that neither the EPA nor DHEC alleged in any respect that the Plaintiff was a PRP. Also, there was never an enforcement action brought or threatened, nor was any agreement or consent order entered between the Plaintiff and the EPA or DHEC. In fact, there appears to be no evidence of any EPA involvement or oversight with the clean up activities undertaken at the Mauldin Road and Lower Reedy facilities given the low levels of PCBs detected in the biosolids at those facilities. This is critical because a general liability policy, or in this case the Tort Liability Insurance Policy, provides third-party *liability* coverage only. **It covers an insured for its wrongdoing or fault, i.e., its liability.** Thus, because there are no allegations of wrongdoing or fault by the Plaintiff, there is nothing that would be covered or should be covered under a third-party liability policy.

D. Coverage is Excluded by Owned Property Exclusion

The Tort Liability Insurance Policy issued by the IRF to ReWa includes an "Owned Property Exclusion" which provides as follows: "This insurance does not apply to property damage to property owned or occupied by or rented to the insured." Importantly, no third-

party has brought suit against the Plaintiff for PCB contamination to another's property. The Plaintiff concedes, in fact, that the PCB contamination was contained to its own property and no PCBs were released from its facilities into the waters of the State. Thus, pursuant to the Tort Liability Insurance Policy, the Plaintiff is seeking to be indemnified for alleged property damage to its own property. That claim falls squarely within the scope of the Owned Property Exclusion.

That very exclusion has been interpreted and applied in the case of *City of Abbeville v. South Carolina Insurance Reserve Fund*, 323 S.C. 60, 448 S.E.2d 579 (Ct. App. 1994). That case involved an insurance claim for fire damage to a public monument located in the Abbeville public square. The Court of Appeals found that the monument was "at the very least" within the care, custody and control of the City of Abbeville, and thus "falls under the specific policy exclusion." The Court of Appeals denied coverage under the identical Tort Liability Insurance Policy as in the present case.

E. Claim was not Caused by an Occurrence

The insuring agreement for the Tort Liability Insurance Policy provides coverage for "personal Injury or property damage to which this applies caused by an occurrence." The term "occurrence" is defined to mean "an accident, including continuous or repeated exposure to conditions, which result in personal injury or property damage neither expected nor intended from the standpoint of the insured." The South Carolina Court of Appeals has explained that "accident" "should be defined according to the usual understanding of the term's significance to the ordinary person" and that the "South Carolina Supreme Court has interpreted the term 'accident' to mean 'an effect which the actor did not intend to produce and cannot be charged with the design of producing.'" *Manufacturers and Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 498 S.E.2d 222, 226 (Ct. App. 1998).

Clearly, the intentional dumping of PCBs, an illegal substance, into grease traps cannot qualify as an accident. Vandalism, which the parties agree is a correct characterization of the offending conduct, cannot be accidental – and certainly not under the operative facts. Hence the Plaintiff cannot demonstrate property damage caused by an occurrence. In addition, the Tort Liability Insurance Policy does not provide coverage for Timothy Howard, the perpetrator of the vandalism, in that Howard is not a governmental actor and does not qualify as an "insured" under the policy. Indeed, the IRF's enabling legislation, S.C. Code Ann. § 1-11-140, does not allow for the IRF to insure a non-governmental person.

F. No Judgment by Trial or Settlement Agreement

Section VII.5 of the Tort Liability Insurance Policy states: "No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the complaint and the Fund." With respect to the Plaintiff's PCB contamination claim, the Plaintiff's "obligation to pay" has not been established by a

judgment after an actual trial or by a settlement agreement. There has not been a settlement agreement with a third-party, and certainly not a settlement to which the IRF agreed.

G. No Coverage for Voluntary Payments Made or Expenses Incurred

Section VII.4.c of the Tort Liability Insurance Policy states: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident." The Plaintiff is barred from recovery by its failure to comply with this provision. As indicated above, the Plaintiff failed to provide notice of a claim or suit by any third party nor make a tender of that claim or suit for a defense and indemnity under the Tort Liability Insurance Policy. To the extent, the Plaintiff voluntarily made any payments or expended funds to resolve such a claim, it is now precluded from seeking indemnity from the IRF.

H. Statute of Limitations Defense

The Plaintiff's causes of action related to coverage under the Tort Liability Insurance Coverage are barred by the applicable statutes of limitations -- three years for the declaratory judgment and breach of contract claims and two years for the bad faith claim. As indicated, the very first mention made by the Plaintiff of a claim made pursuant to the Tort Liability Insurance Policy was a letter dated October 7, 2016 from their counsel (Marcus Manos). The evidence will show that no prior claim was made by the Plaintiff seeking coverage under the Tort Liability Insurance Policy.

On June 23, 2015, the Plaintiff and the IRF entered into a Tolling Agreement, which was renewed several times through the date of October 17, 2016, which is the date that the Plaintiff did file its original Complaint. The Tolling Agreement and the amendments defined the term "Claims" by specific reference to Policy Number F130230115, which is a reference only to the Building and Personal Property Insurance Policy. The Tort Liability Insurance Policy has a different policy number, specifically T130230114, which is not referenced in the Tolling Agreements.

The recital for the Tolling Agreement specifically states: "Claimant has asserted claims for coverage under Policy Number F130230115 issued by the South Carolina Budget and Control Board, Insurance Reserve Fund (hereinafter "Claims")." This demonstrates that the Plaintiff had not made claims pursuant to the Tort Liability Insurance Policy when the Tolling Agreement was entered, such claims were not contemplated by the parties are being included in the Tolling Agreements, and thus the Plaintiff's claims related thereto are now time-barred.

I. Limits of Liability Under Tort Liability Insurance Policy

Because no third-party brought any suit against the Plaintiff, it is only a guess as to the cause of action for which the Plaintiff now seeks indemnity. Presumably the Plaintiff is seeking indemnity for a tort, and as a result, the limit of liability would be \$300,000 per occurrence.

III. Bad Faith Claim

A. Elements of Bad Faith Claim

In *Nichols v. State Farm Mut. Automobile Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983), the South Carolina Supreme Court recognized an action for bad faith refusal to pay benefits under an insurance policy. *Nichols* provides that "if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action." 306 S.E.2d at 619. To establish a bad faith claim under South Carolina law the insured must plead and prove the following elements:

1. The existence of a mutually binding contract of insurance between the plaintiff and defendant;
2. A refusal by the insured to pay benefits due under the contract;
3. Resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; and
4. Causing damage to the insured.

Bartlett v. Nationwide Mut. Ins. Co., 290 S.C. 154, 348 S.E.2d 530 (Ct. App. 1986).

B. Bad Faith Claim Governed by Tort Claims Act

In *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993), the South Carolina Supreme Court ruled that a bad faith cause of action is a tort claim, not a contract claim. Therefore, "as an action in tort, the South Carolina Tort Claims Act applies." 437 S.E.2d at 10. In that case, the Supreme Court did conclude that a bad faith could be asserted against the Insurance Reserve Fund, but the Court also recognized that the claim was properly dismissed because the insurance proceeds claimed exceeded the monetary caps established by S.C. Code Ann. § 15-78-120. The same is true in the present case.

C. Tort Claims Act Defenses and Limitations

To the extent that the Court were even to find that IRF acted in bad faith in any respect, the monetary caps under the Tort Claims Act would apply. Liability for bad faith would be capped at \$300,000 as required by S.C. Code Ann. § 15-78-120. In addition, punitive damages are not recoverable against the IRF. See, S.C. Code Ann. § 15-78-120(b).

D. Tort Claims Act Precludes Recovery of Attorney's Fees

The Defendant IRF cannot as a matter of law be held liable for attorney's fees on a claim brought under the South Carolina Tort Claims Act. As noted above, the Supreme Court has already ruled, to the extent a bad faith claim may be asserted against the IRF, it is a tort that is governed under the terms and limitations of the Tort Claims Act. *See, Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993).

In *Knoke v. South Carolina Department of Parks, Recreation and Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1996), the Supreme Court held that "[t]he Tort Claims Act ... is the exclusive civil remedy for governmental torts, and provides for an award of an attorney's fee only as a sanction for filing frivolous pleadings or motions." 478 S.E.2d at 260, *citing* S.C. Code Ann. § 15-78-120(c). Thus, attorney's fees are not recoverable for any tort claim, including Plaintiff's bad faith claim.

E. Attorney's Fees are Not Recoverable as Damages in Bad Faith Case

Through discovery, it has been determined that the only damages being claimed by the Plaintiff in its bad faith claim are the attorney's fees incurred in retaining Tommy Lavender and the Nexsen Pruet law firm to address insurance coverage issues with the IRF and its retained counsel prior to the institution of the lawsuit. Lavender and the Nexsen Pruet firm had already been retained by the Plaintiff and were providing representation at an hourly rate of \$410 (and later at \$460) to address the environmental issues presented by the PCB contamination. Lavender as well as Marcus Manos then sent some letters and engaged in negotiations with the IRF and its counsel at that same rates, which are not reasonable hourly rates in this jurisdiction for insurance coverage disputes. At any rate, in the case of *Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc.*, 554 Fed. Appx. 176 (4th Cir. 2014), the Fourth Circuit Court of Appeals, applying South Carolina law, found that "[c]ourts applying South Carolina bad faith law have not awarded attorney's fees as consequential damages in tort" and accordingly ruled that "attorney's fees are unavailable to MI [the insured] as consequential damages." 554 Fed. Appx. at 191.

F. No Standing to Sue as "Person" under S.C. Code Ann. § 15-78-50(a)

In *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993), the South Carolina Supreme Court did not consider or address whether a governmental entity even has standing or the capacity to bring a tort claim, such as a bad faith claim, under the provisions of the Tort Claims Act against another governmental entity.³

³ There is no indication that this issue of statutory construction was even raised to the Supreme Court in the *Charleston County School District* case. It is axiomatic that an appellate courts' silence on an issue does not mean the issue does not exist or is not meritorious. As Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak

The Insurance Reserve Fund submits that the Plaintiff, as a governmental entity, is not a "person" under S.C. Code Ann. § 15-78-50(a) and thus lacks standing or the capacity to bring a tort claim under the South Carolina Tort Claims Act against another governmental entity. S.C. Code Ann. § 15-78-50(a) provides that "[a]ny person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter provided." See, S.C. Code Ann. § 15-78-50(a). Thus, only a "person" may file suit or make a claim under the Tort Claims Act. A non-person, however, is barred by sovereign immunity from pursuing any monetary relief for a tort committed by a governmental entity.

The term "person" is not defined in the Tort Claims Act. However, the term "person" is typically limited to natural persons unless the General Assembly specifically defines the term to be inclusive of governmental entities. See *generally*, 1987 S.C. Op. Atty. Gen. No. 87-90, November 10, 1987, 1987 WL 245498. Generally, when the General Assembly has intended "person," as used in a statutory scheme, to be inclusive of governmental entities, it will provide a definition of "person" that expressly includes governmental entities. See *e.g.*, S.C. Code Ann. §§ 11-19-10(d), 15-47-110(4), 27-29-10(3), 34-6-20(6), 34-26-110(13), 36-1-201(27), 44-54-30(10), 44-55-2320(4), 48-43-10(C), and 58-33-(20). However, with respect to the Tort Claims Act, the term "person" is undefined.

Importantly, the General Assembly has expressly required that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." See, S.C. Code Ann. § 15-78-20(f). See *also*, *Baker v. Sanders*, 301 S.C. 170, 392 S.E.2d 229 (1990); *Strother v. Lexington County Recreation Commission*, 332 S.C. 54, 504 S.E.2d 117 (1998). Moreover, prior to the abrogation of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), there was no basis for one governmental entity to sue another governmental entity in tort. Therefore, with the reinstatement of sovereign immunity by the enactment of the Tort Claims Act, the Defendant IRF submits that, if the General Assembly had intended to allow government against government tort claims, it would have made that clear in the Act. The absence of a definition of "person" inclusive of governmental entities, together with the requirement of a liberal construction of the Act in favor of limiting governmental liability, compel the conclusion that the Plaintiff is not a "person" with the capacity to sue the IRF in tort.

IV. Plaintiff's Entitlement to Attorney's Fees

A. S.C. Code Ann. § 38-59-40

The Plaintiff has made a claim for attorney's fees under S.C. Code Ann. § 38-59-40;

unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 (Ct. App. 1991).

however, the Insurance Reserve Fund is not an "insurer" under Title 38 of the Code of Laws. S.C. Code Ann. § 38-1-20(33), which is the definition section for Title 38, defines an "insurer" as "a corporation, fraternal organization, burial association, other association, partnership, society, order, individual, or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance or surety business, including the exchanging of reciprocal or interinsurance contracts between individuals, partnerships, and corporations." *See*, S.C. Code Ann. § 38-1-20(33). In *Davis v. State of South Carolina Budget & Control Board*, 298 S.C. 135, 378 S.E.2d 604 (Ct. App. 1989), the Court of Appeals looked at this very definition of "insurer" and concluded that the Insurance Reserve Fund *did not meet that definition*. The Court of Appeals explained as follows:

The State Insurance Reserve Fund falls under neither definition. It is a special fund established and administered by the State Budget and Control Board under direct authority from the General Assembly. The Fund is not a corporation, fraternal organization, partnership, association, individual, or any of the other entities coming within the statutory definition of "insurer." Neither is it required to be licensed or authorized to issue automobile insurance policies by the South Carolina Insurance Commission as are the "automobile insurance carriers" covered by the statute. We, therefore, hold that the Fund is not an "automobile insurance carrier" within the meaning of Section 38-77-160 and the provisions of that section do not apply to the Fund.

378 S.E.2d at 606. *See also*, *Sanders v. American Southern Ins. Co.*, 325 S.C. 628, 481 S.E.2d 717 (Ct. App. 1997) (citing *Davis* for same statutory construction). Therefore, if the Insurance Reserve Fund does not meet the definition of "insurer" as contained in S.C. Code Ann. § 38-1-20(33), then the provisions of S.C. Code Ann. § 38-59-40 do not apply to the Fund.

In addition, the Defendant IRF submits that there is no clear and explicit waiver of sovereign immunity in S.C. Code Ann. § 38-59-40 or its legislative history. As a result, the Fund is entitled to absolute sovereign immunity for the Plaintiff's Section 38-59-40 claim for attorney's fees. Prior to the decision of the South Carolina Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. In *McCall*, the Supreme Court abolished sovereign immunity. However, in the following year, the General Assembly enacted the South Carolina Tort Claims Act "which reinstated sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002), *reversed on other grounds*, 538 U.S. 456 (2003). "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions." *Id.* The Tort Claims Act "removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act." *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736, 739 (Ct. App. 2001).

In enacting S.C. Code Ann. § 38-59-40, the General Assembly did not make it clear that the statute would be applicable to governmental entities. Certainly, the General Assembly did not clearly and explicitly provide for a waiver of sovereign immunity.⁴ There is no expression, let alone an unequivocal one, in S.C. Code Ann. § 38-59-40 that the General Assembly intended to waive sovereign immunity and make that statute applicable to the State and specifically the IRF. In fact, the legislative history shows that S.C. Code Ann. § 38-59-40 was enacted prior to *McCall v. Batson*, when sovereign immunity was clearly the law. Thus, for this additional reason, the IRF enjoys sovereign immunity with respect to the Plaintiff's claim for attorney's fees under S.C. Code Ann. § 38-59-40.

V. Plaintiffs' Prayer for Pre-Judgment Interest

A. Sovereign Immunity

As indicated above, prior to the decision of the South Carolina Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. In *McCall*, the Supreme Court abolished sovereign immunity. However, in the following year, the South Carolina General Assembly enacted the South Carolina Tort Claims Act "which reinstated sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002), *reversed on other grounds*, 538 U.S. 456 (2003). "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions." *Id.* The Tort Claims Act "removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act." *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736, 739 (Ct. App. 2001). *See also, Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) ("In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity").

In the Tort Claims Act, the General Assembly affirmatively states that it "intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, *only to the extent provided herein.*" S.C.

⁴ In *Reed v. Medlin*, 276 S.C. 604, 281 S.E.2d 125 (1981), the South Carolina Supreme Court explained that the waiver of sovereign immunity by the General Assembly must be "clear and explicit." 281 S.E.2d at 126. This is in accord with United States Supreme Court case law. In *Lane v. Pena*, 518 U.S. 187 (1996), the Court held that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." 518 U.S. at 192. *See also, United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

Code Ann. § 15-78-20(b). (Emphasis added). "All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." *Id.*

Thus, it is well settled that in reaction to *McCall*, the General Assembly reinstated sovereign immunity subject *only* to the limited waiver specifically provided in the Tort Claims Act. The Act does not include a waiver of sovereign immunity for a non-tort causes of action nor does it provide for the waiver of sovereign immunity for pre-judgment interest. Moreover, the General Assembly has not enacted any other legislation that expressly waives sovereign immunity for pre-judgment interest.

Prior to *McCall*, it was well settled law in South Carolina that pre-judgment interest could not be recovered against a governmental entity based upon sovereign immunity. *See, Division of General Services v. Ulmer*, 256 S.C. 523, 183 S.E.2d 315, 319 (1971) (pre-judgment interest "is not allowed in this case by virtue of the doctrine of sovereign immunity"). This is consistent with the common law which likewise bars an award of pre-judgment interest against a governmental entity on unpaid accounts or claims, unless specifically allowed by contract or statute. *See, Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 304 (1923). Given the reinstatement of sovereign immunity with the enactment of the Tort Claims Act and given that *McCall* addresses the tort liability of the State and its political subdivisions, the common law remains intact and thus pre-judgment interest is not recoverable against a governmental entity unless specifically allowed by contract or statute. The Tort Claims Act specifically states that "[a]ll other immunities applicable to a governmental entity, its employees, and agents are expressly preserved," which would be inclusive of sovereign immunity for pre-judgment interest. S.C. Code Ann. § 15-78-20(b). The General Assembly's intent that pre-judgment interest should remain non-recoverable against a governmental entity is further made clear by S.C. Code Ann. § 15-78-120(b), which expressly bars an award of "interest prior to judgment" in tort claims. *See*, S.C. Code Ann. § 15-78-120(b).

On this issue, the reasoning of Justice Pleicones in his concurrence in *Ellisdon Construction, Inc. v. Clemson University*, 391 S.C. 552, 707 S.E.2d 399 (2011), is also instructive. In that case, the Supreme Court reversed an award of pre-judgment interest to the plaintiff contractor. Justice Pleicones concurred in that result finding that the contractor "is barred from recovering prejudgment interest by the doctrine of sovereign immunity." 707 S.E.2d at 402. Justice Pleicones further explained that "[i]t is well-settled that the doctrine bars recovery of interest against the State 'unless [the State has been] bound by an act of the Legislature or by a lawful contract of its executive officers.'" *Id.* Justice Pleicones also discussed why *McCall v. Batson* does not require a different result and why the common law rule as announced in such cases as *Ulmer* remains applicable to contract actions. He explained:

McCall included Appendix A, a list of 122 cases, and provided that these cases were "overruled to the extent that they hold that an action may not be maintained against the State without its consent." Although *Monarch Mills* and *Ulmer* are on that list, their holdings that the State is not liable for prejudgment interest except when bound by statute or by contract remain

unaffected as the right to this interest is not a matter of tort liability. Since § 34-31-20 does not allow for recovery of interest against the State, and because the parties' contract is silent as to this type of interest, I find that appellant's request for prejudgment interest is barred by the doctrine of sovereign immunity.

Id.

The same is true in the present case. There is no statute that allows for the Plaintiff's recovery of pre-judgment interest, and there is no contract providing for an award of pre-judgment interest. Hence, the Plaintiff's prayer for pre-judgment interest is barred by sovereign immunity.

B. Damages are Unliquidated and Not Sum Certain

South Carolina law does not allow for pre-judgment interest to be recovered in an action where a plaintiff's damages are not a sum certain or capable of being reduced to certainty, that is, where the damages are unliquidated. The Court of Appeals has explained that "[i]n the absence of agreement or statute, interest is not recoverable on an unliquidated demand. A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765, 769 (Ct. App. 2007). "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." 656 S.E.2d at 770.

In the case at bar, the Plaintiff's Amended Complaint is not verified and does not seek a sum specific in damages. The only mention of damages in the Amended Complaint is paragraph 66, which states that the Plaintiff "seeks actual damages in excess of \$100,000 for the Fund's breach to be determined by the trier of fact." See, Amended Complaint, ¶ 66. That certainly is not suggestive of any sum certain being claimed. In addition, the Plaintiff's claimed damages have changed multiple times during the claims process, even as recently as in the past week. The Court is thus respectfully requested to deny an award of pre-judgment interest on this additional basis.

C. Waiver/Estoppel

The Defendant IRF further submits that the Plaintiffs did not even seek pre-judgment interest in this litigation until the Amended Complaint, which was filed on June 15, 2018. The original Complaint filed on October 17, 2016, did not include a prayer for pre-judgment interest. It is well settled that pre-judgment interest is waived if not pled in the complaint. See, *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765, 768 (Ct. App. 2007); *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003). Therefore, as an alternative position, the IRF contends that the Plaintiff should be held to have waived its claim or be estopped from claiming any pre-judgment interest that pre-dates June 15, 2018.

Respectfully submitted,

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*Counsel for Defendant South Carolina
Insurance Reserve Fund*

January 17, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
 Renewable Water Resources,	)	
	)	Civil Action No. 2016-CP-23-5905
Plaintiff,	)	
	)	
v.	)	
	)	
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability	)	
Authority of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

**NOTICE OF MOTION AND MOTION FOR JUDGMENT
AS A MATTER OF LAW AND/OR INVOLUNTARY NONSUIT,
MOTION TO ALTER OR AMEND JUDGMENT AND/OR
MOTION FOR RECONSIDERATION, AND MOTION FOR NEW TRIAL**

TO: THE HONORABLE CHARLES B. SIMMONS, JR.

RIVERS S. STILWELL, WILLIAM S. BROWN, AND KATIE E. TOWERY,
COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendant Insurance Reserve Fund (“IRF”) will move before the Honorable Charles B. Simmons, Jr. at the Greenville County Judicial Center, Greenville, South Carolina, at such time and place as may be set by the Court, for an Order pursuant to Rule 41(b), Rule 52(a), Rule 52(b), Rule 59(a), and Rule 59(e), SCRCF, altering, amending, and/or reconsidering the Order/Judgment dated March 18, 2020, so as to grant an involuntary nonsuit and/or judgment as a matter of law to the Defendant or otherwise grant a new trial absolute or otherwise reduce the amount of the judgment. The Defendant further requests the Court to amend the Order to set forth the findings of fact and

conclusions of law with sufficient specificity and detail to allow for proper appellate review. Counsel for the Defendant received a copy of the Order on March 18, 2020.

The Defendant's motion is based on the following grounds:

I. Findings of Fact

1. The Court failed to make any findings of fact as follows: The Plaintiff Renewable Water Resources ("ReWa") submitted a "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" to DHEC on April 15, 2014. The Plan as submitted included the following:

The Lower Reed and Mauldin Road WRRFs have a combined total of approximately 11.3 million gallons of thickened digested solids in storage with low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin Road and from 1.2 ppm to 4.2 ppm at Lower Reedy). Of this total volume, Lower Reedy has approximately 9.5 million gallons in storage. ReWa does not currently intend to land apply this material, even though current regulations would allow land application.

(Pl. Ex. 38). These findings, which are undisputed based on the trial record, are relevant and material to a proper adjudication of this action because they are an admission by ReWa that the regulation in effect on April 15, 2014, did allow for the land application of the stored biosolids at both the Mauldin Road and Lower Reedy facilities.

2. The Court failed to make any findings of fact as follows: Despite acknowledging that current DHEC and EPA regulations in April 2014 allowed for the land application of the contaminated biosolids at the Mauldin Road and Lower Reedy facilities, ReWa did not land apply those biosolids. ReWa did not re-commence land application of the biosolids at Lower Reedy until December 2014, and at Mauldin Road until May 2015. Up through those dates, ReWa was processing both the stored biosolids at those facilities as well as ongoing flows and has claimed the increased costs for that processing in its claim made to the IRF. ReWa personnel never consulted with the IRF about its decision not to land apply the stored biosolids or the

ongoing flows at those facilities. These findings, which are undisputed based on the trial record, are relevant and material to a proper adjudication of this action because the decision by ReWa to process and dispose of the stored biosolids and ongoing flows at the Mauldin Road and Lower Reedy facilities in a landfill (rather than by the customary land application) was solely a business decision made by ReWa without consultation or approval from the IRF and is not covered under the Building and Personal Property Insurance Policy.

3. The Court failed to make findings of fact as follows: The remediation at the Pelham facility began on November 14, 2013 and was completed on February 19, 2014. However, ReWa did not re-commence land application of the biosolids at the Pelham facility until March 2016. After the remediation of the Pelham facility was completed on February 19, 2014, ReWa continued to process the ongoing flows at that facility and has claimed the increased costs for that processing in its claim made to the IRF. ReWa personnel never consulted with the IRF about its decision not to land apply the ongoing flows after the clean-up of the contaminated PCBs at Pelham was completed. These findings, which are undisputed based on the trial record, are relevant and material to a proper adjudication of this action because the decision by ReWa to process and dispose of the ongoing flows at the Pelham facility in a landfill (rather than by the customary land application) was solely a business decision made by ReWa without consultation or approval from the IRF and is not covered under the Building and Personal Property Insurance Policy.

4. The Court failed to make findings of fact as follows:

* At the Pelham facility, the structures that contained biosolids that tested positive for PCBs were Digester 1, Biosolid Holding Tanks 3, 4, 5, and 6, Biosolids Overflow Tanks 1 and 2, two wet wells and the influent pump station. All of those structures were constructed of concrete. None of those structures required demolition and replacement. There was no equipment in those structures that required removal and replacement. The structures were cleaned by pressure washing.

* At the Lower Reedy facility, the structures that contained biosolids that tested positive for PCBs were Holding Tanks 4 and 5. The test results for Digester 1 was non-detect for PCBs. Holding Tanks 4 and 5 were constructed of concrete. None of those structures required demolition and replacement. There was no equipment in those structures that required removal and replacement. The structures were cleaned by pressure washing.

* At the Mauldin Road facility, the structures that contained biosolids that tested positive for PCBs were Digesters 2 and 3, Biosolid Holding Tanks 3, 4, 5, 6, 7, and 8, Biosolid Tanks 1 and 2 (old digesters). All of those structures were constructed of concrete. None of those structures required demolition and replacement. There was no equipment in those structures that required removal and replacement. The structures were cleaned by pressure washing.

These findings of fact are undisputed on the record and are critical and necessary to a proper adjudication of this case.

5. The Court failed to make findings of fact to address a number of the expenses challenged by the IRF including the following: the expenditure for the lake tank that was never used at the Pelham facility and was not required or recommended by AECOM; the additional cost for removing the biosolids from digester #1 at the Pelham facility where about 15,000 gallons of water had to be added to the digester because ReWa personnel had drained the water from that digester without removing the biosolids; the expense for “Little John Portable Toilets which Glenn McManus was unable to explain; the expense charged for the Greenville News which McManus was unable to explain; the purchase of a carport at the Lower Reedy facility; the Lower Reedy expenditure to Greer Roofing, LLC; the discrepancies in the charges for chemicals as brought forth in the cross-examination of McManus including the fact that the costs for chemicals at Mauldin Road (almost \$1.5 million) was ten times the amount spent at Lower Reedy and 15 times the amount spent at Pelham and the fact that McManus could not verify the chemical charges were accurate; and the expenditures for chemicals at Mauldin Road prior to the date that the remediation at that facility began. The Court has failed to make findings of fact regarding these issues and also failed to make deductions in the amount awarded for the various

expenses that Glen McManus could not testify to, explain, or justify during both his direct examination and his cross-examination. In accordance with Rule 52(b), SCRCP, the Court is respectfully requested to make such findings of fact to allow for appropriate appellate review.

6. The Court failed to make any findings of fact regarding the lengthy delays by ReWa in beginning the remediations at the Mauldin Road and Lower Reedy facilities and whether those delays were reasonable and, if so, why they were reasonable delays. The Court gave no consideration for the fact that ReWa was charging the IRF for the costs associated with processing the ongoing flows at the Mauldin Road and Lower Reedy facilities, when those facilities could have been remediated much sooner than they were. The Court also failed to make findings of fact regarding why it was reasonable for ReWa to continue to charge the IRF for costs associated with processing ongoing flows after the Pelham facility was remediated. In fact, the Court made no findings of fact to explain why it was reasonable for ReWa to charge the IRF for any costs associated for processing ongoing plant flows at all three facilities. In accordance with Rule 52(b), SCRCP, the Court is respectfully requested to make such findings of fact to allow for appropriate appellate review.

7. The Court made no findings of fact as to why it accepted the calculation of the “Regular Cost of Processing Solids for Land Application” set forth in Plaintiff’s Exhibit 101 rather than the calculation set forth in Defendant’s Exhibit 16, when the latter provided for a greater offset and was furnished by ReWa as part of its Rule 30(b)(6) deposition testimony which should be binding as an admission on ReWa. The Court also failed to make findings of fact to take into account the errors in the calculations and the discrepancies in the calculations that were addressed in the cross-examination of Glenn McManus. In addition, the Court failed to consider that McManus testified that he could not verify that the calculations in Plaintiff’s Exhibit 101 were accurate because he did not gather, prepare, or review the underlying data.

Further, the underlying data was never placed in evidence, and as a result, the Court could not make an independent determination of the correct calculation. In accordance with Rule 52(b), SCRCp, the Court is respectfully requested to make such findings of fact to allow for appropriate appellate review. The Court is also respectfully requested on reconsideration to allow the offset as set forth in Defendant's Exhibit 16, that being \$2,603.665.51, in the event the Court does not rule that ReWa cannot claim the expense of ongoing plant flows.

8. The Court failed to make findings of fact to explain why the Court found the damages amounts in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 were reliable and properly admissible under Rule 1006 when the underlying data, including invoices, were never admitted into evidence. ReWa, through the testifying damages witness, Glenn McManus, admitted to many errors and inaccuracies in those exhibits. He also admitted that he had no role in the actual preparation of Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100; yet, he was the witness who purportedly provided the foundation to admit those exhibits. The Court is urged on reconsideration to rule that Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 were admitted in error and should be stricken from the record.

9. Additionally, Glenn McManus admitted to not knowing what most of the expenditures set out in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 were for and that he had not verified that each of the entries in those summary documents was accurate and reflected an expense that was actually incurred by ReWa for the remediation of the three facilities. McManus admitted that he spent only half a day in reviewing Plaintiff's Exhibit 100 and had not taken the necessary steps to verify the accuracy of all of the entries set forth in that summary exhibit. McManus also admitted that the entries on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 do not provide any detail or even a brief explanation of the work performed or the item purchased. McManus thus admitted that if the Court attempted to determine what a particular line item in

Plaintiff's Exhibit 100 was for, *there is no evidence in the record to make that determination*. He admitted that the only way for the Court to make that determination was to look at the underlying information which was not in evidence. Yet, the summary exhibit, Plaintiff's Exhibit 100, does not at the very least include a Bates reference so that the underlying information could even be accessed from the documents produced in discovery. In effect, ReWa presented Plaintiff's Exhibit 100 in such a format where it was virtually unverifiable; yet, the Court made no such determination and nonetheless admitted Plaintiff's Exhibit 100 into evidence under Rule 1006. Moreover, despite all of the admitted shortcomings, deficiencies, and inaccuracies in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, the Court nonetheless ruled that "such costs and expenses incurred by ReWa were reasonable and necessary to remediate and repair its facilities and prevent further harm." (Order, p. 14). There was not, however, sufficient evidence in the record to allow the Court to make that determination. Instead, the Court, as factfinder, is speculating that each and every cost item was reasonable and necessary.

10. Additionally, the Court failed to hold ReWa to its burden of proof. Instead, the Court improperly shifted the burden of proof to the Defendant. In its Order, the Court rejected only three items on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, and those were all entries that the Defendant challenged during the cross-examination of Glenn McManus. Therefore, it is clear that any items that were not challenged by the Defendant were accepted by the Court as reliable, reasonable, and necessary.

II. Conclusions of Law

1. In the initial section of the Conclusions of Law captioned "ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required," the Court made several rulings that are in error and warrant reconsideration. The Court ruled that the Toxic Substance Control Act (TSCA) regulates the remediation required after contamination where the PCBs are at a level

greater than 50 parts per million (ppm) concentration.¹ The Court then proceeds to address the Emergency Regulation adopted by the South Carolina Department of Health and Environmental Control (“DHEC”) on September 25, 2013. The Court, however, fails to recognize or include in its Order the time period that the Emergency Regulation was in effect. The Emergency Regulation was effective on September 25, 2013, for a period of ninety days. Thereafter, on December 23, 2013, DHEC re-filed the same verbatim Emergency Regulation. The re-filed Emergency Regulation was effective on December 23, 2013, for a period of ninety days. The re-filed Emergency Regulation thus expired on March 23, 2014, which is a critical point that the Court overlooked. The Court also overlooked that from March 23, 2014 until June 27, 2014, there were no regulations by DHEC in place. Then, on June 27, 2014, DHEC promulgated pursuant to the Administrative Procedures Act amendments to Sections 503 (domestic sludge) and 504 (industrial sludge) of DHEC Regulation 61-9 entitled “Water Pollution Control Permits.” The amendments were published in the South Carolina State Register on June 27, 2014, and were effective on that date. Those amendments did not prohibit the land application of PCBs at a level less than 50 mg/kg concentration. The Court also overlooks that ReWa itself has admitted in its “Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities,” as submitted to DHEC on April 15, 2014, that “ReWa does not currently intend to land apply this material, ***even though current regulations would allow land application.***” (Pl. Ex. 38). (Emphasis added). Therefore, this Court should have ruled as a matter of law that after the expiration of the Emergency Regulation on March 23, 2014, ReWa was *not prohibited* by state or federal law from disposing of biosolids containing PCBs at a level less than 50 mg/kg by land application. In addition, only while the Emergency

¹ The Court chose to use the ppm measurement rather than the more proper milligrams per kilogram (mg/kg).

Regulation was in effect was ReWa required to dispose of biosolids containing PCBs at a level less than 50 mg/kg in a local landfill.

In footnote number 3, by using the term “likely” the Court makes an indefinite ruling of law as follows: “since the Emergency Reg. was enacted to address the PCB contamination, it *likely* applied to all contaminated materials in ReWa’s possession at the time it was implemented.” (Emphasis added). The applicability of the Emergency Regulation and when it was in effect is an issue of law -- either the Emergency Regulation was in effect or it was not. The Court should decide such an issue of law with certainty -- not as a possibility or probability. It is not appropriate for the Court to make a “likely” ruling of law. Further, the Court cites no law, statutory or case law, to support its premise that the Emergency Regulation “likely” remained in effect after its March 23, 2014 expiration. Clearly, there is *no law* to support that premise. It is elementary that an emergency regulation, like any other law, does not remain in effect and binding after it expires. In sum, the Defendant submits that the Emergency Regulation was not in effect after it expired on March 23, 2014. The Court has erred in not making that definitive ruling.

Nonetheless, even if the Emergency Regulation applied to the stored biosolids on March 23, 2014, as the Court found without supporting authority to be “likely,” there is certainly no reasonable or cogent argument that can be made that the Emergency Regulation applied *to the ongoing flows after that date*; yet, the Court made no such distinction and applies the Emergency Regulation to all stored biosolids and all ongoing flows at all three facilities after March 23, 2014 *and all the way into 2016*. In fact, the Court made no determination of the expenses incurred by ReWa for processing the ongoing flows after March 23, 2014, at which point the Emergency Regulation clearly expired. The Court also makes no mention of the permanent regulation adopted on June 27, 2014, which allowed for the land application of PCBs at a level

less than 50 mg/kg concentration, *which includes all biosolids processed at Pelham, Mauldin Road, and Lower Reedy on or after June 27, 2014.* The Court also fails to address whether that permanent regulation was applicable to the disposal of the biosolids and ongoing flows after June 27, 2014 -- which of course, it was. These critical issues of law warrant reconsideration and, at the very least, a more detailed discussion so as to allow for appropriate appellate review.

2. The Court thus failed to properly consider that the disposal of all stored biosolids and the ongoing flows at the Mauldin Road and Lower Reedy facilities were permitted by law to be land applied. Critically, and absent from the Court's findings of fact, the remediation at the Pelham facility began on November 14, 2013 and was completed on February 19, 2014. The remediation at Lower Reedy occurred next and was begun in approximately July 2014 and was completed in mid-November 2014. The remediation at Mauldin Road was started in approximately December 2014 and was completed in June 2015. By June 2015, the PCB remediation at the three facilities was complete. The Court also failed to make the appropriate findings of fact that -- using ReWa's own language in its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" provided to DHEC on April 15, 2014 -- there was "low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin Road and from 1.2 ppm to 4.2 ppm at Lower Reedy)" in those two facilities. Thus, there was no stored biosolids with PCBs even remotely approaching the 50 mg/kg threshold. Thus, it is undisputed those biosolids could be land applied by the time the remediations began for both Lower Reedy and Mauldin Road, July 2014 and December 2014 respectively. This is critical for several reasons. First, the applicable law, supported by the undisputed evidence, establishes that the biosolids and ongoing flows at those facilities did not require any remediation *as a matter of law* in order to be legally land applied, consistent with ReWa's mode of operation prior to the PCB contamination. Accordingly, there was no "direct

physical loss or damage” covered under the Building and Personal Property Insurance Policy. Second, there is absolutely no legal basis for the Court to have ruled that the IRF is legally responsible for paying for the processing of the ongoing flows at the Lower Reedy and Mauldin Road facilities. Clearly, there was no evidence of any “direct physical loss or damage” to those ongoing flows. These critical issues of law warrant reconsideration and, at the very least, a more detailed discussion so as to allow for appropriate appellate review.

3. In its very brief discussion of the Emergency Regulation, the Court erroneously concludes that “[t]he Emergency Reg. imposed more stringent limits, prohibiting land application of sludge with *any* quantifiable amount of PCBs. The Emergency Reg. also provided that the process facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has *no* quantifiable amount of PCBs.” The Court never states what “no quantifiable amount of PCBs” even means, but the evidence from the experts, including ReWa’s expert, Ted Clark, confirms that the PQL (practical quantifiable limit) was 0.5 micrograms/liter (ug/l). Thus, the Court failed to recognize and rule that the Emergency Regulation did allow for a threshold amount of 0.5 micrograms/liter of PCBs to exist in the aqueous phase. That was not a change from the DHEC requirement that pre-dated the Emergency Regulation. Additionally, the Court disregarded and made no finding consistent with the “Sludge Removal and Disposal Plan” prepared by AECOM for the Pelham facility which states:

In bench scale testing of the filtrate after treatment as proposed by various contractors, PCB concentrations in the filtrate have been below 0.5 ug/l. Additionally, and during full scale dewatering of other sludges at the Pelham WRRF where PCB concentrations are less than 50 mg/kg, PCB concentrations in the filtrate have been below 0.5 ug/l *with no treatment of the filtrate*. The PCBs remain associated with any solids removed by the sludge dewatering process and are not detected in the filtrate.

(Pl. Ex. 32, p. 6). (Emphasis added). As Ted Clark testified, the dewatered filtrate from the biosolids that had a concentration of less than 50 mg/kg was less than the 0.5 ug/l threshold, i.e. the quantifiable limit under the Emergency Regulation. Consequently, the Court's conclusion that the filtrate had to be further processed to comply with the Emergency Regulation was in error and contrary to the undisputed expert testimony in the case. This critical issue of law also warrants reconsideration and, at the very least, a more detailed discussion so as to allow for appropriate appellate review.

4. In the initial section of the Conclusions of Law captioned "ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required," the Court also errs in its reliance on the National Pollutant Discharge Elimination System (NPDES) permits. Citing not a single specific provision of either of the multi-paged NPDES permits, the Court states in a conclusory fashion on two separate occasions only that ReWa was prohibited by the permits "from introducing pollutants into its pretreatment process." (Order, p. 4).² It is noteworthy that is the *extent* of the Court's discussion of the NPDES permits. There is not even one reference or cite to any specific provision in the permits nor any quoted language from the permits in the Court's Order. In effect, the Defendant and the appellate courts are left to guess what language in the permits that the Court is relying on in requiring the IRF to pay in excess of \$5.8 million. Moreover, the suggestion that the NPDES permits do not allow *any* level of pollutants into the pretreatment process is incorrect. The Court itself has already recognized that the Clean Water Act allows for PCB contamination in the biosolids of less than the threshold of 50 mg/kg. In addition, ReWa's expert Ted Clark has testified that the Clean Water Act allows for a threshold of 3.0 parts per billion (ppb) for PCBs in the filtrate and wash water. Thus, the NPDES permits,

² The Court also failed to address that ReWa only put in evidence the NPDES permit with respect to the Pelham facility. The NPDES permits for the Lower Reedy and Mauldin Road facilities are not in evidence.

which are issued pursuant to the Clean Water Act and must be read with reference to the Act, allow some level of PCBs into the pretreatment process. The permit, like a contract, cannot be interpreted with no consideration of the enabling law or to require a legal absurdity.³ Yet, that is precisely what this Court has ruled. Moreover, the NPDES permits are to be interpreted like contracts. *See, Piney Run Preservation Association v. County Commissioners of Carroll County*, 268 F.3d 255, 269 (4th Cir. 2001) (applying principles of contract interpretation to NPDES permit). While not considered by the Court, the NPDES permits at issue do provide that “the PCBs shall be less than 50 milligrams per kilogram (mg/kg) of total solids (dry weight basis).” (Pl. Ex. 14).⁴ The Court never mentions that clear language from the permits themselves. Thus, the Court’s ruling which suggests that the NPDES permits do not allow any level of PCBs to enter or exit the treatment facilities is erroneous. The permits state otherwise in express, unambiguous terms.

5. The Court’s discussion of the burden of proof was incomplete. The Court only states that “the insurer bears the burden of establishing that any exclusions apply.” (Order, p. 5). The Court never addresses which party has the burden of proof with respect to the various components of the insuring agreement. The Court is respectfully asked to rule that “[t]he burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract.” *Sunex International, Inc. v. Travelers Indem. Co.*, 185 F.Supp.2d 614, 617 (D.S.C. 2001). The

³ *See, Georgetown Manufacturing & Warehouse Co. v. South Carolina Department of Agriculture*, 301 S.C. 514, 392 S.E.2d 80, 804 (Ct. App. 1990) (“Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result”).

⁴ It is important to note that NPDES Permit No. SC0033804 includes the following critical language: “The Land Application of sludge program (see ReWa Land Application Permit, SC0048381) approval issued by SCDHEC Water Facilities Permitting Division, dated December 1, 2010 shall be incorporated into and become an enforceable part of this permit.” (Pl. Ex. 16). Thus, the reference to the allowed levels of PCBs is included in both NPDES permits.

Court is further asked on reconsideration to correctly apply that burden of proof. It is evident from the Court's decision that the burden of proof was improperly shifted to the Defendant. This is evident because the only expenses claimed by ReWa that the Court ultimately declined to award are those that the Defendant specifically raised at trial. The Court never otherwise held ReWa to its burden of proving the expenses that were awarded.

6. In considering the various components of the insuring agreement, the Court erred in its interpretation and application of the language "direct physical loss or damage." The Court disregarded on point South Carolina case law and interpreted "direct physical loss or damage" to erroneously allow for consequential and non-physical losses or damages, including strictly economic losses and loss of use. The Court made no attempt to even distinguish the South Carolina authorities cited by the Defendant. Based on prevailing South Carolina law and the weight of authority from other jurisdictions, "direct physical loss or damage" means a loss or damage that is immediate, material, tangible, and not consequential or economic in nature. In *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), Judge Henry Floyd, a former state court judge applying South Carolina law, addressed "direct physical loss or damage" and explained that "[t]he use of the term 'physical' to define property damage negates the possibility that the policy intended to include consequential or intangible damages." 337 F.Supp.2d at 769. Moreover, "[t]he Court is unable to construe the plain meaning of the policy in such a way as to find that direct physical accidental loss or damage could mean a consequential or intangible damage *such as loss of use.*" *Id.* (Emphasis added). Judge Floyd relied on the Supreme Court's decision in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003), where the Supreme Court held that economic damages do

not constitute “physical injury” to property. 588 S.E.2d at 115.⁵ Thus, this Court erred in failing to rule, as South Carolina law requires, that “direct physical loss of or damage” includes only the immediate physical damage to the covered property and does not include any consequential, intangible, or economic damages, costs, or expenses. Accordingly, there are many categories of expenses claimed by ReWa which are consequential or economic and are not covered, including testing or sampling expenses;⁶ expert consultant fees incurred in responding to requirements of DHEC and EPA; expenses incurred in investigating the cause of the PCB contamination; and expenses incurred to continue the operation of the waste water facilities including the protocols developed and implemented for the receipt of FOG (fats, oil, and grease) at the Mauldin Road facility.⁷

The Court specifically ruled that “the Covered Property was *unusable* in its contaminated state, which constitutes ‘damage’ under the ordinary meaning.” (Order, p. 8). (Emphasis added). By awarding damages for the structures being “unusable,” the Court is clearly covering “loss of use” damages which is directly contrary to South Carolina law.

The Court’s Order also disregards the “loss payment” provision contained in the Building and Personal Property Coverage Form, which as discussed below, limits the insured’s recovery

⁵ The Supreme Court cited favorably to the case of *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978), and explained that the “use of term ‘physical’ to define property damage negates possibility policy intended to include consequential or intangible damage.” *Brazell*, 588 S.E.2d at 116.

⁶ In *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), the South Carolina Court of Appeals ruled that “[s]ampling and the performance of chemical tests do not constitute ‘physical injury to or destruction of tangible property.’” 387 S.E.2d at 710. The Court disregarded this controlling decision from the Court of Appeals and awarded all sampling expenses. The Court did not acknowledge the *Braswell* case nor attempt to distinguish it. The Court is requested to address that decision on reconsideration.

⁷ The Court did reject the attorney’s fees incurred by ReWa in responding to requirements of DHEC and EPA as well as one invoice from AECOM. But the Court did not reject all of the fees charged by AECOM. (Order, p. 14).

to “the cost of repairing or replacing the lost or damaged property,” and does not include payment for consequential or economic damages such as loss of use. The Court is referred to Judge Floyd’s decision in *Campbell* for the correct analysis in reading the insuring agreement consistently with the “loss payment” provision. See, *Ecclesiastes Prod. Ministries v. Outparcel Asso., LLC*, 374 S.C. 483, 649 S.E.2d 494, 502 (Ct. App. 2007) (“It is fundamental that in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning”). In *Campbell*, Judge Floyd ruled that “the valuation clause of the contract makes damages such as loss of use impossible. Under this clause, the policy will not pay more than the cost to reasonably restore or replace the covered property. There can be no dispute that damages for loss of use exceed restoration and/or replacement costs.” *Campbell*, 337 F.Supp.2d at 769. This Court is urged to grant reconsideration and apply the controlling South Carolina authorities.

7. In footnote 6 of its Order, the Court appears to question whether the terms “direct” and “physical” modify both “loss” and “damage” in the insuring agreement, but the Court does then treat “direct” and “physical” as modifying both “loss” and “damage.” The Court later writes: “The damage from the PCBs was direct and physical.” (Order, p. 8). To the extent that the Defendant is misreading this footnote, it relies on the arguments made in the pre-trial brief, with supporting case law, demonstrating that “direct” and “physical” modify both “loss” and “damage.”

8. Subject to applicable exclusions, the IRF argued that the Building and Personal Property Insurance Policy covers only the expenses related to the repair of “direct physical loss and damage” to the structures themselves. However, no testing of the structures was even performed until *after* the cleaning was completed. As a result, ReWa did not sustain its burden

of proving that the structures, including any digesters or holding tanks at the three facilities, were actually damaged. As testified to by Kevin Finneran, the IRF's expert witness, the chances of the PCBs partitioning into the concrete was highly remote and, if that occurred, would be in such minute concentrations that the structures could not be reasonably considered "damaged." Likewise, ReWa's expert, Ted Clark, agreed that without testing before the pressure washing it was unknown whether any of concrete structures had sustained PCB contamination. Yet, the Court addressed none of this evidence in its Order.

Instead, the Court found that the digesters or holding tanks at the three facilities were "damaged" only because after the digesters and tanks were emptied, there remained biosolids stuck in spots to the walls which resulted in the digesters and tanks being pressure washed. The Court found that constituted sufficient "damage" under the policy although there was no evidence presented by ReWa that having some spots of biosolids attached to the wall rendered the digesters and tanks unusable or "damaged."⁸ Certainly the digesters or tanks that did not contain biosolids testing above the 50 mg/kg threshold were not so "damaged," and that would include all of the digesters and tanks at the Lower Reedy and Mauldin Road facilities as well as all but three of holding tanks at the Pelham facility (specifically Biosolid Holding Tanks 3, 4, and 5).⁹ The Court further ruled that the biosolids had to be removed from the digesters and

⁸ The Court found that "ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations." (Order, p. 8). The Court cites no evidence for that finding. That finding is unsupported in the record. There is no evidence that any of the three facilities were ever shut down or not used for normal operations. In fact, the evidence shows that ReWa took an exceedingly lengthy time period to clean the structures at the three facilities. The remediation at Lower Reedy did not begin until July 2014, and the remediation did not begin at Mauldin Road until December 2014. Those facilities were in operation throughout and processed the ongoing flows. In fact, the Court is requiring in error for the IRF to pay for the costs of processing those ongoing flows.

⁹ As the evidence shows, levels of PCB contamination in all but three holding tanks at Pelham did not exceed the 50 mg/kg threshold. None of the PCB levels at the Mauldin and Lower Reedy facilities even approached that threshold. As ReWa readily conceded in their Plan

tanks in order to pressure wash them and return them to operation. However, instead of limiting the award to the expenses incurred in emptying the digesters and tanks and pressure washing them, the Court included the expenses for dewatering and disposing of the biosolids at all three facilities. The Court appears to agree that the biosolids themselves did not qualify as “covered property,”¹⁰ but the Court nonetheless required the IRF to pay for the disposal of the biosolids -- even those that were not contaminated over the 50 mg/kg threshold. There is no evidence, however, that the digesters and tanks that contained biosolids of less than 50 mg/kg were damaged in any respect. Moreover, the disposal of the biosolids was part of ReWa’s normal operations, which is a critical factor that the Court fails to consider or address. The biosolids are a natural and ordinary byproduct of ReWa’s wastewater process which, regardless of PCB contamination, must be disposed of either by land application or by placement in landfills.

9. Based upon the “loss payment” provision in the Building and Personal Property Coverage Form, the IRF would only be required to “[p]ay the cost of repairing or replacing the lost or damaged property, subject to b. below” and subsection (b) provides: “The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any

to remediate those facilities, based upon the regulations applicable in April 2014, the biosolids at the Mauldin and Lower Reedy facilities could have been land applied as was its ordinary method of disposal. (Pl. Ex. 38). Moreover, based on the low levels of PCB contamination and the applicable law, the cleaning that ReWa engaged in at the Mauldin Road and Lower Reedy facilities was not legally required or necessary. Consequently, ReWa failed to prove any “direct physical loss and damage” at the Mauldin Road and Lower Reedy facilities.

¹⁰ The Court is requested to make the specific ruling that it does not find the biosolids that were contained in the digesters, tanks, and other structures to qualify as “covered property.” As the IRF argued, “covered property” is a defined term in Section A.1 of the Building and Personal Property Coverage Form and is divided into the buildings or structures (including fixtures and permanently installed machinery and equipment) and the business personal property that is also described in a list of items covered. It is undisputed, however, that the Building and Personal Property Coverage Form provides no business personal property coverage for the Pelham, Mauldin Road, and Lower Reedy facilities. That coverage was available to but not purchased by ReWa. Thus, the contents of the physical structures, including the biosolids stored within the structures, are not covered under the policy.

ordinance or law regulating the construction, use or repair of any property." Thus, the Court erred in failing to address the "loss payment" provision. Additionally, the Court overlooked that the "direct physical loss and damage," if any, to the structures at Pelham that exceeded the 50 mg/kg threshold would be limited to the cost of cleaning the structures and not any consequential or economic damages. The same would also be true to the other facilities if the Court is correct in and maintains its current ruling that remediation at the Lower Reedy and Mauldin Road facilities was required by DHEC's Emergency Regulation or by the NPDES Permits. The Court is nonetheless asked on reconsideration to address the "loss payment" provision in its analysis.

10. The Court has also misread and misapplied the decision of the South Carolina Supreme Court in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002). The Court has used the *Ocean Winds* case to broaden the insuring agreement, which constitutes an error of law that merits reconsideration by this Court. In *Ocean Winds*, the Supreme Court was called upon by way of a certified question from the Federal District Court to interpret an "additional coverage" provision for building collapses in a property insurance policy. The insuring agreement for the collapse coverage states: "We will pay for loss or damage caused by or resulting from risks of direct physical loss involving a collapse of a building or any part of the building." The Supreme Court addressed the meaning of the language "risks of direct physical loss involving collapse" and determined that it could be read three different ways: (1) requiring an actual collapse, (2) requiring collapse to be imminent, or (3) requiring substantial impairment of the building to trigger coverage. The Supreme Court found "a requirement of imminent collapse is the most reasonable construction of the policy clause covering 'risks of direct physical loss involving collapse.'" 565 S.E.2d at 308.

The *Ocean Winds* decision has no application to the present case for several reasons. First, the Supreme Court was construing an ambiguous provision in an insuring agreement

specifically for building collapse coverage. The present case involves a different insuring agreement. There is no “collapse” language that is ambiguous. In fact, ReWa has made no argument that the insuring agreement in the IRF policy is ambiguous or is capable of multiple reasonable constructions. Second, in the present case, the parties stipulated and the Court found that the PCB contamination was caused by vandalism which is a Covered Cause of Loss. (Order, p. 5). The vandalism had occurred. The PCB contamination had occurred. ReWa made one claim for the three facilities, not multiple claims alleging multiple occurrences of vandalism over time. Certainly, there was never any additional or later claim made to the IRF for an “imminent” threat of vandalism or an additional PCB contamination to justify the Court’s award of the expenses for sampling, the FOG program, or the remediation of collection lines. Quite simply, the policy does not cover an insured in taking measures to prevent a future loss. Moreover, if there was an additional PCB contamination, ReWa could have made a claim for that, but it did not. Any later claims of contamination, which were never made to the IRF, are not properly part of this lawsuit or before this Court, nor are preventative measures undertaken to prevent a future loss. Third, in *Ocean Winds*, the Supreme Court held that if there is sufficient damage to the point that collapse is imminent, there is coverage, but “substantial impairment” was held to be insufficient to trigger coverage. Therefore, it is a misreading of *Ocean Winds* to suggest that the Supreme Court extended coverage to pay for preventative measures to protect from future claims or losses. As indicated, that is not the purpose of a property casualty policy. Finally, the insuring agreement in *Ocean Winds* covered “loss or damage” and *not* “direct physical loss or damage” which is the language in the insured agreement in the IRF policy. Consequently, as discussed above, the IRF policy does not cover consequential and economic damages but only “direct physical loss or damage” to covered property which further distinguishes the *Ocean Winds* case.

11. The Court has awarded expenses for the remediation of certain collection lines that are outside the premises of the Pelham, Mauldin Road, and Lower Reedy facilities. Those collections lines are not "covered property" for several reasons. First, those lines are not identified in the declaration pages as a separately covered "segment" of property. Second, the policy contains a list of "property not covered" which includes "[u]nderground pipes, flues or drains." The Court failed to address these reasons for denying coverage for the remediation of the collection lines and is respectfully requested to do so on reconsideration.

12. In a single, conclusory sentence and without citing any authority, the Court writes: "Further, ReWa was directed by the policy to take all reasonable steps to protect its Covered Property from further damage." (Order, p. 9). Then, in a footnote, the Court refers to what it calls the "protection of property" provision and rules that "[e]xpenses incurred in testing and remediating lines which flow into the facilities are covered expenses ... even though this testing and remediation did not occur on the Covered Property [sic]." (Order, p. 9).¹¹ The Court committed numerous errors with respect to its reliance on the "protection of property" provision, all of which warrant reconsideration.

First, the provision to which the Court refers states in pertinent part as follows: "Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim." The Court engages in no analysis of this provision or how it should be interpreted or applied. Moreover, the Court cites no authority, from this jurisdiction or other jurisdictions, addressing how that provision should be applied.

¹¹ Presumably, the Court meant "covered premises" since the insuring agreement requires the "direct physical loss or damage" to occur "at the premises described in the Declarations." (Pl. Ex. 8).

Second, and perhaps most importantly, the Court errs in even considering the “protection of property” provision in its coverage analysis. The record clearly shows that that provision of the policy was never pled or previously raised as a basis of coverage by ReWa in this litigation. In the Amended Complaint, the allegations and bases for coverage under the Building and Personal Property Insurance Policy are pled in the first and second causes of action. ReWa printed verbatim the “most relevant” portions of the policy, and the “protection of property” provision is not stated verbatim nor even mentioned in passing. *See*, Amended Complaint, ¶ 31. The Court is also referred to the Plaintiff’s Responses to Defendant’s First Set of Interrogatories, dated March 26, 2018, specifically interrogatory numbers 7, 9, and 11, which for each of the three facilities, asked that ReWa provide an itemized list of losses being claimed and “[f]or each item, provide an explanation, including reference to the specific policy language, of the Plaintiff’s basis in claiming the loss is covered.” ReWa provided a detailed response that addressed various policy provisions; however, the so-called “protection of property” provision was never cited. *See*, Plaintiff’s Responses to Defendant’s First Set of Interrogatories, dated March 26, 2018. Interrogatory numbers 7, 9, and 11 were never subsequently supplemented prior to trial. Even in ReWa’s pre-trial brief submitted to the Court on January 17, 2020, just ten days before trial, there is no mention of the “protection of property” provision as a basis of coverage or an issue that the Court would need to adjudicate. The Court has also been provided the relevant portions of the Rule 30(b)(6) deposition taken of ReWa, and there was no discovery taken on that provision because it had never been pled nor subsequently addressed as a basis for coverage. Finally, the Court has in evidence a number of pre-litigation letters between the parties’ attorneys which include detailed discussions of the relevant coverage provisions; yet again, ReWa never mentioned or cited to the “protection of property” provision. (Defendant’s Exhibits 9-13). In sum, the Court has erred in considering a policy provision and an issue that

was never pled and on which no discovery was taken. In addition, the IRF had no notice the issue would be tried and was therefore unable to present a defense on that coverage provision, thereby depriving the IRF of due process.

Third, the so-called “protection of property” provision has its own very unique body of case law interpreting what it means and how it is to be applied. There is no controlling case law in South Carolina so it involves a novel issue of insurance law which the parties have not briefed and on which the Court has been provided no argument. The reason for that, as argued above, is that the provision was never pled or otherwise raised. Not even ReWa’s counsel has provided the Court any analysis either in their pre-trial brief or in the proposed order that the Court ultimately signed. Certainly, no such analysis appears in the Court’s Order.

The so-called “protection of property” provision is actually referred to as a “sue and labor clause” in insurance jurisprudence. The “sue and labor clause” cannot be used, as the Court has done in this case, to extend or create coverage not otherwise provided by the insuring agreement or to override an applicable policy exclusion. The great weight of the authority from other jurisdictions holds that an insured’s ability to recover expenses under a sue and labor cause is tied to the insurer’s obligations under the general insuring provisions of the policy. In fact, in an early case dealing with recovery under a sue and labor clause, the United States Supreme Court explained as follows:

If this clause be construed with reference to what is most evidently its subject-matter, that is *a loss within the policy*, and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable, that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit

stipulation than we find in the policy, to render them liable to contribute to such expenses.

Biays v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 425, 419 (1813). (Emphasis in original). Other federal and state cases have held the same. See, e.g., *John S. Clark Co., Inc. v. United National Ins. Co.*, 304 F.Supp.2d 758, 767 (M.D.N.C. 2004) (“a sue and labor clause does not extend or create coverage; the recovery ... is tied irrevocably to the obligations undertaken by the insurers in the basic insurance policy”); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 139 F.Supp. 2d 1374, 1383 (S.D. Fla. 2001) (“Whether sue and labor expenses are covered at all ... is tied directly to the policy’s insuring provisions.”); *Southern California Edison Co. v. Harbor Ins. Co.*, 83 Cal.App.3d 747, 148 Cal. Rptr. 106 (1978) (“recovery under a sue and labor clause is tied irrevocably to the obligations undertaken by the insurer in the basic insurance policy”).

Fourth, ReWa presented no evidence to the Court differentiating between the expenses sought because they were covered under the insuring agreement and the expenses sought under the “protection of property” provision. The reason for that is clear. ReWa never pled or asserted a claim under the “protection of property” provision and hence never differentiated the expenses claimed. Similarly, ReWa did not provide that information during discovery in the responses to the Defendant’s interrogatories. Nonetheless, it is respectfully submitted that the evidence of damages, as presented at trial, is insufficient to allow the Court to make that differentiation, and hence, ReWa has not sustained its burden of proof.

Fifth, as a corollary to the previous point, the Court made no findings of fact to allow for a recovery under the so-called the “protection of property” provision. Of course, no such testimony was elicited from the witnesses -- in support or in opposition -- because the claim was never pled.

Therefore, the Court is respectfully requested to alter or amend its order to decline to rely on the so-called “protection of property” provision to create and extend coverage for expenses

that are not covered. The Court is further requested to make factual findings as to those expenses claimed by ReWa and which are currently included in the Court's judgment that were awarded under the "protection of property" provision. This will be necessary to allow for proper appellate review.

13. The Court writes: "the IRF contends that the 'debris removal' and 'pollutant cleanup and removal' provisions limit ReWa's coverage." (Order, p. 9). That is incorrect. The IRF never argued those provisions were policy exclusions. To the contrary, the IRF argued that the "debris removal" additional coverage was not applicable, a position with which ReWa agreed.¹² Moreover, the IRF did offer ReWa \$30,000 for the "pollutant cleanup and removal" additional coverage prior to this litigation, but ReWa rejected that offer, and the evidence at trial now demonstrates that ReWa was not entitled to that coverage. The provision states: "The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs." The evidence at trial demonstrates that ReWa learned of the vandalism more than 180 days before the claim was reported to the IRF. The Court is respectfully requested to alter or amend its Order to correctly address these points.

14. The Court also misapplied the "Ordinance or Law Exclusion" and failed to consider or address the existence of an anti-concurrent causation clause. The Causes of Loss – Special Form includes an "Ordinance or Law Exclusion" which provides no coverage for a loss caused "directly or indirectly" by the "enforcement of any ordinance or law ... (1) regulating construction, use or repair of any property or (2) requiring the tearing down of any property, including the cost of removing the debris." Importantly, this section of exclusions includes an anti-concurrent causation clause that reads: "Such loss or damage is excluded regardless of any

¹² The IRF referred to the additional coverage for "debris removal" only because the inclusion of the additional coverage demonstrates the intent that the expenses for debris removal do not fall within the scope of "direct physical loss or damage"; otherwise, the additional coverage would be unnecessary and meaningless.

other cause or event that contributes concurrently or in any sequence to the loss.” As the Supreme Court has explained in *South Carolina Farm Bureau Ins. Co. v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009), where a policy includes an anti-concurrent causation clause, neither the efficient proximate cause rule nor the concurrent cause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss that is covered. In its Order, this Court ruled that the “Ordinance or Law Exclusion” did not apply, and in so ruling, the Court made several errors of law.

First, the Court writes: “The Court notes that no evidence was presented to indicate the environmental regulations at issue fall within the categories of ordinance and law specified in the policy.” (Order, pp. 9-10). It is unclear what the Court means with this statement. The record is replete with evidence that ReWa’s remediation was required by and governed by the Toxic Substance Control Act (TSCA), federal regulations promulgated pursuant to TSCA, and DHEC regulations including the Emergency Regulation (while it was in effect). The Court even ruled that ReWa’s remediation was governed by those federal and state laws. The exclusion includes within its scope “any ordinance or law ... regulating ... repair of any property.” To the extent the Court finds no evidence of “any ordinance or law ... regulating ... repair of any property,” that is clearly erroneous and merits reconsideration or clarification so as to allow for meaningful appellate review.

Second, the Court rules that “vandalism, not the enforcement of an ordinance or law, created ReWa’s resulting loss.” (Order, p. 10). The Court further states: “Any actions by the EPA and SCDHEC which could be deemed to be ‘enforcement’ under this exclusion did not, either directly or indirectly, cause ReWa to suffer the damages claimed in this lawsuit.” (Order, p. 10). That ruling is unsupported by the evidence and, at any rate, does not negate the application of the anti-concurrent causation clause which the Court did not even address. As

indicated, the record is replete with evidence that the damages sustained by ReWa was in part caused by the enforcement of federal and state regulations governing the remediation process. ReWa itself has taken the position that the remediation at all three facilities was controlled by EPA and DHEC regulations and that ReWa was required to undertake those remediation efforts. The remediations were undertaken pursuant to “plans” that were submitted to EPA (for Pelham) and to DHEC (for Lower Reedy and Mauldin Road). ReWa cannot take the position that the remediation was required by federal and state environmental laws and then take the inconsistent position that those very regulations were not a cause for the damages that are being claimed. In fact, this Court makes the finding that ReWa needed and received “the approval of SCDHEC and the EPA.” (Order, p. 13). Thus, on reconsideration, the Court is respectfully requested to find that the EPA and DHEC regulations were, at the very least, an indirect cause of the resulting damages, even if vandalism was the “efficient proximate cause” that set the chain of events in motion.

It is critical that the Court failed to consider or address the effect of the anti-concurrent causation clause and the Supreme Court’s decision in *Durham*. In that case, the anti-concurrent causation clause read as follows: “Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” Thus, it is identical to the anti-concurrent causation clause in the IRF Policy. The Supreme Court explained the effect of the anti-concurrent causation clause as follows:

The majority of jurisdictions follow the efficient proximate cause doctrine which provides that in circumstances with two or more identifiable causes, the court looks to the cause which is determined to have set the chain of events in motion. If this “efficient proximate cause” is covered under the terms of the policy, then the loss is covered. The minority rule is the concurrent cause rule, which asks whether one of the causes of a loss is covered. If so, then the loss is covered notwithstanding the fact that there is also an excluded cause in the chain of causation. In the instant case, neither doctrine applies since the policy

contains an anti-concurrent causation clause. The exclusion provides that “[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” Consequently, though the underground water pressure was not the sole cause of the loss or even the efficient proximate cause, it was a cause of the loss and so, the exclusion applies.

Durham, 671 S.E.2d at 613. (Citations omitted). In sum, where the policy includes an anti-concurrent causation clause, the Supreme Court has held that neither the efficient proximate cause rule nor the concurrent clause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss, such as vandalism, that is covered. Here, one of the causes for the loss is the enforcement by the EPA and DHEC of its regulations governing the remediation of PCBs. Quite simply, it is immaterial that vandalism was the only “efficient proximate cause” or that there was no other cause of the PCB contamination itself. The IRF recognizes, of course, that the governmental regulations did not “cause” the PCB contamination. But, the anti-concurrent causation clause is not limited to “efficient” causes or “concurrent” causes but to *any* causes -- direct or indirect -- contributing “*in any sequence* to the loss.” The Court fails to focus on the “in any sequence” language. Clearly, the enforcement of the government regulations occurred in the sequence of events that led to the loss claimed by ReWa and for which this Court awarded in excess of \$5.8 million in damages. In sum, the Court is respectfully requested to address the anti-concurrent causation clause and the *Durham* decision and to find that ReWa’s claim is barred by operation of the “Ordinance or Law Exclusion.”

15. The Court failed to give any consideration to the undisputed fact that the Building and Personal Property Insurance Policy includes a \$3,000 deductible per occurrence. Given the Court’s Order, it is unclear whether the Court found more than one occurrence of PCB contamination. The Defendant believes there was a single occurrence, but the Court’s award perhaps suggests otherwise. Nonetheless, the Defendant requests the Court to clarify the number

of occurrences found and to apply a \$3,000 deductible for each occurrence that the Court finds that ReWa has proven.

16. Additionally, the Court is requested to grant a new trial absolute because of procedural irregularities that prevented or otherwise impeded the Defendant's rights to due process and fundamental fairness. Specifically, the Defendant was denied the opportunity to provide closing arguments as required under Rule 43(i), SCRCF. At the close of the testimony, the parties addressed with the Court the opportunity to present closing arguments either orally or by proposed orders. In response, the Court directed only that the parties submit proposed orders, but the Court limited the orders to liability issues only and placed a ten-page limitation on the proposed orders. The Defendant's counsel complied with that direction and did not address any damages issues in their proposed order. The Plaintiff's counsel nonetheless submitted a proposed order that addressed damages issues. The Defendant's counsel subsequently made an additional request by email dated February 27, 2020 to the Court "to either make closing arguments or brief the damages issues based on the evidence presented at trial. ... We would also ask for the ability to present arguments on the damages issues either in writing or at a hearing on the record before the Court makes its final rulings on the case." The Court responded by email on that same date with the following: "As for lack of closing arguments or briefing the damages issues, you are certainly correct. I do not feel the need for closing arguments since I am familiar with the record. As for briefing damages, I did not request that since I believe the record is sufficient for those determinations." See attached emails dated February 27, 2020. Rule 43(i), SCRCF, provides for closing argument or summation in a civil trial and limits the duration of closing argument. Rule 43(i), however, does not give the trial judge the discretion to deny a request for closing arguments. In *Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988), the Court of Appeals ruled that "the trial judge has discretion to limit oral argument to

less than two hours in civil matters.” 375 S.E.2d at 321. But the Court of Appeals did not hold that a trial judge has the discretion to deny closing arguments, either orally or in writing, altogether.

After the close of the evidence, the Defendant never had the opportunity to argue the damages issues based on the evidence presented at trial and has thus been denied due process as a result. The Defendant respectfully submits that the Court would have benefitted from having closing arguments in some form, particularly in light of the substantial amount in controversy, the impact of this Court’s ruling on the public fisc, the sheer number, complexity, and novelty of the issues and defenses, and the substantial evidence, both testimonial and exhibits, that was presented by the parties. In addition, with full recognition that an appeal was likely, as the Court recognized on numerous occasions during the trial itself, the opportunity for closing arguments also ensures the parties’ ability to preserve issues and arguments for subsequent appellate review.

The Court similarly denied, or at least strongly discouraged, the Defendant to make a full or complete argument on its motion for involuntary nonsuit made at the close of ReWa’s case-in-chief.

Additionally, the Court indicated that he wanted to schedule a telephone hearing for February 27, 2020, to address additional issues raised by his review of the case. The Defendant’s counsel requested for that hearing to be on the record. That request was made by an email dated February 27, 2020. The Court denied that request by return email of the same date. See attached emails dated February 27, 2020. Consequently, the Defendant was denied the opportunity to ensure that a record exists of the telephone hearing that was held on that date which is critical in a case such as there where a subsequent appeal by the losing party is expected, a likelihood that the Court recognized on numerous occasions during the trial itself. The parties were denied the opportunity to ensure that the arguments of counsel made during the

February 27, 2020 telephone hearing as well as the colloquy with the Court were preserved for review by an appellate court.

The Defendant's motion is based upon the pleadings filed in this case; the trial record; the Order filed March 18, 2020; the attached exhibits; the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

The Defendant requests oral argument on these post-trial motions.

Respectfully submitted,

s/ Andrew F. Lindemann

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*Counsel for Defendant Insurance Reserve Fund,
a Division of the State Fiscal Accountability
Authority of South Carolina*

March 30, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
	)	
vs.	)	<u>PLAINTIFF'S RESPONSES TO</u>
	)	<u>DEFENDANT'S FIRST SET OF</u>
	)	<u>INTERROGATORIES</u>
Insurance Reserve Fund, a Division of	)	
the State Fiscal Accountability Authority	)	
of South Carolina,	)	
	)	
Defendant.	)	
	)	

Plaintiff Renewable Water Resources ("ReWa") hereby responds to the Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina's ("IRF") First Set of Interrogatories as follows:

INTERROGATORIES

1. Give the names and addresses of persons known to the Plaintiff or its counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: ReWa identifies the following individuals:

A. Joel Jones
Chief Technical Officer at ReWa; Former Pretreatment Manager at ReWa

Mr. Jones has knowledge of the illegal dumping of polychlorinated biphenyls ("PCBs") into ReWa's system and ReWa's response to that illegal dumping. Mr. Jones also has knowledge of the costs ReWa incurred as a result of the PCB contamination.

B. Kevin James
Director of Water Resource Recovery at ReWa

Mr. James has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping. Mr. James also has knowledge of the costs ReWa incurred as a result of the PCB contamination, particularly as they relate to the Pelham Water Resource

Recovery Facility (WRRF). Mr. James also has knowledge regarding the operation of ReWa's other WRRFs.

C. Russell Moore
Plant Operations Foreman – Mauldin Road at ReWa

Mr. Moore has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping. Mr. Moore also has knowledge of ReWa's wastewater treatment facilities and how they are operated.

D. Patricia Dennis
Controller at ReWa

Ms. Dennis has knowledge of the costs ReWa incurred as a result of the PCB contamination, including the repair, remediation, restoration, cleanup, and disposal of contaminated material related to the property covered under the insurance policies at issue in this matter. Ms. Dennis also has knowledge regarding contact with the IRF and its adjusters and attorneys regarding the subject coverage claims.

E. Glen McManus
Director of Operations at ReWa

Mr. McManus has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping. Mr. McManus also has knowledge of the damages sustained by ReWa and the costs ReWa incurred as a result of the PCB contamination.

F. Joey Collins
Biosolids Manager at ReWa

Mr. Collins has knowledge of the illegal dumping of PCBs into ReWa's system and the resulting disruption of ReWa's biosolids land application program.

G. Gene Graham
Pretreatment Hauled Waste Inspector and Data Control Technician at Mauldin Road Plant

Mr. Graham has knowledge of the illegal dumping of PCBs into ReWa's system. Specifically, Mr. Graham has knowledge regarding American Waste and the discovery of PCBs in American Waste's trucks. Mr. Graham is responsible for receiving hauled waste at the Mauldin Road Plant and ensuring that haulers provide the proper paperwork.

H. J.D. Martin
ReWa Board Member; Former Chairman of the Board

Mr. Martin has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping.

- I. George Fletcher, P.E.**
Former ReWa Board Member
116 Rock Creek Drive
Greenville, SC 29605

Mr. Fletcher has technical and operational knowledge regarding ReWa's system and ReWa's response to the illegal PCB dumping.

- J. John Boyette, P.E.**
Former ReWa Board Member
107 Lady Banks Lane
Greer, SC 29650

Mr. Boyette has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping.

- K. Ray Orvin**
Former Executive Director at ReWa
308 Moss Wood Circle
Simpsonville, SC 29681

Mr. Orvin has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping. Mr. Orvin also has knowledge of the damages sustained by ReWa and the costs ReWa incurred as a result of the PCB contamination.

- L. Ann Sims**
Former Laboratory Manager at ReWa

Ms. Sims has knowledge of the laboratory reports that ReWa conducted and the reports received from Shealy Environmental Services and Rogers & Callcott.

- M. Charles Logue, P.E.**
Former Technical Services Director at ReWa
7125 Vantage Drive
Alexandria, VA 22306

Mr. Logue has knowledge of the illegal dumping of PCBs into ReWa's system and ReWa's response to that illegal dumping.

- N. Tommy Lavender and Joan Hartley**
Outside Environmental Counsel – Nexsen Pruet
1230 Main Street, Suite 700
Columbia, SC 29201

Mr. Lavender and Ms. Hartley have knowledge regarding the illegal dumping of PCBs into ReWa's system, and ReWa's response to that illegal dumping. Mr. Lavender and Ms. Hartley

have specific knowledge regarding ReWa's efforts to work with the EPA and DHEC on PCB remediation.

O. Ted Clark
AECOM
10 Patewood Drive – Building 6, Suite 500
Greenville, SC 29615

AECOM was retained specifically to address remediation efforts at the Pelham WRRF.

P. Sam Avery
Rogers & Callcott
426 Fairforest Way
Greenville, SC 29607

Mr. Avery has knowledge of the illegal dumping of PCBs into ReWa's system, and the testing that took place in order to adequately respond to that illegal dumping.

Q. Lucas Odom
Shealy Environmental Services
106 Vantage Point Drive
West Columbia, SC 29172

Mr. Odom has knowledge of the illegal dumping of PCBs into ReWa's system, and the testing that took place in order to adequately respond to that illegal dumping.

R. Timothy Howard
Former Owner and Operator of American Waste Septic Tank Service
108 Chapel Road
Greer, SC 29651

Mr. Howard illegally dumped PCBs into ReWa's system. Mr. Howard plead guilty to violations of the Clean Water Act relating to the same.

S. EPA and DHEC Staff

Including without limitation Heath Martin- EPA, Ken Feely- EPA, Michael Tempel- DHEC, Jeff DeBessonnet- DHEC, Mike Montebello- DHEC, Daphne Neel- DHEC, and Susan Turner- DHEC.

EPA and DHEC staff have knowledge of ReWa's efforts to address the illegal dumping of PCBs in ReWa's system.

T. Vendors

Vendors have knowledge of the repairs to ReWa's system and costs incurred for those repairs. For a list of vendors, see the pivot table included in ReWa's attached damages schedule.

U. IRF Representatives

Including without limitation Jerry B. Anderson and Rob Byers.

IRF Representatives have knowledge relating to the determination that the insurance policy did not cover ReWa's losses, including how such determination was made and the reasoning for the determination.

2. For each person known to the Plaintiff or its counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See response to Interrogatory No. 1 above.

3. Set forth a list of photographs, videotapes, audiotapes, plats, sketches, diagrams, schematics, or other prepared documents in possession of the Plaintiff or its counsel that relate to the claims or any defense in this case.

RESPONSE: ReWa refers the IRF to photographs produced in response to the IRF's Requests to Produce.

ReWa reserves the right to supplement this response before trial, including but not limited to demonstrative exhibits and materials ReWa has not yet prepared but may use at trial.

4. Identify in complete detail each person whom the Plaintiff has retained and/or intends to call as an expert witness at the trial, stating as to each such person:

(a) Name, occupation, title, business address, area of specialization, if any, and professional relationship to the Plaintiff; and

(b) The manner in which such person became familiar with the facts of this case.

RESPONSE: ReWa has not yet retained an expert witness, but will supplement this response as necessary.

The lay witnesses identified in response to Interrogatory No. 1 have certain expertise and specialized knowledge as a result of their day-to-day job duties and responsibilities, and thus ReWa reserves the right to qualify any such hybrid fact/expert witness as an expert witness at trial, if necessary. For instance, Mr. Fletcher and/or Mr. McManus can testify to the reasonableness of ReWa's response to the PCB contamination. Mr. Jones and/or Mr. Lavender can testify to the reasonableness of the testing protocol established to detect and monitor further contamination.

5. As to each person the Plaintiff has retained and/or intends to call as an expert witness at the trial, state in full detail:

- (a) The subject matter or area in which such person is to testify;
- (b) The substance of the facts and opinions in which such person is to testify; and
- (c) A summary of the grounds or basis for each opinion and fact.

RESPONSE: See response to Interrogatory Nos. 1 and 4 above.

6. Set forth an itemized statement of all physical damages claimed to have been sustained by the Plaintiff to the Pelham Waste Treatment Plant. Provide an explanation of the methodology used to calculate the damages and identify by name and address the person(s) who performed the calculation of damages.

RESPONSE: ReWa refers the IRF to Part 3220 of the itemized summary of damages, supporting information for those damages, as well as other costs, including attorney's fees, set forth in the attached damages schedule. Most of the costs allocated to Part 3100 also relate to damages incurred at the Pelham WRRF. These damages were calculated through a report

generated from ReWa's Great Plains accounting software for costs allocated to emergency capital accounts related to the PCB response.

Glen McManus, ReWa's Director of Operations, performed the calculation of damages.

7. Set forth an itemized list of all losses at the Pelham Waste Treatment Plant that the Plaintiff claims to be covered under any policy issued by the South Carolina Insurance Reserve Fund to Renewable Water Resources. For each item, provide an explanation, including reference to the specific policy language, of the Plaintiff's basis in claiming the loss is covered.

RESPONSE: ReWa refers the IRF to the response to Interrogatory No. 6 above. The IRF issued ReWa a Building and Personal Property Policy and a General Tort Liability Policy under Policy Number T130230116A, which were effective for the periods relevant to this litigation (the "Policies"). Properties and operations covered under the Policies include, among others, the Pelham Waste Treatment Plant, the Lower Reedy Plant, and the Mauldin Road Plant.

The Building and Personal Property Policy provides that the IRF "will pay for direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." (Building and Personal Property Coverage Form, § A.) Covered property includes ReWa's business personal property, consisting of the following: (1) Furniture and fixtures; (2) Machinery and equipment; (3) "Stock"; (4) All other personal property owned by you and used in your business; and (5) Labor, materials or services furnished or arranged by you on personal property of others. (*Id.* at § A.1.b.)

The Causes of Loss – Special Form provides coverage for "RISKS OF DIRECT PHYSICAL LOSS" unless excluded or limited therein. Section I.A.1.d. of the Policyholder's Manual defines "Direct Physical Loss" as follows:

"Direct physical loss" means the policy covers all peril of direct physical loss or damage unless they are excluded or limited by the coverage form. The "Causes of

Loss-Special Form” is used to provide coverage on property policies other than inland marine insurance. In addition, the specific perils of earthquake and flood are automatically added by endorsement.

Section I.A.2. of the Manual further defines the property covered for direct physical loss or damage:

Covered Property may be “Building”, “Your Business Personal Property”, or “Personal Property of Others.”

“Building” includes the structure, outdoor fixtures, property which services the premises, completed additions and, if not covered by other insurance, alternations and repairs to the building. A covered building is scheduled on the Declaration page.

“Business Personal Property” applies to furniture and fixtures; machinery and equipment; all other personal property owned by the organization and used in the business; and the insured's use interest as a tenant in improvements and betterments. Also insurable as business personal property is leased property for which you have a contractual responsibility to insure.

(*See also* Building and Personal Property Coverage Form, § A.1., defining “Covered Property.”)

As a result of the illegal dumping of PCBs into ReWa’s system, ReWa incurred expenses including the repair, remediation, restoration, cleanup, and disposal of contaminated material. ReWa had to remove the PCBs from their equipment and facilities, and restore the equipment and facilities to operation. ReWa also incurred expenses in hauling and disposing of the contaminated sludge that was removed from its equipment and facilities. Accordingly, the losses suffered by ReWa were direct physical losses and damage to Covered Property, and therefore covered by the Building and Personal Property Policy.

Furthermore, the exclusion in Section B.2.1. of the Causes of Loss – Special Form does not apply. The Causes of Loss – Special Form contains a pollutant exclusion that excludes certain damages caused by “[d]ischarge, dispersal, seepage, migration, release or escape of ‘pollutants.’”

There is, however, an exception to the exclusion if such discharge, dispersal, seepage, migration, release or escape of pollutants is caused by a “specified cause of loss.”

Section F of the Causes of Loss – Special Form defines “Specified Causes of Loss” as follows:

“Specified Causes of Loss” means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; **vandalism**, leakage from fire extinguishing equipment, sinkhole collapse, volcanic action; falling objects; weight of snow, ice or sleet; water damage.

The losses for which ReWa claims coverage were the result of vandalism. Therefore, the pollutant exclusion does not apply to ReWa’s claim and ReWa’s claim for loss or damages resulting from the illegal dumping of PCBs into its wastewater treatment and collection system is covered under the terms of the Building and Personal Property Policy.

Additional coverage for pollutant cleanup and removal could be found in addition to the provisions listed above under Sections A.4.a. and/or d. of the Building and Personal Property Coverage Form as debris removal and/or pollutant cleanup and removal.

Additional coverage is also available through the General Tort Liability Policy, which provides that “[t]he Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... Property Damage to which this applies caused by an occurrence.”

Moreover, the Policy imposed on the IRF a duty of good faith and fair dealing in the processing of claims. *See Nichols v. State Farm Mut. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983). The IRF had a duty to process ReWa’s claim and make a coverage determination in a fair and timely manner. The IRF has not complied with its duty of good faith and fair dealing in the processing of ReWa’s claim. Due to the IRF’s failure to make a timely determination, and ultimately a failure to find coverage under the Policies even though coverage clearly applies,

ReWa was required to engage counsel and aggressively pursue a determination of coverage. Under South Carolina state law, the IRF's behavior amounts to bad faith, subjecting it to liability for the claim and attorney's fees associated with pursuing the matter as to be determined by a jury.

8. Set forth an itemized statement of all physical damages claimed to have been sustained by the Plaintiff to the Lower Reedy Plant. Provide an explanation of the methodology used to calculate the damages and identify by name and address the person(s) who performed the calculation of damages.

RESPONSE: See Part 3220 of ReWa's damages schedule. ReWa further refers the IRF to the response to Interrogatory No. 6 above.

9. Set forth an itemized list of all losses at the Lower Reedy Plant that the Plaintiff claims to be covered under any policy issued by the South Carolina Insurance Reserve Fund to Renewable Water Resources. For each item, provide an explanation, including reference to the specific policy language, of the Plaintiffs basis in claiming the loss is covered.

RESPONSE: ReWa refers the IRF to the responses to Interrogatory Nos. 6 and 7 above.

10. Set forth an itemized statement of all physical damages claimed to have been sustained by the Plaintiff to the Mauldin Road Plant. Provide an explanation of the methodology used to calculate the damages and identify by name and address the person(s) who performed the calculation of damages.

RESPONSE: ReWa refers the IRF to the response to Interrogatory No. 6 above.

11. Set forth an itemized list of all losses at the Mauldin Road Plant that the Plaintiff claims to be, covered under any policy issued by the South Carolina Insurance Reserve Fund to

Renewable Water Resources. For each item, provide an explanation, including reference to the specific policy language, of the Plaintiffs basis in claiming the loss is covered.

RESPONSE: ReWa refers the IRF to the responses to Interrogatory Nos. 6 and 7 above.

12. Set forth an itemized statement of the actual and/or extra-contractual damages claimed to have been sustained by the Plaintiff as a result of the alleged bad faith.

RESPONSE: ReWa refers the IRF to the responses to Interrogatory Nos. 6 and 7 above. Further, ReWa has sustained damages in tort as a result of the facts set forth in ReWa's Complaint and herein, including without limitation attorney's fees.

ReWa also claims pre-judgment interest dating from October 30, 2014, when the IRF sent ReWa a letter stating that "Renewable Water Resources has presented documentation to date that shows ReWa has incurred \$5,711,028.17 in expenses associated with the cleanup of the PCBs..." and yet denied coverage under both Policies. ReWa incurred additional costs following the date of this letter, and therefore claims pre-judgment interest on those costs following the date they were incurred.

13. Provide a list of all vendors for which the Plaintiff is seeking reimbursement or recovery as part of its claim against the South Carolina Insurance Reserve Fund, including a full address for each vendor, the contact person for each vendor, and a description of the work performed by each vendor.

RESPONSE: Documents with names or addresses of vendors will be produced in response to Requests for Production of Documents Nos. 6 and 7. ReWa refers the IRF to the response to Interrogatory No. 6 above. The itemized schedule of damages indicates the vendors that ReWa engaged in resolving the PCB contamination. The receipts and other cost information provide the addresses, contacts, and description of work performed by each vendor.

14. Set forth a detailed explanation of the conduct of the Defendant that the Plaintiff alleges to have been in bad faith or in breach of the implied covenant of good faith and fair dealing.

RESPONSE: ReWa refers the IRF to the response to Interrogatory No. 7 above. ReWa further responds that ReWa and the IRF have a mutually binding contract of insurance. ReWa paid its premiums under the Policy and ReWa made claims for covered losses resulting from the illegal dumping of PCBs. However, the IRF failed to pay for these covered losses. The IRF has consistently tried to make an arbitrary distinction between “physical loss” and other damages. When ReWa responded that all costs incurred in responding to the PCB contamination were covered under the Policies, the IRF did not counter this response with any specific denials of coverage based on the fact that certain losses were not “physical losses.”

Furthermore, the IRF admitted in a letter dated October 30, 2014 that the PCB contamination was “vandalism,” and therefore a covered cause of loss. ReWa provided the IRF with monthly reports detailing the amount of loss it had sustained from responding to the PCB contamination. However, the IRF never offered ReWa more than \$30,000 under the Policy, in direct contravention of its admission that the losses resulted from a covered cause of loss and its access to ReWa’s loss calculations.

Despite knowing ReWa was working under the supervision and approval of the EPA and SCDHEC, and of case law such as *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004) and related legal precedent, the IRF offered no coverage under the Tort Policy. The IRF has imputed knowledge of the case law related to the owned property exclusion, including *Governmental Interinsurance Exchange v. City of Angola*, 8 F. Supp. 2d 1120 (N.D. Ind. 1998), *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 28 F. Supp. 2d 448 (E.D. Mich.

1998), and other case law previously provided by counsel for ReWa and, upon information and belief, by counsel for Spartanburg Water.

The case law in South Carolina is clear that “[w]here the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted.” *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 639, 594 S.E.2d 455, 459 (2004). Therefore, the IRF should have resolved any ambiguity in the insurance policy in favor of finding coverage. *See Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 547, 443 S.E.2d 552, 553 (1994). While the IRF is aware of the strong case law which construes policies in favor of coverage, and narrowly construes exclusions against the insurer, the IRF still denied ReWa’s valid claims for covered losses. *See M&M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

The IRF’s failure to provide coverage was in bad faith, and constitutes a breach of the Policy, including without limitation a breach of the implied covenant of good faith and fair dealing that neither party will do anything to impair the other’s rights to receive benefits under the contract. As a direct and proximate result of the IRF’s bad faith, the IRF has deprived ReWa of the benefit of the insurance coverage for which ReWa paid substantial premiums, and has caused ReWa to sustain further substantial damages in tort. ReWa is entitled to a judgment against the IRF for actual and consequential damages, and for attorney’s fees pursuant to common law and S.C. Code Ann. § 38-59-40 due to the IRF’s breach of the implied covenant of good faith and fair dealing, and bad faith.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Rivers S. Stilwell

Rivers S. Stilwell
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Greenville, South Carolina 29601
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Attorneys for Renewable Water Resources

Greenville, South Carolina
March 26, 2018

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

Renewable Water Resources,) Civil Action No. 2016-CP-23-5905
)

Plaintiff,)
)

vs.)

CERTIFICATE OF SERVICE

Insurance Reserve Fund, a Division of)
 the State Fiscal Accountability Authority)
 of South Carolina,)
)

Defendant.

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Renewable Water Resources, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by electronic mail and United States Mail, postage prepaid, to the following address(es):

Pleadings:

ReWa's Responses to the IRF's First Set of Interrogatories

Counsel Served:

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 Lindemann, Davis & Hughes, P.A.
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 Email: andrew@ldh-law.com

John R. Devlin, Jr., Esquire
 Lori E. Jolly, Esquire
 Devlin & Parkinson, P.A.
 Post Office Box 10387
 Greenville, SC 29603
 Email: john.devlin@devlinparkinson.com
 Email: lori.jolly@devlinparkinson.com


 Ann Pollard
 Administrative Assistant

May-26, 2018

From: [Simmons, Judge Charles](#)
To: [Andrew Lindemann](#)
Cc: [Herrmann, Karen](#); [John Devlin](#); [Katie Towery](#); [Hanks, Danette](#); [William Brown](#); [Rivers Stilwell](#)
Subject: RE: Renewable Water Resources v. Insurance Reserve Fund - C.A. No. 2016-CP-23-5905
Date: Thursday, February 27, 2020 8:58:18 AM

Mr. Lindeman,

The call this afternoon will not have a court reporter. And, I do not typically ask for attorneys to appear in person and do not see a reason for in-person appearances today. If there is an objection to a conference call, I am fine with moving ahead with finalizing the order based upon the record thus far.

As for lack of closing arguments or briefing the damages issues, you are certainly correct. I do not feel the need for closing arguments since I am familiar with the record. As for briefing damages, I did not request that since I believe the record is sufficient for those determinations.

Please advise if the 4:00 conference call today will be necessary.

Charles B. Simmons, Jr., Judge
Greenville County Courthouse
305 East North Street, Suite 313
Greenville, SC 29601

Phone: (864) 467-8556
Fax: (864) 467-8401

From: Andrew Lindemann [mailto:Andrew@LDH-Law.com]
Sent: Thursday, February 27, 2020 8:45 AM
To: Simmons, Judge Charles
Cc: Herrmann, Karen; John Devlin; Katie Towery; Hanks, Danette; William Brown; Rivers Stilwell
Subject: Renewable Water Resources v. Insurance Reserve Fund - C.A. No. 2016-CP-23-5905

CAUTION: This email is from an EXTERNAL source. Ensure you trust this sender before clicking on any links or attachments.

Judge Simmons:

Good morning. I understand from the email received yesterday and the "Preliminary Memo of Ruling" that you want to address with counsel at least two substantive issues (as stated at the end of the memo) at today's conference call scheduled for 4:00. Of course, we welcome the opportunity to address those issues and any others with you. However, I did want to inquire ahead of time whether the Court will have a court reporter present for that conference call. If that was not the plan, I would respectfully request that a court reporter be present so that the discussions can be on the record. If that is not feasible, I will be happy to travel to Greenville at 4:00 so that the discussions with the Court may be on the record. Please let me know if you wish for me to be there in person.

Additionally, while you have provided your preliminary ruling, I would respectfully point out that we have not yet been given the opportunity to either make closing arguments or brief the damages issues based on the evidence presented at trial. When you asked for proposed orders, you instructed the parties to only address liability issues, which is what we did. We would also ask for

the ability to present arguments on the damages issues either in writing or at a hearing on the record before the Court makes its final rulings on the case.

Thank you for your consideration of this request.

Andrew

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
vs.	)	
	)	
Insurance Reserve Fund, a Division of	)	<u>PLAINTIFF'S MOTION FOR</u>
the State Fiscal Accountability Authority	)	<u>COSTS</u>
of South Carolina,	)	
	)	
Defendant.	)	

Pursuant to Rule 54 of the South Carolina Rules of Civil Procedure, Plaintiff Renewable Water Resources ("ReWa") hereby moves for taxable costs in the amount of \$32,955.84.

Rule 54(d), SCRCF, provides that "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law." The South Carolina Supreme Court and Court of Appeals have held that costs may be assessed against the State as with any other Defendant. *See Dunn v. Dunn*, 298 S.C. 365, 369, 380 S.E.2d 836, 838 (1989); *Varn v. South Carolina Dept. of Highways & Public Transp.*, 311 S.C. 349, 354, 428 S.E.2d 895, 898 (Ct. App. 1993).

Rule 54(e), SCRCF, states that taxable costs include: (1) costs authorized by statute; (2) all filing and recording fees charged by the clerk of court in which the action is pending; (3) fees of the sheriff for service of the summons and complaint or subpoenas for trial; (4) fees incurred in service of process, which include the fees incurred to subpoena the witnesses who testified at trial or for the production of documents and materials actually used at trial; (5) witness fees and mileage actually traveled and paid to persons who testified at trial; and (6) fees for exemplification and copies of papers necessarily obtained for trial.

In the present case, statutory provisions allow ReWa to recover interest from the time the Honorable Charles B. Simmons, Jr. entered his Findings of Fact and Conclusions of Law on March 18, 2020 until such time as the judgment was entered by the clerk on April 8, 2020. Pursuant to S.C. Code Ann. § 15-37-30, “[w]hen the judgment is for the recovery of money, interest from the time of the verdict or report until judgment may be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.” The legal rate of interest is currently 8.75%, which is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. *See* S.C. Code Ann. § 34-31-20(B); *see also* S.C. Supreme Court Order dated January 6, 2020 Re: Interest Rate on Money Decrees and Judgments.

In support of its Motion, ReWa relies upon the Affidavit of William S. Brown, attached hereto as **Exhibit A**, and the itemized listing of costs attached to the Affidavit, which includes categories and specific amounts of each item for which ReWa seeks recovery in this Motion for Costs. ReWa respectfully asks that this Court grant its Motion for Costs and award ReWa Thirty Two Thousand Nine Hundred Fifty-Five Dollars and Eighty-Four Cents (\$32,955.84).

(signature page follows)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/William S. Brown

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Attorneys for Renewable Water Resources

Greenville, South Carolina

April 16, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
 Renewable Water Resources,	)	
	)	Civil Action No. 2016-CP-23-5905
Plaintiff,	)	
	)	
v.	)	
	)	DEFENDANT’S RETURN AND
Insurance Reserve Fund, a Division of	)	OBJECTIONS TO PLAINTIFF’S
the State Fiscal Accountability	)	MOTION FOR COSTS
Authority of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

The Defendant Insurance Reserve Fund submits the following return and objections to the Plaintiff’s Motion for Costs filed April 16, 2020.

As a threshold issue, the Defendant is concerned that the Plaintiff is not following the proper procedures for taxation of costs as established in Rule 54(d), SCRPC, which provides: “Costs may be taxed by *the clerk* on one day’s notice. On motion served within 10 days after receipt of notice, the action of the clerk may be reviewed by the court.” *See*, Rule 54(d), SCRPC. (Emphasis added). Thus, the decision on taxation of costs is to be made initially by the Clerk of Court. The Circuit Court then has the authority, upon motion, to review the decision of the Clerk. In this case, the Defendant is unaware of any initial decision having already been made by the Clerk of Court nor of the filing of a motion seeking review of that decision by the Court. Thus, it was premature for Plaintiff’s counsel to forward the Motion for Costs to Judge Charles Simmons for any initial decision on taxation.

Additionally, the Defendant will be filing an appeal in this case to the South Carolina Court of Appeals. The Notice to Appeal will be filed and served on April 23, 2020. Rule 54(d), SCRPC,

provides discretion for delaying the taxation of costs until the appeal is completed. Thus, the Defendant respectfully asks the Clerk of Court or this Court to delay any taxation of the requested costs until the appeal is completed.

In the event that the Clerk of Court or this Court is unwilling to delay the taxation of costs, the Defendant objects to certain items claimed by the Plaintiff. Specifically, the Plaintiff seeks \$29,324.19 in interest to be taxed as costs. The Plaintiff cites to no provision in Rule 54(e), SCRCP, to support that claim for taxable costs. Instead, the Plaintiff relies solely on Section 15-37-30 as the basis for that claim. The Defendant submits that Section 15-37-30 has been repealed or is otherwise inconsistent with Rule 54(e), and Rule 54(e) is controlling as a matter of law. When the Rules of Civil Procedure were first adopted in 1985, the General Assembly enacted 1985 S.C. Act No. 100 which provided for the repeal of specific statutes governing the practice and procedure in civil courts. Section 3 of the 1985 Act further provided as follows: “In event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed in this act, *the provision of the rules shall control.*” 1985 S.C. Act No. 100, § 3. (Emphasis added). Thus, the General Assembly adopted a rule of construction whereby the Rules of Civil Procedure control over any procedural statute, even one that was not explicitly repealed in the 1985 Act.

The 1985 Act did not explicitly provide for the repeal of Section 15-37-30. However, the original Rule 54, as adopted in 1985, did not include subsection (e) or an equivalent provision setting forth a list of taxable costs. Thus, the original Rule 54 was intended to follow the existing statutory law for determining eligible costs for taxation. That changed in 1993, when Rule 54 was substantially amended. That amendment included the addition of subsection (e) which now includes a list of eligible taxable costs. The adoption of subsection (e) was intended to repeal or otherwise supersede the statutory provisions that previously governed taxable costs. That is clear

from the Notes that accompanied the 1993 Amendment, which includes the following: “Rule 54(e) provides a list of taxable costs. It is based upon the comparable local federal rule, and follows generally the state statutes that *previously* authorized taxable costs.” *See*, Rule 54, SCRCF, Note to 1993 Amendment. (Emphasis added). The use of the word “previously” indicates the clear intent that the newly adopted Rule 54(e) governs over the previously existing statutes, including Section 15-37-30. The current Rule 54(e) does not include any interest as a taxable cost in the list of eligible costs for taxation. Thus, the Defendant submits that Rule 54(e) is controlling over Section 15-37-30 which has been impliedly repealed consistent with the rule of construction established in Section 3 of the 1985 Act. For this reason, the Defendant opposes the award of interest as a taxable cost.¹

Additionally, the Defendant objects to the claim for “exemplifications and copies of papers necessarily obtained for trial” in the amount of \$3,356.65. Rule 54(e)(6), SCRCF, provides as follows:

The costs of one copy of a document introduced in evidence in lieu of the original; the fees of officials for certification of proof of the non-existence of documents; the cost of securing translation if the document translated is taxable or the translation is necessary for exemplification of matters before the court; the cost of maps and one copy of a photograph introduced into evidence, are taxable.

See, Rule 54(e)(6), SCRCF. (Emphasis added). Of the costs encompassed within Rule 54(e)(6), SCRCF, only the highlighted items above have any applicability. The Plaintiff is claiming \$90.10 for the cost of “foam board exhibits.” The Defendant is not certain what exhibits are referred to, but there were no oversized foam board exhibits introduced into evidence during the trial.

¹ In the event the Clerk or the Court does award interest as a taxable cost pursuant to Section 15-37-30, the Defendant disputes the Plaintiff’s calculation of “daily interest” as \$1,396.39. The correct number is slightly less -- \$1,392.57, which at 21 days would be a total of \$29,243.97. The Plaintiff based its calculation of the “daily interest” on 365 days, but 2020 is a leap year with 366 days.

Additionally, the Plaintiff is claiming \$647.35 for other “trial exhibits.” The Plaintiff has not provided the invoices to support or explain that amount, but Rule 54(e)(6) allows for *one copy* of the documents and photographs that were introduced into evidence. At a reasonable charge of 10 cents or less for each copied page, the Plaintiff would be seeking recovery for one copy of over 6,400 pages of exhibits. While the Defendant does not know the precise number of pages of exhibits introduced by the Plaintiff, it was a number far less than 6,400 pages. Thus, the Plaintiff has not supported its claim to the taxation of trial exhibits.

The Plaintiff also seeks the recovery of the costs of depositions for use at trial. Rule 54(e)(6), SCRCF, does not provide a basis for the recovery of deposition expenses as taxable costs. In the case of *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993), which predates the 1993 amendment to Rule 54 which added subsection (e), the South Carolina Court of Appeals addressed whether deposition costs may be properly taxed as costs under then existing statutory provisions. The Court referenced Section 15-37-40 which allowed for the “reasonable compensation of commissioners in taking depositions.” S.C. Code Ann. § 15-37-40. The Court affirmed the denial of the depositions costs because the record was insufficient. But, the Court also opined that “[w]e doubt the applicability of this provision to present day deposition practice.” 433 S.E.2d at 25, n.7. The Plaintiff here has not cited Section 15-37-40 as a basis for recovering the depositions costs, and correctly so given that it was repealed and/or superseded by the adoption of Rule 54(e). Nonetheless, it is clear that Rule 54(e)(6), which the Plaintiff does rely upon, does not provide for the taxation of deposition expenses.²

² It should also be mentioned that only the depositions of Robert Byers and Fred Young were published to the Court during the trial. The deposition of Jerry Anderson was never used. Mr. Anderson never testified by deposition or as a live witness.

Based on the foregoing, the Defendant respectfully requests that the Clerk of Court and/or the Court delay the taxation of costs, but if not, that the costs be limited to the filing fees and expenses incurred for service of process as sought by the Plaintiff.

Respectfully submitted,

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*Counsel for Defendant South Carolina
 Insurance Reserve Fund*

April 23, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Renewable Water Resources,	)	Civil Action No. 2016-CP-23-5905
	)	
Plaintiff,	)	
vs.	)	
	)	
Insurance Reserve Fund, a Division of the	)	<u>REPLY TO DEFENDANT’S</u>
State Fiscal Accountability Authority of	)	<u>OBJECTIONS TO PLAINTIFF’S</u>
South Carolina,	)	<u>MOTION FOR COSTS</u>
	)	
Defendant.	)	

Plaintiff Renewable Water Resources (“ReWa”) submits the following Reply to the objections of Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina (“IRF”) to ReWa’s Motion for Costs.

As an initial matter, the IRF mistakenly asserts that ReWa has not followed the proper procedure for requesting that the Court award costs. Rule 54(d), SCRCP, states as follows: “A motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment.” ReWa followed this clear procedure by filing its Motion for Costs on April 16, 2020, which was within 10 days of receipt of written notice of the entry of final judgment. ReWa forwarded a copy of the Motion for Costs to the Honorable Charles B. Simmons, Jr. out of courtesy to the Court. The IRF’s argument that this courtesy was “premature” and somehow constitutes a procedural defect is completely misguided.

The IRF, without any justification or explanation, requests that the Court delay taxation of costs until the appeal is completed. ReWa does not believe that a delay in awarding its costs is warranted or justified under the circumstances of this case. The polychlorinated biphenyl (“PCB”) contamination occurred at ReWa’s facilities approximately seven years ago, and this action has

been pending for three and a half years. The IRF's request that the award of costs be delayed pending its appeal is merely another effort to delay a rightful award to ReWa.

The IRF further argues that ReWa is not entitled to certain costs claimed. The IRF asserts that S.C. Code Ann. § 15-37-30 was impliedly repealed by Rule 54(e), SCRCP. As the IRF notes, when the Rules of Civil procedure were adopted in 1985 S.C. Act 100 (attached as **Exhibit A**), the General Assembly provided a long list of statutes which were repealed because they were replaced by the Rules. Importantly, S.C. Code Ann. § 15-37-30 was not listed as repealed by the General Assembly in 1985 S.C. Act 100 or any subsequent Act.

"In general, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation." *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 135, 694 S.E.2d 213, 216 (2010). "The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." *Spectre, LLC v. South Carolina Dep't of Health & Env'tl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). The IRF does not even attempt to satisfy the extremely high threshold of this analysis for when a statute can be repealed by implication.

The adoption of the Rules of Civil Procedure in 1985 did not repeal S.C. Code Ann. § 15-37-30. This is shown by the fact that South Carolina Appellate Courts found the statute binding and applicable after 1985. See *Vance v. Jacobs*, 294 S.C. 377, 364 S.E.2d 755 (Ct. App. 1988) (applying interest on the verdict from the time of the original jury verdict until entry of judgment pursuant to S.C. Code Ann. § 15-37-30).

Furthermore, the 1993 amendment of Rule 54 did not impact S.C. Code Ann. § 15-37-30, or any other statute. The express language of Rule 54(e), SCRCP, refutes the IRF's assertion. Rule 54(e)(1) permits recovery of "Costs Authorized by Statute" allowing for the awarding of

costs authorized “in favor of the prevailing party under *any statute* or Rule of Civil Procedure.” Rule 54(e)(1), SCRCP (emphasis added); *see also* 7 S.C. JUR. COSTS § 42 (March 2020 Update) (attached as **Exhibit B**). Because the express language of the Rule allows for costs authorized by statute, there can be no implied repeal of the very statutes under which the Rule allows costs to be recovered. Application of S.C. Code Ann. § 15-37-30 is consistent with and in accordance with Rule 54, not inconsistent as the IRF attempts to suggest.¹ Therefore, under Rule 54(d) and (e), SCRCP, ReWa is entitled to costs pursuant to S.C. Code Ann. § 15-37-30 in the amount of \$29,324.19.²

¹ The IRF’s reliance on the Reporter’s Note that accompanied the 1993 amendment is misplaced. The Reporter’s Note states that Rule 54(e) “follows generally the state statutes that previously authorized taxable costs.” (Emphasis added.) According to the IRF, the Note’s use of the word “previously” indicates those statutes no longer authorize the interest requested by ReWa. The IRF’s argument is wrong for at least two reasons.

First, when a Reporter’s Note is meant to indicate that a rule supersedes, alters, or replaces prior practice, it expressly says so. *See, e.g.,* Rule 20, SCRCP, Rptr’s Cmt. (noting that Rule 20(a) “liberalizes joinder in State practice” and “overrules cases like *Hellams v. Switzer*, 24 S.C. 39 (1885)”; Rule 29, SCRCP, Rptr’s Cmt. (“The 2001 amendment eliminates the requirement of court approval for requests for extensions regarding discovery procedure where the parties agree to the extension in writing.”); Rule 41, SCRCP, Rptr’s Cmt. (“This Rule amends present State practice . . .”). The Note to Rule 54(e) contains no such express language.

Second, the Note expressly says that the rule “follows,” or continues, the same practices as the statutes in force in 1993. When a Reporter’s Note states (as here) that a rule “follows” prior law or practice, it means that the Rule maintains and preserves the same practices and requirements already in place. *See, e.g.,* Rule 4, SCRCP, Rptr’s Cmt. (noting that “Rule 4(j) . . . follows State practice”); Rule 33, SCRCP, Rptr’s Cmt. (“The \$10,000 limitation follows the approach set by present Circuit Court Rule 87J.”); Rule 44, SCRCP, Rptr’s Cmt. (noting that Rule 44 “conforms to present practice and Code §§ 19-5-10, 19-5-20, 19-5-40 and 19-5-220”). Accordingly, at most, the Reporter’s Note on which the IRF relies simply establishes that Rule 54(e) itself continues the practice of permitting an award of interest such as what ReWa seeks here.

² The IRF claims that ReWa’s daily interest calculation should be \$3.82 less because 2020 is a leap year. ReWa could not find any authority to support the IRF’s position that the interest should be calculated based upon a 366-day calendar year as opposed to a 365-day calendar year.

ReWa's costs for exemplifications and copies of papers necessarily obtained for trial are also recoverable under Rule 54(e)(6), SCRCPP. During trial, ReWa used a foam board blow-up of Plaintiff's Exhibit 107, which reflects ReWa's total damages calculation. The cost of obtaining this exemplification was \$90.10. ReWa also claims the cost of copying one full set of Plaintiff's trial exhibits for the Court, including copies of color pictures, which totaled \$647.35. These costs relate to copies of papers that were necessarily obtained for the trial of this matter, and are therefore recoverable under Rule 54(e)(6), SCRCPP.

Furthermore, ReWa's costs in obtaining original depositions for use at trial are also recoverable. The South Carolina Supreme Court upheld the award of deposition costs in *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 401-402, 618 S.E.2d 903, 908 (2005). Noting that the "trial judge has broad discretion to award costs to the prevailing party," the Supreme Court upheld the trial court's award of deposition costs pursuant to Rule 54(d), SCRCPP and S.C. Code Ann. § 15-37-40.³

For the reasons set forth above, and in the Motion for Costs, ReWa's Motion for Costs should be granted.

SIGNATURE ON FOLLOWING PAGE

³ ReWa concedes, however, that the deposition costs of \$428.78 relating to Jerry Anderson can be removed from ReWa's total claimed costs because Mr. Anderson did not testify as a live witness and, although portions of his deposition were originally designated, his deposition was not published to the Court during trial.

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Greenville, South Carolina
April 24, 2020

EXHIBIT A

Session 106 - (1985-1986)

S*0586 (Rat #0145, Act #0100 of 1985) General Bill, By Senate Judiciary

A Bill to repeal Sections of the Code of Laws of South Carolina, 1976, to be replaced by the South Carolina Rules of Civil Procedure promulgated by the Supreme Court pursuant to Article V, Section 4A of the South Carolina Constitution; those Sections of the Code repealed are Sections 15-1-20 and 15-1-70 through 15-1-210, Section 15-3-10, Sections 15-5-10 through 15-5-80, Sections 15-5-180 through 15-5-200, Sections 15-5-310 through 15-5-380 and Sections 15-5-510 through 15-5-570, Sections 15-9-10 through 15-9-100, Sections 15-9-470 through 15-9-500, Section 15-9-520, Sections 15-9-910 through 15-9-1030, Sections 15-13-10 through 15-13-960, Sections 15-15-10 through 15-15-70, Sections 15-21-10 through 15-21-50, Sections 15-23-10 through 15-23-90, Sections 15-25-10 through 15-25-50, Sections 15-27-10 through 15-27-630, Sections 15-28-10 and 15-28-20, Sections 15-31-10 through 15-31-140, Sections 15-33-10 through 15-33-120, Sections 15-35-10 through 15-35-150 and Sections 15-35-190 through 15-35-340; Sections 15-55-10 through 15-55-100; Sections 15-57-10 through 15-57-40; Sections 15-59-10 through 15-59-30, Sections 15-61-60 through 15-61-90, Section 15-65-40, Sections 18-1-50, 18-1-60 and 18-1-110, Sections 18-7-40, 18-7-50, 18-7-120, and 18-7-410 through 18-7-440, Sections 18-9-60 through 18-9-120, and 18-9-260, Sections 19-7-10 through 19-7-40, Sections 19-13-10 through 19-13-120, Sections 19-15-10 through 19-15-110, Sections 19-17-10 through 19-17-90, Sections 19-19-10 through 19-19-230, and Section 19-21-70; and to provide the South Carolina Rules of Civil Procedure shall control when in conflict with the Code of Civil Procedure except as to substantive rights of the parties.

04/25/85	Senate	Introduced, read first time, placed on calendar without reference SJ-1765
04/26/85	Senate	Read second time SJ-1789
04/26/85	Senate	Ordered to third reading with notice of amendments SJ-1789
04/30/85	Senate	Read third time and sent to House SJ-1795
04/30/85	House	Introduced and read first time HJ-2758
04/30/85	House	Referred to Committee on Judiciary HJ-2759
05/02/85	House	Recalled from Committee on Judiciary HJ-2919
05/08/85	House	Read second time HJ-3000
05/09/85	House	Read third time and enrolled HJ-3083
05/15/85		Ratified R 145
05/21/85		Signed By Governor
05/21/85		Effective date 07/01/85
05/21/85		Act No. 100
06/03/85		Copies available

EXHIBIT B

7 S.C. Jur. Costs § 42

South Carolina Jurisprudence | March 2020 Update

Costs

Donald B. Clark, Esq., Rosen, Rosen & Hagood

V. Specific Costs Recoverable

§ 42. Interest

References

When a judgment is for the recovery of money, interest from the time of the verdict or report until the judgment is finally entered is to be computed by the clerk and added to the costs of the party entitled to costs.¹ Thus, when a verdict is set aside by a trial court and subsequently reinstated by an appellate court, the interest is computed from the time of the original verdict.² The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually.³

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Footnotes

- 1 S.C. Code Ann. § 15-37-30 (Law. Co-op. 1976).
- 2 Vance v. Jacobs, 294 S. C. 377, 364 S. E. 2d 755 (Ct. App. 1988).
- 3 S.C. Code Ann. § 34-31-20(B), amended eff. March 21, 2005, providing further that this rate applies to all judgments entered on or after July 1, 2005; for judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

End of Document

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Renewable Water Resources,) Case No. 2016-CP-23-05905
)
 Plaintiff,)
)
 -vs-) TRANSCRIPT OF RECORD
)
Insurance Reserve Fund, a)
Division of the State Fiscal)
Accountability Authority of)
South Carolina,)
)
 Defendants.)
_____) January 28, 29, 30, 2020

BEFORE: THE HONORABLE CHARLES B. SIMMONS, JR.

APPEARANCES:

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Attorneys for the Plaintiff

Andrew Lindeman, Esquire
John Devlin, Esquire
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Danette P. Hanks, CCR
Court Reporter

<u>I N D E X</u>				
WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
George William Fletcher Stilwell Devlin The Court	14	75 103	98	102
Joel Henry Jones Stilwell Devlin	108	170		
Ted Clark Vincent Brown Lindeman	198	228	253	
Robert Glen McManus Stilwell Lindeman	256	332	456	
Patricia Dennis Towery Devlin	460	507	552	555
Kevin Finneran Devlin Brown The Court	567	597 603	612	608
Christopher Michael Lombard Lindeman Brown	618	674	702	

PLAINTIFF'S/EXHIBITS

NO	DESCRIPTION	ID	EV
P-1	General Tort Liability Policy Declaration Page	10	
P-2	Building and Personal Property Policy Declaration Page	10	
P-3	General Tort Liability Policy Declaration Page	10	
P-4	Building and Personal Property Policy Declaration Page	10	491
P-5	General Tort Liability Policy Declaration Page	10	
P-6	Building and Personal Property Declaration Page	10	492
P-7	General Tort Liability Policy Declaration Page	10	
P-8	Building and Personal Property Coverage Form	10	
P-9	Causes of Loss - Special Form	10	
P-10	Tort Liability Insurance Policy	10	
P-11	Policyholder's Manual	10	
P-12	Policyholder's Manual	10	
P-13	Tort Manual	10	
P-14	Notice of DHEC NDPES Permit No. SC 0048381	10	556
P-15	Notice of DHEC NDPES Permit No. SC0033804	10	524
P-16	DHEC Email to Charles Logue re: ReWa Pelham WWTF Biosolids PCB	10	
P-17	Logue Email to DHEC re: Pelham Adverse Impact	10	139
P-18	SLED Bulletin	10	19
P-19	Joel Jones Email to DHEC re: Temporary Approval - ReWa Pelham WWTP	10	
P-20	Logue Email to DHEC re: Pelham WWTF situation	10	
P-21	DHEC letter to American Waste re: Septic Tank Service	10	
P-22	Nexsen Pruet Letter to DHEC and EPA re: American Waste	10	
P-23	DHEC Email re: 3ppb and EPA	10	
P-24	Hartley Letter to DHEC and EPA	10	
P-25	Lavender Email to DHEC re: ReWa biosolids filtrate	10	
P-26	Tommy Lavender Email to DHEC re: ReWa operations	10	
P-27	ReWa Letter to EPA and DHEC re: Notification of PCB Detection	10	
P-28	ReWa Letter to DHEC re: Pelham WWTP WW Solids Letter	10	
P-29	DHEC Press Release with Regulation	10	

NO	DESCRIPTION	ID	EV
P-30	PCB Emergency Regulation	10	
P-31	DHEC Memo re: PCB Handling and Disposal Guidelines for Grease Traps	10	
P-32	ReWa Letter to EPA and DHEC re: Notification of PCB Plan	10	
P-33	DHEC Letter to ReWa re: Beltpress Filtrate Operation pursuant to Emergency PCB Regulation	10	
P-34	Lavender Letter to DHEC re: Draft Sampling Protocol	10	
P-35	Lavender Letter to EPA re: Draft Sampling Protocol	10	
P-36	DHEC Email to Lavender re: PCB Notifications	10	
P-37	EPA Email to ReWa re: Frac tank at Mauldin	10	
P-38	Charles Logue Email to DHEC re: Mauldin and Lower Reedy PCB clean-up	10	161
P-39	Jones Email to EPA and DHEC	10	
P-40	Jones Email to EPA and DHEC	10	
P-41	Lavender Email to EPA and DHEC	10	
P-42	DHEC Email re: PCB Regulation	10	
P-43	Jones Email to EPA and DHEC	10	
P-44	Jones Email to EPA and DHEC	10	
P-45	Jones Email to EPA and DHEC	10	
P-46	IRF Memo to Fred Young re: ReWa Property Claims	10	
P-47	IRF Email to Patricia Dennis re: Claim	10	
P-48	Nelson Chandler Email to Patricia Dennis re: Coverage	10	
P-49	IRF Letter to ReWa re: Claim	10	
P-50	Young Report to IRF re: PCB Contamination	10	
P-51	Young Report to IRF re: PCB Contamination	10	
P-52	ReWa Email to Fred Young re: PCB Expenses	10	
P-53	ReWa Email to Fred Young re: PCB Expenses	10	
P-54	Patricia Dennis Email to IRF re: Coverage	10	
P-55	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-56	Fred Young Email to Patricia Dennis re: PCB Expenses	10	

NO	DESCRIPTION	ID	EV
P-57	Fred Young Email to ReWa re: PCB Expenses	10	
P-58	Young Report to IRF re: PCB Contamination	10	
P-59	Patricia Dennis Email to Fred Young re: PCB Expenses	10	
P-60	Patricia Dennis Email re: PCB Expenses	10	
P-61	Fred Young Email to Jerry Anderson re: ReWa Approval	10	
P-62	ReWa Email to Fred Young re: PCB Expenses	10	
P-63	ReWa Email to Fred Young re: PCB Expenses	10	
P-64	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-65	Patricia Dennis Email to Fred Young re: Coverage	10	
P-66	Fred Young Email to Jerry Anderson re: PCB Expenses 106-66	10	
P-67	ReWa Email to Fred Young re: PCB Expenses	10	
P-68	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-69	ReWa Email to Fred Young re: PCB Expenses	10	
P-70	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-71	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-72	Fred Young Email to Jerry Anderson re: PCB Expenses	10	
P-73	Fred Young Email to Patricia Dennis re: PCB Expenses	10	
P-74	Fred Young Email to Rob Byers re: Coverage	10	
P-75	Rob Byers Email to Patricia Dennis re: PCB Claim	10	
P-76	Rob Byers Email to Patricia Dennis re: PCB Claim	10	
P-77	IRF Letter to ReWa re: Coverage Determination	10	
P-78	ReWa Email to Fred Young re: PCB Expenses	10	
P-79	Young Report to IRF re: PCB Contamination	10	
P-80	Young Invoices to IRF	10	
P-81	Proof of Loss	10	
P-82	Rob Byers Email to Patricia Dennis re: Proof of Loss	10	
P-83	ReWa Email to Fred Young re: PCB Expenses	10	

NO	DESCRIPTION	ID	EV
P-84	Claim Data Sheet	10	
P-85	IRF Claim Notes	10	
P-86	Damage definition from Dictionary.com	10	
P-87	Damage definition from Oxford Dictionaries	10	
P-88	Time line of PCB-Related Activities	10	
P-89	FAQ on PCBs	10	50
P-90	ReWa Land Application and Landfill Information	10	325
P-91	ReWa PCB Sampling Results *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary of voluminous underlying data. The underlying data is admissible into evidence, and has been either produced (see ReWa v. IRF_020138-40844) or made available for examination by the IRF	10	169
P-92	Sampling Reports	10	
P-93	Sampling Reports	10	
P-94	AECOM Final Summary Report	10	
P-95	Ted Clark Curriculum Vitae	10	
P-96	Logue Email to Welch re: Pelham Sludge Related Issues	10	
P-97	Welch Email to Clark re: Status of Work	10	
P-98	Welch Email to Lavender and Logue re: PCB Calculations at Mauldin Road	10	
P-99	Summary of PCB Expenses Spreadsheet	10	305
P-100	PCB Expenses Spreadsheet *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary of voluminous underlying data. The underlying data is admissible into evidence and has been either produced (see ReWa v. IRF_000661-011715, ReWa v. IRF_012787-19989) or made available for examination by the IRF	10	305
P-101	Regular Cost of Processing Solids for Land Application *Pursuant to Rule 1006, SCRE, this spreadsheet constitutes a summary of voluminous underlying data. The underlying data is admissible into evidence and has been either produced (see ReWa v. IRF_041323-41346), ReWa v. IRF_012787-19989) or made available for examination by the IRF	10	
P-102	Nexsen Pruet Invoices	10	505
P-103	ReWa Presentation	10	
P-104	Rogers & Calcott Lab Report	10	

NO	DESCRIPTION	ID	EV
P-105	ReWa Presentation	10	
P-106	Photographs 106.93, 106.6, 106.7, 106.8, 106.11, 106.14, 106.20, 106.21, 106.23, 106.27, 106.30, 106.35, 106.37, 106.46, 106.59, 106.63, 106.67, 106.68, 106.69, 106.70, 106.71, 106.72, 106.74, 106.77, 106.78, 106.79, 106.81, 106.82	10	290
P-106.60	Photograph	10	155
P-106.61	Photograph	10	155
P-106.66	Photograph	10	25
P-106.90	Photograph	10	292
P-106.91	Photograph	10	292
P-106.92	Photograph	10	292
P-106.93	Photograph	10	268
P-106.96	Photograph	10	292
P-106.97	Photograph	10	292
P-106.61	Photograph	10	155
P-107	ReWa's Total Damages	10	

DEFENDANT'S/EXHIBITS

D-1	Tolling Agreement, executed June 23, 2015	10	
D-2	First Amendment Tolling Agreement, executed September 21, 2015	10	
D-3	Second Amendment Tolling Agreement, executed October 29, 2015	10	
D-4	Third Amendment Tolling Agreement, executed January 14, 2016	10	
D-5	Fourth Amendment Tolling Agreement, executed March 31, 2016	10	
D-6	Fifth Amendment Tolling Agreement, executed July 18, 2016	10	
D-7	Sixth Amendment Tolling Agreement, executed September 22, 2016	10	
D-8	Letter from W. Thomas Lavender, Jr. to Rob Byers, dated February 11, 2015 (SCBCB 000080-000085)	10	635
D-9	Letter from W. Thomas Lavender, Jr. To John R. Devlin, Jr., dated July 28, 2016 (Exhibit 8 to ReWa/Dennis Deposition)	10	639
D-10	Letter from W. Thomas Lavender, Jr. To John R. Devlin, Jr., dated July 28, 2016 (Exhibit 8 to ReWa/Dennis Deposition) *** PROFFERED	10	644

D-11	Letter from John R. Devlin, Jr. To W. Thomas Lavender, Jr., dated August 29, 2016 (Exhibits 9 to ReWa/Dennis Deposition)	10	
D-12	Letter from Marcus Manos to John R. Devlin, Jr., dated October 7, 2016 (Exhibits 10 to ReWa/Dennis Deposition)	10	648
D-13	Letter from John R. Devlin, Jr. To Marcus Manos dated October 13, 2016 (Exhibits 10 to ReWa/Dennis Deposition)	10	659
D-14	Email from Fred Young to Patricia Dennis, dated February 11, 2014 (SCBCB 000145)	10	556
D-15	Pivot PCB Expense @ 6-30-16 (Exhibit 10 to ReWa/McManus Deposition)	10	
D-16	Regular Cost of Processing Solids for Land Application (Exhibit 16 to ReWa/McManus Deposition)	10	448
D-17	Waste Management Schedule of Value for the Pelham Dewatering Project (ReWa v. IRF 000793)	10	
D-18	Scope of Work: Pelham WWTP Sludge Removal and Disposal (ReWa v. IRF 000822-823)	10	
D-19	John B. Russell & Son Construction Invoices for Mauldin Road Facility Invoice Numbers 33312, 33274, 33326, 33407, 33406, 33437, 33340, 33341, 33481, 33501, 33511, 33502 (ReWa v. IRF 010757, 010737-010740, 010776, 011101-011102, 015528-015529, 011192-011193, 011186-011187, 011180-011181, 011289, 011324-011327, 011369, 011318, 011333)	10	393
D-20	HEPACO Invoice, Proposal and Emails for Lower Reedy Facility (ReWa v. IRF 007851-007856, 007861-007862)	10	375
D-21	Kevin Finneran - CV	10	
D-22	Brenntag Contract (ReWa v. IRF 000876-000917)	10	
D-23	Brenntag Vendor Documents (ReWa v. IRF 001799-001847)	10	430
D-24	Minutes - Renewable Water Resources Board meeting of September 23, 2013	97	97
D-25	Minutes - Renewable Water Resources Board meeting of October 28, 2013	97	97
D-26	Minutes - Renewable Water Resources Board meeting of November 25, 2013	97	97
D-27	Invoice from A&B Environmental - washing out tank number 7	404	404

COURT'S/EXHIBITS

NO ID	EV	DESCRIPTION		
C-1		List of Exhibits Stipulated to	11	
C-2		Original copy of Deposition of Ted V. Clark	12	
C-3		Former Defendant 1 - Tolling Agreement - June 23, 2015	557	
C-4		Former Defendant 2 - Sixth Amendment Tolling Agreement - August 15, 2016	557	
C-5		Former Defendant 3 - First Amendment Tolling Agreement - September 21, 2015	557	
C-6		Former Defendant 4 - Second Amendment Tolling Agreement - October 29, 2015	557	
C-7		Former Defendant 5 - Third Amendment Tolling Agreement - January 14, 2016	557	
C-8		Former Defendant 6 - Fourth Amendment Tolling Agreement - March 31, 2016	557	
C-9		Former Defendant 7 - Fifth Amendment Tolling Agreement - July 28, 2016	557	

1 (WHEREUPON, Plaintiff Exhibit Numbers 1 through 107
2 were marked for identification.)

3 (WHEREUPON, Defendant Exhibit Numbers 1 through 23
4 were marked for identification.)

5 THE COURT: For the record this is 2016-05905;
6 Renewable Water versus Insurance Reserve. Here today for
7 issues arising out of certain insurance policies and PCB
8 contamination.

9 So gentlemen and lady, I understand there have been
10 some stipulations that need to be addressed. So let's go
11 ahead and move into that.

12 MR. BROWN: Yes, Your Honor. On the ReWa exhibit
13 list, certain exhibits were stipulated to. We've marked
14 them in yellow on a copy we've provided to the Court
15 Reporter.

16 THE COURT: Ms. Hanks, what's that going to be
17 marked?

18 COURT REPORTER: Court Exhibit Number 1.

19 THE COURT: All right. Thank you.

20 MR. BROWN: And I can read them off quickly in
21 batches if that's ---

22 THE COURT: No. I'm pretty good at reading. So
23 anything with yellow is stipulated to; correct?

24 MR. BROWN: Anything with yellow highlighting is
25 stipulated and we would move all of those into evidence,

1 Your Honor.

2 THE COURT: All right.

3 MR. LINDEMAN: No objection, Your Honor, as far
4 as the yellow ones are the ones that have been stipulated
5 to.

6 (WHEREUPON, Court Exhibit Number 1 was marked for
7 identification.)

8 (WHEREUPON, Plaintiff Exhibit Numbers 1, 2, 8, 9, 10,
9 14, 15, 27, 28, 29, 30, 31, 32, 33, 38, 42, 46, 47,
10 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61,
11 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74,
12 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88, 94 and
13 95 were stipulated to and admitted into evidence.)

14 THE COURT: All right. Any other -- I
15 understand there's also a list of some stipulations that
16 counsel have agreed on that we need to make sure that's
17 part of the record?

18 MR. BROWN: Yes, Your Honor. We would hand up
19 what has been agreed to as a joint stipulation.

20 THE COURT: Does that need to be marked as an
21 independent exhibit?

22 COURT REPORTER: Do you want to mark it as a
23 Court exhibit?

24 MR. BROWN: I think marking it as a Court
25 exhibit would be appropriate, Your Honor. And here's a

1 copy that you can keep, as well.

2 (WHEREUPON, Court Exhibit Number 2 was marked for
3 identification.)

4 THE COURT: All right. Any other preliminary
5 housekeeping matters that we need at this point?

6 MR. STILWELL: I don't think so, Your Honor.

7 THE COURT: All right. And let me, just for a
8 clear record for the fine folks down in Columbia when this
9 gets there, Mr. Stilwell, since you're standing, if you
10 would -- I want all counsel to identify themselves and who
11 they're here on behalf of. So, Mr. Stilwell, be glad to
12 hear from you first.

13 MR. STILWELL: Your Honor, I'm Rivers Stilwell.
14 I'm the outside General Counsel for Renewable Water
15 Resources. And of course, William Brown is here with me
16 representing ReWa and Katie Towery is my associate and
17 she's here participating in the trial, as well. The
18 corporate representative Joel Jones is here. And then we
19 have George Fletcher, who is a former board member, is
20 going to be our first witness. And we have Ted Clark who
21 is our expert witness.

22 THE COURT: All right. Mr. Lindeman.

23 MR. LINDEMAN: Thank you, Your Honor. May it
24 please the Court, Your Honor? Andrew Lindeman on behalf of
25 the Defendant, the South Carolina Insurance Reserve Fund.

1 Co-Counsel is John Devlin, who I know you know. With us
2 here today is Chris Lombard. He is the Assistant Claims
3 Manager for the Insurance Reserve Fund. Kevin Finneran is
4 also present. He is an expert witness who you will likely
5 be hearing from later in the case. And John's paralegal,
6 Paige ...

7 MS. NELSON: Nelson.

8 MR. LINDEMAN: ... Nelson is with us, as well.
9 Sorry, Paige. Thank you, Your Honor.

10 THE COURT: And I've been around long enough to
11 understand that the paralegals are the ones who kind of
12 keep all this flowing and pulled together. I have great
13 respect for paralegals.

14 So, Mr. Stilwell, you can go ahead and call your first
15 witness.

16 MR. STILWELL: I was going to go. I didn't want
17 to overlook Meg Thrasher because she's my paralegal. She's
18 been working with me twenty-five years, so she helps carry
19 everything we've got going here.

20 Judge, Mr. Fletcher is going to come up as our first
21 witness, George Fletcher.

22 THE COURT: All right. All counsel is certainly
23 free to use that little podium. Just be aware it is taped
24 with a microphone, so don't get overly aggressive with it.

25 MR. STILWELL: Okay.

1 THE COURT: Mr. Fletcher, if you'll place your
2 left hand on the bible and raise your right hand for me.
3 Do you swear to tell the truth, whole truth and nothing but
4 the truth?

5 MR. FLETCHER: I do.

6 THE COURT: Thank you. If you'll come around
7 and have a seat, please, sir.

8 MR. STILWELL: Judge, just for housekeeping,
9 these are the exhibits we'll be using out of our full set.

10 THE COURT: All right. Thank you.
11 And if you would state your full name, please, sir.

12 MR. FLETCHER: George William Fletcher.

13 THE COURT: All right.

14 **GEORGE WILLIAM FLETCHER**

15 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

16 **DIRECT EXAMINATION**

17 **BY MR. STILWELL:**

18 Q. George, just by way of background, can you tell the
19 Judge something about where you're from and how you ended
20 up in Greenville?

21 A. I grew up in Kansas City. I was working -- after I
22 went to the University of Kansas, Civil Engineering and
23 Business, I went to work for a company in Toledo, Ohio,
24 Owens Corning in pollution control. I traveled with them
25 for three years. They moved me to Anderson, South Carolina

1 to go to graduate school at Clemson. I went back with the
2 company for three years and then joined two guys that I
3 started an engineering company with in 1976.

4 Q. So your degree was in Chemical ---

5 A. Civil Engineering.

6 Q. Civil Engineering. Okay.

7 A. Master's degree in Environmental Engineering.

8 Q. Now, the Master's degree, it was Owens Corning who
9 sent you to get that while you were still working ---

10 A. Correct.

11 Q. --- for them?

12 A. Correct. While I was working in the Anderson plant.

13 Q. Okay. And I understand that work actually had
14 something to do with PCBs?

15 A. Actually it didn't. It was for recycling the waste
16 water. It had to with a taste and odor problem down in
17 Abbeville that was caused by the discharge from Owens
18 Corning. At that time we were using PCBs in -- for heat
19 exchange units, but it wasn't in the waste treatment plant.

20 Q. Okay. We'll come back and talk about PCBs in
21 general, but tell me how you ended up becoming involved
22 with ReWa as a board member?

23 A. Well, let's see, I was on their long range planning
24 group with Jane Manson in 1994. One of the greatest
25 planning efforts I've ever been involved with. She just

1 did a fabulous job. I joined the board in 2000. I was
2 with ReWa, the board, for sixteen years. I resigned when I
3 was elected to Greenville City Council in 2016.

4 Q. And then you just finished with Greenville City
5 Council last year?

6 A. Yeah.

7 Q. Okay.

8 A. The electorate finished it for me.

9 Q. That's probably a blessing in disguise. Right now
10 you have a nomination to come back on the ReWa board?

11 A. I've got an application in.

12 Q. Okay.

13 A. Yeah, I'd like to go back on the board.

14 Q. Seeking a nomination?

15 A. Yes.

16 Q. Okay. And we touched on it briefly, but like at one
17 time you owned your own engineering firm after working at
18 private firms for a long time?

19 A. I did. Well, when I -- when we started the first
20 company we sold that to a wholly owned subsidiary of
21 Wisconsin Power & Light called R&T. Worked for them for
22 eight years and then went off and started my own company in
23 1992. Had it for thirteen years.

24 Q. And what kind -- were you doing environmental work
25 when you were working professionally?

1 A. Absolutely.

2 Q. Okay.

3 A. That's all we did, was waste water. Well, waste
4 water, solid waste, hazardous waste.

5 Q. I know at one time you said you actually owned a
6 sewer plant.

7 A. I did.

8 Q. Can you tell me about that?

9 A. In 1997 we bought the waste treatment plant from Dow
10 Chemical down in Mauldin. They had closed down the plant.
11 And we were doing the cleanup work as they closed down the
12 plant. And I went to the Plant Manager and asked him if
13 they would sell their waste treatment plant, which was
14 across the street from the main plant, to us to use as a
15 contract waste treatment plant. And that purchase went all
16 the way to the President of Dow Chemical because we were a
17 small engineering firm, relatively, but we had Ph.D.
18 chemical engineers on staff, and they agreed to sell it to
19 us.

20 Q. I don't know what it was named then, but that's the
21 Vopak? Is that what the firm is?

22 A. Yes. It's BLS Recovery now.

23 Q. So generally what do they do? They do remediate
24 waste that gets brought to them?

25 A. Yes. They recycle waste. They treat waste. They do

1 all non-hazardous type of materials and ---

2 Q. I may have missed it when I said I thought your
3 Master's work was in PCBs, but you had some experience with
4 PCBs in there somewhere?

5 A. Well, over the years, yeah. In fact, I'm working on
6 a PCB problem up in South Carolina right now. But PCBs
7 were banned in 1979.

8 Q. Let's use a document to talk about those a little
9 bit.

10 A. Okay.

11 Q. If you'll turn to the first one in there, page 18 --
12 or document 18 is your first tab.

13 A. Okay.

14 MR. STILWELL: Is this one of the stipulated
15 ones? Okay.

16 Your Honor, ...

17 Q. George, have you seen this bulletin before?

18 A. I have.

19 MR. DEVLIN: Mr. Stilwell, what is that exhibit
20 again?

21 MR. STILWELL: 18.

22 MR. DEVLIN: 18? Is it in this booklet that you
23 gave me?

24 MR. STILWELL: It is. It's the first one.

25 Q. This document says it was issued by the Fusion

1 Center, which apparently is a SLED document. Is this
2 something you saw in the course of the contamination that
3 ReWa experienced in 2013?

4 A. I'm sure I did. I don't remember this particular
5 document.

6 Q. Okay.

7 A. But I'm sure I saw it.

8 MR. STILWELL: Your Honor, I would offer this
9 into evidence as a public record.

10 MR. DEVLIN: Your Honor, I object. This witness
11 can't qualify this as a public record. He says he doesn't
12 remember it.

13 MR. STILWELL: Your Honor, it's self-
14 authenticating because it's got SLED on the top and it was
15 issued by an official agency in the course of its duty.

16 THE COURT: I'm going to allow it.

17 MR. STILWELL: Okay.

18 (WHEREUPON, Plaintiff Exhibit Number 18 was admitted
19 into evidence.)

20 Q. Mr. Fletcher, you were talking about the properties
21 of PCBs. Some of it is in here, but tell me what you know
22 from this or from your own personal knowledge? Like what
23 the properties of PCBs are?

24 A. Well, first, chlorinated hydrocarbon which makes it a
25 problem right off. It was two benzene rings that were

1 chlorinated. As such it's incredibly persistent in the
2 environment. It is not particularly soluble. It is
3 soluble in allowing grease and body fat. It is a known
4 carcinogen.

5 MR. DEVLIN: Your Honor, he's giving opinions as
6 to PCBs. He's not qualified as an expert. And he's not
7 been identified as an expert in the qualities of PCBs.

8 THE COURT: Mr. Stilwell.

9 MR. DEVLIN: They have an expert and Mr.
10 Fletcher has been identified as a lay witness with certain
11 expertise who may qualify as to the reasonableness of
12 ReWa's response to the PCB contamination. If he wants to
13 testify as to how ReWa responded, that's one thing. But if
14 he wants to qualify himself as an expert on PCBs
15 themselves, he's not been identified for that purpose.
16 They have an expert for that.

17 THE COURT: Mr. Stilwell.

18 MR. STILWELL: Your Honor, he's not even
19 testifying about the properties as an expert. He's sitting
20 here reading a bulletin that says it's a carcinogen that
21 was banned in the seventies. I think that's actually in
22 some of the stipulated material.

23 THE COURT: Let's move on then.

24 MR. STILWELL: Okay.

25 Q. So in the course of your career of running a plant

1 and everything, have you ever seen PCBs in a sewer plant?

2 A. Yes.

3 Q. Here? I mean at ReWa?

4 A. Not at ReWa.

5 Q. Okay. Somewhere else?

6 A. Yes.

7 Q. With Vopak?

8 A. Not with Vopak; no.

9 Q. Okay. I don't even want to go on to what it was.

10 A. We probably worked in, I don't know, a hundred and
11 fifty textile plants, so ...

12 Q. Okay. Where did you find PCBs then?

13 A. Well, usually they were from transformers or the heat
14 exchange equipment that were in the plants and they would
15 get into the treatment plant by accident.

16 Q. Okay.

17 A. I mean EPA banned them in 1979 with the intent that
18 they would not be present.

19 Q. Okay. I want to now step back and just talk a little
20 bit about ReWa generally and what we do. If you turn to
21 the next tab, 103, I just want to ...

22 MR. DEVLIN: Your Honor, we have not stipulated
23 to Exhibit 103. It appears to be a presentation that was
24 put together at some point by someone who I do not believe
25 to be Mr. Fletcher.

1 MR. STILWELL: In fairness, I haven't offered it
2 into evidence. It's just a demonstrative exhibit.

3 THE COURT: But I assume we're on that road to
4 -- let's go ahead. And Mr. Devlin, if he seeks to admit
5 it, you can certainly make your objection at that point.

6 Q. First of all, Mr. Fletcher, this picture here on the
7 second page of ReWa -- tell me what ReWa is?

8 A. It's a special purpose district that -- are you
9 talking about this picture?

10 Q. Yep.

11 A. Okay. It's a special purpose district created for
12 the treatment of waste water.

13 Q. How many counties does it cover? I know that doesn't
14 cover all of them, but how many counties ---

15 A. It covers all of Greenville. It covers parts of
16 Spartanburg, Laurens, Pickens and Anderson.

17 Q. So just to orient off of this service area map there,
18 it says three river basins. Like what are the river basins
19 inside ReWa service district?

20 A. All right. The Enoree is on the east side. The
21 Reedy River runs down the middle. And the Saluda runs on
22 the west side.

23 Q. Okay.

24 A. Because it connects -- because the Enoree and the
25 Saluda split Greenville and the surrounding counties, your

1 waste treatment plants tend to be basin-oriented. So
2 there's land on the other side of Greenville that feeds
3 into those treatment plants.

4 Q. So that's how we end up in Spartanburg or Anderson a
5 little bit?

6 A. Correct.

7 Q. Okay. So in this case the plants that were involved
8 were what? Pelham, Lower Reedy and Mauldin?

9 A. The three largest, actually; the Pelham plant,
10 Mauldin Road plant and the Lower Reedy plant.

11 Q. So it's kind of self-intuitive, I guess. The Lower
12 Reedy is on the Reedy. Where are the other two plants,
13 Mauldin Road ---

14 A. Mauldin Road is on the Reedy, which is the smallest
15 of the three rivers. The Pelham plant is on the Enoree.

16 Q. Okay. So -- okay. I don't need to go into that.

17 A. And because those rivers are small, those treatment
18 plants had to be designed for pretty high levels of
19 treatment.

20 Q. If you flip to the next page there ---

21 MR. DEVLIN: Your Honor, if he's going to be
22 testifying as to specific pages of this document, I think
23 he needs to offer it into evidence or needs to testify of
24 his own knowledge about what his answer to the question is.
25 He can't refer to the document itself before it's in

1 evidence.

2 MR. STILWELL: It's just a demonstrative, Judge.
3 It's just like I had it on a board sitting right here.

4 MR. DEVLIN: We have not been told it's
5 demonstrative evidence, Your Honor.

6 MR. STILWELL: It's been on the exhibit list for
7 twelve days. He didn't object to it till Sunday.

8 THE COURT: Gentlemen, let's move on. We're not
9 going to get mired in the mud twenty-eight minutes into a
10 three-day trial, so let's move on.

11 Q. George, how many plants do we have?

12 A. We've got seven big ones and one small one.

13 Q. Okay. And you said these plants are the three
14 largest ones?

15 A. Yes.

16 Q. Okay. Let's talk about the Pelham plant
17 specifically.

18 A. Okay.

19 Q. If you'll turn to page 66 of 106. It's all the
20 photos. It's down in the middle of the photo batch.

21 MR. DEVLIN: Your Honor, we're now on pictures
22 that have are -- that IRF has not agreed to this Exhibit
23 106. I'll wait till he offers it.

24 THE COURT: All right. Thank you.

25 Q. George, what is page 66 of 106?

1 A. Well, it's an aerial photo of a treatment plant that
2 has the major processes identified.

3 Q. Is this a picture of the Pelham plant?

4 A. Yes.

5 Q. I guess that's what the label says?

6 A. Yes.

7 Q. Is this a fair representation of what the ReWa plant
8 looked like in 2013?

9 A. Yes.

10 Q. The Pelham plant?

11 A. Yes.

12 Q. Okay. Your Honor, I'd offer that into evidence.

13 MR. DEVLIN: Your Honor, we don't have any
14 objection to this picture coming into evidence. Just as a
15 housekeeping matter, it's one of about fifty pictures that
16 are in Exhibit 106. Can we mark it separately?

17 MR. STILWELL: It is.

18 MR. DEVLIN: Call it 106-66?

19 MR. STILWELL: That's how it's marked. It's
20 marked that way right now.

21 THE COURT: All right. Thank you.

22 (WHEREUPON, Plaintiff Exhibit Number 106-66 was
23 admitted into evidence.)

24 MR. STILWELL: We'll go back at the end and pull
25 out the pictures we don't use.

1 Q. So, George, can you just basically walk us through
2 the sewer plant; how it works? Like just tell us where the
3 sewer flows in and how it comes back out, just as a general
4 primer for how the operation works.

5 A. All right. The sewage comes in on the right hand
6 side of the drawing. In the picture there's an influent
7 pump station, wet wells. The sewage comes into the
8 influent pump station and is pumped to the headworks.

9 Q. You're going like clockwise around the plant?

10 A. Yeah.

11 Q. Okay.

12 A. Exactly.

13 Q. Headworks?

14 A. Headworks is on the bottom. That's where the grit,
15 the sand is removed. And from there it goes into the daily
16 equalization. There's like two and a half times difference
17 in flow between the middle of the night and the peak flow,
18 so ---

19 Q. You're talking about the EQ tank at the top?

20 A. Correct. No, right above the headworks.

21 Q. I got you.

22 A. Not the big one. The big one on the very top of the
23 page is for storm water. And so if you get a storm in and
24 you can't handle it in the treatment plant, there are pumps
25 that pump it into the large equalization tank and hold it

1 till you can treat it.

2 Q. So I -- I got you out of order.

3 A. The incoming water flows through what's called an
4 anoxic basin. That basin is for treating nitrogen;
5 specifically nitrate under anaerobic conditions or reduce
6 it to gaseous nitrogen and release it to the atmosphere.
7 From the anoxic basins it goes to the primary clarifier.

8 Q. Okay. And those are the three disks there on the
9 left at the bottom?

10 A. And that's where you settle out your large sewage
11 solids.

12 Q. Okay.

13 A. The sludge from the primaries goes into a digester,
14 noted as digester 1 and 2 on the left hand side of the
15 page.

16 Q. Like right up there in the middle?

17 A. Correct.

18 Q. Okay.

19 A. The water containing the soluble organics goes into
20 the aeration basins or the secondary treatment plant.
21 Secondary treatment involves microorganisms that consume
22 the soluble organics. And from there the secondary waste
23 goes into the secondary clarifiers where the sludge, which
24 is actually the biological solids, ---

25 Q. Right.

1 A. --- are recycled back into the aeration basin. The
2 influent from the secondary clarifiers goes to deep bed
3 sand filters, filtering out the remaining solids that carry
4 through. Usually -- well, always less than twenty-five;
5 usually less than ten part per million. The sand filters
6 knock that down to under five part per million. And then
7 you have ultraviolet disinfection. That water is then
8 discharged to the Enoree River. The discharge is typically
9 better than the water quality standards of the river
10 itself.

11 Q. So generally on this picture the river is running
12 across the top of it there, around the top of the plant?

13 A. Well, around the top the left-hand side; yeah.

14 Q. Okay. So it comes in at the influent pump station
15 and goes out ---

16 A. I'm sorry. On the right-hand side.

17 Q. It goes out right there where the deep bed filters
18 and the UV are?

19 A. Correct.

20 Q. Okay. Now the biosolids, each ---

21 A. Biosolids would be two things. It would be the
22 solids that come from the digestion -- you remember I said
23 the primary sludge goes into digesters. So in that you
24 have reduction using, under anaerobic conditions, no oxygen
25 conditions. And so it's a different type of bacteria. But

1 you're chewing up the sludge solids from the primaries in
2 the digesters. And then the waste from that goes into
3 biosolids holdings. And then, as well, you have waste
4 activated sludge from your secondary system. And that goes
5 into the biosolids.

6 Q. Do you use sludge and biosolids synonymously or is
7 there a difference in them in your mind?

8 A. Well, one of them is an anaerobic solid and the other
9 one is an aerobic solid. But, yeah, they're basically
10 microorganisms.

11 Q. Okay.

12 A. Both of them.

13 Q. How do the biosolids -- I see them here in these
14 holding tanks, which by the way are misnumbered because
15 there's two 5's in it.

16 A. Yeah.

17 Q. But these holding tanks, this is where the
18 contamination was in Pelham?

19 A. Correct.

20 Q. Tell me how the biosolids get out of the plant
21 normally and then we'll go talk later about how we did it
22 during this contamination phase?

23 A. Okay. Well, typically you thicken the biosolids to
24 about three percent and then you haul them -- or ReWa hauls
25 them or a contractor for ReWa hauls them onto fields where

1 they're applied as nutrient, as soil conditioner, as liquid
2 application to the fields. And it's a ---

3 Q. You raised a good point when you were talking about
4 thickening a solid like the biosolids. What is generally
5 the consistency of the sludge or the biosolids?

6 A. Well, you can spray it onto a field. You use a
7 sixty-five hundred gallon truck. Those trucks will spray
8 roughly sixty-five hundred gallons an acre twice.

9 Q. Okay.

10 A. So you'll put about eleven thousand gallons on an
11 acre.

12 Q. What is the consistency of it? Like what would it
13 look like? I wish I had some, but I never did get any in
14 here. Maybe everybody is happy we don't have some in the
15 courtroom.

16 A. Well, it's like a dark -- three percent would be
17 thirty thousand parts per million. So there's a lot of
18 solids in it. So it's a -- not a real thick solution. I'm
19 trying to think of something ---

20 Q. Well, I mean compared to like two percent milk?

21 A. I don't know what milk is.

22 Q. Okay. Let's go on.

23 A. There was a picture in here, I think, of spraying the
24 sludge on the field.

25 Q. Oh, okay, we've got that.

1 A. Okay.

2 Q. We've got that.

3 A. That shows, I think, a pretty good example of what it
4 is.

5 Q. If you could turn to page 89 of 106.

6 A. Yeah. A picture of spraying it on a field.

7 Q. Okay. So that tractor right there is whose? That's
8 one of the contractors you mentioned?

9 A. Yeah, that's Synagro, I think.

10 Q. Spraying it on a what, on a ---

11 A. On a field.

12 Q. A farm field?

13 A. Yeah.

14 Q. Okay. Now tell me generally how -- I'm going to step
15 back a little bit from how it gets on the field and just
16 talk about ReWa's biosolids program. How long has ReWa
17 been doing that?

18 A. Quite a while. I think late eighties.

19 Q. Okay. And how big of a program is it for ReWa?

20 A. It's big. I mean it's how we dispose of most of our
21 sludge solids, as opposed to compacting them and putting
22 them in a landfill, which is the more common way of doing
23 it.

24 Q. Okay. So what is that, the way of taking it to the
25 landfill instead of taking it to the farm fields? When you

1 said that's a more common way of doing it?

2 A. Well, it's more expensive because you've got to pay
3 for the landfill. And secondly, you've got to compact the
4 sludge.

5 Q. Okay. And just generally that second process you
6 were talking about, that's what ReWa did during this
7 remediation?

8 A. Yes.

9 Q. Okay.

10 A. And compacting the sludge, you've got to make it a
11 cake. You can't take that much liquid to the landfill, so
12 you've got to squeeze the water out of the sludge and make
13 a cake of it.

14 Q. Where does ReWa put its biosolids? Like where are
15 the fields?

16 A. All in Greenville -- I mean, all within probably
17 fifty miles of the plant.

18 Q. Okay. And is ReWa's program certified or anything
19 like that?

20 A. Yes. EPA certifies it. And there's always been a
21 lot more demand for the sludge than we had sludge. I mean
22 it's a very popular program.

23 Q. It's not very common in South Carolina?

24 A. No, not in South Carolina. Although around the
25 country it's fairly common.

1 Q. Do you know anybody else in South Carolina who does
2 it offhand?

3 A. I don't, offhand.

4 Q. Okay.

5 A. It would surprise me if there aren't others, but I
6 don't know of any.

7 Q. Hang on a second. I've got to catch up with you.
8 Okay. I want you to turn, if you can, to Exhibit 88.

9 THE COURT: Tab 88 or picture 88?

10 MR. STILWELL: Tab 88, Your Honor.

11 THE COURT: Thank you.

12 MR. STILWELL: I think that this one has been
13 stipulated to.

14 MR. DEVLIN: Yes, sir.

15 Q. George, have you seen this time line before?

16 A. I have.

17 Q. Okay. What is it generally?

18 A. Well, it's generally a time line between February of
19 2012 and I think July 2012.

20 Q. I think the last ---

21 A. August 30th, 2012 -- 2013, I'm sorry. It was a
22 period of time, basically, when we discovered the PCBs and
23 I think it was put together at my request.

24 Q. Okay. And I want to ask you some dates off -- if we
25 have to go to it to get some particular dates off it, we'll

1 do it, but I think I'll just ask you questions generally.

2 On this time line it appears that on the top of it from the

3 -- the dates at 2012, what is that demonstrating? We

4 didn't have any hot PCBs hits in 2012; did we?

5 A. Correct.

6 Q. Okay. So those are just showing ---

7 A. I mean that's the point. We don't expect to see

8 PCBs, so we're required to test it once a year. And we did

9 and it was clean in 2012 and then come 2013 we found PCBs.

10 The problem there was that we didn't know when it came in.

11 I mean it could have been March of 2012. We wouldn't have

12 known it.

13 Q. So the first testing where it showed up was that

14 first January testing there under 2013?

15 A. Correct.

16 Q. Okay. And where was the first contamination?

17 A. It was at the Pelham Road plant.

18 Q. Okay. In particular was it in the biosolids

19 themselves?

20 A. It was in the biosolids; yes.

21 Q. Okay. And that would mean they would be in the

22 holding tanks?

23 A. Yes.

24 Q. Okay. And when did you first find out about the

25 contamination?

1 A. I don't know exactly, but I think it was probably in
2 the range of May or June of 2013.

3 Q. And why do you say that?

4 A. Well, because there's a note in here about having Ray
5 call Vopak. Vopak was that treatment plant that I owned.
6 And we didn't own it as of 2016, but I had previously owned
7 it, and I knew they did a lot of work with the people that
8 were handling oils. They had an oil recovery system
9 themselves. And I've always felt like the key to this
10 whole thing was finding out where those PCBs came from. So
11 I suggested that Ray call Vopak.

12 Q. What's the connection to oil, recycled oil with
13 PCBs?

14 A. Well, in the first place ---

15 Q. Not technical. We've got a lot of lawyers in the
16 room.

17 A. PCBs are soluble in oils. PCB is an oil in the sense
18 that it's used in transformers and heat transfer fluid.
19 And the old transformers are typically where they found the
20 PCBs, that and farm tractors.

21 Q. What was the situation when you first learned of the
22 contamination in the Pelham plant? What was generally
23 going on? I know it's been seven years ago, but ...

24 A. You mean with ReWa?

25 Q. Right?

1 A. Well, it was panic. I mean you don't expect to see
2 PCBs. And from my standpoint PCBs are one of those
3 chemicals when I was in the consulting engineering business
4 we used to call chemicals like that dimethyl death. And
5 the reason was that people didn't care what the
6 concentrations were. The fact that it was there was a huge
7 concern.

8 Q. Did you ever know what the concentrations were when
9 you first heard about it from Ray?

10 A. It didn't matter to me much. I suspect I did hear
11 the concentrations, but I don't remember.

12 Q. You learned about them later?

13 A. Yes.

14 Q. Okay. When you first heard about it were the
15 contaminations only at Pelham Road?

16 A. Yes.

17 Q. When did you have the contaminations at the other
18 plants?

19 A. Well, we started testing the other plants when we
20 found out about Pelham Road. I don't know exactly when
21 they found it at Lower Reedy and Mauldin, but ---

22 Q. Okay. And those were -- you tested the other plants,
23 as well?

24 A. Yes.

25 Q. But it's only those three that had ---

1 A. Correct.

2 Q. --- PCBs hits? Okay. What dilemmas were facing ReWa
3 when you had this contaminations? Like tell me the things
4 that had to be addressed from a board perspective?

5 A. From a board perspective, the fact that it was there
6 was the overwhelming concern. At that point in time ReWa
7 had stopped land applying and was holding the solids. We
8 totally agreed with that decision.

9 Q. The staff was ---

10 A. The concern was how much PCB was already out in the
11 fields. Yeah, the staff had stopped land applying.

12 Q. Okay. Before it even came to the board the staff had
13 stopped?

14 A. Correct. And we totally agreed with that decision.

15 Q. The stop on the land applying was just in the
16 contaminated plants, though; right?

17 A. Yes.

18 Q. The other plants we're not even talking about, they
19 were still going to the fields?

20 A. Because they had been tested and they did not have
21 the PCBs.

22 Q. Okay. At one point in time were the fields tested?

23 A. Yes.

24 Q. And do you know exactly when that was or about when
25 it was?

1 A. It was that summer. I mean it was right after they
2 found -- the first concern was that we had had already put
3 PCBs on the field.

4 Q. If I can direct your attention to page 5 of Exhibit
5 88. I just noticed it there in front of me. It looks down
6 there in the August 13, farmers notified and then test
7 taken August 14?

8 A. Yeah. But I think the farmers were notified, the
9 ones -- well, there was a complicating factor in there in
10 that DHEC wanted to do the testing -- may have wanted to do
11 the testing, and we -- and how you do the testing. So
12 there was some negotiations with DHEC that went on about
13 the testing. I thought we had done it before August, but
14 maybe not. Maybe it was August.

15 Q. You know, you raised a good point though. I didn't
16 want to skip over the regulatory framework under which ReWa
17 operates.

18 A. Well, yeah, there was a fifty milligram limit on
19 PCBs.

20 Q. Hold on a second. I want to go up to this level.
21 You said DHEC and EPA. I just want it to be clear.

22 A. Right.

23 Q. What regulatory authorities does ReWa answer to?

24 A. DHEC and EPA.

25 Q. What's the relationship between those two because I

1 mean it's ---

2 A. Well EPA is a federal agency. They set the
3 standards. ReWa will match the federal standards and in
4 some cases make it more stringent, although in general the
5 ReWa -- I mean the DHEC regs match EPA regs.

6 Q. So the relationship between DHEC and EPA, I
7 understand South Carolina is a -- what do they call it, a
8 delegated state?

9 A. Well, let's see. Yes.

10 Q. Can you explain what that means?

11 A. Well, it just means that the authority for enforcing
12 the regulations has been delegated to the state of South
13 Carolina as opposed to EPA.

14 Q. Okay. And so you said DHEC wanted to test the fields
15 themselves and then what happened? Did ReWa test the
16 fields?

17 A. Well, then we ended up testing them. But it was a
18 matter of agreeing on how you test them, the number of
19 samples and all that.

20 Q. Why were y'all testing the fields?

21 A. Because the concern about PCBs.

22 Q. What did you find when you tested the fields?

23 A. Well, a few of them had PCBs. They had been put on
24 before we knew they were there.

25 Q. Do you know what levels the PCBs was?

1 A. It was fairly low. But any PCB to me was a concern
2 because that opened the door for those landowners to come
3 back and sue us and make us clean it up.

4 Q. Why do you say that?

5 A. Because you apply PCB to a field, it gets uptaken
6 into the hay, an animal eats the hay and you eat the
7 animal.

8 Q. Okay.

9 A. I mean it's a concern. PCBs weren't supposed to be
10 there.

11 Q. So did it turn out that ReWa had actually put
12 contaminated material on their fields?

13 A. Yes.

14 Q. Okay. Did DHEC or EPA ever initiate an enforcement
15 action related to that contamination?

16 A. No.

17 Q. Was it a concern of yours?

18 A. Not so much the enforcement action. What was a
19 concern to me was the landowners themselves suing the
20 agency.

21 Q. Okay. I know you told me one time you met with Ken
22 Feely. How much interaction did you have with DHEC and EPA
23 yourself?

24 A. Well, not much. My concern was the criminal
25 investigation. I felt like all along that we knew about

1 the one guy that was discharging, but the question was
2 where the PCBs were coming from. And I felt like the
3 criminal investigation ought to be finding out where it was
4 coming from and they never did. That was a huge
5 frustration to me and the board.

6 Q. So who was in charge of the criminal investigation?

7 A. Well EPA and DHEC.

8 Q. You mentioned the guy I think as part of the
9 stipulations. But who was the guy you're talking about?
10 The guy who went to jail for this?

11 A. Yeah.

12 Q. Okay.

13 A. Tim Howard.

14 Q. When did you generally -- when did ReWa figure out
15 that guy was the one that was bringing it to ReWa?

16 A. I think he was tabbed maybe in the winter of 2014.
17 But I don't think he was arrested until six months later
18 because they were trying to find out, I think -- and again
19 I knew we were trying to find out about the criminal
20 investigation and couldn't find anything out. At one point
21 we even talked about hiring our own criminal investigator
22 and backed down because we didn't have the authority to
23 really get records and that sort of things. But I just --
24 it was incredible to me. They knew who was doing it and
25 they hadn't moved because they were trying to find out

1 where it was coming from. And they never did.

2 Q. I guess I ---

3 A. Phenomenally frustrating.

4 Q. I said something about the waste being brought to us.
5 But let's just take Pelham for instance. How did the
6 contamination get into the plant?

7 A. Well, several ways. Basically he was discharging the
8 PCBs to grease traps. And they would go in under the
9 pretense of pumping the grease trap, but in fact was
10 pumping something from the truck into the grease trap. And
11 there was a logical reason for that because the oil in the
12 PCBs were soluble in the grease.

13 Q. Okay. I don't want to go over like grease traps. I
14 learned the hard way what grease traps were. But tell the
15 Judge what a grease trap is and where you find them.

16 A. Okay. Restaurants have grease traps and they're
17 roughly fifteen hundred gallon tanks where you separate the
18 water from the grease. The grease will flow. And so the
19 water goes on to the treatment plant and the grease stays
20 in the grease trap.

21 Q. And it's like usually in the ground?

22 A. Yeah.

23 Q. Okay. And this guy was pumping into a grease trap or
24 pumping out of the grease trap?

25 A. No. He was supposed to be pumping out. He was

1 pumping in. And I also think he discharged directly to
2 some manholes in the middle of the night. I mean I'm
3 convinced he knew he had some bad stuff.

4 Q. You talked about the testing ReWa did. Some of the
5 testing was up in the collector system in the grease traps
6 and lines?

7 A. Correct.

8 Q. Okay. Why were y'all doing that?

9 A. To find out how extensive it was.

10 Q. How long did it take, do you remember -- you can
11 probably look on here. Yeah, let's look on this time line.
12 I've got American Waste on here. On the same page we're
13 on, page 5, notified American Waste of suspended permit.
14 American Waste was the guy who was dumping this in the
15 system?

16 A. Yes.

17 Q. So from January till August, that's how long it took
18 us to find who was doing it?

19 A. Yeah, except he continued to discharge from other --
20 I don't think he was arrested until the spring of 2014.

21 Q. So that goes off of our time line which is kind of
22 where I was leading?

23 A. Exactly.

24 Q. Like it goes off of our time line as far as ---

25 A. And we know he was discharging it and for whatever

1 reason continued to let him do so apparently because we
2 were trying to find out where it was coming from. Again, I
3 haven't seen the records from the criminal investigation.

4 Q. August 30 is the end of this time line. But as far
5 as ReWa is concerned, August 30, 2013, had the remediation
6 work even begun?

7 A. Well, in the sense that we had stopped discharging to
8 the fields. We had begun to reactivate our own presses.

9 Q. Right.

10 A. Some of the presses were old and not very
11 serviceable. So we began to order -- I don't know exactly
12 when in there we ordered the temporary presses. But we
13 began to do all the stuff we had to do to treat what we
14 had.

15 Q. We'll go over that stuff later with some of the ReWa
16 operations folks. But what you're talking about is dealing
17 with the flows that were still coming into the plant;
18 right?

19 A. Correct.

20 Q. The question I had asked about the stuff that was in
21 the holding tanks at Pelham and Lower Reedy and Mauldin
22 Road, first of all how big are those tanks? Generally? I
23 mean they're five hundred thousand gallon tanks, something
24 like that?

25 A. No, I don't think they're that big. I guess they're

1 thirty thousand. I don't know exactly.

2 Q. Okay. We'll ask some other people.

3 A. Yeah.

4 Q. How many -- do you know just approximately how many
5 million gallons of biosolids ReWa had to deal with that was
6 contaminated? A. As I recall we had eleven million
7 gallons. But I think that was over the total period of
8 time.

9 Q. That work, what did we do with the contaminated
10 biosolids? That hadn't begun in August?

11 A. I don't know exactly when we began it, but ---

12 Q. I can see ---

13 A. Where we had, where we had sludge presses we began to
14 activate those and treat them. But I know we began to --
15 we ran out of tank capacity pretty quickly.

16 Q. The first time I see -- here you go. If you look on
17 August 6th -- I seem to be stuck on page 5 -- August 6th
18 there's a reference on this time line that says received
19 guidance on storage of PCBs from AECOM. Who is AECOM?

20 A. AECOM is a company we hired to work on PCBs. It was
21 the largest engineering company in the country, and had
22 experience, direct experience in the Greenville office with
23 PCBs. So that's the reason they were selected.

24 Q. I don't even know if you got a chance to meet Mr.
25 Clark earlier today ---

1 A. I did.

2 Q. --- but Mr. Clark's company? Okay. So ReWa hired
3 AECOM to help advise what to do with this stuff?

4 A. Correct.

5 Q. And did they come meet with the board at different
6 times?

7 A. I don't remember AECOM meeting with the board. They
8 probably met with the operations and planning committee.
9 But in general the engineers don't meet directly with the
10 board. They pretty much work through staff.

11 Q. You know that's actually a good point. We're missing
12 some key staff members. I want to go back and do a little
13 bit of a cast of characters. You weren't Chairman of the
14 board at the time this happened; were you?

15 A. I was not. I had been Chairman three times, but I
16 was not at that time.

17 Q. Were you a committee chair?

18 A. No.

19 Q. Okay. How did you end up participating in this round
20 other than as a chair of a committee? In other words I
21 know you worked with the Executive Committee, but why you?

22 A. Well, I guess because I had spent my entire career in
23 pollution control. I had experience with PCBs. And I was,
24 I suppose, the board's resident expert.

25 Q. How -- what kind of work -- okay. First of all, the

1 Executive Director at the time was whom?

2 A. Ray Orvin.

3 Q. And he's since retired?

4 A. Yes.

5 Q. Okay. And then kind of next on the line of like
6 staff members responsible for this was whom? Charlie
7 Logue?

8 A. Yes.

9 Q. And he's somewhere else?

10 A. Yeah. He wasn't with us a long time.

11 Q. Okay. How many members of the board have turned over
12 since this happened? I mean not just generally. Like you
13 came -- or went and may be coming. Who else is not around
14 that used to be?

15 A. Well, John Boyette who is head of an engineering
16 company was on the board at that time. And he was chair, I
17 think, of the Operations and Planning Committee.

18 Q. And you and John are both PEs?

19 A. Yes.

20 Q. Okay.

21 A. Willie Whitaker has passed away. Gary Gilliam has
22 passed away. So those are at least two board members that
23 have changed.

24 Q. Do you know where Mr. Logue went?

25 A. Either -- I think he went to Florida. No, he went to

1 Virginia. Outside of Washington, D.C.

2 Q. I want to turn your attention to Exhibit 89 in there
3 and ask you if you can identify this document for us?

4 Exhibit -- have you got it, George?

5 A. Yes.

6 Q. Exhibit 89 is a report from Ray to the Board of
7 Commissioners; and you were on the board; right?

8 A. Yes.

9 Q. Okay. Do you recall receiving this document?

10 A. Yes.

11 Q. Okay. And was it kept by ReWa in the regular course
12 of business?

13 A. I'm sorry?

14 Q. Was this kept by ReWa in the regular course of
15 business? In other words, this is a business record of
16 ReWa?

17 A. Yes.

18 MR. STILWELL: Your Honor, we'd move to admit
19 89.

20 MR. DEVLIN: Your Honor, I'll object on the
21 grounds that it's a document that came from Ray Orvin who I
22 believe is scheduled to testify. Otherwise it's hearsay, a
23 statement by Mr. Orvin.

24 MR. STILWELL: It's a hearsay exception of the
25 business records, Your Honor. The declarant doesn't have

1 to be here.

2 THE COURT: Lay some additional foundation,
3 please, sir.

4 Q. Okay. Was Ray the one who authored this document?

5 A. Well, I don't ---

6 Q. Apparently? Yes?

7 A. I would assume so, but it could have been his staff
8 that prepared it. I don't know.

9 Q. All right. Was this given to you at a board
10 meeting?

11 A. Yes.

12 Q. And at the time of this would Ray have known about
13 the PCB contamination of which he writes?

14 A. In September?

15 MR. DEVLIN: Objection, Your Honor. He's
16 calling for the witness to speculate as to what somebody
17 else knew.

18 MR. STILWELL: That's the only way you can do
19 it, Your Honor, if ---

20 THE COURT: Go ahead.

21 MR. STILWELL: --- the declarant is not here.

22 THE COURT: Go ahead.

23 A. Well, I mean, September. The time line went from
24 January to September. Absolutely he knew.

25 Q. Okay. And then this was produced in this case, so

1 this document was kept by ReWa in the course of its
2 duties?

3 A. Yes.

4 Q. Okay.

5 MR. STILWELL: Your Honor, I think I just hit
6 all the points of the business record exception.

7 MR. DEVLIN: Your Honor, I don't believe he's
8 the keeper of the business records. I don't believe
9 there's any evidence that there was a regular practice of
10 FAQs being kept as a business record. I don't think it
11 qualifies as a business record in the least.

12 THE COURT: Noted for the record. I'm going to
13 allow Plaintiff's 89.

14 (WHEREUPON, Plaintiff Exhibit Number 89 was admitted
15 into evidence.)

16 Q. George, do you think this was in -- the September
17 time frame was the first time that ReWa or that Ray came to
18 brief the whole board about the PCB contamination?

19 A. I looked back at the time line. I think he briefed
20 them in August. And this would have been September. It
21 was close.

22 Q. Okay. The time line, I guess it mentioned like
23 sometime like in July Ray was calling board members?

24 A. (No verbal response.)

25 Q. Okay. Tell me what he told you in September? Let's

1 go over some of this. So he talks about residual amounts
2 of PCBs have identified in material deposited by septage
3 haulers at certain ReWa WRRFs. A WRRF is a sewer plant?

4 A. Yes.

5 Q. The septage haulers, what's the plant that handles
6 septage hauling?

7 A. Most of it is in Mauldin Road. We may take it other
8 places, but Mauldin Road is the one who would typically
9 have the septage.

10 Q. Of the three contaminated plants, Lower Reedy,
11 Mauldin Road and Pelham, Mauldin Road is the only one that
12 has the septage in it?

13 A. I think that's correct.

14 Q. Okay. And that was the situation I mentioned before,
15 people moving it to you -- bringing it to you?

16 A. Yeah. In fact I think that's where they found PCBs
17 in American Waste's truck.

18 Q. Okay.

19 A. They tried to bring it to Mauldin Road.

20 Q. If you go down there to where it says Mauldin road
21 WRRF, it says, land application was suspended at Mauldin
22 Road. I'm down at the bottom of the page.

23 A. Uh-huh (affirmative).

24 Q. And then the same thing for all three of these
25 plants. They've all been suspended?

1 A. Yes.

2 Q. Land apps? Okay. Do you know at this time what the
3 level of contamination was in each of these? Actually it
4 says right there. Mauldin Road was below fifty parts per
5 million?

6 A. To me it was irrelevant.

7 Q. Okay. Why do you say that?

8 A. Because it's there. It's the dimethyl death thing
9 that I was speaking about earlier. If it's there you've
10 got a problem.

11 Q. Okay. If I look at Mauldin Road, just staying on
12 that, it says -- right after it says land application
13 suspended, it says, currently staff is thickening solids
14 and placing in holding tanks. What does that mean? Is
15 that the pressing cake that you talked about earlier?

16 A. The -- which one?

17 Q. Right there where it says Mauldin Road land
18 application was suspended. That next sentence, currently
19 staff is thickening solids and placing in holding tanks.
20 What does that mean?

21 A. It means you're trying to get as much of the water
22 out as possible. Thicker solids are easier to dewater in
23 the sludge presses.

24 Q. So is this different at this point in time than
25 preparing it for land application?

1 A. Sure.

2 Q. Okay.

3 A. Because the water you can take to the land
4 application.

5 Q. I guess I got ---

6 A. And when you have to thicken them, you've got to feed
7 it chemicals. You've got to run it through presses. Just
8 a lot more complicated process.

9 Q. If you'll skip down to Lower Reedy for me, the third
10 or fourth sentence in there, after talking about thickening
11 solids it says, after August 15 solids have been pressed
12 and sent to the Twin Chimneys Landfill. Tell me what
13 they're doing with the solids at Lower Reedy? What does
14 that mean?

15 A. They're landfilling them. I mean it's a cake. It's
16 not a sludge anymore. So it's -- albeit a wet cake, it's
17 still probably a fifteen percent, twenty percent cake.

18 Q. Can you take biosolids to a landfill?

19 A. Yes.

20 Q. Do you have to prepare them further to get them down
21 there?

22 A. No. You just have to -- I mean you don't want to
23 haul water. And the landfill doesn't want water going in
24 there. So I think Twin Chimneys was the one that had the
25 layer of sludge solids that was separate from -- I mean

1 they had the sludge solids together.

2 Q. You don't want to haul water because of what?
3 Expense?

4 A. Yeah.

5 Q. Okay.

6 A. And because the landfill doesn't want the water.

7 Q. Okay. What -- just the relative degrees of thickness
8 between the biosolid and then what you haul to the
9 landfill, can you analyze that or anything for us? Can you
10 help explain that?

11 A. If you think of a cake of solids -- I'm trying to
12 think of an analogy -- versus the liquid that you're
13 spraying, I mean you couldn't spray the cake. The cake
14 would hold shape in a pickup truck or a truck that hauls it
15 to a landfill. There is a substantial difference of three
16 percent solids and twelve percent solids.

17 Q. If you turn over with me to the next page, roman
18 numeral V, so this is September 12 and Ray talks about
19 working closely with DHEC and EPA. Is this around the time
20 that you met with EPA or do you know how that relates to
21 that?

22 A. I don't know exactly when we met with EPA, but I know
23 when -- I think it was August that -- maybe September --
24 but EPA came out -- or DHEC and EPA both came out with a
25 decree that we couldn't landfill -- we couldn't put the

1 biosolids with PCBs on the land. And that lasted for six
2 months.

3 Q. Okay. So you're getting ahead a little bit. We'll
4 get to that.

5 A. I'm sorry.

6 Q. You're talking about an emergency -- no, that's okay.
7 You're talking about the emergency regulation?

8 A. Yes.

9 Q. Okay. And that came after this date?

10 A. Okay. I wasn't exactly sure when that date was, but
11 ...

12 Q. Okay. The next sentence there I was reading, working
13 closer to DHEC -- DHEC and EPA, it says ReWa has contracted
14 with AECOM to develop a plan of action and a turnkey
15 solution. Does that refresh your recollection about when
16 AECOM was actually engaged?

17 A. Well, I mean we hired -- that time line had them on
18 August. I don't remember exactly when they were engaged.

19 Q. Why did y'all need to hire outside experts?

20 A. Because of the expertise and PCBs.

21 Q. Okay.

22 A. That's not something we had seen before.

23 Q. And then down at the bottom there, that paragraph, it
24 says, you have requested soil samples from farmers who had
25 received biosolids. Let's look at some of those farmers'

1 tests. Can you turn to Exhibit 24 for me?

2 A. Okay.

3 Q. If you turn to the back of Exhibit 4 for me --
4 Exhibit 24; I'm sorry. Does this list reflect like all of
5 the farmers that ReWa takes to or is this just some of
6 them? I'm on the back two pages of it.

7 A. Yeah. This is not all the farmers we take it to.
8 All the fields weren't contaminated, just some of the
9 fields.

10 Q. Okay. About how many of the fields that we tested --
11 these are tests that we did; right?

12 A. Yes.

13 Q. That ReWa did. About how many of those fields tested
14 positive?

15 A. I don't know the percentage. A lot of it had to do
16 with which fields we were taking solids from, Pelham Road
17 or Mauldin or Lower Reedy. So those were the fields we
18 were testing. And of the fields we tested, I don't know
19 the percentage.

20 Q. Okay. I didn't want the percentage, but I mean you
21 had some positive fields. You already talked about that?

22 A. Yes.

23 Q. And did you ever meet personally with any of the
24 farmers?

25 A. I did not.

1 Q. Who went down to meet with them?

2 A. I assume Ray and the staff people.

3 Q. Okay. What kind of concerns were raised about the
4 farmers' fields?

5 MR. DEVLIN: Objection, Your Honor. What kind
6 of concerns were raised about the fields, that's not
7 calling for hearsay?

8 MR. STILWELL: I want to know what the board was
9 concerned with about the farmers' fields?

10 THE COURT: All right.

11 MR. DEVLIN: Hearsay, Your Honor.

12 THE COURT: Overruled. Go ahead. This is the
13 time he's on the board; correct?

14 MR. STILWELL: He is on the board at that time,
15 Your Honor.

16 THE COURT: Overruled.

17 A. Well, the farmers would be concerned about whether
18 they can sell their field in twenty years; would be
19 concerned about what the health aspects of being around the
20 stuff. I mean, again, that was my huge concern because I
21 didn't feel like even though you could land apply a certain
22 concentration of PCBs that doesn't mean it was there or
23 that people would be comfortable doing it.

24 Q. Am I to understand they weren't like putting this on
25 tomato crops; were they? Were they putting on hay?

1 A. Not food crops. But hay definitely, and is
2 indirectly a food crop. All those points, I'm sure, were
3 made by Ray. I was just concerned that the landowners
4 would turn around and request that it be dug up.

5 Q. I'm about to get to the emergency regulation, but
6 before we get there, Ray's brief to the board, the writing
7 to the board on September 12th, if you'll turn to Exhibit
8 27, shortly thereafter, I want to ask you -- and I think
9 this is one of the stipulated documents -- Mr. Fletcher,
10 can you identify this document and tell us what it is
11 basically?

12 A. Well, this is the notification of PCB connection --
13 detection to EPA and to DHEC. And it's the formal notice.

14 Q. The formal notice?

15 A. I'm sure they knew it before this.

16 Q. Okay. I'm not going to go back to the time line to
17 look at some of that stuff. We'll do it with later
18 witnesses. But why did it take so long to get this formal
19 notice down to DHEC?

20 A. I don't really know. That's something you'll have to
21 ask Ray. But in general there was a lot of soul searching
22 on our part.

23 MR. DEVLIN: Your Honor, objection. He just
24 said he doesn't know. He just said he doesn't know the
25 answer. He's just speculating at this point.

1 Q. Tell me what work went into this from the board's
2 perspective? I mean this looks like a pretty thick
3 document. Like what all was involved in getting this
4 together?

5 A. Well, it's an accumulation of everything that we had
6 done from January 1st on to, you know, whenever the --
7 September 20th. So it's a formal compilation of everything
8 that happened.

9 Q. In addition to that, if I look down there under the
10 introduction and purpose, it also says not only what
11 happened, but it says a general outline of our anticipated
12 response actions. Is that part of what this document is?

13 A. Yes.

14 Q. Okay. If I go through the second page of it where it
15 talks about influent pump stations, headworks, secondary
16 treatment. Those first couple of pages are just a
17 description of what you talked about of how the Pelham
18 plant works; right?

19 A. Yes.

20 Q. Okay. If I look at where it says, on page 11908, the
21 third page, it says solids or solids handling. At the
22 bottom of that paragraph, the last part says, filtrate from
23 both operations is designed to be returned to the influent
24 wet well for treatment. Tell me what's happening there?
25 What is the filtrate and why is it being returned to the

1 headworks?

2 A. The filtrate is when you squeeze water out of the
3 solids. That's the water. And the filtrate is just
4 routinely returned to the front of the plant.

5 Q. When it's coming out of either the biosolid operation
6 or the cake operation, you get filtrate?

7 A. Yes.

8 Q. Okay. And usually the plan as designed, what do you
9 do with that water?

10 A. Put it in the front of the plant. Retreat it.

11 Q. Okay. What happened in this case of remediating
12 these biosolids? What happened to that filtrate?

13 A. EPA through some -- or DHEC through some -- I have no
14 idea why, but they had decreed that ---

15 MR. DEVLIN: Objection, Your Honor. He's
16 testifying what EPA decrees. That's hearsay.

17 MR. STILWELL: He's not.

18 THE COURT: I don't believe he's offering it for
19 the truth of what was stated, just what was told. So I'm
20 going to allow it. Go ahead.

21 Q. The question was what did y'all do with the
22 filtrate?

23 A. We usually took it to the front of the plant. With
24 PCBs and an EPA and DHEC decree that you couldn't put it in
25 the front of the plant.

1 Q. Okay.

2 A. And for reasons -- I mean again the treatment plant
3 is a very good treater of PCBs because they can remove
4 solids. And they're -- when you do sludge presses, you get
5 solids in the filtrate. And so running them back through
6 the plant made a huge amount of sense. But we were
7 prevented from doing it by EPA and DHEC.

8 Q. Let's go -- so flip over if you can to the top of
9 page 11911. I wish this thing had its own page numbers,
10 but we've got to use the produced page numbers. It's that
11 page right there that says corrective measures.

12 A. Yes.

13 THE COURT: I'm sorry, Mr. Stilwell, which
14 exhibit, please, sir?

15 MR. STILWELL: Same one, Your Honor.

16 THE COURT: Okay. And where are we on the
17 exhibit?

18 MR. STILWELL: It's the bates number that says
19 11911.

20 THE COURT: Okay.

21 MR. STILWELL: It's right before the signature
22 page, but there's a bunch of stuff after it.

23 Q. George, we'll talk a lot later about fifty parts per
24 million above and below. Just this top sentence up here,
25 the first full sentence on that page says the dewatered

1 solids with PCBs less than fifty milligrams per kilogram
2 are being transported offsite for disposal at appropriate
3 permitted landfills. This -- first of all, this report is
4 about the Pelham plant?

5 A. Yes.

6 Q. Okay. Did the Pelham plant also have some material
7 that was less than fifty parts per million?

8 A. Less than?

9 Q. Yes?

10 A. Yes.

11 Q. Okay. And what was being done with that water?

12 A. Nothing. I mean we were -- well, what was being done
13 was we were sludge pressing it and taking it to the
14 landfill.

15 Q. Okay.

16 A. I'm not sure what your question was.

17 Q. Well, that was it. Well, I'll tell you that I'm
18 opposing it to the fifty parts per million part?

19 A. Yes.

20 Q. At this point in time it's still sitting in the
21 tanks; right?

22 A. Right.

23 Q. There's a reference ---

24 A. That was the proposal that we ---

25 Q. Uh-huh (affirmative). You were going right where I

1 was. The proposal, the initial plan here, the bottom
2 sentence, it says -- the bottom two sentences of that same
3 page, the dewatered solids will be transported offsite for
4 disposal in Emelle, Alabama. That's talking about what
5 part? The fifty part per million and above?

6 A. Yes.

7 Q. Okay. What is Emelle, Alabama?

8 A. It's a hazardous waste landfill.

9 Q. Okay. So that's where all that stuff was taken?

10 A. Yes.

11 Q. The first sentence on the next page -- maybe I should
12 have taken you here further. Can you tell us what that
13 sentence refers to, filtrate from the dewatering process
14 will be subjected to treatment if necessary to ensure that
15 no reasonable potential exists to cause or contribute to a
16 water quality violation prior to recirculation. Is the
17 part -- is that what we're talking about ---

18 A. Yes.

19 Q. --- about whether the filtrate goes back to the front
20 or not?

21 A. Well, we couldn't take it back to the front; so,
22 yeah.

23 Q. What did we end up doing with it? Like instead of
24 just taking it back to the top, like generally at Pelham
25 for less than fifty, at the other plants less than fifty.

1 What happened to the filtrate?

2 A. I do not know.

3 Q. Okay. We'll ask some other guys that. I want to
4 turn you to Exhibit 28. Exhibit 28, do you recognize this
5 document, George?

6 A. I guess I recognize the content itself.

7 Q. Okay. And did you see this document before it went
8 to DHEC?

9 A. I'm sure I did.

10 Q. Okay. And what does this document refer to
11 generally?

12 A. Well, it says that there are solids that we had that
13 are above fifty part per million.

14 Q. Is this a subsequent notice about the other plants,
15 other than Pelham?

16 A. Yes.

17 Q. Okay.

18 MR. STILWELL: Your Honor, I would offer this
19 one into evidence.

20 MR. DEVLIN: We stipulated to this one, Your
21 Honor.

22 THE COURT: All right. Thank you.

23 MR. STILWELL: I caught one break. It only took
24 me an hour.

25 Q. George, let's go through this just briefly. Just

1 looking at that first paragraph there, this talks about the
2 previous notice of above fifty parts per million at Pelham
3 and then right here, the middle sentence says, we have also
4 identified PCBs at concentrations below fifty at Lower
5 Reedy and Mauldin Road. Is this the time frame, September
6 24, 2013, where you're also trying to figure out what to do
7 at Lower Reedy and Mauldin Road?

8 A. Yeah. This also addresses the whole issue of the
9 standards that are inconsistent. I mean you've got a
10 drinking water standard that's way higher than a discharge
11 standard. And this was when we first began to get in the
12 whole issue of what the standards are. It was kind of the
13 same thing with that recycling of the filtrate. Here you
14 had a standard of drinking water of a half part per million
15 and you couldn't take filtrate back that was in the part
16 per billion range.

17 Q. Are you talking about the part on page 2 ---

18 A. Yes.

19 Q. --- that paragraph with the calculations in it?

20 A. Yes.

21 Q. Okay. So the standard for the protection of aquatic
22 life there, help me with the math. The .014 parts per
23 billion, is that a part per trillion?

24 A. Yeah. Fourteen parts per trillion.

25 Q. Okay. Do you know what ---

1 A. And you could drink a half part per million.

2 Q. Do you know what the standard for the filtrate ended
3 up being?

4 A. At one time it was six parts per trillion. I mean
5 because that was the -- that was some standard that they
6 applied to it; .00614.

7 Q. Can you even test that low?

8 A. No. Again, they were applying toxic -- TSCA
9 regulations, toxic substances, control regulations to some,
10 drinking water standards to some. There was just a whole
11 plethora of regulations that ... And part of the reason
12 for the inconsistency was the PCBs weren't supposed to be
13 there in the first place.

14 MR. DEVLIN: Your Honor, I object to this
15 witness testifying as to standards of filtrate without
16 laying a foundation for it. He's testifying as to what a
17 regulatory agency did. He's not offering any documents,
18 any regulations or anything. He's just saying this is the
19 number and putting it into evidence. We need some
20 foundation for that.

21 THE COURT: Mr. Stilwell?

22 MR. STILWELL: Your Honor, that's what's in this
23 document right here. It's got the filtrate standard that
24 we proposed to DHEC and EPA.

25 THE COURT: I'll let it in for whatever it's

1 worth.

2 Q. Mr. Fletcher, I want to direct your attention to the
3 next to the last paragraph there where Ray says, we have no
4 feasible or cost effective alternative to managing the
5 filtrate from these sludges other than routine
6 recirculation as originally designed. Original designing
7 means that's how the plants always worked before?

8 A. Correct.

9 Q. Okay. What alternative -- when he says cost
10 effective alternatives, what alternative is there to
11 retreating the filtrate in the plant? What else could you
12 do with it?

13 A. Well, the PCBs are insoluble. So if you filter it
14 fine enough, if you've got a tight enough filter, you could
15 get the PCBs out. As well you could have sent it to a TSCA
16 incinerator. I think there was one in Alabama. And as I
17 said, I don't know what we finally did with it. But there
18 were solutions available.

19 Q. The incinerator is how expensive?

20 A. Oh, it's -- I don't remember. It was expensive.

21 Q. Okay. Was it more expensive than what ReWa ended up
22 doing?

23 A. I don't know what ReWa ended up doing.

24 Q. Okay. We'll talk to some other witnesses about that.

25 I want to turn to Exhibit 29 and talk about the emergency

1 regulation. And George, this is one of the stipulated
2 documents. We don't have to focus on the first couple of
3 pages because they're basically reflected in the reg
4 itself. If you'll turn to page 1 of the regulation, it's
5 like three pages in. Four pages in. Okay? If you'll look
6 down at the second paragraph, it references that there was
7 a hit of PCBs in Richland County. Do you recall that?

8 A. Yeah.

9 Q. Okay. At this point in time, in September, how long
10 generally had ReWa been in contact with DHEC or EPA about
11 this issue?

12 A. I'm sure a couple or three months. I don't know
13 exactly when they were first contacted.

14 Q. Okay. And what was this emergency regulation
15 pertaining to generally?

16 A. Well, it generally prevented you from land
17 applying the sludge ---

18 MR. DEVLIN: Your Honor, I'm going to object to
19 this witness interpreting this legal document. It's a
20 question of law for the Court as to what this document
21 means. Interpreting the law is not a witness's purview.

22 MR. STILWELL: Your Honor, there are some
23 complicated regs out there. This ain't. We can go through
24 all four paragraphs and we'll just read them, but ...

25 THE COURT: Repeat the question, please, sir.

1 MR. STILWELL: I said what generally was the
2 topic of this regulation?

3 THE COURT: Overruled. You can answer.

4 A. Well, the regulation prevented us from land
5 applying -- said we couldn't land apply the sludge.
6 Though we had not -- we had stopped land applying
7 anyway.

8 Q. We had already stopped?

9 A. Yes.

10 Q. Okay. The next to the bottom paragraph on page 1
11 says, with the issuance of this emergency regulation, the
12 department is prohibiting the land application of sludge
13 with quantifiable levels of PCBs from wastewater systems.
14 So quantifiable levels means if it's got any you can't land
15 apply it?

16 A. Yes.

17 Q. Okay.

18 A. But the test -- the test limit.

19 Q. And ReWa was already doing that anyway?

20 A. Yes.

21 Q. Okay. If you flip over to the next page, page 2, the
22 second sentence there says sludge treatment by methods such
23 as thickening, digestion and dewatering generates
24 additional wastewater that must be managed by the
25 wastewater treatment system. That additional wastewater is

1 the filtrate we were just talking about?

2 A. I would -- yes, I would think so.

3 Q. And then the next sentence in that same top paragraph
4 says, to protect public health and the environment related
5 to the effluent discharge to surface waters. The effluent
6 discharge is what? Coming out the back of the plant?

7 A. Yes.

8 Q. To protect the effluent discharge to surface waters
9 and the land, the Department needs to establish
10 restrictions for sludge treatment operations. Is that a
11 part of this regulation, as well?

12 A. Yes.

13 Q. Okay. The next sentence, it refers there to water
14 quality standards for NPDES facilities.

15 A. Where are you?

16 Q. The second paragraph on the top of page 2.

17 A. I'm not seeing what it refers to. Which sentence are
18 you talking about?

19 Q. I'm in the second paragraph where it starts with
20 South Carolina.

21 A. Yes.

22 Q. South Carolina has water quality standards that apply
23 to dischargers (e.g., NPDES facilities). What are NPDES
24 facilities?

25 A. National Pollution Discharge Elimination System.

1 That's the national system for permitting wastewater
2 discharges.

3 Q. Under the Clean Water Act?

4 A. Clean Water Act.

5 Q. And these three plants that we've talked about, Lower
6 Reedy, Mauldin Road, Pelham, those are NPDES facilities?

7 A. Correct.

8 Q. Okay. The last sentence of that paragraph says,
9 since management of PCB contaminated sludge creates a new,
10 but temporary waste stream, it is important to evaluate the
11 return waste stream to determine if levels of PCBs are
12 above detection (i.e., quantifiable levels).

13 A. Yeah.

14 Q. Is that the filtrate return of the headworks piece?

15 A. Yes.

16 Q. Let's flip over to the third page which is -- I want
17 to look at section 3(b). 3(b) says, when operating sludge
18 management systems -- which is what we're talking about;
19 right?

20 A. Right.

21 Q. --- where wastewater is generated that is feeding
22 back in the wastewater treatment system, and it says right
23 there, filtrate piped to the head of the treatment
24 facilities, if the return wastewater is below levels of
25 quantification as set in item "c" below, then operation is

1 deemed in compliance. Does this refresh your recollection
2 about them setting the limit for the filtrate coming back?

3 A. Yeah.

4 Q. Okay. If I look at section "c" it refers to, it
5 doesn't have any numbers into it. Do you know where I
6 would get those numbers? You may not.

7 A. There are documents that say what the numbers are.

8 Q. Okay.

9 A. Again, it was a whole issue that we couldn't return
10 the filtrate.

11 Q. Okay.

12 A. If it had anything in it, almost. Anything above a
13 detection level.

14 Q. We'll pick up that other part later. And just to
15 briefly skip over to the last document I find, I've got,
16 actually, this amended -- this emergency reg, I'm sorry,
17 was in effect for how long?

18 A. I think they came out with a permanent reg in about
19 February. So it was roughly six months.

20 Q. So this thing came in in September of '13 and went to
21 February of '14 saying no land application?

22 A. Correct.

23 Q. Okay. Can you compare that generally to when the
24 plants were actually cleaned out? Like tell me the order
25 of the plants that were cleaned out, if you remember?

1 A. Well, we cleaned out Pelham Road, then Mauldin, then
2 Lower Reedy.

3 Q. How long did that take from one end to the other?

4 A. I don't know when it was finally all finished. I
5 know we started land application again about a year later.

6 Q. Okay. A year after all the remediation was done?

7 A. A year after roughly the end of 2014, January 2015.

8 Q. So this final -- first of all, I'd offer this one.
9 Do you recognize this final regulation? You've seen that
10 before, haven't you?

11 A. Yeah.

12 MR. STILWELL: And this is stipulated, Your
13 Honor. Number 42.

14 THE COURT: All right.

15 Q. Are you on page 3 of the -- page 3 is kind of the
16 meat of the regulation.

17 A. Page 3. Okay.

18 Q. I'd just ask you generally, did this regulation allow
19 some land application of biosolids?

20 A. Yes.

21 MR. DEVLIN: Your Honor, I think the same
22 objection. He's interpreting the law for you and I believe
23 that's your province; not the witness's. The witness is
24 not an expert on the law.

25 THE COURT: Sustain the objection.

1 MR. STILWELL: I'll finish the question.

2 Q. George, when did ReWa -- this regulation came into
3 effect in what? May of 2014. And when do you think ReWa
4 started land applying again?

5 A. It certainly wouldn't have been until after this reg.
6 I don't know, like -- I think it was the end of the year of
7 2014, 2015.

8 Q. Okay. And ---

9 A. So it was probably six to eight months after this.
10 And we started land applying when there was no longer any
11 PCBs in the sludge ---

12 Q. Okay. Did ReWa ---

13 A. --- and in the biosolids that were applied. And we
14 felt strongly that we shouldn't be land applying PCBs.

15 Q. Okay. So there was basically a buffer period of
16 clean runs before you land applied anything? Well let me
17 -- I messed that up. Did ReWa ever land apply knowingly
18 any contaminated biosolids?

19 A. Not knowingly.

20 Q. Okay.

21 A. We did land apply some, obviously, early on, but we
22 didn't know it was there.

23 Q. Okay. Hang on a second and let me go check to make
24 sure I got everything.

25 A. Sure.

1 Q. George, let me look at my outline real quick. I
2 forgot I actually have an outline. George, do you know
3 generally what this remediation cost ReWa?

4 A. Yes.

5 Q. What is it?

6 A. It's roughly six million dollars. It was a total of
7 nine million.

8 Q. How did you get to that, just generally?

9 A. Just generally netting out the total cost minus the
10 costs that we would have had anyway.

11 Q. Okay. And has ReWa recovered any of that money from
12 anybody?

13 A. Not to my knowledge.

14 Q. I'm going to let you go now and you can answer any
15 questions that apparently Mr. Devlin will have.

16 **CROSS EXAMINATION**

17 **BY MR. DEVLIN:**

18 Q. Good morning, Mr. Fletcher.

19 A. Good morning.

20 Q. Let's start with something you just said. You stated
21 that we felt strongly we shouldn't be land applying when we
22 knew we had PCBs. And you never land applied when you knew
23 it was there?

24 A. Correct.

25 Q. I want you to look at the time line, Exhibit 88 in

1 your notebook.

2 A. I'm sorry. Where is that?

3 Q. I believe it's Exhibit 88.

4 A. Yes.

5 Q. February 11th -- I'm sorry. Let me know when you're
6 there.

7 A. I don't know where it is. I apologize.

8 MR. DEVLIN: May I approach the witness, Your
9 Honor?

10 THE COURT: Oh, certainly.

11 Q. Exhibit 88.

12 A. Appreciate it.

13 Q. Look at the February 11th, 2013 entry. And I'll give
14 a little background on this. Y'all had just got test
15 results back on testing of Pelham digester; right?

16 A. Okay.

17 Q. And Pelham holding tanks; right?

18 A. Right.

19 Q. Pelham holding tanks were holding biosolids for land
20 application; correct?

21 A. Correct.

22 Q. And these test results show that at holding tank 4
23 you've got seventy-two parts per million of PCB
24 contamination; right?

25 A. Okay.

1 Q. Eighty-one parts per million in holding tank 5?

2 A. Okay.

3 Q. And forty-five parts per million in holding tank 6?

4 A. Okay.

5 Q. What was the limit? Fifty parts per million?

6 A. Yes.

7 Q. And if you look on down there it says holding tanks 4
8 and 5 suspended from land application; right?

9 A. Okay.

10 Q. Tank 3 suspended from land application pending
11 confirmation of previously higher number?

12 A. Okay.

13 Q. Holding tank 6, forty-five parts per million. Y'all
14 knew that had ninety percent of the allowable quantity of
15 PCBs in it and you didn't suspend land application on
16 holding tank 6; right?

17 A. I don't know. The board knew nothing about this at
18 the time.

19 Q. Well, do you think that this time line that you
20 ordered to be done is inaccurate?

21 A. No, as far as I know it's correct.

22 Q. So if the people who put this together did it
23 accurately, then ReWa is saying that they normally applied
24 biosolids that had a PCB contamination level of forty-five
25 parts per million; right?

1 A. You'll have to ask Stan that one.

2 Q. If this is accurate, would that be true?

3 A. Does it say they land applied it?

4 Q. It does not say they suspended land applying.

5 A. It didn't say they land applied it. It just said it
6 was there.

7 Q. Okay. Look at the March 20th to 22nd entry?

8 A. Okay.

9 Q. Next page over.

10 A. Pelham tank 6, less than fifty parts per million. I
11 stand corrected.

12 Q. You're continuing to apply, knowing that there are
13 PCBs in it that had less than fifty parts per million;
14 right?

15 A. Again, the board knew nothing about this. And I
16 stand corrected, according to this.

17 Q. And ReWa knew that it was applying PCBs with more
18 than zero parts per million in the biosolids; right?

19 A. I will agree with that.

20 Q. So all this testimony about we felt strongly it
21 shouldn't be there, you're not talking about ReWa; you're
22 talking about you?

23 A. I'm talking about the board.

24 Q. And we're in an insurance dispute over, among other
25 things, a building and property insurance policy; right?

1 You know that's ---

2 A. Yes.

3 Q. --- the basis of this lawsuit?

4 A. Yes.

5 Q. And you've just testified to about six million
6 dollars that has been incurred in the remediation?

7 A. Yes.

8 Q. And do you understand that the question for the court
9 to decide is whether or not the monies that were spent are
10 covered by that policy; right?

11 A. Yes.

12 Q. What in all your direct testimony that you just gave
13 shows that there were physical damage to covered property?

14 MR. STILWELL: Your Honor, I would object that
15 he hasn't even laid a foundation that this guy has ever
16 even looked at the insurance policies because I promise you
17 he hasn't.

18 THE COURT: I have no problem allowing him to
19 answer the physical damage question as a board member, to
20 the extent he has knowledge of that.

21 Q. What physical damage was there to the property of --
22 to covered property of ReWa?

23 A. I don't think I would know that.

24 Q. Y'all spent a lot of money on putting in different
25 types of hardware, belt presses and that sort of thing, to

1 handle the dewatering of sludge that you did not used to do
2 before the land application process stopped; right?

3 A. Yes.

4 Q. And those costs weren't physical damage to covered
5 property; were they?

6 A. Again, I don't think I know.

7 Q. I believe you testified that the land application
8 program was less expensive than the alternative of
9 dewatering, carrying to a landfill and compacting the
10 biosolids; right?

11 A. Yes.

12 Q. So when you realized that you had to stop the land
13 application, ReWa was going to start spending more money
14 using an alternative method of dealing with the biosolids?

15 A. Yes.

16 Q. And it made a business decision that it wanted to
17 continue to use the land application process; right?

18 A. We made a business decision to use it for the sludges
19 that weren't contaminated with PCBs. Is that what you
20 mean?

21 Q. Yes.

22 A. Yes.

23 Q. And you could have ceased using the land application
24 program and not had to go through all of the remediation
25 that you did; right?

1 A. I didn't think we could. I thought there was a huge
2 risk in that.

3 Q. Well, in the six and a half years since this -- since
4 the PCBs contamination has been discovered and revealed to
5 the board, how many landowners have come to ReWa and said,
6 we're going to sue you for the cost of taking up dirt?

7 A. I don't know. I haven't been on the board since
8 2016.

9 Q. Well, between 2013 and 2016 ---

10 A. Remind me ---

11 Q. --- how many such lawsuits were there?

12 A. There were none that came forward. But the other
13 issue there that the board was thinking was that we would
14 find who was discharging the PCBs and be able to go after
15 them for some of those costs. And we never identified who
16 was discharging them, which was a huge source of
17 frustration.

18 Q. You understand that ReWa has stipulated that a
19 Timothy Howard from American Waste was discharging into
20 grease traps?

21 A. He was. But where was he getting them. He wasn't
22 making them. They were coming from some place. And we
23 felt like some place was a deeper pot.

24 Q. Have y'all sued Timothy Howard?

25 A. Who?

1 Q. Have y'all sued the waste hauler?

2 A. I don't know.

3 Q. You were talking about when the board first started
4 finding out about this problem. When was this?

5 A. I think about July. And the reason I said that is
6 that the earliest thing in here was -- that I recognized
7 was a call to Vopak and that was July 27th maybe. July --
8 it says July 23rd Ray began calling board members. But
9 before that he contacted Vopak and I remember July 2nd. So
10 I had known about it before July 2nd.

11 Q. And that would have been approximately five months
12 after the first ---

13 A. Yes.

14 Q. --- excessive PCB readings were discovered by ReWa?

15 A. Yes.

16 Q. Did you inquire of Mr. Orvin of why you were kept in
17 the dark for five months?

18 A. I'm sure we did.

19 Q. Why were you kept in the dark for five months?

20 A. I don't know.

21 Q. And you understand ---

22 A. And I don't totally know it was a full five months.

23 Like I said, the only thing I know was that I remember
24 telling him to call Vopak. So we may have been notified
25 before that, but I don't recall exactly when we were

1 notified.

2 Q. But you would agree that the time line shows that
3 ReWa knew on February 11th, 2013 that it had excessive
4 readings in a number of the Pelham holding tanks; right?

5 A. I would agree the board should have been notified.

6 Q. And that -- you agree that ReWa continued their land
7 application program and thereby saving money until April of
8 2013; right?

9 A. As I testified I didn't think we ever land applied
10 PCBs but -- that we knew about. But where does this show
11 I was wrong?

12 Q. If you look at page two of the time line, you would
13 agree that -- at the bottom, April 29th, land applications
14 from Pelham discontinued in order to avoid cumulative
15 effect on fields.

16 A. Okay.

17 Q. So between February 11th when y'all first discovered
18 them, and April 29th, y'all were still land applying?

19 A. Okay.

20 Q. And it was legal; wasn't it? It was under fifty
21 parts per million?

22 A. Yeah. We didn't do anything illegal. Very possibly
23 they could have held -- there was a lot of biosolids tanks
24 out there, so quite possibly they could have been applying
25 those to sludges that were not contaminated, but I don't

1 know. Like I said I didn't know about any of this.

2 Q. Except for the fact that y'all's own report says that
3 you're applying biosolids from Pelham tank number 6, which
4 has already been shown to have forty-five parts per
5 million. That would be a correct statement otherwise;
6 right?

7 A. Yes, sir.

8 Q. Okay. And you understood that if DHEC had found that
9 you were operating in violation of your permit, they could
10 have had that permit revoked?

11 A. Yes.

12 Q. And you were apparently personally concerned about
13 the DHEC's -- DHEC requirement for the use of filtrate;
14 right?

15 A. Yes.

16 Q. Because it was going to make you spend more money?
17 How much of that six million dollars had to deal with the
18 increased costs of dealing with filtrate?

19 A. I don't know.

20 Q. And you ---

21 A. I would not think very much of it because the
22 filtrate was not a -- there was not a lot of filtrate, but
23 I don't -- I really don't know.

24 Q. The only reason you had to spend that money is
25 because DHEC ordered you to do so?

1 A. No. We spent that money because -- yeah, DHEC
2 ordered them to filtrate, but the decision to not land
3 apply was ours up until the emergency order when DHEC
4 obviously agreed and put the emergency order in place
5 saying don't land apply.

6 Q. We'll get to that. You made numerous statements
7 about what this Mr. Howard, the American Waste hauler guy,
8 did in terms of pumping in instead of pulling out. Do you
9 have firsthand information on that?

10 A. Did I see it?

11 Q. Yes, sir.

12 A. No.

13 Q. Who told you that?

14 A. It was reported to the board.

15 Q. So what you're telling the Court here is not what you
16 know ---

17 A. It was reported to -- yes.

18 Q. --- but what somebody told you?

19 A. Yes.

20 Q. And y'all sent a -- I put it in here earlier -- a
21 report to DHEC with a proposed plan of action on how to
22 deal with this; correct?

23 A. Yes.

24 Q. And you got a response back from DHEC that approved
25 that plan?

1 THE COURT: Which exhibit number, Mr. Devlin?

2 MR. DEVLIN: Oh, I'm sorry, Your Honor. I'll
3 have to look that up.

4 THE COURT: I just want to make it clear for the
5 record.

6 MR. DEVLIN: Yes, sir, Your Honor.

7 THE COURT: Is that Plaintiff's 28?

8 MR. DEVLIN: Plaintiff's 28, Your Honor, is --
9 no, sir, we did not talk about that.

10 Q. There was a communication -- Mr. Fletcher wasn't
11 there -- from Mr. Orvin to DHEC which contained an AECOM
12 plan for how to remediate the issue they had with PCBs in
13 the biosolids; right?

14 A. Yes.

15 Q. And that was ---

16 THE COURT: Is that the September 24 ---

17 MR. DEVLIN: No, sir. I'm sorry. I've not
18 given him the exhibit number. I believe that is Exhibit
19 31.

20 MR. LINDEMAN: 32.

21 MR. DEVLIN: I'm sorry, 32, which has been
22 stipulated by the parties.

23 MR. STILWELL: Your Honor, I didn't put that in
24 through Mr. Fletcher. In fairness to the witness, if he's
25 going to ask him questions about it, he needs to give it to

1 him.

2 THE COURT: Yeah, if you can hand him that
3 because it's not in the notebook.

4 MR. LINDEMAN: Where are the exhibits we
5 stipulated to ---

6 MR. DEVLIN: Pardon?

7 MR. LINDEMAN: Where are the exhibits that we've
8 all stipulated to? Do you have them?

9 MR. DEVLIN: We've got a ---

10 MR. LINDEMAN: To the court reporter?

11 MR. BROWN: We haven't provided a full set of
12 anything to the court reporter yet. We asked the court
13 reporter and the court reporter said she'd rather do it at
14 the end. That was the process we were ---

15 (ATTORNEYS SPEAKING AMONG THEMSELVES)

16 THE COURT: So now, Mr. Devlin, what exhibit?

17 MR. DEVLIN: Exhibit 32, Your Honor. It's an
18 October 17, 2013 letter from I think Mr. Orvin to the EPA
19 and DHEC.

20 THE COURT: Is it a Plaintiff or Defendant
21 exhibit?

22 MR. DEVLIN: Plaintiff's Exhibit 32, Your Honor.

23 THE COURT: Thank you.

24 MR. DEVLIN: It's been stipulated.

25 THE COURT: Do you have that, Mr. Fletcher?

1 MR. FLETCHER: Yes, sir.

2 THE COURT: And what's the date of what you're
3 looking at?

4 MR. FLETCHER: October 17th, 2013.

5 THE COURT: All right. Thank you.

6 MR. STILWELL: Your Honor, that's the Court's
7 copies, but maybe he's got another one for you.

8 Q. And do you know that a response was received to that
9 from DHEC about five days later, Mr. Fletcher?

10 A. I assume this is the sludge we're taking to Emelle.
11 But I'm sorry, what is your question?

12 Q. Do you know that there was a response provided by
13 DHEC as to the approval of that plan about five days
14 later?

15 A. No, but I assume it was approved.

16 Q. Do you know what the conditions were that DHEC put on
17 the approval of that plan?

18 A. I do not.

19 Q. Do you know whether that included some testing for
20 PCBs that would have allowed there to be some quantifiable
21 level of PCBs?

22 A. I assume there was. Again, I haven't seen the
23 letters you're talking about. At least I haven't -- I
24 don't remember them. Let me put it that way.

25 Q. You're not trying to testify to this Court that there

1 is some binding regulation or law that required a 0.00
2 percent of parts per million PCB in the biosolids;
3 correct?

4 A. I've never testified to that.

5 Q. Okay. I just want to make sure.

6 A. I testified that regardless the level of PCBs were
7 there we shouldn't land apply. That was the board's
8 position.

9 Q. I understand. And that's your opinion as an
10 engineer, but that's not the law and that's not the
11 requirements by which ReWa operated; right? Yes or no?

12 A. Ask the question again.

13 Q. Your opinion as to the level at which PCBs are
14 allowed is not the guideline by which ReWa was required to
15 operate?

16 A. Yes. Yes. The board's opinion was that we shouldn't
17 land apply PCBs.

18 Q. And that is not the binding authority on what ReWa
19 can actually do; right?

20 MR. STILWELL: Your Honor, I ---

21 A. Well, the board ---

22 THE COURT: Hold on, please, sir.

23 MR. STILWELL: That part -- first of all, he's
24 not offering opinion testimony. He said this is what we
25 did and the board is the boss at ReWa. So this whole line

1 of questioning is off base and conflating what the
2 regulatory requirements are and who the boss is in that
3 organization.

4 THE COURT: I'm going to allow it because I can
5 see that the board may have a different opinion on what the
6 applicable law is and that may have some bearing on the
7 language and the enforceability under the policy. So for
8 that purpose go ahead.

9 Q. Mr. Fletcher if the board was going to order ReWa to
10 comply or to reduce their PCB parts per million footprint
11 to 0.00, that would be something that they would have to
12 order ReWa to do and it would be reflected in the meeting
13 minutes of the board of directors at ReWa; correct?

14 A. I don't know about meeting minutes.

15 Q. But you would have -- the board would have to order
16 ReWa to do that?

17 A. I think the staff themselves -- well, no, from
18 September on EPA had said you can't land apply, from
19 September until February.

20 Q. I'm sorry. That's not the question I asked.

21 A. I'm sorry.

22 Q. The question I'm asking is if the board's opinion is
23 the only allowable level of parts per million PCBs and
24 biosolids is 0.0, that you would have to make that feeling
25 clear to ReWa itself, to its staff, to its management,

1 everyone? It's going to have to direct that; right?

2 A. I don't know about 0.0. But the technical levels, we
3 said we don't want to apply PCBs to land. Yes.

4 Q. And y'all said that after you had found out that
5 y'all had been applying PCBs to land knowingly for how many
6 months?

7 A. We didn't -- as I said before, I didn't know we had
8 been doing that. I didn't think we ever applied it to land
9 when we knew there was PCBs there.

10 Q. And I understand ---

11 A. And the time line clearly says that, so ...

12 Q. Don't get me wrong, Mr. Fletcher. I'm not saying
13 that the board and you knew that you were knowingly
14 applying PCBs out in the corn fields of Greenville County.
15 I'm saying that your records reflect that ReWa did it and
16 knew that it was doing it up until the point of April 2013,
17 then it elected to stop doing it. And my question to you
18 is, did the board thereafter decide that the only allowable
19 level of PCBs in the biosolid is 0.0?

20 A. Detectable.

21 Q. Detectable. Okay. And you don't know whether that
22 is consistent or not with the DHEC standards in the -- or
23 the DHEC conditions in the October ---

24 A. Well, DHEC said that after the -- in the February
25 order -- I mean the fifty milligrams per liter was always

1 -- fifty parts per million was always a legal discharge.

2 We didn't think that made any difference. We thought that
3 we shouldn't be discharging PCBs.

4 Q. All right. Are you speaking today as to your
5 individual opinion or on behalf of the board?

6 A. The board, the board agreed unanimously that we were
7 not going to apply PCBs.

8 Q. And show me where that was ---

9 A. I'm just telling you, that's what we said.

10 Q. When?

11 A. From the time we knew about it.

12 Q. In what meeting minutes is that reflected?

13 A. I don't know.

14 Q. And was there a vote taken on it?

15 A. I don't know that.

16 Q. Was there an executive session discussion about it?

17 A. I'm sure there was.

18 Q. And if ---

19 A. Probably open to the public. The committee meetings
20 were open to the public.

21 Q. And this issue of PCB contamination became a topic of
22 board conversation in September of '13?

23 A. I don't know. It became a topic of conversation when
24 we knew about it.

25 Q. I'm going to offer you an exhibit which we have not

1 put on our list that is the September 23rd, 2013 minutes of
2 the board of commissioners meeting. And I'd like you to
3 review this and see if that refreshes your recollection
4 about that meeting? And let me know when you're finished
5 reviewing it, please.

6 A. Okay.

7 Q. Please correct me, but I don't see one reference in a
8 three-page set of minutes from September 13 to the PCB
9 issue and it's on the final page when Commissioner Boyette
10 makes a motion about emergency procurement for disposing of
11 the contaminated solids. Is there any other reference in
12 that exhibit to PCB contamination or allowable levels of
13 PCB?

14 A. Well, there is the modification I made that said that
15 if the staff needs to do something on an emergency basis,
16 do it.

17 Q. Yes, sir. And does this help you remember now that
18 on September 13th the board made no comment, made no
19 motion, took no vote on what to order ReWa to conform to in
20 terms of allowable PCB levels?

21 A. Yeah. But there was broad consensus that that was a
22 good idea not to. There was a memo from staff saying the
23 staff recommended not ---

24 Q. The question is ---

25 A. --- doing land application.

1 Q. The question is not what's a broad consensus ---

2 A. Well, what you're giving me are the minutes ---

3 Q. Hold on a minute, Mr. Fletcher.

4 A. I'm sorry.

5 Q. Let me finish and I'll be sure to let you finish;
6 okay?

7 A. I apologize.

8 Q. That's okay. I do it all the time. And if I
9 interrupt you, you please tell me and I'll stop. Does
10 looking at this document refresh your recollection that the
11 board did not vote to institute some different standard,
12 some other standard for PCB detection in September '13?
13 Yes or no?

14 A. No. Yes.

15 Q. Yes, you did not vote on that?

16 A. Yes, we did not vote.

17 Q. They didn't reference that; did they?

18 A. Right.

19 Q. I'm going to let you review another document and see
20 if it refreshes your recollection about the meeting that
21 occurred on October 28th, 2013, the next monthly meeting?

22 A. Uh-huh (affirmative).

23 Q. Take a minute to review that and let me know when
24 you're ready.

25 A. Can I ask you a question?

1 Q. Well, you may. I might or might not answer it. Go
2 ahead.

3 A. What was the date of the emergency order from DHEC?

4 Q. September the 25th, 2013, I believe.

5 A. So it was two days after the first meeting?

6 Q. Yes, sir. If my math holds; yes.

7 A. Thank you. Okay. Now your question about this one,
8 do I recognize it?

9 Q. Does that refresh your recollection about any board
10 action about PCB -- acceptable PCB levels?

11 A. Okay. At this point it was a moot point. I mean we
12 were under emergency order not to land apply.

13 Q. Having looked at this, does it refresh your
14 recollection that the board took no action to order ReWa to
15 comply with a zero parts per million or non-detect?

16 A. I can't imagine the board taking an action in an
17 emergency order that they can't do it.

18 Q. Yes or no?

19 A. No. I don't know whether yes or no was right, but I
20 agree with you.

21 Q. Thank you. And finally, I'm going to give you the
22 November 25th, 2013 board meeting minutes. Take a look at
23 those.

24 A. Can I make one other comment about October? There's
25 not the minutes here of the administration under the

1 Operations and Planning. They could have well discussed
2 that in Operations and Planning. And then Ops and Planning
3 would also have reported then to the board. That's just
4 part of the normal board practice. Okay. November?

5 Q. Would you agree with me that in November there was no
6 action taken as far as the meeting minutes reflect as to
7 PCBs whatsoever?

8 A. Repeat your question.

9 Q. I'm not sure I could.

10 A. I'm sorry.

11 Q. Would you agree with me that the November 25th, 2013
12 meeting minutes reflect no action taken by the board
13 whatsoever with regard to PCB detection levels?

14 A. Well, again, the Operations and Planning group would
15 have reported to the board. And they could have provided
16 direction to the staff of Operations and Planning, and they
17 just told the board. Those are not things you vote on.

18 MR. DEVLIN: Your Honor, I'd like to move all
19 three of these in as separate exhibits, beginning with
20 Number 24, that's the September meeting minutes, Number 25,
21 that's the October meeting minutes and Number 26, that's
22 the November meeting minutes.

23 THE COURT: All right. And again, to avoid any
24 confusion on appeal will these be Plaintiff or Defendant?

25 MR. DEVLIN: These are Defendant's exhibits. I

1 think that the Plaintiff's exhibits run up about a hundred
2 and something. These are Defendant's Exhibits, 24, 25 and
3 26.

4 THE COURT: So September -- I'm going to ask ---

5 MR. DEVLIN: The September meeting minutes are
6 24 ---

7 THE COURT: I'm going to ask my -- with all due
8 respect, I'm going to ask my court reporter because I trust
9 her more than I trust lawyers as far as what stickers
10 should be appropriately placed on said exhibits.

11 COURT REPORTER: The September meeting is 24;
12 October meeting is 25; and November is 26. And they're all
13 Defendant exhibits.

14 THE COURT: All right. Thank you. She agrees
15 with what you said, Mr. Devlin, so we're tracking so far.

16 MR. DEVLIN: I feel a lot better now, Judge.

17 (WHEREUPON, Defendant Exhibit Numbers 24, 25 and 26
18 were marked and admitted into evidence.)

19 Q. At the end of your testimony Mr. Stilwell asked you
20 about the total costs of remediation. How much involvement
21 did you have in calculating that?

22 A. None.

23 Q. And you don't know exactly what all is in those
24 charges; do you?

25 A. No.

1 Q. Do you know that that includes a hundred and fifty
2 something thousand dollars in legal fees for your
3 environmental lawyers, not including the Nelson, Mullins
4 crew?

5 A. No, I don't know what the legal fees are. I don't
6 know what was in the six million. That was just the number
7 reported to the board.

8 Q. And you don't know whether any part of that includes
9 the actual cost for repairing physical damage of or lost to
10 covered property; do you?

11 A. I do not.

12 Q. So that's just a big ---

13 A. That was the number we were working with.

14 Q. Okay.

15 A. And we felt like it was less than what it would have
16 been had we had to dig up those fields.

17 Q. Thank you. No further questions.

18 THE COURT: Any other questions?

19 MR. STILWELL: Just some brief questions, Your
20 Honor.

21 **REDIRECT EXAMINATION**

22 **BY MR. STILWELL:**

23 Q. George, the time line that Mr. Devlin showed you said
24 that the landfilling stopped in April, but didn't you say
25 that you didn't know about it until about July or

1 something?

2 A. Yes.

3 Q. By the time you or any of the board knew about it had
4 the land application already been stopped by the staff?

5 A. By the time we knew about it, it had been stopped. I
6 didn't know they had applied -- until just now I didn't
7 know that they had applied PCBs knowingly to the land.
8 I've seen that time schedule, so that was my fault.

9 Q. Okay. It happened and then the staff stopped it?

10 A. Yes.

11 Q. Okay. The board agreed with it?

12 A. Yes.

13 Q. You talked about whether there was ever a board vote
14 on this or not. What is that O&P committee? I mean these
15 aren't the only minutes of ReWa; are they?

16 A. No. And I would very much like to see the O&P
17 minutes as part of this. The Operations and Planning
18 Committee and the Administrative and Planning, the board
19 was divided into two committees and they met immediately
20 before the board members -- board meetings on every fourth
21 Monday. So it was a part of the whole two, three hour
22 stretch of meetings that we had.

23 Q. Were you on the O&P Committee?

24 A. Yes.

25 Q. I just looked at this last one that Mr. Devlin handed

1 you. It's kind of handy. It looks like the last page of
2 Exhibit 26, the November one, you were the chairman that
3 year?

4 A. Of O&P?

5 Q. No. Chairman of the Board.

6 A. No, I wasn't.

7 Q. Do you think you were or weren't, right there?

8 A. I think I wasn't.

9 Q. Look at the bottom of the Exhibit, the last one,
10 November.

11 MR. DEVLIN: J.D. Martin, Chairman.

12 A. J.D. Martin, Chairman.

13 Q. Oh, that's the nominating committee. I'm sorry.

14 A. Yeah.

15 Q. We've got a lot of committees. That's the wrong
16 one.

17 A. That was to get the officers for the next year.

18 Q. Okay. Let me just take the first minutes that we
19 looked at, the September ones. I think it's Exhibit 24.
20 He was asking you about what was in the minutes and what
21 wasn't. This is three pages. How many hours was this
22 meeting?

23 A. Usually the meetings ran an hour or two hours.

24 Q. Look at this one. Look what time did it adjourned?
25 First of all, what time did they start?

1 A. Eight oh four. They started at six.

2 Q. So it was over a two-hour meeting and three pages?

3 A. Yeah.

4 Q. Okay. The minutes don't reflect every single word
5 that happened; right?

6 MR. DEVLIN: Objection, Your Honor.

7 THE COURT: Overruled.

8 Q. George?

9 A. I'm sorry.

10 Q. The minutes don't reflect every word that happened;
11 right?

12 A. No.

13 Q. Okay.

14 A. They're clipped.

15 Q. Staying in that September record with me.

16 A. Did say that -- no, that was October where we asked
17 for the costs or how we were going to pay the four or five
18 million dollar costs.

19 Q. In the September meeting, last page, third page of
20 the September 23, you went into executive session from six
21 forty-two to eight o'clock?

22 A. Yep.

23 Q. Okay. And then you immediately came out of it and
24 John Boyette makes a motion to emergency procure for the
25 disposition of contaminated solids.

1 A. Yep.

2 Q. Does that refresh your recollection about whether
3 that is what you're talking about?

4 A. Yes, it does. I read that very closely.

5 Q. Okay.

6 A. So clearly we talked about it for an hour plus.

7 Q. Mr. Devlin mentioned you didn't get sued by any of
8 the farmers?

9 A. Yes.

10 Q. But you stopped land applying; didn't you?

11 A. Yes.

12 Q. I don't have any other questions.

13 **RECROSS EXAMINATION**

14 **BY MR. DEVLIN:**

15 Q. One last question. Look at the November 25th
16 meeting. What time did it adjourn?

17 A. Six twenty-three.

18 Q. What time did it start?

19 A. Six.

20 Q. Did you get word in that meeting -- anything in that
21 meeting?

22 A. (Negative nod.)

23 MR. DEVLIN: That's all I have, Your Honor.

24 COURT REPORTER: Was that a no? You need to
25 answer out loud for me, please.

1 solids and disposing of solids. And so the only
2 remediation we had -- choice we had was to put it in a
3 landfill. I mean I guess we could have incinerated it.
4 That would have been remediation. But you can't really
5 treat it. It's not treatable in a biological treatment
6 plant. So our choice was to put it on the land or to put
7 it in a landfill and we chose to treat it and put it in a
8 landfill.

9 Q. All right. But the remediation expenses, would they
10 have been different if the board had chosen to use the
11 fifty parts per million?

12 A. Yes.

13 Q. Okay. Can you quantify ---

14 A. Well, that's what -- if we had put it on land, that's
15 what it would have cost us anyway. That's our normal
16 method. So we wouldn't have had to gone through the
17 filtration and all the other steps.

18 Q. You couldn't do that?

19 A. With the exception -- well, we wouldn't have even had
20 to worry about the filtrate because we wouldn't have been
21 filtering it. Yeah, we could have put it on the land for
22 the same costs as we were doing it before.

23 Q. All right. But how about when DHEC says you can't do
24 that?

25 A. Then you incur additional costs.

1 THE COURT: All right. Gentlemen, any questions
2 in response to my questions? Again, which truly may or may
3 not be relevant?

4 MR. STILWELL: No, Your Honor.

5 THE COURT: Mr. Devlin?

6 MR. DEVLIN: No, sir, Your Honor.

7 THE COURT: All right. Can Mr. Fletcher step
8 down?

9 MR. STILWELL: Yes, sir, Your Honor. I'm sorry.

10 THE COURT: All right. Mr. Fletcher, you're
11 free to stay, free to go.

12 MR. FLETCHER: Thank you.

13 THE COURT: The rest of us are locked in here
14 for a couple of days, but you're welcome to be here.

15 Why don't we take a short break.

16 How long do you anticipate for your next witness, Mr.
17 Stilwell?

18 MR. STILWELL: I think he'll go -- I think his
19 direct will go past lunch, Your Honor. But I mean I could
20 try to squeeze it in, like do it by twelve thirty.

21 THE COURT: Y'all are good lawyers and I let
22 good lawyers try their own cases.

23 MR. STILWELL: I think it'll be a little
24 quicker, at least. I always anticipate every witness gets
25 a little faster, so ...

1 THE COURT: All right. Why don't we take a
2 fifteen minute break and start back at eleven thirty.

3 (WHEREUPON, Court stood at recess for a short break.)

4 THE COURT: Mr. Stilwell, you can call your next
5 witness.

6 MR. STILWELL: Joel Jones.

7 THE COURT: If you'll place your left hand on
8 the bible and raise your right hand for me. Do you swear
9 to tell the truth, whole truth and nothing but the truth?

10 MR. JONES: Yes, sir, I do.

11 THE COURT: Come around and have a seat.

12 And gentlemen, have y'all figured out which exhibit --
13 I'd certainly like to have the one that was made for the
14 Court to stay better informed on the documents that you all
15 are referencing.

16 MR. STILWELL: Your Honor, what I've got for you
17 again is the ones for this witness. This is the subset.
18 What's down here on the bench for the court reporter is at
19 the end. It's a full set of the hundred and six, which
20 believe me, we ain't gonna do. But I don't know about
21 theirs.

22 MR. LINDEMAN: So apparently, Your Honor, when
23 we use Plaintiff's exhibits that aren't earmarked for that
24 particular witness by the Plaintiff, they won't be in that
25 notebook. So if I understand it, Plaintiff's counsel

1 doesn't have any separate complete set of Plaintiff's that
2 goes for the Court as well as to put into evidence. And we
3 didn't know that's the way they were going to handle it.

4 THE COURT: That's fine.

5 MR. LINDEMAN: But there may be some exhibits
6 that we may use on cross examination ---

7 THE COURT: I understand.

8 MR. LINDEMAN: --- that aren't in that notebook.

9 THE COURT: Judges just tend to be better
10 positioned to make an intelligent decision when they
11 actually have the exhibits in front of them they're getting
12 ready to rule on. But we'll cross that bridge as we go
13 with it.

14 MR. LINDEMAN: I think we have a notebook of all
15 the Defendant's exhibits for Your Honor. We can give that
16 to you, Your Honor.

17 THE COURT: That would be a good thing.

18 MR. LINDEMAN: May I approach?

19 THE COURT: Certainly.

20 MR. STILWELL: Your Honor, we only want
21 intelligent decisions on our documents.

22 MR. DEVLIN: Your Honor, we would prefer them
23 just on ours just to make it easier.

24 THE COURT: Listen, if I can get fifty percent
25 on a good day, I'm doing okay. All right. Sorry to get

1 things kind of sidetracked. At this point everybody is
2 nice and everybody gets along. That'll change as the trial
3 goes on.

4 If you'll state your full name, please, sir.

5 MR. JONES: Joel Henry Jones.

6 THE COURT: All right. Thank you.

7 MR. STILWELL: Judge, just before we start, do
8 you want me to stop -- I don't know how long his direct is
9 going to take, but it depends on how long we go before
10 lunch.

11 THE COURT: We're going to go until -- I'm fine
12 until your direct is done and if that's twelve thirty, one
13 thirty, two, whatever.

14 MR. STILWELL: Okay.

15 THE COURT: Now, I want to be sensitive to Mr.
16 Brown.

17 MR. STILWELL: He gets hangry on me.

18 THE COURT: Well, you can deal with that. I've
19 got great confidence in that. All right.

20 **JOEL HENRY JONES**

21 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

22 **DIRECT EXAMINATION**

23 **BY MR. STILWELL:**

24 Q. Joel, you already gave the Judge your name. Can you
25 tell the Judge something about where you're from and how

1 you got here?

2 A. I grew up in Pickens County. Been there my whole
3 life. Live there now. Went through the Pickens County
4 School District school system. Went on to Clemson. Got a
5 B.S. degree in Wildlife and Fisheries Biology. Later on I
6 went back to Southern Wesleyan University and got a Masters
7 in Science and Business Management. Started at ReWa not
8 long after college, about 1993, and have been there on and
9 off for almost twenty-seven years now.

10 Q. So ReWa was your first sewer job?

11 A. Yes. Yes.

12 Q. And then you went where? Where did you work after
13 that?

14 A. Yes. Well, I started at ReWa as an operator trainee
15 working night shift out of college. And spent time working
16 as an operator. Spent time working as a lab tech. Spent
17 time in the pretreatment program. And then eventually the
18 Facilities Manager. Left ReWa after about ten years. Went
19 to Spartanburg Water and served as their Wastewater
20 Operations Manager for about ten years. Then I came back
21 to ReWa in September of 2012 as the Pretreatment Manager.

22 Q. Okay. So at the time of this contamination in 2013,
23 you were the Pretreatment Manager?

24 A. That's correct. That's correct.

25 Q. So if we look on the time line and it says

1 pretreatment, that's you?

2 A. That's me; yes, sir.

3 Q. Now, your job now is different than it was then. Can
4 you tell us what your current job is?

5 A. Yes. Now I'm the Chief Technical Officer for ReWa.
6 I lead the Operations, Engineering, Maintenance and
7 Regulatory Services Divisions.

8 Q. You said you ran a plant at ReWa. You never ran all
9 the plants; right?

10 A. I was over half the plants when I was Facilities
11 Manager.

12 Q. Okay.

13 A. Yes.

14 Q. When you were at Spartanburg, you were more like Glen
15 was, you had the Ops?

16 A. I had all of them, that's correct, all of the
17 Operations programs.

18 Q. Okay. In your pretreatment capacity, was part of
19 your job dealing with the permits that ReWa operates its
20 plants under?

21 A. Yes. Yes, sir.

22 Q. Okay. And then I want to start then with Exhibit 15,
23 if you'll go to your notebook. Don't get into George's
24 notebook.

25 A. Okay.

1 Q. So this is a 2013 permit for which plant?

2 A. This is a NPDES permit that applies to the Pelham
3 Wastewater Treatment Facility.

4 Q. Okay. So this is just one plant right here?

5 A. That's correct. We have these permits for all our
6 treatment facilities.

7 Q. I know the plants are on different rivers and
8 whatnot, but like generally what's the difference between
9 the permits, if any?

10 A. The general format is the same. It will contain all
11 the same information. But the parameters or permissive
12 limits may be different, depending on the stream in which
13 they discharge to.

14 Q. Okay. Pelham is on which? It's on the Enoree?

15 A. That's on the Enoree; that's correct.

16 Q. Okay. Let's look at some pieces of this permit
17 then.

18 MR. STILWELL: And this is a stipulated
19 document, Your Honor.

20 Q. Now, Joel, if you'll turn to page 3 of 37.

21 A. Okay.

22 Q. This permit talks about the first definition is of
23 the Act, and it refers to what?

24 A. The Clean Water Act.

25 Q. Okay. And this is what George talked about. This is

1 an NPDES permit?

2 A. That's correct.

3 Q. Okay.

4 THE COURT: Pardon me, Mr. Stilwell. Where are
5 you under tab 15?

6 MR. STILWELL: On page 3, Your Honor. See right
7 at the top it says 3 of 37.

8 THE COURT: Okay. Thank you.

9 Q. This is an NPDES permit; right? That's what we're
10 holding?

11 A. That is correct; yes.

12 Q. Okay. And it's issued under the Act?

13 A. Under the Clean Water Act; right.

14 Q. Okay. Is there -- I don't know, is there anything in
15 this permit that refers to TSCA? We haven't really talked
16 about that yet, but what is TSCA?

17 A. Well TSCA is the Toxic Substance Control Act. And
18 it's an independent act of the Clean Water Act. It was
19 designed, from what it states, instances of contamination
20 of toxic substances. There is a prohibition in the NPDES
21 permit for many toxic substances being allowed into or
22 released from the POTW as a condition of the permit.

23 Q. We'll talk about that a little bit. You're talking
24 about toxins in the back of the permit?

25 A. That's right.

1 Q. We'll come back to that. Tell me generally what you
2 do with this permit? Like Joel Jones as the Pretreatment
3 Manager, what does this permit do?

4 A. Well, as the Pretreatment Manager this permit has
5 conditions in here that state how we're to regulate
6 discharges into our treatment facilities, for lack of a
7 better term, source control. As you know, we don't just
8 have domestic discharges or households. We have
9 businesses, we have industries, we have hauled waste that
10 comes into those. And that's the purpose of the
11 Pretreatment Program, so through this permit it states that
12 you must have an approved Pretreatment Program to control
13 the sources coming into the treatment facility.

14 Q. Okay. And this permit also has your discharge limits
15 on it?

16 A. That's right. It has the permissive limits in Part
17 III of the permit that tell you what you can discharge to
18 the rivers or receiving streams. It also, by stating in
19 the permit that you have these limits, it gives you the
20 ability to discharge certain parameters back to the
21 streams.

22 Q. Is there any reference to PCBs in this permit?

23 A. No, sir.

24 Q. Okay. We talked about the discharge limits. Is
25 there something in here -- and I don't know it works

1 exactly -- like what the processes are? Like what the
2 tanks are, what -- the format of the tank? Is that an
3 attachment?

4 A. All the treatment devices that are approved through
5 DHEC are part of a separate document. Those are approved
6 through the engineering portion and you're issued permits
7 to operate for those treatment parameters. In this it just
8 says you shall only maintain all approved devices.

9 Q. I think there's a drawing later we'll look at, but
10 it's like a drawing in AECOM report. So there is approved
11 devices and equipment in the process?

12 A. Right.

13 Q. Okay. Can you do anything inside the plant that's
14 not within that description of the approved devices and
15 equipment?

16 A. No. Any modifications to the process have to be
17 approved through DHEC.

18 Q. Okay. Let me turn your attention to page 6 of 37.
19 And you would expect to have this. I'm going to direct
20 your attention to the duty to comply paragraphs. And I'm
21 not going to read the whole thing, but in 1(a) it talks
22 about the Clean Water Act. But 1(b) there, can you read
23 that 1(b) for me?

24 A. It says, it is the responsibility of the permittee to
25 have a treatment facility that will meet the final effluent

1 limitations of this permit. The approval of plans and
2 specifications by the Department does not relieve the
3 permittee of responsibility for compliance.

4 Q. Okay. And the permittee under this permit is ReWa;
5 right?

6 A. That's correct.

7 Q. Okay. What does that say to you about like ReWa's
8 responsibility for meeting these limits?

9 A. It says that DHEC may approve ---

10 MR. LINDEMAN: Your Honor, objection to the
11 point that that calls for a legal conclusion. To reiterate
12 what we raised before, the only determiner of the law in
13 this particular case is Your Honor. There's clear South
14 Carolina case law, including such cases as *Dawkins versus*
15 *Fields*, that make it very, very clear that witnesses cannot
16 testify as to the law.

17 And I recognize that some of the law in this case is
18 highly technical because it deals with federal regs and it
19 deals with TSCA, and it deals with state regs. But those
20 are all laws. And the only person who can interpret and
21 determine what the applicable law in this case is Your
22 Honor.

23 Now, obviously at the end of the case you may ask for
24 us to provide suggested conclusions of law, but ultimately
25 witnesses, under South Carolina Evidentiary Law, and again,

1 I can get you a host of cases if you need it, cannot
2 testify as to what the law is.

3 THE COURT: I understand. And you're protected
4 on the record. I'm going to allow it based on daily
5 practice and procedure and his experience and education.

6 Q. Okay. Who's responsible for compliance with this
7 permit?

8 A. The owner of the permit, ReWa.

9 Q. Okay. If we go to the next paragraph, paragraph 2
10 there, if ReWa doesn't comply with this permit, can you
11 tell me what paragraph 2 says happens?

12 A. Well, it says failure to comply with permit
13 conditions or the provisions of this permit may subject the
14 permittee to civil penalties under S.C. Code or criminal
15 sanctions under S.C. Code. And it says sanctions for
16 violations of the Federal Clean Water Act may be imposed in
17 accordance with the provisions of 40 CFR 122.

18 Q. So regulatory enforcement agencies, as far as this
19 permit, is it DHEC or EPA or both?

20 A. It is DHEC up until the point that EPA does not feel
21 that DHEC has done an appropriate job of regulating us.

22 Q. Okay. In your job as the Pretreatment Manager, you
23 talked with the folks in Columbia? Who did you deal with
24 at DHEC?

25 A. Yes. Typically the Columbia office.

1 Q. Okay. Let's go over to the next page. Part D, duty
2 to mitigate. Can you read that paragraph for us?

3 A. It says, the permittee shall take all reasonable
4 steps to minimize or prevent any discharge or sludge use or
5 disposal in violation of this permit which has a reasonable
6 likelihood of adversely affecting human health or the
7 environment.

8 Q. Okay. And that applies over this permit no matter
9 what ReWa does in this plant?

10 A. That's correct.

11 Q. Let's go to the back. I'm going to skip over some
12 pages, mercifully. Page 18, this table here, is this the
13 toxins? You tell me what that is?

14 A. No. Page 18 is the first part of Part III that has
15 numeric limits or numeric limitations for some of the
16 parameters that we're allowed to discharge to the receiving
17 stream.

18 Q. And either in this part or somewhere else, if we were
19 allowed to discharge PCBs into this stream it would have to
20 be in this permit?

21 A. Yes. If we were allowed to, they would have to
22 develop a numeric limit.

23 Q. So I don't know, I put a tab on this page, page 21 of
24 37. Is this more of the toxic limit descriptions?

25 A. Yes. These are limitations that apply to the whole

1 effluent toxicity. In additional to the numeric limits,
2 the parameters that we discharge, we're also limited on the
3 amount of toxicity that we can discharge to the effluent,
4 to the receiving stream. And this gives the process by
5 which we are monitored for that, and we have to comply with
6 those.

7 Q. Okay. Now, I want to ask you about another permit
8 ReWa has which is Exhibit 14, if you can turn to that.

9 A. Okay.

10 Q. What is Exhibit 14?

11 A. This is the portion of the NPDES permit that applies
12 to our Land Application Program.

13 Q. Okay. And -- well, first of all I wanted to go back.
14 We looked at the Pelham permit, but the Mauldin Road and
15 the Lower Reedy permits like in all the parts we looked at,
16 it was essentially like that?

17 A. Yes. Would be very similar.

18 Q. Substantially similar; okay. Let's go over to the
19 land application permit. So what does this generally tell
20 you? What can you do -- what does this permit tell you?

21 A. It again describes the conditions and limitations
22 under which we can operate a Land Application Program in
23 the state of South Carolina.

24 Q. Okay. And if we turn to page 36 of 47, this table
25 here tells you these are all the plants it applies to?

1 A. Yes.

2 Q. Okay. Without this permit you couldn't land apply at
3 all?

4 A. That's correct.

5 Q. Okay. So the part about the fifty parts per million,
6 where is that in this? I think it's on this page, but if
7 you could just point it out to us.

8 A. It is. It's in 5.a.ii. And it's under the section
9 that says permittee shall provide the Department with an
10 annual certification of the content of the sludge, from
11 each facility prior to land application and this shall
12 include, and under ii it says, total polychlorinated
13 biphenyls that are present. And then it has a statement,
14 the PCBs shall be less than 50 milligrams per kilogram of
15 total solids on a dry weight basis.

16 Q. Okay. So if it's above fifty parts per million what
17 happens to it?

18 A. Well, there's a standard prohibition here against
19 anything above fifty.

20 Q. Okay. Is that when you have to go to another Act to
21 find that?

22 A. Yes.

23 Q. Okay. What does this permit tell you about what to
24 do if you have less than fifty parts per million biosolids
25 in the plant?

1 A. It really doesn't tell you what to do.

2 Q. Okay. Does it give you an alternative if you do not
3 land apply? And I direct your attention to page 40 of 47.

4 A. I believe I know what you're referring to. Let me
5 turn over. Yes. Alternatives land application as has been
6 stated or we can take it to a landfill. And those also
7 have to be designated through the state, so we have to
8 request permission to take it to certain landfills that are
9 permitted to take municipal sludge. And those are stated
10 in this permit as allowable locations to take it.

11 Q. So we have a restricted list of where we can take it
12 to?

13 A. Right.

14 Q. Are there times just in the regular course of
15 business that ReWa takes biosolids to the local landfills
16 instead of taking it to the fields?

17 A. Yes.

18 Q. Like what?

19 A. Well, in times where it's too wet to get on the
20 fields to land apply, we may have to take the biosolids to
21 the landfill.

22 Q. So that the condition of the field itself, like it's
23 soggy and you can't ---

24 A. And those conditions are found in this permit. You
25 can't do it if you've had -- you know, if there's any

1 chance of runoff, if it's going to rain, or the fields are
2 too wet, or you've exceeded the hydraulic capacity of the
3 field to land apply.

4 Q. What about problems with the biosolids itself, like
5 it's got like not PCBs or ---

6 A. That's right. If through testing you find that the
7 parameters will not allow it, then we would not take it if
8 it's all spec. We would take it to the landfill.

9 Q. Generally at this point in time in '13 and '14, how
10 much was ReWa land applying? Was it like everything or
11 most of it or what was ---

12 A. Yeah, probably ninety-eight percent, probably about
13 forty million gallons a year is land applied.

14 Q. Okay. These two permits we looked at which were the
15 ones that applied when y'all got hit in 2013?

16 A. I believe that's right; yes, sir.

17 Q. Okay. I want to change the focus then, and you can
18 use Exhibit 88 there, the time line, to the extent you need
19 it, ---

20 A. Okay.

21 Q. --- to talk about -- ask you some questions about
22 finding it and figuring out where it was coming from. So
23 you can use this as you want, but I might direct you to it,
24 but you can use it to refresh your recollection.

25 A. Okay.

1 Q. The -- first of all there was annual testing at the
2 beginning of 2013 that you discovered there was
3 contamination?

4 A. Yes. In addition to the annual sludge sampling
5 required in that permit, we also do annual sampling as part
6 of the Pretreatment Program. So it's called an annual
7 survey in which you do a priority pollutant scan along any
8 known sources coming into the treatment facility, the
9 influent, the sludge within the facility and the effluent
10 to determine if there's any constituents that haven't been
11 there before that we might need to regulate or take into
12 consideration in our operation. So as a part of that
13 routine annual sampling in 2013, January, there was a
14 sample that I got the results back, being the Pretreatment
15 Manager, the results came to me. I didn't notice that
16 there was a presence of PCB in that annual sampling.

17 Q. So looks like if we look at the time line on page 88,
18 January 7 is when that sample was taken and you got the
19 results back end of the month?

20 A. End of the month.

21 Q. January 28?

22 A. Yes, January 28.

23 Q. Seven years to the day. So I don't have that lab
24 result right in front of me, but like do you know if that
25 was above or below fifty; do you know?

1 A. I don't really recall. It was enough that it got my
2 attention, just that it was there.

3 Q. Just that it was PCBs?

4 A. Yes.

5 Q. Okay. What did you do when you found that out?

6 A. I notified the Operations Group and I notified at the
7 time my boss, which was Charlie Logue, to let him know that
8 we had had a detection of PCB in the sludge.

9 Q. When you say the Operations Group, you're talking
10 about Glen?

11 A. Glen and/or some of the operations folks at the
12 plant. Probably both.

13 Q. Okay.

14 A. I don't recall. It was probably a blanket email sent
15 to several people.

16 Q. And George didn't talk that much about the staff.
17 But generally who was the staff that was kind of like the
18 command group that dealt with this remediation?

19 A. Most of it was dealt with -- myself from the
20 regulatory standpoint, Charlie Logue who was Technical
21 Services Director, my boss, Glen McManus, who was the
22 Operations Director, and his folks that were involved
23 running the plants.

24 Q. Charlie's job, did he have some kind of advanced
25 degree in environmental engineering or something?

1 A. I believe he had a Master's Degree in environmental,
2 and a P.E.

3 Q. Let me direct your -- well, you tell me. When is the
4 first time you talked to DHEC about this contamination?

5 A. Soon after the detection I had a conversation with a
6 local office trying to determine where the contamination
7 may have come from. As Pretreatment Manager it was my job
8 to identify sources of pollutants, and so we started making
9 phone calls to different people that we thought might have
10 knowledge of PCBs. DHEC being one of them. We knew that
11 they were involved in the Twelve Mile River cleanup, which
12 was a PCB cleanup. So we made a call to them to see if
13 there was a possibility of cross-contamination.

14 Q. Can you find that on this time line?

15 A. It's January, February.

16 Q. Right after that January 31st entry?

17 A. Yeah.

18 Q. Where it says Pretreatment contacted DHEC, that's
19 you?

20 A. That would have been me; yes.

21 Q. Okay.

22 A. Me and probably my staff would have made a conference
23 call.

24 Q. We talked earlier with George about September sending
25 a written notice to DHEC. How much contact did you and

1 Charlie have with DHEC and EPA between that period, like
2 prior to the written notice?

3 A. On and off ---

4 MR. LINDEMAN: Your Honor, I object to Charlie
5 because he hasn't laid a foundation that he would know how
6 those contact ---

7 THE COURT: Just limit it to ---

8 Q. I said both. I mean y'all together?

9 A. Yeah.

10 Q. How much contact did you have with DHEC and EPA?

11 A. I had contact on and off during this time. It was
12 not that frequent, but just, you know, trying to determine
13 -- most of it was about source control trying to find out
14 where it may have come from, what can we do to stop it, did
15 they know where it came from, and that sort of thing.

16 Q. When you contacted DHEC in January or February what
17 did they tell you?

18 A. Not much.

19 MR. LINDEMAN: Your Honor, objection, hearsay.

20 MR. STILWELL: Your Honor, it's hearsay that
21 shows motive, which is like 803(A)(1).

22 MR. LINDEMAN: I don't understand what motive it
23 shows.

24 THE COURT: Motive for what?

25 MR. STILWELL: The motion in the plan of what

1 they were going to do. I'll get it out ---

2 THE COURT: That's fine. I'm familiar with the
3 Rule, but help me understand how that Rule with that
4 exception fits.

5 MR. STILWELL: It shows what -- well, that
6 actually doesn't matter about the content of it. But
7 actually that's a better thing, is it's not even for the
8 truth of the matter, Your Honor. I'm just asking him as to
9 what effect it had on them for what they did.

10 THE COURT: I'll allow it for that limited
11 purpose. Not the substance of what was told him, but as a
12 result of what was told him what did the Plaintiff do.
13 Subject to your objection.

14 MR. STILWELL: Okay.

15 MR. LINDEMAN: Thank you, Your Honor.

16 A. From that conversation we felt like it was on us to
17 try to figure this thing out. What we needed to do, who --
18 find out who it was, what the control measures needed to
19 be.

20 Q. Okay. What steps did you take to try to find that
21 out, then?

22 A. We began an extensive sampling program trying to
23 sample all the potential sources that we could find.
24 Obviously the treatment plant, the effluent, the collection
25 system, pump stations. And eventually we worked our way

1 back up into the grease traps.

2 Q. So you did additional testing is what you're saying?

3 A. Yes.

4 Q. Okay. How about inside the plant? At this time I
5 think it's just Pelham Road. What kind of additional
6 sampling did you do inside the plant?

7 A. Eventually during this period we began to sample all
8 the sludges from all the facilities, holding tanks,
9 influence, effluence, to try to determine which facilities
10 had been affected and which ones had not.

11 Q. Is that what ended up showing you the other
12 facilities had been hit, or was it annual testing? Do you
13 know?

14 A. I think it was a combination. I think we moved the
15 annual sampling up in order to do that investigation. Yes.

16 Q. The part you were talking about sampling in the
17 collection system, that's stuff like up in Greer like that
18 flows down to Pelham?

19 A. It could be all over our service area.

20 Q. Okay. Eventually tell me the general gist of like
21 how much of that sampling you did to try to find the source
22 of this?

23 A. I mean I don't know how to quantify it. There were
24 hundreds of samples taken, if not thousands taken during
25 the investigative phase of this.

1 Q. The sampling that was done up above the plant, that
2 was all done by your department?

3 A. In combination with other departments. It was all
4 boots on the grounds at that time. We were scrambling
5 trying to see if we could figure out where this could be
6 coming from and how extensive it was.

7 Q. And how about testing in the plant that was done by
8 Pretreatment, did y'all do the influent and the effluent
9 testing? A. That was typically done through our
10 laboratory. So those were samples that were done by them.
11 They scheduled them and took them.

12 Q. That's kind of a good segway of like the laboratory
13 that ReWa has, did ReWa do the PCB testing in-house for any
14 of this?

15 A. No. We weren't certified or had the equipment or
16 expertise to do that.

17 Q. So who -- so your lab couldn't even do the testing?

18 A. No.

19 Q. Okay. Who did that testing?

20 A. A couple of labs mainly. Rogers and Callcott, which
21 is local to Greenville, and then Shealy Environmental which
22 is, I believe, out of Columbia, did most of the sampling
23 and testing.

24 Q. How about I had mentioned the influent and the
25 effluent. Can you just tell us what that is to make sure

1 I'm not ---

2 A. What actually influent is?

3 Q. I mean influent means wastewater?

4 A. Influent is wastewater that comes through the
5 collections system through the trunk sewers to the
6 treatment plant.

7 Q. Okay.

8 A. So typically when we say influent, it's at the very
9 beginning of the treatment process.

10 Q. How often do you have to test the effluent? Effluent
11 is going out the back of the plant; right?

12 A. Yes.

13 Q. How often do you have to test that regularly?

14 A. Daily.

15 Q. Daily?

16 A. Daily.

17 Q. And you started testing it for PCBs?

18 A. Yes. Not daily, but we tested it on some frequency
19 during the period.

20 Q. Okay. Otherwise you only test the effluent like once
21 a year?

22 A. That's right. For PCB; that's correct.

23 Q. During the time you were testing for PCBs were you
24 testing the effluent at all the plants or just at these
25 three contaminated plants?

1 A. I think -- I couldn't recall the exact frequency.

2 Once the plant was found to be clean, it was not in the
3 sludge or the influent, then I think there was some ongoing
4 testing of the effluent, but not routinely. Just enough to
5 ensure that we hadn't had a contamination that we missed.

6 Q. And just to be clear, did you ever have a positive
7 test in the effluent going out of the plant?

8 A. No, we did not.

9 Q. Okay. Let me look at a couple of other things on
10 here. The March period, if I can direct your attention to
11 page 2 of Exhibit 88.

12 A. Uh-huh (affirmative).

13 Q. Is that the first time y'all had detections at
14 Mauldin Road and Lower Reedy?

15 A. That I'm aware of.

16 Q. Okay. Do you know -- I'll ask Glen in more detail,
17 but do you know where the -- generally where the positive
18 hits were found inside those plants?

19 A. Well, these samples taken on March 1st are for the --
20 I believe those are holding tanks.

21 Q. Okay. And those holding tanks are holding tanks for
22 what? Biosolids?

23 A. For the biosolids; yes. So those would have been
24 solids that were ready for land application.

25 Q. Okay. Were you involved -- were you part of the

1 decision to stop doing land application?

2 A. I was part of the decision only in that I was -- gave
3 my advice that we should not continue with land
4 applications.

5 Q. Okay. That was part of the staff's action before the
6 board knew?

7 A. That's right.

8 Q. Do you remember the timing? Okay. Why was that your
9 recommendation?

10 A. Well, because of the risk involved. I believe even
11 though there's a fifty threshold in the land application
12 permit, I don't think that speaks to the point that you can
13 land apply anything up to fifty. And so we made an
14 interpretation, which I think is a good one, that we
15 shouldn't do that until we get more information.

16 Q. Were you involved in the process of testing the
17 fields to see if they had been contaminated?

18 A. I was not personally involved in that; no.

19 Q. Well, did you order those tests? Or who did organize
20 those tests?

21 A. That was coordinated through the Technical Services
22 Group, which would include the Lab Manager, Joey Collins
23 who's the Solids Manager, and in coordination with DHEC.

24 Q. Okay. Were you made aware of the results of those
25 tests?

1 A. Yes.

2 Q. Okay. And we talked about it earlier, but some of
3 them were positive?

4 A. Some of them were positive; yes, sir.

5 Q. Okay. By the time those tests came back had ReWa
6 already stopped land applying anyway?

7 A. Yes.

8 Q. Okay. You mentioned earlier that you thought the
9 board voted on whether to stop land applying or not. Do
10 you have any recollection of that?

11 MR. LINDEMAN: Objection, Your Honor. South
12 Carolina Supreme Court case law is very clear the only
13 admissible evidence of action taken by a board, a council,
14 a school board, are the minutes themselves. Witnesses
15 can't just testify as to what are decisions by a board or a
16 commission. And I'll cite the Court the case of ---

17 THE COURT: I'm going to rule; okay? The
18 question was, do you recall such a meeting. That's clearly
19 a relevant -- go ahead. You're protected on the record.

20 MR. LINDEMAN: Thank you.

21 THE COURT: Stop. He's not getting into the
22 substance. He's not saying what happened. He was asked
23 was there a meeting. He can answer that question.

24 MR. LINDEMAN: Thank you, Your Honor.

25 Q. I'm just asking your recollection of if you recall

1 the land application issue being voted on in the board?

2 A. I recall the resolution being put forth.

3 Q. Okay. Do you know when that was?

4 A. To be honest I don't. I can recall who did it. It
5 was Billy Merritt, was the one who asked for the
6 resolution.

7 Q. Okay. We'll go back and look during lunch or
8 sometime and catch it up. I don't have those minutes with
9 me. If you turn to page 4 of Exhibit 88, at the top of it
10 it says July 19, Ops staff and Pretreatment -- Pretreatment
11 was you?

12 A. Yes.

13 Q. --- met to discuss contingency plan for handling
14 uncontaminated biosolids. What were y'all doing with
15 uncontaminated biosolids at that time?

16 A. I couldn't remember the specifics. The context would
17 probably be we were trying to figure -- make sure we don't
18 take uncontaminated biosolids and let them be contaminated
19 by other sources or other biosolids. How we could continue
20 to operate.

21 Q. You're talking about mixing the two?

22 A. Mixing the two. Allowing contaminating from one
23 source to the other.

24 Q. Okay. Down at the middle of that page, July 26th,
25 the notification to DHEC and EPA, were you involved in that

1 process of notifying DHEC and EPA of this situation?

2 A. Yes.

3 Q. Okay. Was that in writing? Do you know?

4 A. There was an email sent; yes.

5 Q. Okay. Do you know who it was sent by?

6 A. I forwarded the information to Charlie Logue who
7 forwarded it on to EPA and DHEC about our contamination.

8 Q. Let's look at Exhibit 17. Exhibit 17, the part at
9 the bottom there from you sending this to Charlie. What is
10 this that you were sending Charlie?

11 A. As a part of the Pretreatment Program we respond to
12 adverse impacts at our treatment facilities. If the
13 operators notice anything coming in that's out of the
14 ordinary that may be impactful to the treatment process,
15 they would contact us. And so they did that in May. They
16 had an oily sheen come in. And they called Pretreatment to
17 come out and investigate it. So we did an investigation.
18 We took samples and had those analyzed. And this is a
19 communication of what we did back to Charlie Logue.

20 Q. And then did Charlie send that to EPA?

21 A. It looks like at the top he did; yes, sir.

22 Q. Okay. Who are those people, Tempel and Kemp; do you
23 know who they are?

24 A. Michael Tempel was a criminal investigator for SC
25 DHEC. I think Brian Kemp is just a staffer with DHEC.

1 Q. I said EPA. But this is DHEC. Tempel is the
2 criminal -- the guy who was doing the criminal
3 investigation?

4 A. For DHEC, yes.

5 Q. Okay.

6 A. There was also a Heath Martin that was a criminal
7 investigator for EPA.

8 Q. Let's go through this lab report that's attached to
9 this just like if -- looking at one of them.

10 MR. LINDEMAN: Your Honor, this is not a
11 stipulated exhibit and they haven't moved it into evidence.
12 We do have an objection to it before the substance of it is
13 discussed any further.

14 THE COURT: All right.

15 MR. STILWELL: Okay.

16 MR. LINDEMAN: I mean, I'm assuming he's going
17 to be moving to admit it? I don't want to be too
18 presumptuous here.

19 MR. STILWELL: I would like to. I haven't yet,
20 though. I'm still in the process of laying the foundation,
21 but ...

22 THE COURT: When he proffers it, you may
23 certainly object. I don't want to do an anticipatory ---

24 MR. LINDEMAN: Well, if I'm premature -- I
25 thought he was going to ask him to actually publish the

1 attachment to it or refer to it in his testimony from that
2 last question. But anyway ...

3 Q. Is this document, this lab report what you attached
4 to this email?

5 A. Yes.

6 Q. Okay. And who performed this work?

7 A. Rogers and Callcott actually did the analysis.

8 Q. And then it was reported to you?

9 A. Yes.

10 Q. Okay. And in this record, lab reports, are these
11 reports which you retain as a course of your regular
12 business at ReWa?

13 A. Yes. We have to maintain these for at least three
14 years.

15 Q. That three-year requirement, are you actually
16 required to retain them by law?

17 A. Yes.

18 Q. Okay. Where do you keep them? In a database or
19 where do you keep them?

20 A. Yes. We keep them in files.

21 Q. Okay. And do you recognize this report as the one
22 which was forwarded -- first of all that picture right
23 there, was that actually forwarded to Charlie?

24 A. Yes. That was a part of the adverse impact report
25 that was forwarded.

1 Q. Okay. And the lab report itself, can you tell me how
2 I can figure out like when this was -- when the sample was
3 taken and what not?

4 A. Okay. If you'll refer to page 2 of 20, and that's of
5 the Rogers and Callcott ---

6 Q. So you're into the lab report itself?

7 A. I'm into the lab report itself.

8 Q. Okay.

9 A. There's always a cover letter. But the second page
10 gives more specific information about the sample number,
11 the source of the sample, the matrix, which at this point
12 was wastewater. The other matrixes would be solids or
13 drinking water.

14 MR. LINDEMAN: Objection to publishing the
15 document before it's been admitted.

16 THE COURT: I understand.

17 MR. LINDEMAN: He's reading it now. I don't
18 know how that's laying a foundation.

19 MR. STILWELL: Your Honor, I'd move to admit
20 this into evidence then.

21 THE COURT: Now I'll be glad to hear your
22 objection.

23 MR. LINDEMAN: Thank you, Your Honor. Your
24 Honor, we object to this on several bases. First of all
25 the email itself is purely hearsay. Email communications

1 between two employees of ReWa and then even forwarding it
2 to DHEC is not an exception to the hearsay rule. It is
3 still hearsay. The use of the suggestion that the business
4 records rule would allow this to go into evidence is not
5 correct. This is not evidence of a repeated business
6 activity; number one.

7 Number two, obviously the sampling records here is
8 purely hearsay, as well, and there is a lack of
9 authentication, as well, as to these sampling documents
10 that have been attached to it. To my knowledge he hasn't
11 laid a foundation as far as that.

12 And then thirdly, Your Honor, is relevance. We're
13 here on an insurance coverage question. I don't know what
14 the relevance of this particular document is.

15 THE COURT: Let me start, Mr. Stilwell, with the
16 third objection. What is the relevancy?

17 MR. STILWELL: The relevance of this document,
18 Your Honor, is just showing that we were -- we had this hit
19 in Pelham and that at this point in time this is when we
20 were having high hits at Pelham and the staff shortly
21 thereafter suspended the land application and that we were
22 briefing EPA and DHEC on what we were doing the whole time.

23 THE COURT: All right. And then how does the
24 report itself need to come in?

25 MR. STILWELL: The report itself, Your Honor?

1 THE COURT: Yes, sir.

2 MR. STILWELL: He testified that we gave it to
3 DHEC and EPA, that we reported this information to them.
4 So I'm satisfied with that.

5 This -- the report itself, the lab report, is just to
6 walk through the fact of like how these things work.
7 Because we have twenty thousand pages of these that I don't
8 intend to put in. If I can get away with it, this is the
9 only one we're going to talk about.

10 THE COURT: How do you respond that this is not
11 proper under Business Records Act exception?

12 MR. STILWELL: Your Honor, that thing about that
13 it's a regular thing that we do, that's not a part of the
14 business record exception. When we have something like
15 this it's regular for us to retain this record. This
16 record was produced by ReWa out of our email system. And
17 that is a business record.

18 THE COURT: All right. I'm going to allow it
19 in.

20 (WHEREUPON, Plaintiff Exhibit Number 17 was admitted
21 into evidence.)

22 Q. Joel, I just wanted to ask you like so you can tell
23 me like where the reading is on this. You were back on
24 page 2 of 20. Would you go back into the pages there where
25 I can basically tell like whether this thing had PCBs in it

1 or not?

2 A. Yes. Three of 20 begins the reporting of the
3 parameters that were tested and the results. And they're
4 showing results of some benzyl alcohol, decane, octadecane
5 ---

6 Q. Can you flip over to page 5 for me?

7 A. And page 5, at the very bottom, there's a result of
8 PCB 1260 of 20.3 micrograms per liter.

9 Q. We talk a lot -- there's a lot of different decimal
10 stuff in here that kind of escapes me. But 20.3 is a part
11 per billion? That's ---

12 A. That's a part per billion; that's correct.

13 Q. Okay. What vessel was this checking? Where did you
14 get this sample?

15 A. This sample was taken from a primary clarifier and so
16 it's a very large tank. It's part of the treatment works,
17 probably about a million gallons. And this was a flow
18 proportional or time proportional sample. So it was taken
19 over twenty-four hours and composited.

20 Q. This sampling right here, was this actually some
21 secondary sampling to what y'all did on this oily sheen
22 here?

23 A. Yes.

24 Q. Okay. What was the other sample reading?

25 A. There was a grab sample taken of the oily sheen that

1 was significantly higher. I think it was fifty-one hundred
2 parts or something like that, parts per million.

3 Q. Per million?

4 A. Per million.

5 Q. Okay. How do you get different results like that
6 based on two different samples? Explain that to me.

7 A. It's the difference between a discreet ---

8 MR. LINDEMAN: Objection, Your Honor. Calls for
9 expert testimony. He hasn't been qualified as an expert.

10 THE COURT: If you can lay some additional
11 foundation as to his source of knowledge.

12 Q. How many years have you worked in the sewer
13 operations?

14 A. Twenty-seven years.

15 Q. Do you know how the sampling works at the plants?

16 A. Yes, I do.

17 Q. Have you actually directed that and done it
18 yourself?

19 A. Yes, I have.

20 Q. Okay. Can you tell me the difference between a grab
21 sample and a whatever -- a composite sample? I know what
22 it was.

23 A. A grab sample is just a discrete sample that's taken.
24 You take a container, you go to where you want to get the
25 sample, you dip the container and you put a lid on it and

1 that's it. It's a point in time, point in place sample.
2 Composite sample is taken typically by a machine and it can
3 either be time or flow proportional. In other words over a
4 certain amount of time it will take a number of samples to
5 be representative of the flow over a twenty-four hour
6 period. And those are composited into a cool container and
7 kept for the twenty-four hours. And they're harvested and
8 then analyzed.

9 Q. So when you scooped the oily sheen it came up to
10 fifty-one hundred parts per million?

11 A. Yes.

12 Q. The testing that came up in the clarifier, twenty
13 parts per billion ---

14 A. Right.

15 Q. --- you directed that testing?

16 A. I did.

17 Q. Okay. Was there any reason why you did it
18 differently than the grab testing?

19 A. Well, I felt the composite sample would be more
20 representative of what may have come in over time.

21 Q. Okay.

22 A. Is one thing. The other thing is I didn't want to
23 take a sample that throw us into the TSCA regulation at
24 this time until I knew what the potential source was. I
25 didn't want to have to decontaminate that primary

1 clarifier, all the collection system, because that was the
2 line that EPA and DHEC were taking. If it was presented to
3 be over fifty, then it had to be decontaminated, as such.

4 Q. Okay. You know, just to stop right there on that
5 point. These tanks, whether they were over fifty or under
6 fifty, could you use them while they were filled with
7 contaminated liquid?

8 A. No.

9 Q. Okay. Why not?

10 A. Because we could not do anything with it. We could
11 not dewater it, we could not land apply it or anything
12 without the potential of some of that PCB contaminated
13 sludge getting back into the treatment plant.

14 Q. Could you even add more biosolids to the tank?

15 A. No. That was a prohibition, as well.

16 Q. Okay. Could we turn to Exhibit 19? Do you recognize
17 Exhibit 19, Joel?

18 A. Give me just a moment.

19 Q. Okay.

20 A. Yes, I do.

21 Q. Okay. Did you request -- there's a reference there
22 like you requested to use a temporary sludge holding tank
23 at Pelham. Did you make that request to DHEC?

24 A. I did.

25 MR. LINDEMAN: Objection to the publishing and

1 testimony about this exhibit. It has not been stipulated
2 into evidence, Your Honor.

3 MR. STILWELL: I guess I'll go to my book and
4 get another one. Recorded recollection, a memorandum of
5 record concerning a matter that the witness once had
6 knowledge of, but now has insufficient recall to enable the
7 witness to testify fully and accurately.

8 THE COURT: Well, he has not testified that he
9 does not recall this. So I don't think that exception
10 applies. So at this point I sustain the objection.

11 MR. STILWELL: Okay.

12 Q. Joel, can you remember what happened on August 1st of
13 2013 without the use of this document specifically?

14 A. Probably not.

15 Q. Okay. If you use this document does it refresh your
16 recollection about contact you had with Brenda Green about
17 that time?

18 A. Yes.

19 Q. Okay. She said ...

20 MR. STILWELL: Well, I move to admit it into
21 evidence, Your Honor.

22 MR. LINDEMAN: Your Honor, his communication
23 with Brenda Green is hearsay, and there's not an exception
24 to the hearsay rule.

25 MR. STILWELL: That's exactly what I just read

1 out of the hearsay exception. The recorded recollection to
2 refresh -- I mean recorded memorandum to refresh
3 recollection is like Part 3 of the hearsay rule.

4 MR. LINDEMAN: Your Honor, he can have his
5 memory refreshed by a document, but that doesn't make the
6 document admissible into evidence where it goes to fact
7 finder.

8 MR. STILWELL: It can be read into the record.

9 MR. LINDEMAN: No, it cannot. It can be
10 referred to by the witness ---

11 THE COURT: All right. I'm going to sustain the
12 objection. You may proffer it and he may testify as to the
13 substance of this now that his recollection has been
14 refreshed.

15 MR. STILWELL: It does say, Your Honor, it can
16 be admitted if we read into the record but not published.
17 So I'll concede that.

18 THE COURT: Thank you.

19 Q. Joel, did you make a request to Brenda about using a
20 frank tank at Pelham?

21 A. Yes, I did.

22 Q. Why? Why did you have to do that?

23 MR. LINDEMAN: Your Honor, the request itself is
24 hearsay if it's being offered for the truth of the matter
25 of assertion. This is not a party opponent. He's the

1 declarant. It's hearsay.

2 THE COURT: I understand. Overruled. Go ahead.

3 Q. Did you make that request?

4 A. I did.

5 Q. Why?

6 A. We were without -- we were running out of room to
7 hold and process our solids and so we needed a temporary --
8 what they call a lake tank, it's a metal-clad tank, to be
9 installed. And so, as I stated before, we can't install
10 any kind of process equipment without getting DHEC
11 approval. And so I was the one that made the request to
12 Brenda Green to get it permitted so we could install it.

13 Q. Okay. And did she ask you for additional information
14 before you could install that lake tank?

15 A. Yes.

16 Q. And did you end up providing that information?

17 A. Yes.

18 Q. Okay. And again, the lake tank was a big tank at
19 Pelham; is that what it was?

20 A. Yes. I don't remember the exact size. It may be on
21 the documents.

22 Q. So why did you need additional capacity up there?

23 A. Because the tanks that we use in our normal process
24 of processing our solids were damaged. They were out of
25 commission, so we didn't have anything else to do.

1 Q. How did it come to you to be the one that had to make
2 the request?

3 A. I think it was by pure circumstance of annual leave.
4 Typically probably Charlie Logue or another engineer would
5 have made this request. And I also had a relationship with
6 Brenda Green.

7 Q. So y'all ended up installing the lake tank?

8 A. Yes.

9 Q. Okay. Joel, I think George referenced a gap in the
10 regulations. Can you tell me what that was? Like what was
11 the problem ReWa had applying these regulations and permits
12 to its processes?

13 A. Well, from the land application standpoint, I believe
14 the gap was that there was a -- the fifty number is stated
15 in the regulation. I don't know that that gives you
16 permission to do that. But also the reason, there's a duty
17 to mitigate clause in there that says you can't do anything
18 that will harm the environment as a part of this process.
19 And so my confliction was that because PCB is published
20 everywhere else as a known carcinogen and is impactful to
21 the environment, how do those two things coincide? And so
22 I just couldn't make it work.

23 Q. The Judge asked a question of Mr. Fletcher about what
24 the difference is like if it's above fifty or below fifty,
25 and I'm paraphrasing pretty badly, above fifty or below

1 fifty, about like what you have to do in the process. Can
2 you address that question?

3 A. Well, I think what we have to do in the process is
4 the same as far as how do we process the filtrate and the
5 solids, because regardless if it's above fifty or below
6 fifty, we cannot introduce any PCBs back into our treatment
7 facilities. That was the -- because we're not permitted to
8 discharge them out the effluent; therefore we can't allow
9 them into the influent.

10 Q. So even when you're preparing biosolids to be land
11 applied, does that create filtrate, as well?

12 A. Yeah.

13 Q. Okay.

14 A. Biosolids have to be conditioned and thickened before
15 they can be land applied.

16 Q. And then was there guidance from the regulatory
17 agencies about what you needed to do with the filtrate?

18 MR. LINDEMAN: Objection, Your Honor. Calls for
19 hearsay. He's asking him what the regulatory agencies
20 advised them.

21 THE COURT: Overruled. That's his job to know
22 that. So go ahead.

23 A. I believe we had stated guidance that's in the reply
24 to us of our plan of what we needed to do.

25 Q. I think that document is actually in your set of

1 exhibits. Maybe we could go to it. If you could look at
2 Exhibit 33. I think these are the documents Mr. Devlin was
3 using, but this Exhibit 33 is -- well, can you tell us what
4 it is?

5 A. It's the response that we received from DHEC after we
6 submitted our decontamination plan.

7 Q. So the decontamination plan from AECOM that was
8 submitted?

9 A. That's correct.

10 Q. Okay. And that plan is -- I think it's in the
11 exhibits, the previous exhibit in your notebook. Exhibit
12 32?

13 A. Yes.

14 Q. Okay. And Exhibit 32 is the -- tell me what that is?
15

16 A. Exhibit 32 was the submittal of the plan.

17 Q. Okay.

18 A. To DHEC from the Executive Director.

19 Q. Okay.

20 MR. STILWELL: Your Honor, I would move this
21 into evidence. I don't know if it did with Mr. Fletcher.

22 MR. LINDEMAN: It's already in.

23 THE COURT: I was thinking it had already come
24 in.

25 MR. STILWELL: Okay. Good.

1 Q. So you put in a plan to DHEC and then DHEC accepted
2 it five days later. Is that what these two documents do?

3 A. What it looks like; yes.

4 Q. Okay. Can you tell me the thing about what the limit
5 has to be for the filtrate and turning it back to the
6 headwaters. What in that tells you that?

7 A. Well, it says that the PT well -- it has to meet a PT
8 well of .5. So all sampling has to meet that. It also
9 says in number 4, if there's operational problems or
10 quantifiable level of PCB, which means if there's any that
11 is detected, it's detailed in the emergency regulation,
12 operations should cease until problems are resolved in
13 compliance with the regulation, as confirmed.

14 THE COURT: I'm sorry. Where is this language
15 he's referring to?

16 MR. STILWELL: What exhibit were you speaking
17 from?

18 MR. JONES: 33.

19 THE COURT: 33?

20 MR. STILWELL: Yes, sir, Your Honor.

21 THE COURT: Thank you.

22 Q. Joel, the first part of Exhibit 33 where it says as
23 proposed with temporary frac tank storage before discharge.
24 Do you see that part?

25 A. What number? I'm sorry.

1 Q. Number 1.

2 A. Okay.

3 Q. Okay. And then it mentions at number 3, ReWa should
4 monitor filtrate flow rate as proposed. Do you see that
5 part?

6 A. Yes, I do.

7 MR. STILWELL: Is 33 in?

8 MR. LINDEMAN: Yes.

9 MR. STILWELL: Okay.

10 Q. I want to ask if you can just briefly find the
11 references to those in the AECOM plan, and I want to direct
12 you back to Exhibit 32. I'm not going to make you hunt and
13 peck for it. I'm going to suggest something to see if you
14 can -- if that's what it is.

15 A. All right.

16 Q. So the parts about handling filtrate, is that what
17 the parts on page 5 and 6 are talking about there?

18 A. Yes, I believe so.

19 Q. Okay. Just paragraph 4 there on page 6, is this the
20 sampling that was referred to there in the middle of that
21 paragraph where it says, once sampling results have been
22 confirmed, the PCB levels are below quantifiable levels,
23 this treated water will be released through temporary
24 piping and discharged back to the head of the plant?

25 A. Yes.

1 Q. Is that what that was referencing?

2 A. That's what that references.

3 Q. Is that how it was done at Pelham?

4 A. That's how it was approved. I cannot say that I was
5 out there to see how it was actually done.

6 Q. Okay. We'll ask another one about that. Okay. And
7 then when it talks about -- down at the next to the last
8 paragraph there, PCB concentrations in the filtrate have
9 been below .05 -- I don't know what that is. Milligrams --
10 not milligrams.

11 A. That's micrograms.

12 Q. Micrograms per liter. That's a part per billion?

13 A. Part per billion; yes, sir.

14 Q. Okay. And that's the same limit that was reflected
15 in Exhibit 33?

16 A. That's correct.

17 Q. Okay. I kind of skipped ahead. Let me go back. Let
18 me see if any of these are working catch up; okay? Can you
19 just tell me ...

20 MR. STILWELL: Your Honor, maybe this is a good
21 place to stop.

22 THE COURT: Depends on how much longer you
23 expect his testimony to go.

24 MR. STILWELL: Well, I just looked at it and I
25 was like some of this stuff, like I said, I skipped ahead

1 so I can chunk this stuff out over break, but it's hard for
2 me to do it on the fly. So that's what I'm trying to do.

3 THE COURT: All right. If we continue now, what
4 would be your best guesstimate of how much longer for Mr.
5 Jones?

6 MR. STILWELL: Maybe a half hour.

7 THE COURT: Mr. Lindeman, any objection to going
8 ahead and taking a lunch break now?

9 MR. LINDEMAN: None, Your Honor.

10 THE COURT: And is an hour enough time for
11 everybody to get where you'll be going and get back?

12 MR. STILWELL: Yes, sir.

13 THE COURT: You good with that, Mr. Brown?

14 MR. BROWN: Yes. Thank you, Your Honor.

15 THE COURT: All right. Start back at one
16 thirty. The courtroom will be locked, so feel free to
17 leave whatever you need to here.

18 Ms. Fryer, what time do you think it'll be unlocked?

19 THE BAILIFF: A quarter till.

20 THE COURT: All right. We'll open back up at
21 one fifteen. Thank you.

22 (WHEREUPON, Court stood at recess for a lunch break.)

23 THE COURT: Mr. Jones, I'll just remind you that
24 you're still under oath.

25 MR. JONES: Yes, sir.

1 THE COURT: All right.

2 **DIRECT EXAMINATION CONTINUED**

3 **BY MR. STILWELL:**

4 Q. Joel, I want to start back with a couple of
5 photographs for you and ask if you could identify these
6 plants for us? I think you've got Exhibit 106 in there
7 that's got the two pictures of the plants. Page 60 and
8 page 61.

9 A. Let me get this thing oriented properly.

10 THE COURT: This is in which book, Mr. Stilwell?

11 MR. STILWELL: It's in Mr. Jones' book, Your
12 Honor, where he's got the pictures at 106. He's only got a
13 few pictures there.

14 THE COURT: Okay. All right. Thank you.

15 Q. Okay. So page 61 there, is this an accurate
16 representation of the Lower Reedy plant?

17 A. 61?

18 Q. 60?

19 A. 60; yes.

20 Q. And the next page, 61, is that an accurate
21 representation of the Mauldin Road plant at the time of
22 this contamination?

23 A. Yes. At the time of the contamination; yes.

24 MR. STILWELL: I'd like to move those two into
25 evidence, Your Honor.

1 THE COURT: All right.

2 MR. LINDEMAN: Can you clarify for me what
3 exhibits, please.

4 THE COURT: It's tab 106.

5 MR. STILWELL: Two photos in 106.

6 MR. LINDEMAN: Two Plaintiff's?

7 MR. STILWELL: Yes, two Plaintiff's.

8 MR. LINDEMAN: No objection, Your Honor.

9 THE COURT: All right. Thank you.

10 (WHEREUPON, Plaintiff Exhibit Numbers 106.60 and
11 106.61 were admitted into evidence.)

12 Q. Joel, and all I want to do with that is I want to
13 talk to you a little bit about the hauled waste and how
14 that works at Mauldin Road and stuff. So just generally,
15 if you could, looking at page 61, can you tell us where the
16 hauled waste used to go into Mauldin Road?

17 A. Yes. If you'll look to the left side of the
18 photograph, about two-thirds up on the left, there's a
19 little red structure you can see hanging off the edge of
20 the picture there that was a receiving station right there
21 where we -- at that -- before -- or prior to the
22 contamination that's where we received the hauled waste.

23 Q. So up here on the left where the biosolids holding
24 tanks one through six are, that's where you used to put the
25 septage into the plant?

1 A. That is correct.

2 Q. Okay. And what trouble did you have with the hauled
3 waste during this contamination? Tell me what happened
4 there?

5 A. Well, obviously once we found that we had the
6 contamination, we determined it was coming, at least
7 partially, through the hauled waste program. We realized
8 that we needed to move the site from where it was to an
9 area where we could have better oversight and segregation
10 of the hauled waste that came in.

11 Q. Okay. So you moved the location?

12 A. We did.

13 Q. Did you change the process for receiving hauled
14 waste, also?

15 A. Yes. Before the contamination it was not a manned
16 process. In other words, we didn't have someone dedicated
17 to receiving hauled waste. It was done through a
18 manifesting process where the paperwork was brought in with
19 the load and we checked it that way. After the
20 contamination, it was a manned process. We condensed the
21 hours in which we received hauled waste to allow us to have
22 a person there all the time. We began a sampling protocol
23 where we took a sample of every load that was brought in.
24 We also installed frac tanks to allow us to segregate the
25 hauled waste until we could test to be sure that it was

1 clean before we released it in the facilities.

2 Q. Let me stop you right where you are. If you're still
3 in the photographs, when you turn to page 100 there.

4 A. Yes, sir.

5 Q. Okay.

6 MR. STILWELL: And I'm not going to move to
7 admit these, Your Honor. They're just demonstrative.

8 Q. Can you identify what that is on the top?

9 A. That is the bank of frac tanks that were used to
10 accept and segregate the septic waste.

11 Q. Okay. How did it used to go in? It went into the
12 line itself?

13 A. Yes. It went into the trunk line that came into the
14 facility and just became a part of the flow.

15 Q. Okay. And just sewer for dummies down there, that
16 part at the bottom, that's actually one of the hauled waste
17 trucks; is that what that is?

18 A. That is.

19 Q. Okay. And so what is a frac tank? I've been hearing
20 that a lot. What does it stand for?

21 A. It stands for frac. They're typically used in the
22 mining industry.

23 Q. Oh, like fracing?

24 A. Yeah.

25 Q. Okay.

1 A. And so it's used to -- as a storage vessel.

2 Q. Okay. So just to be clear, before the old part, you
3 didn't have any of these frac tank processes or anything
4 like that?

5 A. No, we did not.

6 Q. Okay. And the flow went -- so once you used the frac
7 tanks how was the flow like segregated from the rest of the
8 plant?

9 A. Okay. From the truck it was put into a frac tank.
10 We would keep one frac tank that was open and online at all
11 times. Once it became full then we would test that frac
12 tank to be sure it was not contaminated. If it came back
13 and the test was clean, then we could put it directly back
14 into the facility. If we detected PCB in it, then it was
15 sequestered where it was until it could be decontaminated.

16 Q. Could you turn to Exhibit 39 for me?

17 A. I've got it.

18 Q. Do you recognize this document?

19 A. Yes.

20 Q. Okay. Is it a communication you sent to EPA about
21 that process you just talked about?

22 A. Yes, that is correct. This was a standard
23 communication if we detected PCB waste in a frac tank, then
24 there was communication sent out basically to this email
25 grouping. It states that we had a detection, the level of

1 the detection and then ---

2 MR. LINDEMAN: Your Honor, again, this document
3 is not in evidence and he's ---

4 MR. STILWELL: I'm about to move it into
5 evidence, Your Honor.

6 THE COURT: All right.

7 Q. Is the attachment to the back of this, this report,
8 is this the attachment that's referenced there in your
9 attachment line?

10 A. Yes.

11 Q. Okay. And ...

12 MR. STILWELL: Your Honor, I would move to admit
13 this into evidence. Exhibit 39.

14 THE COURT: Yes, sir.

15 MR. LINDEMAN: Your Honor, it's an email from
16 Mr. Jones to numerous people, including Ken Feely with EPA
17 and individuals with DHEC. It is hearsay, Your Honor.

18 MR. STILWELL: The declarant is sitting there
19 subject to cross examination, Your Honor. It's not
20 hearsay.

21 THE COURT: I'm not sure that clears the hearsay
22 objection, but ---

23 MR. LINDEMAN: It's still an out-of-court
24 statement. I presume, unless he's got a different purpose,
25 other than being offered for the truth of the matter

1 asserted, Your Honor, that's hearsay. I don't think
2 there's an exception for this particular document.

3 THE COURT: What's the purpose of Plaintiff's 39
4 being offered?

5 MR. STILWELL: The purpose is, Your Honor, to
6 show that like even in 2014 that this issue of locking out
7 and segregating the flow is under the direction and control
8 of DHEC and EPA. This is something we have to report to
9 them under our permit, as he reported. We don't just
10 willy-nilly choose what to do inside our plant. It's a
11 regulated activity.

12 THE COURT: All right.

13 MR. LINDEMAN: And Your Honor, in addition to
14 that, the attachment to it is another sampling report.
15 It's unauthenticated. And speaking to that particular
16 point, I didn't hear any basis for suggesting that there
17 was a reason other than admitting it for the truth of the
18 matter asserted. So ---

19 THE COURT: I understand. I'm going to allow it
20 ---

21 MR. LINDEMAN: --- it falls under the hearsay.

22 THE COURT: --- for the purpose of establishing
23 that communication was with DHEC and with other authority
24 that is required under the operating procedures. But
25 you're noted on the record with your objection.

1 MR. LINDEMAN: Thank you, Your Honor.

2 (WHEREUPON, Plaintiff Exhibit Number 39 was admitted
3 into evidence.)

4 Q. Joel, again, this process of keeping it locked out
5 from the treatment facility, that particularly applies just
6 to Mauldin Road; right?

7 A. That's correct.

8 Q. Okay. How did you get it into the facility? Like
9 what did you end up doing with it when it was in that frac
10 tank?

11 A. Well, it would have to be treated as contaminated
12 waste and therefore it would have to be processed, the
13 vessel decontaminated and made ready for use again.

14 Q. Would the -- the stuff that was in it was hauled
15 sewage like septic tank stuff?

16 A. Right.

17 Q. Okay. How did you test that material before you put
18 it in the plant?

19 A. We would take a composite sampling of that tank, mix
20 it thoroughly and then pull the sample and sent it off to
21 the lab. Usually we got results in twenty-four to forty-
22 eight hours.

23 Q. Could you put anything into the plant that had a
24 detectable level of PCB in it?

25 A. No.

1 Q. Is that per your permit?

2 A. Yes. Because we're not permitted to do that. We
3 would have to be permitted in order to do that.

4 Q. I mean just to be clear, can you put pollutants into
5 your own plant?

6 A. Not knowingly; no.

7 Q. Okay. Eventually, and this is part of the
8 stipulation, y'all caught the American Waste guy dumping on
9 -- into the
10 plant?

11 A. That's correct.

12 Q. Can you tell me about the specific time you actually
13 caught him at Mauldin Road dumping?

14 A. Yes. We were tipped off that he might have been
15 involved in some illegal dumping activities in a
16 neighboring community and so we put him on watch and were
17 waiting for -- we knew he was an infrequent customer of
18 ours, and put him on watch. And we were able to catch him
19 before he left the gate. He came and deposited a load.
20 This was before we moved the receiving site.

21 Q. So the old system?

22 A. It was the old location. We were able to catch him
23 before he got out of the facility but after he had already
24 discharged his load. We got a sample of residual out of
25 his truck.

1 Q. Okay.

2 A. So it tested positive for PCB and other things.

3 Q. What did you do then? What did ReWa do?

4 A. Well, when that came back we immediately suspended
5 his rights to utilize any of our facilities, which is our
6 only recourse.

7 Q. If you look at Exhibit 22 -- I'm not going to move
8 this in -- but does that refresh your recollection about
9 when that happened?

10 A. Yes.

11 Q. About when did that happen, when y'all suspended his
12 rights to haul?

13 A. August the 1st, 2013.

14 Q. And it's been a long time, but George didn't know
15 about when this guy got prosecuted and all. Like how long
16 did that take?

17 A. I don't know exactly. I know it took a year and a
18 half, two years maybe before ---

19 Q. So it looks like you suspended him in August of 2013,
20 but that previous document we looked at, Exhibit 39, you
21 were still getting readings in 2014 from hauled waste ---

22 A. Yes.

23 Q. --- positive readings of PCBs?

24 A. Yes. We ---

25 Q. How long -- go ahead.

1 A. I think up until about September of 2014 we continued
2 to get readings either in grease traps or in the hauled
3 waste vessels as they came in.

4 Q. So the grease trap stuff is the stuff that comes in
5 the pipes?

6 A. That's right.

7 Q. Comes in the influent of the thing. And you got them
8 all through, what did you say, '15?

9 A. I think through September of '14 may have been the
10 last time. I don't recall. Somewhere in that year.

11 Q. If Mr. Howard were shut down like you said, the stuff
12 that's coming in the hauled waste, where was that coming
13 from?

14 MR. LINDEMAN: Object to the form, Your Honor.
15 Lack of foundation.

16 Q. Are you the one that did the investigation of where
17 it came from?

18 A. Yes.

19 Q. What did y'all determine?

20 A. We determined that through the course of business of
21 different haulers that it migrated from one location to the
22 other. So if you had a contaminated tank, someone else
23 came in to service that tank, they picked up that
24 contamination and took it somewhere else, and so it just
25 spread.

1 Q. Will you look at Exhibit 40 for me? Does this
2 document refresh your recollection about catching other
3 relatives of Mr. Howard's actually dumping contaminated
4 material?

5 A. Yes. This document is actually subsequent to the
6 previous one about the contaminated frac tank. Once we
7 determined that frac tank was contaminated, we would go
8 back and analyze all of the hauler information associated
9 with it.

10 Q. You would backtrack it?

11 A. So once we find the hauler then we find out where the
12 hauler had been and we tracked this back to a commercial
13 septic tank, actually, and found that that septic tank was
14 contaminated. And this is the correspondence letting
15 everyone know.

16 Q. I don't know if you did this part, but the frac tanks
17 that would hold septage and what not, did you do the
18 cleaning of those, too, after you were done with them?

19 A. No, I did not.

20 Q. When did that end? Like when did you stop having to
21 segregate the waste?

22 A. I don't recall the date. I don't.

23 Q. Is it still segregated today or is the process
24 different?

25 A. No, it is not. It is not segregated.

1 Q. Okay. So those pictures we looked at -- let me see -
2 - the pictures we looked at of the guy like cleaning down
3 his truck right there, page 100, spraying out from
4 underneath, is that actually the new system?

5 A. It's hard to say. That is not actually a picture of
6 someone discharging. That's someone at the site that just
7 shows the type of truck that they would be in.

8 Q. Okay.

9 A. So it's hard to say what location or when that was.

10 Q. Okay. I want to go now and ask you to look at
11 Exhibit 91 and talk to you about that. Can you tell me
12 what the different reports in Exhibit 91 are?

13 A. These appear to be summaries or tables of different
14 analyses that were run in different areas within the
15 agency. The front page one here says it's a sampling from
16 the collection system, which would mean out in the pipes
17 that lead to the treatment facility.

18 Q. This is summary data from databases that ReWa has?

19 A. It would be. It would be.

20 Q. Okay. And behind each of these test results are some
21 of those Shealy or Rogers & Callcott tests that we held?

22 A. Yes.

23 Q. Those were the same ones that you were required to
24 hold for three years by regulation?

25 A. There would be a report in the chain of custody and

1 all the associated QAQC data.

2 Q. And those were all kept in the regular course of your
3 business?

4 A. Yes.

5 Q. Okay. Now if we look through here, there's different
6 types of tables. All this data comes out of what? I think
7 you told me WIMS and LIMS. Can you say what that is?

8 A. Yes. It primarily came from either our Water
9 Information Management System which is the system we use to
10 collect data for the treatment facilities or the LIMS,
11 Laboratory Information Management System, which we use to
12 collect and house data for our laboratory.

13 Q. Are these documents as a composite an accurate
14 reflection of all the testing data that you collected in
15 the course of this contamination investigation?

16 A. To my knowledge.

17 MR. STILWELL: Your Honor, I would offer these
18 as an exhibit under Rule number 1006, Summary of Voluminous
19 Data.

20 MR. LINDEMAN: Your Honor, I don't believe a
21 proper foundation has been laid because I don't -- didn't
22 -- at least I didn't hear Mr. Jones testify that he's the
23 person who prepared all of these different summaries. As I
24 understand it under Rule 1006, obviously you can put
25 summaries into evidence, but the foundation needs to be

1 laid by the individual who created the summaries, and I
2 didn't get that gist from his testimony that he reviewed
3 all ---

4 THE COURT: Does it have one from the one who
5 created them or the one who was responsible for having them
6 done and maintaining them?

7 MR. LINDEMAN: Well, Your Honor, it's a
8 substitute for -- under Rule 1006, it's a substitute for
9 the actual documents themselves, and I don't believe that
10 Plaintiff's counsel is planning to put the actual documents
11 themselves into evidence, which would be all of the
12 different sampling reports. I don't have a problem with it
13 coming in as a summary, but it needs to come in where a
14 proper foundation is laid with the person who prepared the
15 summary is testifying and authenticating for this Court
16 that this is a summary of the underlying information. And
17 I didn't hear Mr. Jones to be the person who did that.

18 THE COURT: All right. Can You lay some
19 additional foundation then?

20 MR. STILWELL: Your Honor, the first thing I'd
21 say is like that issue about him being the guy who prepared
22 them is not in number 1006.

23 THE COURT: I understand.

24 MR. STILWELL: And if you think about it,
25 voluminous data, we produced twenty thousand pages ---

1 THE COURT: If you could just lay some
2 additional foundation to address Mr. Lindeman's concerns.

3 Q. Were these summaries prepared by people that work for
4 you or worked for ReWa in the testing at the labs and what
5 not?

6 A. That's correct.

7 Q. Under your direction?

8 A. For the most part; yes.

9 Q. Okay.

10 MR. STILWELL: I'd offer this into evidence,
11 Your Honor.

12 THE COURT: All right. Subject to your
13 objection, be Plaintiff's 91.

14 (WHEREUPON, Plaintiff Exhibit Number 91 was admitted
15 into evidence.)

16 Q. Hang on a second, Joel.

17 MR. LINDEMAN: Judge, just for the record, is
18 the underlying information going to be put in the record
19 with the Court?

20 MR. STILWELL: No.

21 MR. LINDEMAN: Okay. So the underlying data
22 will not be available to the Judge to be able to evaluate
23 and make rulings in this case?

24 THE COURT: From what I understand the rule is,
25 as long as the underlying documents are available for

1 counsel to review and counsel to cross-examine, then the
2 summary is admissible. That's what my ruling is.

3 MR. LINDEMAN: Well, the rule goes on to say,
4 Your Honor, the Court may order that they be provided in
5 Court.

6 THE COURT: I understand that. I've made my
7 ruling.

8 MR. LINDEMAN: Thank you, Your Honor.

9 Q. Okay. I don't have any other questions for you,
10 Joel.

11 THE COURT: All right. Your witness.

12 **CROSS EXAMINATION**

13 **BY MR. LINDEMAN:**

14 Q. Good afternoon, Mr. Jones.

15 A. Good afternoon, sir.

16 Q. Just so I can be clear from the beginning, you're not
17 someone who has the knowledge and expertise for ReWa as far
18 as the various expenses that were incurred in doing the
19 remediations at the three plants; is that correct?

20 A. That would be correct.

21 Q. Okay. Who would be the appropriate person for us to
22 inquire of that type of information?

23 A. I would assume our Controller, Patricia Dennis, would
24 be able to.

25 Q. All right. As far as the interaction with the

1 Insurance Reserve Fund, did you have any communications at
2 all with any employees of the Insurance Reserve Fund?

3 A. Not that I recall.

4 Q. Did you have any communications or interactions with
5 an individual named Fred Young who is an independent
6 adjustor who had been retained by the Insurance Reserve
7 Fund?

8 A. I do not recall that I did.

9 Q. All right. So you didn't have any specific direct
10 participation in the claims process; is that a fair
11 statement?

12 A. That is a fair statement.

13 Q. Did you ever have actually a face-to-face meeting
14 with anyone with the EPA?

15 A. Yes.

16 Q. And where did that take place?

17 A. At least once at ReWa.

18 Q. And who was the person associated with the EPA who
19 came to ReWa?

20 A. I met with Heath Martin, I know.

21 Q. Okay. How about any meetings with Ken Feely?

22 A. I don't recall that I met Ken Feely face-to-face.

23 Q. All right. Were all of your communications with Mr.
24 Feely by email?

25 A. There was email, there were phone communications and

1 voice messages left to Mr. Feely.

2 Q. All right. Now, the EPA never cited ReWa for any
3 type of violation; did they?

4 A. Not as of yet.

5 Q. And I'm referring to specifically this PCB
6 contamination in 2013?

7 A. No, they haven't; not yet.

8 Q. All right. How about DHEC? DHEC never cited ReWa
9 for anything; did they? Is that correct?

10 A. No, they did not.

11 Q. Was ReWa -- are you familiar with the term
12 potentially responsible party?

13 A. Yes, as it ---

14 Q. Under CERCLA?

15 A. Under CERCLA; yes.

16 Q. Okay. Did -- was ReWa ever placed on notice that
17 they were considered a potentially responsible party under
18 CERCLA?

19 A. Not for this contamination.

20 Q. And I am asking about this contamination. Based upon
21 your experience with this particular contamination, was
22 there anything that ReWa did to cause their contamination?

23 A. No.

24 Q. Was there anything that ReWa did to cause the PCB
25 contamination to get worse?

1 A. Not that I'm aware of.

2 Q. Were there ever any claims made against ReWa by third
3 parties related to the PCB contamination?

4 A. No.

5 Q. And we heard about farmers who were a part of the
6 land application process. Did any farmers ever make claims
7 against ReWa?

8 A. No.

9 Q. You testified on direct examination that after the
10 PCB contamination came to light there would be daily, at
11 least I understood you to say, daily testing of the
12 effluent at Pelham Wastewater Plant?

13 A. There's always been daily testing of the Pelham
14 effluent. Not necessarily PCBs.

15 Q. Okay. How often was it tested for PCBs after the PCB
16 contamination?

17 A. I don't know what the frequency was.

18 Q. All right. But I believe you testified that there
19 was never a positive detection of PCBs in the effluent at
20 Pelham; is that correct?

21 A. To my knowledge that is correct.

22 Q. And Pelham, correct me if I'm wrong, actually
23 discharges into the Enoree River; correct?

24 A. That's correct.

25 Q. As far as the other two facilities that we're

1 concerned about, Mauldin Road discharges into the Reedy
2 River; correct?

3 A. That's correct.

4 Q. Were there ever any positive detections of PCBs in
5 the effluent that was tested at Mauldin River -- Mauldin
6 Road?

7 A. Not that I'm aware of.

8 Q. Same question as to Lower Reedy?

9 A. Same answer. Not that I'm aware of.

10 Q. All right. And Lower Reedy, as the name I guess
11 suggests, discharges into the Reedy River?

12 A. Downstream of the Mauldin Road facility.

13 Q. Okay. Were there ever any type of reports or records
14 of PCBs once they were introduced to the three plants
15 migrating outside the boundaries of those three plants?

16 A. Other than the land application sites?

17 Q. Right. Other than the land application sites?

18 A. Not that I'm aware of, no.

19 Q. And I'm looking for unintentionally. I mean land
20 application was ---

21 A. No. I think we did a great job of keeping it in the
22 fence.

23 Q. Okay. And you kept it in the fence at all three
24 facilities?

25 A. As far as I know; yes.

1 Q. All right. Let me go through each of those locations
2 in a little bit more detail. Let me ask you this first, as
3 a background, because I don't quite have this in my own
4 mind. You said you were the Pretreatment Manager at that
5 time?

6 A. That's correct.

7 Q. Explain the concept of pretreatment. What does that
8 mean exactly?

9 A. That's an EPA term. It's a program that's derived
10 from the Clean Water Act through the NPDES permitting
11 system. Because we have industrial discharges on our
12 systems, we have to have a -- we're mandated to have a
13 pretreatment program that regulates the sources,
14 potentially, that are not domestic. And so any industrial,
15 commercial hauled waste, anything that we accept at our
16 treatment facilities that does not come from a residence,
17 we have to have a program to regulate that and ensure that
18 it does not impact our facilities.

19 Q. And what kinds of measures do you -- at the time in
20 2013 and 2014 time frame, what types of measures were
21 implemented as part of that pretreatment program?

22 A. Well, we have a permitting system that we permit some
23 users. We accept hauled waste through a permitting and
24 acceptance letter system. Some of our industrial users are
25 required to treat their waste before it comes to us.

1 That's where the term pretreatment comes from. Obviously
2 we have a sewer use ordinance that regulates that and sets
3 the enforcement umbrella for us to maintain our program.

4 Q. Was there a program of testing that was in place as
5 part of the pretreatment?

6 A. Yes.

7 Q. Can you explain that to me? What was the scope of
8 that?

9 A. For all permitted industrial customers, they're
10 required to do self-monitoring. And it's a pretty
11 intensive monitoring program. We also monitor our
12 industrial and commercial users, as well. We being ReWa.
13 We go out and set samplers and do that.

14 Q. So part of that program is you all have a sampling
15 program with some of your industrial customers?

16 A. That's right. And we also have an annual survey
17 program which I spoke of earlier which on an annual basis
18 we have to go out and test our influent, our effluent, our
19 sludges and all our unknown non-domestic dischargers to
20 find out if there's anything that they're discharging that
21 we're not equipped to handle or not permitted to.

22 Q. When you do sampling of your industrial customers, is
23 that done by ReWa personnel?

24 A. It is sometimes and sometimes it's done by
25 contracting.

1 Q. And let me be clear. In the 2013, 2014 time frame?

2 A. Same. It's a combination of ReWa personnel and
3 contracted personnel.

4 Q. And is that an expense then that is born by ReWa as
5 part of its normal operations?

6 A. The pretreatment program's expenses are borne by the
7 customers which it regulates.

8 Q. And how is that handled?

9 A. It's through fees and charges.

10 Q. Okay. And then you use the fees money to -- but as
11 far as the direct payment, for instance for sending
12 employees out to do sampling and then getting test results,
13 so the immediate expense is borne by ReWa and you use fees
14 to offset that?

15 A. That's correct.

16 Q. Okay. Now, the -- are you familiar with the
17 remediation that was done at all three plants?

18 A. No. I'm not intimately familiar with the
19 remediation; no, sir.

20 Q. Are you familiar with the remediation that was done
21 at any of the plants?

22 A. No. Not the details of the remediation; no, sir.

23 Q. Now, you touched on some of the remediation, what
24 exactly was done, did you not, on direct examination?

25 A. I don't think I got into the remediation; no, sir.

1 Q. All right. So you are not the person to talk to as
2 far as that?

3 A. No.

4 Q. Who is?

5 A. I believe that will be some upcoming witnesses.

6 Q. Anyone specifically that was basically over the
7 remediation at the three plants?

8 A. Glen McManus was over the Operations Division at that
9 time, had direct responsibility for it.

10 Q. So Operations is what oversaw the remediations?

11 A. Yes.

12 Q. Okay. Did you participate in any of the testing that
13 was done at those three plants? Was that part of your
14 scope of authority?

15 A. My scope of authority dealt with testing mostly
16 outside of the plants within the collection system and
17 testing of potential sources. So I was not involved as
18 much in testing of the different treatment units or sludges
19 or anything like that.

20 Q. All right. So once the -- now, the initial test
21 results that showed PCBs in late January 2013, that was
22 something that you initially caught; correct?

23 A. That's correct.

24 Q. And is that -- at that point you turned it over to
25 Operations?

1 A. Well, I turned it over to both Operations and our
2 Technical Services Director who was my boss; yes.

3 Q. All right. And so you testified earlier that there
4 was sampling done as part of the investigative process to
5 try to figure out where these PCBs came from; correct?

6 A. That's correct.

7 Q. But was that part of your role?

8 A. Most of it; yes.

9 Q. Okay. And as part of that testing process -- strike
10 that. How did you go about determining where you would
11 test or sample as part of that investigative process?

12 A. Well, we would start from where we knew we had
13 contamination and work upstream through the collections
14 system. So we knew we had it at the Pelham facility, so we
15 would start going up until the system branched and test the
16 manholes, the collection system, trying to find the source.

17 Q. And did that also include testing of customers'
18 properties?

19 A. Not originally. Not until we were fairly certain
20 that the source had come from a grease interceptor. We did
21 some -- we didn't do any testing. We did do some visual
22 observations of grease traps and that sort of thing early
23 on to see if that could be a potential source.

24 Q. And at some point you did do actual sampling at a
25 particular location or locations?

1 A. That's correct.

2 Q. And where did you actually do that sampling?

3 A. Well, we sampled two or three hundred -- we, ReWa,
4 actually sampled two to three hundred grease interceptors.
5 And then beyond that we started requiring the owners of the
6 grease interceptors to have the sampling done.

7 Q. Okay. I thought I just understood you to say you
8 didn't start going towards the customers to actually sample
9 on the customer's property until you pretty much had
10 narrowed it to one place or one particular location?

11 A. We never -- no. Once we knew that the source was
12 coming through a grease trap then we started sampling all
13 grease traps.

14 Q. Okay. And so did you sample all grease traps that
15 was within the service area for the Pelham plant?

16 A. Yes.

17 Q. And you said that was what, about three hundred?

18 A. In Pelham possibly. We ended up sampling over a
19 thousand or having sampled. We either sampled ourselves or
20 had contractors sample over a thousand of them.

21 Q. And so the testing that we're talking about right now
22 is testing that was done on the customers' premises;
23 correct?

24 A. That's correct.

25 Q. Those grease traps would be on their own property;

1 correct?

2 A. That's correct.

3 Q. All right. And that was testing that ReWa incurred
4 the expense for?

5 A. No. We only incurred the expense for the ones we
6 used in the investigative process. Once we determined the
7 grease traps were the source, then that caused us to put
8 back on the owners to go and do the testing.

9 Q. Okay. So the claim that's been made to the Insurance
10 Reserve Fund does not include expenses for testing that was
11 done on customers' premises?

12 A. It could be as we were investigating. But once we
13 found the sources then we put that cost back on the
14 customer to perform that.

15 Q. And how, in looking at the testing expenses, how do
16 we distinguish between what was done as far as customers of
17 ReWa versus what was borne by ReWa?

18 A. Well, if it was done by our customers, it would not
19 be included in that expenses.

20 Q. So the customers would be able to use whatever ---

21 A. They contracted independently with whoever they
22 wanted to to do the sampling and help certify tests run.

23 Q. Okay. So then the -- so the testing that you all
24 have included as part of your claim, then, is testing that
25 was done as part of this investigative process?

1 A. That's correct.

2 Q. And that would include testing of collection lines?

3 A. That would, yes.

4 Q. Is that correct?

5 A. Yes, that's correct.

6 Q. And by collection lines, you mean the lines that lead
7 to the plant; correct?

8 A. That's correct.

9 Q. Would it include testing of any type of lift stations
10 or pump stations?

11 A. Yes. There are some in there.

12 Q. And would it include testing of customers'
13 properties?

14 A. I would not -- there may be some of the grease traps
15 that were owned by the customers; yes. I don't know if
16 those have been parsed out, but any grease interceptors
17 that are included in there would be on the customer's
18 property.

19 Q. Did you play any role in parsing that out?

20 A. No, I did not. I just -- my role was to provide the
21 costing information. So whatever I provided was
22 information that we gained in the investigative process.

23 Q. There was also testing that was done in all of ReWa's
24 other installations; is that correct?

25 A. I would think so; yes.

1 Q. Do you know?

2 A. I don't know for sure; no.

3 Q. You don't know?

4 A. No.

5 Q. Okay. That's not part of the testing that you were
6 in charge of?

7 A. No.

8 Q. Who would have been in charge of that testing?

9 A. Either our Lab Manager or potentially the Operations
10 Group.

11 Q. All right. How about if we've heard testing was done
12 out in the field where the biosolids had been previously
13 land applied. Were you involved in that testing process?

14 A. No, I was not.

15 Q. Who would have been involved in that testing
16 process?

17 A. That would have -- as I testified earlier, that would
18 have been our Technical Services Director and our
19 Operations Director in coordination with our Lab Manager
20 and our Solids Manager.

21 Q. All right. And those would essentially be farms
22 where the biosolids were land applied?

23 A. That's correct.

24 Q. And those wouldn't be properties that were owned by
25 ReWa; would they?

1 A. That is correct.

2 Q. I think you also testified that following the PCB
3 contamination ReWa made procedural and protocol changes in
4 how it accepts FOG; right?

5 A. That's correct.

6 Q. What does FOG stand for?

7 A. Fats, oils and grease.

8 Q. Okay. And I think you were testifying that your FOG
9 Program has always been at Mauldin Road; is that correct?

10 A. That's correct.

11 Q. None of the other facilities except fats, oils and
12 grease?

13 A. That's correct.

14 Q. And that's the way it was prior to this
15 contamination?

16 A. Yes, sir.

17 Q. All right. And as a result of that contamination,
18 you all set up a new program that included this
19 infrastructure where frac tanks were installed and the
20 fats, oil or grease -- and I guess that applies to septage,
21 as well; correct?

22 A. That's correct.

23 Q. You all would receive septic tank waste at that
24 particular location?

25 A. Yes, sir.

1 Q. So you all would first segregate the FOG as well as
2 the septage in these frac tanks while tests were run to
3 determine whether or not there were any pollutants in them;
4 is that correct?

5 A. That's correct.

6 Q. And you tested for pollutants other than PCBs; did
7 you not?

8 A. Infrequently we did; yes.

9 Q. Okay. I mean you were looking for more than just
10 PCBs as part of that program?

11 A. On routine tests, 99.9 percent of those tests were
12 PCB only.

13 Q. And were you looking for a particular type of PCB?

14 A. 1260. Aroclor 1260.

15 Q. And that's what you understand was involved in this -
16 --

17 A. That's right.

18 Q. --- particular contamination?

19 A. Typically the scan includes all congeners of PCB when
20 it's performed.

21 Q. The expenses for setting up that new program at
22 Mauldin Road, do you know whether that's part of the claim
23 that's being made to the Insurance Reserve Fund?

24 A. Yes.

25 Q. And that program was run for how long?

1 A. I don't know the exact dates. I would say eighteen
2 months to two years.

3 Q. But it's been discontinued at present?

4 A. That's correct.

5 Q. Okay. And the expenses of running the program
6 through that entire eighteen months to two years is part of
7 the claim against the Insurance Reserve Fund?

8 A. As far as I know it is; yes, sir.

9 Q. All right. And there were several incidences where
10 PCBs were intercepted once that program was set up through
11 the testing in the frac tanks; correct?

12 A. That's correct.

13 Q. How many times?

14 A. I want to say twenty, maybe. I don't know that
15 number exactly.

16 Q. And each of those occasions -- there was testimony
17 earlier about Timothy Howard in August 2013 was caught
18 trying to bring some -- or bring his hauling truck in to
19 deposit some sort of waste? Wasn't that your testimony?

20 A. Yes.

21 Q. And had that program been put into place at that
22 point in time?

23 A. No, it had not.

24 Q. Okay. Since that program has been put into place,
25 has there been an incident of one of the approximately

1 twenty that you just described that involved Timothy
2 Howard?

3 A. No. Timothy Howard was suspended from using our
4 facilities.

5 Q. So these are other haulers who were attempting to
6 introduce PCBs into your system?

7 A. I couldn't say they were attempting to introduce
8 PCBs. They were attempting to introduce hauled waste that
9 contained PCBs.

10 Q. Okay. So it wasn't -- there's no evidence that in
11 any of those approximately twenty circumstances that it was
12 an intentional act by the hauler to put PCBs -- introduce
13 PCBs into the system?

14 A. I do not believe it was intentional by anyone other
15 than potentially Timothy.

16 Q. Have any of those twenty instances -- you're guessing
17 twenty; right?

18 A. Yeah. I'm guessing.

19 Q. I think in your deposition you testified eight to
20 twelve?

21 A. Well, we had around thirty grease traps that were
22 identified and eight to twelve different haulers, but some
23 of them had multiple detections, so ...

24 Q. I'm talking about people who actually used the new
25 program at Mauldin Road where PCBs were detected?

1 A. Okay. Well, you've got my deposition. Whatever I
2 said, you know. That was a long time ago.

3 Q. Okay. And I'll represent to you, and I'm happy to
4 show you your deposition where you said eight to ten. Does
5 that sound more accurate?

6 A. Eight to ten haulers. That sounds right.

7 Q. All right. And so on each of those eight to -- or
8 eight to twelve. I'm sorry. On each of those eight to
9 twelve instances, were investigations ever conducted into
10 the haulers and what they were doing?

11 A. Every one of them.

12 Q. All right. Was there ever a conclusion that any of
13 them were intentionally trying to introduce PCBs into the
14 system?

15 A. Not that I can say.

16 Q. So none of those instances then was an incident of
17 vandalism? You would agree with me on that?

18 A. I don't know the definition of vandalism. Like I
19 said, I don't know their intent. All I know is that they
20 had PCB when they brought it to us, and it came from
21 somewhere.

22 Q. And you all investigated and didn't determine any
23 intent in any of those eight to twelve instances?

24 A. We don't determine intent. All we determine is where
25 it came from, the source, and who brought it. So intent

1 doesn't play into our enforcement guide.

2 Q. Did ReWa ever make any additional claims against the
3 Insurance Reserve Fund for those eight to twelve
4 instances?

5 A. I don't know what the claim entitles.

6 Q. Are you aware of any claims that were made to the
7 Insurance Reserve Fund for those eight to twelve
8 instances?

9 A. Not that I'm aware of. We segregated that first and
10 we had no further impact beyond the frac tank as we put
11 those processes in place.

12 Q. So in each of those eight to twelve instances, the
13 PCB contaminated material never were introduced into the
14 plant; is that correct?

15 A. That's right. It was sequestered, segregated, before
16 it got to the plant.

17 Q. But there was expense for testing the material and
18 then once it was determined to be contaminated, for
19 cleaning the frac tanks that were holding it; correct?

20 A. Yes.

21 Q. Were those expenses, the testing expenses and the
22 cleaning of the frac tanks, in each of those eight to
23 twelve instances, are those included in the claim that's
24 been made against the Insurance Reserve Fund?

25 A. The cost of cleaning the frac tanks was put back on

1 the hauler that brought it to us. So there was cost
2 recovery sought. I don't know that all of it was recovered
3 from the haulers, but in each case we filed a cost recovery
4 on the haulers that brought it to us to cover the costs.

5 Q. Were any of those costs included in the claim that
6 was made against the Insurance Reserve Fund?

7 A. I can't say that.

8 Q. You just don't know?

9 A. I don't know.

10 Q. How about the testing expenses for those eight to
11 twelve instances, was any of that included in the claim
12 that was made to the Insurance Reserve Fund?

13 A. I would say possibly. I don't know for sure. There
14 was cost recovery made on that, as well.

15 Q. All right. There was also testing that was done
16 separate and apart from the investigation of the PCB
17 contamination in 2013. There continued to be testing of
18 collection lines; correct?

19 A. There was testing of collection lines until we had no
20 more -- a pattern of no more detectable PCBs in the
21 collection cycles; that's correct.

22 Q. So for how long did those type of tests -- were those
23 type of tests conducted?

24 A. I don't know the dates. They're in an exhibit here,
25 but I can't see them.

1 Q. Were the collection lines tested in the collection
2 lines leading to all three facilities; Pelham, Lower Reedy
3 and Mauldin Road?

4 A. I would guess so. I think primarily it was in the
5 Pelham system because that's where we had the highest level
6 of contamination.

7 Q. And those collection systems where testing was done,
8 they're not actually located within the premises of the
9 three plants; are they?

10 A. They would be connected to the plant. Definition of
11 BOTW is all the treatment works and everything connected to
12 it.

13 Q. But there are lines there that are running outside
14 the boundaries, the premises, of the plant itself;
15 correct?

16 A. I guess. I mean I see it as a system. So I don't --
17 the system doesn't stop at the fence line, so ...

18 Q. The collection lines, though, are outside the fence
19 line; correct?

20 A. If there's a fence; yes. They're inside their own --
21 sometimes in their own fences.

22 Q. Those collection lines don't run on ReWa property; do
23 they?

24 A. Yes. We maintain ownership or easements of all.

25 Q. You have easements, but they're not -- you don't have

1 fee ---

2 A. Some ---

3 Q. --- ownership of -- let me finish the question,
4 please. You don't have fee simple ownership of the
5 property where those lines run; do you?

6 A. Not all of them.

7 Q. And the pump stations or lift stations that are part
8 of those collection lines, they're not located within the
9 premises of those three plants; are they?

10 A. Not -- we do have some pump stations that are
11 maintained within the fence line of the treatment plant and
12 others are not.

13 Q. Okay. Now, were there -- subsequent to 2013 were
14 there any contaminated -- PCB contaminations in any
15 collection lines?

16 A. Not that I'm aware of.

17 Q. You're not aware of a PCB detection in two miles of
18 line near Greer in September 2014?

19 A. Yes, I am.

20 Q. Okay.

21 A. I thought you just asked me prior to 2013.

22 Q. No. I said since 2013.

23 A. Okay. I misunderstood your question.

24 Q. Okay. Well, let me re-ask it. Are you aware of any
25 PCB contaminations that were located in collection lines

1 since 2013?

2 A. I do know we continued to detect it in the collection
3 lines for the Pelham facility. And also at the Mauldin
4 Road facility I believe there was a detection.

5 Q. Okay. And how many -- were there detections to the
6 point that remediation was undertaken?

7 A. There was some cleanup work done. I don't know to
8 what extent.

9 Q. That's not something you can testify to?

10 A. No.

11 Q. The cleanups of those PCB contaminations in
12 collection lines, are those included in the claim that was
13 made against the Insurance Reserve Fund?

14 A. I could not answer that. I do not know.

15 Q. Would that be something that would fall under the
16 ambit of Operations?

17 A. I would assume so.

18 Q. So you didn't have any direct involvement in your
19 position with any type of remediation that was done of
20 collection lines?

21 A. No, sir.

22 MR. LINDEMAN: With the Court's indulgence.

23 Q. What was your involvement with the land application
24 program?

25 A. I was not directly involved at that time in the land

1 application program.

2 Q. You said at that time. At some point did you become
3 involved in the land application program?

4 A. Well, it currently falls underneath my realm; yes.

5 Q. And your current position is what?

6 A. Chief Technical Officer.

7 Q. And when did you assume that position?

8 A. April of 2016.

9 Q. Had the land application program resumed at the point
10 you started the new position?

11 A. It resumed about that same time.

12 Q. But did it resume at the same time at all three
13 facilities?

14 A. I don't think so.

15 Q. What were the -- when was it resumed at Pelham?

16 A. I don't know the dates.

17 Q. Do you know the dates for Mauldin Road or Lower
18 Reedy?

19 A. No. I do not have those dates.

20 Q. Who would know those dates? Is that something
21 Operations would know?

22 A. I would think Operations would know the dates.

23 Q. Was land application, was that program continued in
24 the wastewater treatment plants -- were there other
25 wastewater treatment plants operated by ReWa other than

1 Pelham, Mauldin Road and Lower Reedy?

2 A. Yes.

3 Q. So those were never suspended?

4 A. I can't say they were never suspended, but if they
5 were it was -- as soon as it was determined that there was
6 not any contamination those programs resumed.

7 Q. Just so I'm clear. You did not have any involvement
8 with the remediations at any of the three facilities?

9 A. That is correct.

10 Q. Okay. So you didn't provide any type of interaction
11 with employees of AECOM in devising and overseeing the
12 remediation plan at Pelham?

13 A. No. My only involvement was advising of what
14 potential permit impacts that it would impose on ReWa on
15 different scenarios of the cleanup plan.

16 Q. Okay. But as far as the nuts and bolts of what was
17 done through the remediation, why, that sort of thing, you
18 don't have any personal knowledge of that?

19 A. No. Left that to the experts.

20 MR. LINDEMAN: With the Court's indulgence.

21 Q. Did you have any involvement, Mr. Jones, in
22 calculating the setoff that has been put into evidence in
23 this particular case or ---

24 A. No, I did not.

25 Q. Okay. You didn't have any involvement in that?

1 A. I provided numbers from my program, the Pretreatment
2 Program when I was Pretreatment Manager, to be included,
3 but I did not ---

4 Q. Who did you provide those numbers to?

5 A. Those primarily went to Glen McManus.

6 Q. Okay.

7 MR. LINDEMAN: With the Court's indulgence for
8 the last time.

9 Nothing further. Thank you, Your Honor.

10 THE COURT: Any other brief redirect?

11 MR. STILWELL: I want to, Your Honor, but my co-
12 counsel says I'm not allowed to ask any other questions.

13 THE COURT: I appreciate that, Mr. Brown.

14 MR. STILWELL: Especially being that ---

15 THE COURT: May Mr. Jones be excused?

16 MR. STILWELL: Yes, sir.

17 MR. LINDEMAN: Yes, Your Honor.

18 THE COURT: Okay. Thank you, sir.

19 MR. JONES: Thank you, Your Honor.

20 THE COURT: All right. How long do your
21 anticipate your next witness to be?

22 MR. BROWN: If I had to guess his direct is
23 between an hour and an hour and a half.

24 THE COURT: All right. And then how many other
25 witnesses do you all have for today?

1 MR. BROWN: We have one other witness who we
2 would expect to possibly start today, but I'm not competent
3 we can finish him today.

4 THE COURT: I always tend to be an optimist, so
5 ...

6 MR. BROWN: Well, your optimism may bear fruit;
7 I don't know.

8 THE COURT: Do y'all want to take a ten-minute
9 break now or ...

10 MR. DEVLIN: Yes, sir.

11 MR. STILWELL: Yes.

12 THE COURT: All right. We'll take a ten-minute
13 break.

14 (WHEREUPON, Court stood at recess for a short break.)

15 THE COURT: You can call your next witness.

16 MR. BROWN: Your Honor, we would call Ted Clark.

17 THE COURT: You can come around to the witness
18 stand, please, sir. Place your left hand on the bible and
19 raise your right hand. Do you swear to tell the truth,
20 whole truth and nothing but the truth?

21 MR. CLARK: I do.

22 THE COURT: Thank you. Come around and have a
23 seat, please, sir. And sir, if you would state your full
24 name, please.

25 MR. CLARK: It's Ted Vincent Clark.

1 THE COURT: All right. Thank you.

2 All right, Mr. Brown, your witness.

3 MR. BROWN: Thank you, Your Honor.

4 **TED VINCENT CLARK,**

5 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

6 **DIRECT EXAMINATION**

7 **BY MR. BROWN:**

8 Q. Mr. Clark, I think you just stated your name. Where
9 do you live?

10 A. In Greenville. Technically my billing address is
11 Greer, but Greenville.

12 Q. And what do you do for a living?

13 A. Absolutely nothing. I'm retired.

14 Q. Okay. How long have you been retired?

15 A. About a year. Little over a year.

16 Q. And before retiring what did you do?

17 A. I was a professional engineer for forty years.

18 Q. And tell us about your education, your educational
19 background?

20 A. I graduated from Purdue University with a Bachelor of
21 Science in Civil Engineering. And as part of my curriculum
22 there I focused primarily in environmental engineering with
23 more of a minor in hydraulics. Environmental engineering
24 side, I took about a half -- beyond the introductory
25 environmental courses, I took about a half a dozen graduate

1 level courses, including -- there's three, environmental
2 principals, biological, physical and chemical; those three
3 classes. I took an industrial waste class. On the fluid
4 side or the hydraulic side, it was basic fluid mechanics
5 and then fluid transport and those.

6 Q. And tell us about your work experience. You said
7 forty-two years as an engineer. Where did you work?

8 A. When I left Purdue, I went to Champagne, Illinois.
9 Was there for ten years. Firms that were precursors to
10 AECOM, I've spent about forty-two years. Always been AECOM
11 or one of its predecessors. I never changed jobs. I
12 worked forty-two years there.

13 Q. Let me stop you. Were there times where the firm you
14 worked with merged with others so that the name on the door
15 may have changed, but your office didn't necessarily
16 change?

17 A. I have many different callers and name business
18 cards; yes. But it's always been the same company.

19 Q. Okay. And when did you come to the South Carolina
20 area?

21 A. I came in 1986. I did a transfer from a company I
22 was working up in Champagne down to Greenville. I, at that
23 time, went to work for Sierra Sirrene, which was the same
24 company that I was at in Illinois. Later we split off and
25 started Sirrine Environmental Consultants. Then we became

1 SCC Donahue and Brust and Earth Tech and AECOM.

2 Q. But all those sort of mergers or changes, were
3 precursors or part of the same company?

4 A. Yes, sir.

5 Q. Okay. What type of work did you primarily do in this
6 forty-two years as an engineer?

7 A. My focus has been pretty much on design and
8 construction of water -- waste water treatment systems,
9 both municipal and industrial. More so industrial than
10 municipal plants. That's been my primary focus.

11 Q. If you would turn to Exhibit 95, which has been
12 stipulated and is in evidence. Is that a copy of your CV?

13 A. Yes, it is.

14 Q. And does it talk through some of your journeys, your
15 training, your certifications?

16 A. Yes, it has that. And what I've tried to include in
17 here is a cross-reference of typical projects that I've
18 done over the forty years.

19 Q. And the experience listing the projects there, are a
20 significant number of those dealing with water treatment or
21 wastewater treatment facilities?

22 A. A vast majority; yes.

23 Q. And do you understand that this case involves a
24 dispute over insurance coverage for damage to certain ReWa
25 facilities because of PCB contamination?

1 A. Yes.

2 Q. Did you and AECOM have any role or activity in
3 dealing with the PCB contamination at these ReWa
4 facilities?

5 A. Yes.

6 Q. When did you get involved with ReWa's efforts to
7 remediate and repair this damage from the PCB
8 contamination?

9 A. Pardon, was that when?

10 Q. When?

11 A. We got involved late summer of 2013, July. And our
12 first contract was signed early August. But we had done a
13 little consultation with them prior to signing the
14 contract.

15 Q. What was your specific role within the AECOM team
16 that worked on this -- worked with ReWa regarding this PCB
17 contamination?

18 A. I was the lead for our team, which comprised myself,
19 three other individuals; a gentleman Dave Henderson out of
20 Milwaukee that had extensive remediation of PCB waste. He
21 was our regulatory technical expertise. We had David Welch
22 who is my permitting -- local permitting, South Carolina
23 permitting expert in our office. And then Scott Snyder was
24 actually the engineer that was out in the field involved in
25 oversight of the cleanup.

1 Q. And was it AECOM's normal practice to employ a team
2 of people for a project of this type?

3 A. Yeah, almost always. This was a little exception.
4 Normally we would go to Milwaukee to get an expert, but
5 Dave Edward had that experience that we didn't have down at
6 our office.

7 Q. And again, you were the person in charge of the
8 team?

9 A. Yeah. I headed the water department at the time, so
10 I got to set up the teams the way I wanted them.

11 Q. And what were you and your team essentially tasked to
12 do?

13 A. Basically to come in -- first off, we assisted ReWa
14 with their notification of the contamination. And then we
15 put together the plan. Submitted that to the state. Then
16 actually implemented the plan, followed with the cleanup
17 and signed off at the facility as complete.

18 Q. And in your roles did you -- did AECOM actually do
19 the work to do the remediation or decontamination?

20 A. No. We hired subcontractors. Actually ReWa hired
21 subcontractors at our recommendation.

22 Q. And were you and AECOM involved in the process of
23 evaluating the subcontractors?

24 A. Yes. That's what I did; yes.

25 MR. BROWN: Your Honor, we would move that Ted

1 Clark be qualified as an expert in the field of remediation
2 and repair of wastewater treatment facilities?

3 THE COURT: Any voir dire from whoever is going
4 to be crossing him?

5 MR. LINDEMAN: Yes, Your Honor.

6 THE COURT: All right.

7 **VOIR DIRE EXAMINATION**

8 **BY MR. LINDEMAN:**

9 Q. Good afternoon, Mr. Clark.

10 A. Good afternoon.

11 Q. As I understand it, you personally have very limited
12 experience with PCB contamination cleanups; correct?

13 A. I have had one treatment system that I designed for
14 PCBs ---

15 Q. Can you speak up a little? I'm sorry.

16 A. Oh, I'm sorry. Yeah, I've had one treatment system
17 that I was involved in early in my career for design of a
18 PCB wastewater treatment system, primarily just a
19 filtration system for that. And then the other instance
20 where I've dealt with PCBs has been PCBs have been a
21 portion of the wastewater that we've had to deal with,
22 predominantly dealing from like an industrial landfill,
23 there's always co-mingling of a lot of different kinds of
24 waste. PCBs are sometimes present in those applications,
25 although it wouldn't be the primary contaminant. It would

1 be a contaminant and would be part of the waste stream.

2 Q. Do you have any prior experience in designing a
3 remediation plan for a wastewater treatment plant that had
4 PCB contamination?

5 A. No, I have not.

6 Q. And as I understand it, the one project you were
7 involved in, and you said it was early in your career in
8 Illinois; correct?

9 A. It was actually in Indiana.

10 Q. Oh, in Indiana?

11 A. Yes, sir.

12 Q. Okay. And PCBs were actually a small part of that
13 contamination; right?

14 A. No. This one was to remove solids that were PCB
15 contaminated. So in that case it was principally PCBs.

16 Q. What was your role in that particular project?

17 A. I was a process engineer that designed the equipment.

18 Q. Equipment that was used in the remediation?

19 A. Yes. Well, yeah, it was a wastewater treatment
20 system. We added a filtration step to a treatment plan
21 because PCB solids were coming into the plant and we wanted
22 to remove those prior to going through the rest of their
23 treatment plan.

24 Q. But as far as determining how the PCB remediation
25 would be done in that particular instance, that didn't

1 involve you; correct?

2 A. I would say, to answer the question, yeah, I would
3 think you are right. It was not -- it was a senior
4 engineer at our office who determined that filtration was
5 what we needed. I implemented the system for the
6 filtration system.

7 Q. Okay. Somebody came up with the idea to use a
8 particular type of filtration and you designed the
9 filtration system?

10 A. Yes, sir.

11 Q. Okay. In this particular -- on this particular
12 project you indicated that you were the team leader among
13 four different engineers; is that right?

14 A. Yes, sir.

15 Q. And the person who actually had the expertise in PCB
16 remediation was Dave Henderson?

17 A. Yes, sir.

18 Q. Another member you described was David Welch. He's
19 the person who had the regulatory knowledge here in how --
20 in dealing with EPA and DHEC?

21 A. Let me correct that, David Welch, yes, he had some
22 the local regulatory experience dealing with South Carolina
23 DHEC. Dave Henderson had the overall regulatory expertise
24 from the TSCA side and the cleanup side from that, in that
25 regard.

1 Q. But you yourself didn't have that technical knowledge
2 regarding PCB contamination?

3 A. No. I accessed that from Dave; yes.

4 Q. Okay. So anything you testify along those lines
5 today would be information that was gathered secondhand
6 from Mr. Henderson?

7 A. No. It was gathered firsthand from Mr. Henderson.

8 Q. Okay. But you would be relaying his information that
9 you learned from Mr. Henderson?

10 A. Yes.

11 Q. That's not expertise that you yourself have?

12 A. I have it now.

13 Q. You have it based upon Mr. Henderson ---

14 A. Yes, sir.

15 Q. --- having that expertise?

16 A. Correct.

17 Q. All right. And actually the decision-making
18 regarding how the remediation would be done, that was
19 something that Mr. Henderson made the decisions on; was it
20 not?

21 A. No, that was -- well, it was a team decision. No one
22 works in a vacuum. We work together as a team on that. So
23 which part of the remediation, I would have to be more
24 specific.

25 Q. Just so the Court is clear and I'm clear, so anything

1 that you would testify here today is information that you
2 learned from Dave Henderson?

3 A. That's not true.

4 Q. Okay. Any technical information regarding PCBs is
5 information you would have learned from Dave Henderson?

6 A. From a regulatory guideline; yes.

7 Q. Now, you are not a chemist; correct?

8 A. I'm an engineer.

9 Q. All right. And you're not qualified to testify as to
10 the chemical or molecular makeup of PCBs; correct?

11 A. Correct.

12 Q. Are you even aware of what specific PCB we're dealing
13 with here?

14 A. Yes, I am.

15 Q. And what is that?

16 A. It's aroclor 1260.

17 Q. All right. Do you agree with you were not aware of
18 that when I took your deposition?

19 A. I'm not sure.

20 MR. LINDEMAN: Your Honor, can I -- we don't
21 have a clerk. Can I open the deposition?

22 THE COURT: Yes, sir.

23 MR. BROWN: Your Honor, just one point for the
24 record. We did not offer Mr. Clark as an expert in PCB or
25 PCB chemistry. We have offered him as an expert in

1 wastewater treatment plant remediation.

2 THE COURT: All right. Thank you.

3 Q. Mr. Clark, if you would turn to, I believe, page 40.

4 A. Pardon, which page?

5 Q. Page 40. Look at lines 15 through 18 and read that
6 to yourself.

7 A. I do not know specifically the type of PCB that was
8 involved.

9 Q. Okay. I was actually asking you to read it to
10 yourself so you ---

11 A. No, that's fine.

12 Q. Anyway, in your deposition, you agree with me, you
13 didn't know ---

14 A. Yes, I must not have known at that time.

15 Q. And when was this deposition taken? Can you look at
16 the cover?

17 A. February 12th, 2019. So February of last year.

18 Q. You would agree with me you don't have any expertise
19 regarding the chemistry of aroclor 1260; is that correct?

20 A. That is correct.

21 Q. All right. Am I correct that you're not qualified
22 and cannot offer opinions regarding the specific PCBs found
23 at the ReWa facilities and the chemical characteristics of
24 those PCBs?

25 A. That would be true.

1 Q. All right.

2 MR. LINDEMAN: Court's indulgence.

3 Q. Mr. Clark, have you ever been qualified as an expert
4 witness by a Court previously?

5 A. I don't believe so. I have done two depositions,
6 served in that capacity, and never went to the Court where
7 I was certified, as you said.

8 Q. Thank you.

9 MR. LINDEMAN: I don't have any further
10 questions, Your Honor.

11 THE COURT: All right. For the purpose that Mr.
12 Brown is offering him, I think by way of education,
13 training, experience, and being a team leaders on this
14 project, I find him qualified, again, for the purpose that
15 Mr. Brown is offering him.

16 MR. BROWN: Thank you, Your Honor.

17 MR. LINDEMAN: I never got to say an objection.
18 Can I at least get that on the record.

19 THE COURT: Yes, sir.

20 MR. LINDEMAN: We would object to his
21 qualifications for which he was tendered because it was my
22 understanding it was remediation of wastewater treatment
23 plant that specifically was contaminated with PCBs. And he
24 does not -- and I think the testimony shows he does not
25 have that expertise.

1 THE COURT: If we start -- I don't mean this to
2 be a pun at all -- leaching into PCB experts or for
3 analysis, you certainly have the right to make those
4 objections. But for the purpose that Mr. Brown is
5 proffering him, I find him qualified.

6 MR. LINDEMAN: Thank you, Your Honor.

7 **DIRECT EXAMINATION CONTINUED**

8 **BY MR. BROWN:**

9 Q. I think one of the things that you mentioned that you
10 and your team did was to put together a plan for the
11 remediation and repair of this facility; is that fair?

12 A. That's correct.

13 Q. And when you were evaluating the sort of steps you
14 needed to take to do that, can you sort of summarize what
15 y'all went through, what y'all considered?

16 A. Sure. Initially we looked at means to, obviously,
17 the first step you have to do is remove the material from
18 the tanks. We then looked at treatment technologies to
19 basically remove the solids from the stream. So we looked
20 at a pretreatment system -- you know, not necessarily a
21 pretreatment system but a sludge to watering system to take
22 the -- remove sludge, chemical condition it, run it through
23 the dewatering equipment, transport that material for
24 approved offsite disposal and then take the permeate or
25 filtered water or filtrate from that dewatering process,

1 run it through a further filtrate step.

2 Q. Let me stop you there for just one second. Let me
3 back up a second. While you were preparing a plan do you
4 recall DHEC issuing an emergency regulation?

5 A. Oh, yes. Absolutely.

6 Q. And if you could turn to Exhibit 29 in the binder.

7 MR. BROWN: Your Honor, these have been
8 stipulated as admitted.

9 Q. Does this appear to be the press release that DHEC
10 issued and then after that the actual substance of the
11 emergency reg ---

12 A. Yes.

13 Q. --- involved? And in the document, does it
14 acknowledge that in fact this emergency reg was issued in
15 direct response to the illicit dumping into sewer systems of
16 PCBs that are at issue in this remediation?

17 MR. LINDEMAN: Objection, Your Honor, leading.

18 THE COURT: Don't lead.

19 Q. Does the press release say why they issued this
20 emergency reg?

21 A. Yes, it does.

22 Q. What does it say?

23 A. It was in response to illegal dumping that had been
24 discovered in the upstate, as well as midlands, Columbia
25 area.

1 Q. And the upstate dumping, would that include the
2 dumpings into the ReWa system?

3 A. Sure.

4 Q. Does the emergency reg deal with land application of
5 sludge contaminated by PCBs?

6 A. Yes.

7 Q. And if you'll turn to the text of the regulation
8 itself. Did this regulation impact you and your team in the
9 formulation of your plan?

10 A. Yes, it did.

11 Q. And in terms of -- what does the emergency reg deal
12 with in terms of land application?

13 A. It basically prohibited land application if you had
14 any detectable hits of PCBs in your sludge.

15 Q. And which section would that information be in for
16 the Court to look at?

17 A. I believe it's section 1, first section.

18 Q. Did section 2 also deal with land application
19 issues?

20 A. Yes. It basically gives sampling requirements. It's
21 increased to quarterly instead of the annual sampling.

22 Q. Does section 3 deal with land application?

23 A. It actually deals with the treatment of the permeate
24 from the filtration.

25 Q. And how does that impact the AECOM plan that they

1 were -- that y'all were preparing for remediation of the
2 facility?

3 A. It just further defined the filtering we had to do of
4 the permeate or from the dewatering system in order to
5 discharge it back to the head of the plant.

6 Q. Okay. And does this impose limits on what can be
7 discharged back up to the head of the plant?

8 A. Yes, it did.

9 Q. And the language in section 3 reads that to be in
10 compliance with the returned water must be below levels of
11 quantification.

12 A. Practical quantification.

13 Q. Tell me what quantification means?

14 A. There's -- there are two different detection limits
15 that they'll refer to. There's -- what they're referring
16 to here is a practical quantification limit. There's --
17 and that is the level at which anything -- any hits above
18 that level they are deemed to be representative samples.
19 There's a lower limit, more stringent limit, which is the
20 method detection limit. That's the limit to where -- at
21 which you can actually detect the material that's present,
22 like PCBs are present. But between the method detection
23 limit and the practical quantative limit, any hits at those
24 levels, they are to be flagged as approximate. So
25 basically the test is set there are PCBs there. But the

1 accuracy of that number is in question.

2 Q. And so the level below which accuracy is in question
3 is which level again?

4 A. Below the PQL or practical -- below the PQL and above
5 the MDL is this range that they're saying it's a positive
6 for PCBs, but the accuracy of that number is in question.

7 Q. And the PQL, would that be equivalent to the level of
8 quantification?

9 A. Yes.

10 Q. And after the emergency reg was issued did AECOM
11 ultimately finalize a plan for remediation of the
12 facility?

13 A. Correct. It came out during the period we were
14 working on the plan.

15 Q. All right. Turn to Exhibit 32, which is already in
16 evidence. The first page of this is a letter. Do you see
17 that?

18 A. Uh-huh (affirmative). Yes.

19 Q. What's the date of that letter?

20 A. October 17, 2013.

21 Q. And to whom is it addressed?

22 A. Addressed to both EPA, Ken Feely, and DHEC, Mike
23 Montebello.

24 Q. And I think there was some earlier testimony about
25 this, but did, in fact, DHEC approve this plan?

1 A. Yes.

2 Q. And if you'll look with me at Exhibit 33.

3 MR. BROWN: Which is already in evidence, Your
4 Honor.

5 Q. What is the date of that letter?

6 A. October 22nd, 2013.

7 Q. Look in the RE line, the first line of the RE line,
8 what does it reference?

9 A. Your request of October 17th.

10 Q. And is the request of October 17th Exhibit 32 that we
11 were just looking at?

12 A. Yes.

13 Q. The RE line also notes, Beltpress Filtrate Operation
14 pursuant to Emergency PCB Regulation. Do you see that?

15 A. Yes.

16 Q. Is that the regulation we were just talking about?

17 A. Yes.

18 Q. Within the body of Exhibit 33 there are six bullet --
19 or six numbered items. It says, this letter serves to
20 approve the request subject to the following conditions.
21 And you see the numbered paragraphs. Do you see those?

22 A. Yes.

23 Q. Number 1 appears to deal with sampling; is that
24 fair?

25 A. Correct.

1 Q. Was this condition materially different in any way
2 from the plan that was submitted?

3 A. It's less stringent sampling than we had proposed and
4 ultimately implemented.

5 Q. So the plan actually required more testing than
6 this?

7 A. Yes. We took the filtrate, after further filtering,
8 we put into frac tanks again, and then we held those tanks
9 until we sampled them and found that they were -- the
10 contents were below that .5 and we then -- before we
11 discharged them back to the head end of the plant.

12 Q. And then the second item appears to deal with sample
13 results that come back at certain levels. Explain to us
14 what that second item deals with?

15 A. It's what we just previously discussed about the
16 level between the PQL and the MDL and any results that came
17 back at those numbers, they were to be -- what we called J-
18 flagged, just to highlight those, that those are not
19 accurate numbers, but they are representative of PCBs being
20 present.

21 Q. And does that materially change any provision of the
22 plan?

23 A. No.

24 Q. And number 3 appears to relate to filtrate --
25 monitoring filtrate flow rates; is that correct?

1 A. Correct. That was our measurement of each -- the
2 volume of each tank that we discharged back to the head end
3 of the plant.

4 Q. Does that item materially change anything in the
5 plan?

6 A. No.

7 Q. Number 4 provides that if you have a problem you have
8 to take certain steps. Is that a fair ---

9 A. Yes.

10 Q. And does that seem to relate to this section 3 of the
11 emergency reg that we just talked about?

12 A. That's one problem -- that's a primary problem; yeah.
13 And in our case we monitored each tank and with -- four
14 times we did have frac tanks that were above the limit. We
15 took them back to the head end of the plant, run through
16 again, filtered them again, and they were not a problem.
17 So we discharged nothing above ---

18 Q. And when you say the plant, you're not talking about
19 ReWa's facility; are you?

20 A. No. Yeah, I clarified that back to our ---

21 Q. We'll get into the details of your remediation
22 equipment in a minute. But did that provision materially
23 change anything in the plan?

24 A. No.

25 Q. Number 5, compliance of materials equal to or greater

1 than fifty milligrams per kilogram. What did that
2 require?

3 A. That material we had to transport -- dewater and
4 transport offsite for disposal at -- it turned out to be
5 Emelle, Alabama, but a Subtitle C landfill.

6 Q. And you said Emelle, Alabama?

7 A. Yeah.

8 Q. What is that?

9 A. That's a hazardous waste landfill. And it's actually
10 run by Chem Waste Management/Waste Management.

11 Q. And did item number 5 materially change the plan at
12 all?

13 A. No. That was our plan all along.

14 Q. And number 6 deals with prior disposition of tank 6
15 sludge. Please confirm PCB levels and dispose accordingly.
16 By the time you got involved was there anything in tank 6?

17 A. Not that I'm aware of. We only dealt with 3, 4 and
18 5.

19 Q. So did any of those conditions materially change the
20 plan?

21 A. No.

22 Q. All right. Let's go back to 32 and talk about the
23 plan. Again, the first page of 32 is the letter
24 transmitting it, and thereafter is that of a copy of the
25 plan?

1 A. Yes.

2 Q. And if you look to the second page of the plan is
3 there a table there?

4 A. Yes.

5 Q. And what does that table represent?

6 A. It lists the various structures that we had to deal
7 with and provides the approximate volume of each of those
8 tanks.

9 Q. And each of these structures, where were they
10 located?

11 A. Well, at various locations around the Pelham
12 treatment plant proper.

13 Q. Were they all at the Pelham Road Wastewater Treatment
14 Plant?

15 A. Yes.

16 Q. And were all of these structures tanks or equipment
17 or holding operational equipment that was used by ReWa in
18 its normal operations?

19 A. Yes.

20 Q. And off to the right hand side of that column there
21 is a listing of approximate volume and gallons. Does that
22 represent the holding capacity or does that represent the
23 amount of sludge in them at the time?

24 A. At that time those basically were one in the same.
25 The tanks were all completely full at the time.

1 Q. And if you look over onto page 5 with me, beginning
2 on page 5, does the plan identify the steps to be taken to
3 deal with the contaminated sludge and structures?

4 A. Yes.

5 Q. Essentially tell me what the first step -- are those
6 steps the numbered paragraphs in there?

7 A. Yes.

8 Q. Tell us what the first step is?

9 A. Well, as listed here, the first step will be to
10 remove the material from the tanks and transfer it over to
11 the mixed tank for our sludge dewatering system.

12 Q. Could you test the tanks and digesters and equipment
13 themselves when they're full of contaminated sludge?

14 A. Not that I'm aware of, not a way I'm aware of.

15 Q. So the first step had to be to remove what sludge was
16 in them?

17 A. Correct.

18 Q. And then what's the second step you identify?

19 A. That's the dewatering step where we pump the sludge
20 through the plate and frame filter press, remove a majority
21 of the water, leave the dewatered cake for offsite
22 transport and then have the filtrate ready for the next
23 step.

24 Q. And in terms of that step -- what's the third step?

25 A. That's taking the filtrate water from the plate and

1 frame press and run it through a further filtration system,
2 remove residual solids that have those PCBs associated with
3 them.

4 Q. If there's solids that didn't get removed in 2 is
5 that what's the purpose of 3?

6 A. Yes. It's -- yes, it's a filtration system. It's a
7 three-step filtration system.

8 Q. Would the process for removing solids identified in
9 this plan be more efficient than the normal dewatering
10 process at the ReWa facilities?

11 A. Yeah, I believe so. The plate and frame in itself is
12 probably a more effective filtration system. But once you
13 couple the three stage filtration system on the filtrate
14 that water would be cleaner than what would come off the
15 normal operation.

16 Q. And what would step 4 be?

17 A. That's basically, I mentioned earlier, that we would
18 transfer the treated water to the storage tanks. We would
19 fill those tanks, sample them, ensure that they were in
20 compliance with the .5 microgram per liter limit before we
21 discharged it back to the head end of the main treatment
22 plant.

23 Q. And the .5 micrograms per liter was that the
24 detectable limit we talked about earlier?

25 A. Yes.

1 Q. And so was that done to ensure compliance with the
2 emergency reg?

3 A. Yes.

4 Q. Would that also be necessary to comply with the DHEC
5 operating permits for the Clean Water Act? If you know?

6 A. I cannot say that definitively one way or the other.

7 Q. And then step number 5 says, once biosolids storage
8 tanks and other structures have been emptied of sludge
9 containing PCBs, the interior surfaces will be double
10 pressure washed for decontamination. What was the purpose
11 of that?

12 A. To clean residual materials that are left in the tank
13 so we can put the tanks back into operation.

14 Q. So if there's sludge or PCBs adhering to the walls,
15 that'll clean it?

16 A. Yes.

17 Q. And then step 6, what was it?

18 A. And that's remaining equipment that was used by the
19 vendor to -- he would have to clean all his material and
20 his equipment prior to putting it back into operation.

21 Q. In addition to the actual steps that you would go
22 through to remediate and repair this -- the structures at
23 the facility, does page 7 talk about sort of processes of
24 what's going to happen and pathways of the travel of
25 materials?

1 A. Yes. More a description of how we'll transfer from
2 the various tanks to the sludge dewatering system.

3 Q. And then if you roll over to page 9 with me, the
4 section called tank/equipment cleaning confirmation, what
5 does that provision deal with?

6 A. It gives a description of how to -- how they propose
7 to clean the tanks and then sample them to ensure that they
8 were clean.

9 Q. And so is this a testing methodology to confirm ---

10 A. Yes.

11 Q. --- your plan?

12 A. Yes, sir.

13 Q. And again, this plan that we just walked through was
14 sent to DHEC?

15 A. Correct.

16 Q. And DHEC approved that as an appropriate plan?

17 A. Yes.

18 Q. Did AECOM assist ReWa in evaluating the contractors
19 who bid to perform this work?

20 A. Yes. I did that.

21 Q. And how many bidders were there?

22 A. There were two.

23 Q. And who did ReWa ultimately hire?

24 A. Waste Management.

25 Q. Was Waste Management the lower bid?

1 A. Yes.

2 Q. And explain that to us?

3 A. And I said that with further clarification required.

4 Waste Management and Bionomics, the other bidder, bid on

5 this on a different criteria or different pay rate. Waste

6 Management based theirs on the amount of gallons processed,

7 where Bionomics based theirs on pounds of sludge processed.

8 And we felt that since we had a better handle on the

9 quantity of sludge that was there, that it was a more

10 assured -- we had more assurances that we had an accurate

11 bid from Waste Management than we did from Bionomics. Of

12 course, when we did evaluate it at different percent solids

13 in the tank and as the percent solids in the tank got

14 higher, the Waste Management bid was lower because it was

15 based on gallons, whereas Bionomics bid got more expensive

16 as the sludge concentration went up because theirs was

17 based on pounds of solids.

18 Q. So the volumes of sludge was a known factor; is that

19 fair?

20 A. Yes. We felt more comfortable that we had a better

21 handle on that than the actual percent solids in those

22 phases.

23 Q. And who ultimately was the contractor that was

24 hired?

25 A. It was Waste Management.

1 Q. And in the process of implementing the plan did AECOM
2 assist in overseeing the work done by Waste Management?

3 A. Yes. Scott Snyder was my engineer onsite.

4 Q. And he was part of your team ---

5 A. Yes.

6 Q. --- that you supervised?

7 A. Yes.

8 Q. After the work was done at the Pelham facility did
9 AECOM prepare a report summarizing what was done?

10 A. Yes.

11 Q. And if you'll turn to Exhibit 94 with me.

12 MR. BROWN: And this is stipulated in evidence,
13 Your Honor.

14 THE COURT: All right.

15 Q. Is that the summary report after the Pelham facility
16 was finished?

17 A. Yes.

18 Q. And if you'll look through the document on the third
19 page there is a table of structures. Do you see that?

20 A. Correct.

21 Q. And does that represent the same structures that were
22 planned to be repaired and be able to be put back in
23 service after that work?

24 A. Yes.

25 Q. That were in the plan?

1 A. Yes.

2 Q. So there's no change in the plan in terms of
3 structures that were planned to be dealt with?

4 A. No.

5 Q. And if you'll scroll over to page 7, there's in
6 essence the same 7 to 9. Are those the same six steps that
7 were described in the plan?

8 A. Yes.

9 Q. And in terms of this report regarding those steps, do
10 you report how you complied with the plan?

11 A. Yes.

12 Q. And was there any material deviation from the plan
13 documented?

14 A. Yes, there was one change made at the request of
15 DHEC. When we -- the original plan we were going to ---

16 MR. LINDEMAN: Object to anything that was said
17 by DHEC that would be hearsay.

18 MR. BROWN: Your Honor, he's talking about what
19 he did.

20 THE COURT: Whatever the variation was, I think
21 he's qualified ---

22 MR. BROWN: Thank you.

23 THE COURT: --- to say what was done as a result
24 of any communication with DHEC.

25 A. In the communication with DHEC, they requested we ---

1 Q. Just say what you did in response to their request?

2 A. Okay. We transferred material from the aerobic
3 digester via tanker trucks over to the sludge dewatering
4 system.

5 Q. Okay. And that differed from the plan how?

6 A. The plan we were going to empty the digesters to pump
7 station 1202 and pump it through their existing facility --
8 existing piping over to it.

9 Q. And by the time you dealt with digester number one,
10 where was that in the order of structures that were dealt
11 with?

12 A. It was the last structure we cleaned.

13 Q. And so if you pumped it over to other structures did
14 that present the potential of contaminating structures that
15 had already been cleaned?

16 A. If we had already cleaned them; yes.

17 Q. By using tanker trucks did you avoid that potential?

18 A. Yes.

19 Q. Any other significant mediations from the plan
20 identified in the report?

21 A. No.

22 Q. And after the structures were dealt with in a manner
23 identified in the plan and identified in the report, how
24 did the tests come back?

25 A. The tanks were clean.

1 Q. So those -- no more contamination of the tanks after
2 the plan was implemented?

3 A. Correct.

4 Q. And based upon your experience in wastewater
5 remediation, do you have an opinion as to whether the work
6 done by AECOM in this plan was necessary and reasonable to
7 deal with the contamination and to get these treatment
8 facilities fully operational again?

9 A. Yes, I do.

10 Q. And what is that?

11 A. The plant was -- this portion of the plant was
12 presently inoperable. We came in, we removed the
13 materials, disposed of them properly, we cleaned the tanks,
14 put the tanks -- we did not put the tanks up, but enabled
15 the tanks to be put back into operation and the plant
16 resumed normal operations.

17 Q. Please answer any questions that counsel for the IRF
18 may have for you.

19 THE COURT: Your witness.

20 CROSS EXAMINATION

21 BY MR. LINDEMAN:

22 Q. Mr. Clark, I'd like to first turn your attention to
23 the emergency regulation, and I think that's in front of
24 you, using that notebook of paragraph -- I'm sorry --
25 Plaintiff's Exhibit 32; is that right?

1 MR. BROWN: 29.

2 Q. I'm sorry, 29. You're right, 29. And I believe you
3 indicated that when AECOM devised its remediation plan for
4 Pelham this emergency regulation was already in place; is
5 that right?

6 A. Yeah. It occurred while we were in the process of
7 putting the plan together.

8 Q. Okay. The plan itself is dated in October 2013; is
9 that right?

10 A. Yes.

11 Q. And that's Exhibit 32 that was forwarded with a cover
12 letter dated October 17, 2013; is that right?

13 A. That is correct.

14 Q. Okay. The regulation itself deals with land
15 application; does it not?

16 A. Yes.

17 Q. Okay. There was never an intent as part of the
18 remediation of Pelham for any of the stored biosolids to be
19 land applied; were there?

20 A. After the -- I know I'm not allowed to ask you
21 questions, but you mean after they were sampled and the
22 PCBs were present?

23 Q. I'm talking about, when you started the process there
24 were biosolids in various structures that tested positive
25 for PCBs, some over fifty milligrams per kilogram, some

1 under; correct?

2 A. Yes.

3 Q. All right. It was never AECOM's design intent to
4 land apply any of those biosolids that were already
5 contained within the holding tanks or the digester at
6 Pelham; were they not?

7 A. Well, we could not with the -- any of the holding
8 tanks we could not.

9 Q. Right.

10 A. The digester possibly could have been until the
11 emergency regulations came out.

12 Q. All right. And the reason for that is the holding
13 tanks all had concentrations above the fifty milligram per
14 kilogram level?

15 A. Yes, sir.

16 Q. And so those could never have been land applied, even
17 if this regulation didn't exist?

18 A. Correct.

19 Q. And what you're saying is what was contained within
20 the one digester -- and there was just one digester;
21 correct?

22 A. Yes.

23 Q. And what was in the digester actually tested at less
24 than fifty milligrams per kilogram?

25 A. Yes.

1 Q. So in theory that could have been land applied if
2 this emergency regulation didn't exist?

3 A. Correct.

4 Q. Under normal TSCA and DHEC regulations that
5 preexisted the emergency regulation?

6 A. Yes.

7 Q. Okay. So is that the one change -- well, was there
8 ever consideration to taking the biosolids that were in
9 that digester and land applying them?

10 A. We received a request from ReWa to include the
11 digester in with the other tanks.

12 Q. That was done during the process of cleaning -- the
13 remediation process; correct?

14 A. No. That was early in our involvement in the job.
15 The digester was added to the list of tanks that we were to
16 clean.

17 Q. Okay. So initially it was not; is that what you're
18 saying?

19 A. The first communication we had from ReWa did not
20 include the digester. That was added within weeks of the -
21 - of us getting involved.

22 Q. Okay. You also mentioned that the emergency
23 regulation included a PQL of .5 micrograms per liter;
24 correct?

25 A. Correct.

1 Q. And that is the threshold amount of PCBs that were
2 allowed to exist in the aqueous phase; correct?

3 A. That was returned to the head end of the plant.

4 Q. And that was the aqueous phase?

5 A. Yes.

6 Q. The liquid phase?

7 A. Yes.

8 Q. All right. And that was already an existing law by
9 DHEC regulations, that .5 micrograms per liter; correct?

10 A. I don't believe so. Not to my knowledge.

11 Q. So what was the threshold prior to this emergency
12 regulation for DHEC's -- what was DHEC's threshold prior to
13 this emergency regulation?

14 A. They did not have one.

15 Q. Your testimony is they did not have one?

16 A. There is the clean water requirement that has
17 existing, as I understand, it was explained to me, is that
18 there was three parts per billion is the numerical limit
19 that any discharge cannot be made in the sewer system above
20 three parts per billion.

21 Q. And by three parts per billion, you're actually
22 referring to three micrograms per liter?

23 A. Yes. Yes, sir.

24 Q. All right. Those terms are actually -- those
25 measurements are actually interchangeable; aren't they?

1 A. Yes.

2 Q. Even though technically that's not correct? Don't
3 you agree, technically you should use micrograms per liter
4 -- I mean the science, it would be proper under the
5 science; correct?

6 A. Yes.

7 Q. All right. So what you are telling the Court, as I
8 understand and let me make sure I've got it right, that
9 under existing regulations prior to this emergency
10 regulation, the threshold number was three micrograms per
11 liter?

12 A. As I -- as it was explained to me; yes.

13 Q. Okay. And your understanding is DHEC did not have
14 any such threshold. That was actually pursuant to the
15 Clean Water Act?

16 A. Correct. As it was explained to me; yes.

17 Q. And so you did not have any knowledge that DHEC
18 actually had a more stringent threshold prior to the
19 emergency regulation?

20 A. Not that I'm aware of. But I must caution, I was not
21 the regulatory expert in our team.

22 Q. Okay. Did you ever explore what existing DHEC
23 regulations were prior to the emergency regulation?

24 A. I did not.

25 Q. Let me get you to turn to Exhibit 32, page 6 of that

1 exhibit, which is the remediation plan that you and your
2 team put together; correct?

3 A. Correct.

4 Q. I want you to look at the second to last paragraph.

5 THE COURT: Mr. Lindeman, I'm sorry, which page?

6 MR. LINDEMAN: It's page 6 of Exhibit 32.

7 THE COURT: All right. Thank you.

8 Q. And starting at the word additionally, will you read
9 that paragraph -- the remainder of that paragraph into the
10 record?

11 A. Yes. Additionally, and during full scale dewatering
12 of other sludges at the Pelham WRRF where PCB
13 concentrations are less than fifty milligrams per kilogram,
14 PCB concentrations in the filtrate have been below .05
15 micrograms per liter with no treatment of the filtrate.

16 Q. And by full scale dewatering, that means that there
17 was actually in process dewatering that was done of
18 biosolids that were contaminated by PCBs; is that correct?

19 A. That is correct.

20 Q. And for any PCBs that had been dewatered that were
21 less than the threshold of fifty milligrams per kilogram,
22 the filtrate was always below five micrograms per liter?

23 A. .5.

24 Q. .5, I'm sorry.

25 A. Yes.

1 Q. Okay. Didn't require any additional treatment?

2 A. That is correct.

3 Q. And that's what you're trying to convey here;
4 correct?

5 A. Correct.

6 Q. And the next sentence actually explains why; does it
7 not?

8 A. Yes.

9 Q. And can you read that into the record?

10 A. The PCBs remain associated with any solids removed by
11 the sludge dewatering process, and are not detected in the
12 filtrate.

13 Q. So what I gather from this is that during the full
14 scale dewatering that had been done prior to your plan
15 being finalized, it was determined that for any PCB
16 contaminations of less than fifty milligrams per kilogram,
17 the filtrate would be less than the threshold sought by
18 DHEC in the emergency regulation?

19 A. Right. That's what was reported to us. We did not
20 do the sampling or testing.

21 Q. Okay. But that's obviously sampling you had
22 available to you that you drew this conclusion?

23 A. Yes.

24 Q. Would you agree with me that PCBs in the industry are
25 considered a pollutant?

1 A. Yes.

2 Q. It is a toxic substance?

3 A. Yes.

4 Q. All right. That's why it falls under the Toxic
5 Substance Control Act at certain levels; is that correct?

6 A. Yes.

7 Q. And the threshold level that we've been talking about
8 is fifty milligrams per kilogram; correct?

9 A. Correct.

10 Q. All right. Before I talk a little bit more about
11 Pelham, I just want to also make certain the record is
12 clear as far as AECOM's involvement. AECOM was hired
13 solely to provide environmental engineering and consulting
14 services for the Pelham facility; correct?

15 A. Correct.

16 Q. You all weren't involved at all in the remediations
17 of Mauldin Road or at Lower Reedy?

18 A. No.

19 Q. Now there's going to be put into evidence later, I
20 think it was actually stipulated to and may already be in
21 evidence, a remediation plan for those two facilities. Did
22 AECOM have any involvement at all in preparing that
23 document?

24 A. Not that I'm aware of. I don't think so.

25 Q. Did ReWa use a different engineering firm for those

1 facilities?

2 A. I don't know.

3 Q. But is it fair to say that your opinions here today
4 are limited to the Pelham facility and the remediation of
5 that facility?

6 A. Yes.

7 Q. Okay. Serving as an expert on this case, you haven't
8 taken a look at what was done at Mauldin Road or Lower
9 Reedy; have you?

10 A. I have not.

11 Q. Now, how many different structures were there at
12 Pelham that were contaminated with PCBs over fifty
13 milligrams per kilogram?

14 A. Five.

15 Q. And those were which ones?

16 A. The three biosolids holding tanks 3, 4 and 5. Wet
17 well 1202, and influent pump stations number 1 and number
18 2. That's why I hesitated whether I counted that as one
19 structure or two.

20 Q. The influent pump stations?

21 A. Yes, sir.

22 Q. That's basically one structure with two segregated
23 sides?

24 A. Yes.

25 Q. So there was also a digester 1. Did it have any PCB

1 contamination?

2 A. Yes, it did.

3 Q. But it didn't exceed fifty milligrams per kilogram?

4 A. Correct.

5 Q. There also was a biosolids holding tank number 6.

6 Did it have any PCB contamination?

7 A. I'm not knowledgeable of 6. We didn't deal with it.

8 Q. Okay. How about biosolids overflow tanks 1 and 2,
9 did you have any dealings with those?

10 A. No, we did not.

11 Q. So as far as you know -- so those weren't part of the
12 remediation then?

13 A. Correct.

14 Q. So it's safe to assume that those didn't have any PCB
15 contamination that needed to be remediated?

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

17 Q. All right. Well, let me ask you about the structures
18 you do know about. The biosolids holding tanks 3, 4 and 5,
19 were those structures made of concrete?

20 A. Yes.

21 Q. How about digester 1?

22 A. Yes.

23 Q. How about wet well 1202?

24 A. Yes.

25 Q. And the two influent pump stations, were they made of

1 concrete?

2 A. Yes.

3 Q. So all those structures were made of concrete; is
4 that correct?

5 A. Correct.

6 Q. Now, the PCB contamination that exceeded fifty
7 milligrams per kilogram, that couldn't be disposed of in a
8 local landfill; correct?

9 A. Correct.

10 Q. So that had to be processed in order to go to the
11 facility in Emelle, Alabama; is that right?

12 A. Yes.

13 Q. But the digester number 1, that could be sent to a
14 local landfill?

15 A. Yes.

16 Q. Is that how that -- those biosolids were ultimately
17 processed and disposed of?

18 A. Yes.

19 Q. There's also a digester number 2 at that facility,
20 but my understanding is that digester was never in
21 operation and therefore was not contaminated; is that
22 correct?

23 A. I'm not sure that I believe it was in operation, but
24 it was not contaminated.

25 Q. Okay. Let me ask you about sampling or testing that

1 was done. It's my understanding that no sampling or
2 testing was done of any of these concrete structures after
3 the biosolids were removed but before any type of cleaning
4 was done of those structures; is that correct?

5 A. That's correct.

6 Q. Now, pretreatment sampling or testing of those
7 structures could have been done; could it not?

8 A. After we cleaned them, the first cleaning we could
9 have tested them.

10 Q. Well, I'm asking after -- the first step was removing
11 the biosolids from those structures; correct?

12 A. Correct.

13 Q. And at that point what you're left with is the empty
14 structure; correct?

15 A. Correct.

16 Q. The next step was pressure washing those structures;
17 ---

18 A. Correct.

19 Q. --- is that right?

20 A. Yes.

21 Q. That was the method of cleaning them?

22 A. Yes.

23 Q. And it was just a double pressure washing with water;
24 is that correct?

25 A. I'm not sure. I wasn't involved in that. There may

1 have been a solvent clean in there. I'm not sure.

2 Q. In looking at your plan did that require -- did it
3 mention any type of solvent?

4 A. No, it did not.

5 Q. Okay. It just talked about pressure washing with
6 water; correct? I'm looking at page 7 of ---

7 A. Yeah, I'm looking also.

8 Q. Paragraph 5 talks about washing them after the fact;
9 correct?

10 A. Yes. Original plans were to just pressure wash.

11 Q. Okay. And those plans never changed; did they?

12 A. I cannot confirm that. I was off the project by the
13 time they got to the cleaning.

14 Q. How were you off the project when it came to the
15 cleaning? Weren't you still on the project when the final
16 report was done?

17 A. No. I was -- we were on another project. I was only
18 remotely involved.

19 Q. So you didn't have any involvement whatsoever in
20 preparing the final report, which is Exhibit 33?

21 A. Only on a review.

22 Q. I'm sorry; Exhibit 94?

23 A. Only a review of the final report.

24 Q. So you were still employed by AECOM?

25 A. Oh, yes.

1 Q. All right. Well, going back to my original question
2 about testing after the biosolids were removed from the
3 holding tanks or the digester, there could have been
4 testing that was done of the walls at that point?

5 A. Yes.

6 Q. But none was done?

7 A. No.

8 Q. Okay. So prior to cleaning, we don't know as we sit
9 here today whether the concrete had any PCB contamination;
10 is that correct?

11 A. Yes, that is correct.

12 Q. And the testing that's done is simply called wipe
13 testing where wipes are put on the surface and then those
14 are tested; correct?

15 A. Correct.

16 Q. Now, was there testing done of the structures after
17 the pressure washing was completed?

18 A. Yes. To my knowledge. I was, like I said, not
19 involved.

20 Q. Actually looking at the plan on page 7, paragraph 5,
21 it says all wash water liquids will be processed -- I'm
22 sorry. Is there something here that states -- I thought
23 there was -- that required the surfaces of the structures
24 to be tested after the pressure washing?

25 A. On page 9 of the plan it describes -- I saw it

1 somewhere.

2 Q. Read what you're referring to there, please.

3 A. It is anticipated that one selected tank will
4 initially be cleaned and sampled in accordance with
5 procedures outlined above. In the event that sampling
6 indicates that PCBs are less than one part per million, the
7 same procedures will be used for the remainder of the
8 tanks. If the sampling indicates that PCBs are still
9 present in excess of 1 pbm, additional washing of the tank,
10 possibly with the use of a cleaning agent, will be
11 performed at a tank resample. Once that tank has been
12 found to be clean, similar procedures will be used for the
13 remainder of the tank structures.

14 Q. And up at the top of that page it says, after the
15 tanks have been cleaned wipe samples will be taken to
16 confirm that no PCBs above the targeted level of one part
17 per million remain on the surface of the tank structures;
18 is that correct?

19 A. Yes.

20 Q. All right. Was that part of the plan followed? Was
21 there sampling done of the tanks after the pressure
22 washing?

23 A. I was not knowledgeable of that sampling being done.
24 I can only -- yes, I can assume that was done. That's how
25 they ---

1 Q. Have you ever seen those test results?

2 A. No, I have not.

3 Q. Were those test results included in the final summary
4 report?

5 A. I'm not sure. I don't know. I'd have to look.

6 Q. You don't know?

7 A. I don't know off the top of my head; no.

8 Q. Is that something that would be typically put in the
9 final report?

10 A. I would think that would go in the final report.

11 Q. Okay. I'll represent to you that I couldn't find it
12 there. I'd welcome you to prove me wrong if that's
13 actually in the report?

14 A. No, I couldn't find it either.

15 Q. Oh, you couldn't find it either?

16 A. I was looking for it in going through all the
17 samples.

18 Q. Okay. Did you actually look at the sampling reports
19 that were done after the fact to see if sampling was
20 actually done?

21 A. I did not.

22 Q. Now, we've put into evidence here today a summary,
23 it's Exhibit Number 91. I think it's in the ...

24 MR. LINDEMAN: If I can approach the witness,
25 Your Honor.

1 Q. I think it's in the notebook for Mr. Jones, which may
2 be gone now. I'll be happy to ---

3 THE COURT: I've got one.

4 MR. BROWN: In the box under the rail there's a
5 full set of every exhibit.

6 MR. DEVLIN: Okay. You've got a copy of it.

7 Q. Let me show you what's marked as Exhibit 91,
8 Plaintiff's Exhibit 91, and let me refer you to the second
9 page of that exhibit. Based upon the headings, does that
10 look like those are test results for the Pelham plant?

11 A. The first page says Pelham collection system.

12 Q. So you're agreeing with me that that reflects testing
13 at Pelham?

14 A. The first page says Pelham. I can assume the second
15 page refers to Pelham.

16 Q. Okay. Do you know when the holding tanks and the
17 digester and the wells, when those were actually cleaned?

18 A. It would have been January/February time frame of
19 2014.

20 Q. The report itself says that all of the work except
21 the digester number 1 was completed by -- I think it was --
22 give me one second -- completed by January 30, 2014; is
23 that correct?

24 A. Yes.

25 Q. Okay. Do you see -- and the report says the work

1 actually started November 14, 2013; correct?

2 A. I'm sorry, excuse me, I didn't -- can you repeat
3 that?

4 Q. I'm reading from your summary report and it says all
5 of the work except the digester number 1 was started on
6 November 14, 2013 and completed on January 30, 2014. I'm
7 looking at the second line of page 11.

8 A. Oh, okay.

9 Q. Does that sound right?

10 A. That sounds right.

11 Q. Do you see any testing that was done of the holding
12 tanks between that time frame that's reflected on this
13 summary exhibit? Holding tanks 3, 4 and 5?

14 A. I don't -- no, I -- I don't know what this is
15 sampling -- this sampling even consists of.

16 Q. You don't see any records of any sampling that was
17 done of those three structures during that time frame;
18 correct?

19 A. The best I could see.

20 Q. All right. In fact, there are no further sample
21 dates even beyond that date all the way to the bottom of
22 the page, which runs through December of 2014, for those
23 three structures. Do you agree with me?

24 A. Yeah. I believe these are liquid samples, samples of
25 sludge, would be my interpretation of this. But I'm not

1 aware of this. This is not our sampling.

2 Q. Well, let me ask you this. Are you aware of any test
3 results that would reflect that testing was done of the
4 structures themselves per your plan?

5 A. I do not have it in our plan; no.

6 Q. Okay. And it's not in your summary report?

7 A. No. I meant the summary report, not the plan.

8 Q. Core sampling was never done in any of those
9 structures; was it?

10 A. No.

11 Q. Let me ask you a little bit about the pressure
12 washing itself. The pressure washing was actually done by
13 Waste Management as part of its contract; correct?

14 A. Yes. In fact they hired a subcontractor, as I
15 understand it.

16 Q. You testified at your deposition that Waste
17 Management did that work themselves; did you not?

18 A. At the time I was under the impression of that, but
19 I've learned later that they subcontracted that work.

20 Q. And who is the subcontractor?

21 A. I do not know.

22 Q. Waste Management didn't actually separately bill the
23 cleaning of those structures as a line item in their
24 billings; did they?

25 A. I'm not aware of what the amount of billings were.

1 Q. Now, at the time of your deposition, you were aware,
2 were you not?

3 A. I was under the impression that they were billed as
4 part of the gallons treated.

5 Q. All right. So you would agree with me you testified
6 there wasn't a separate line item for the pressure washing
7 by Waste Management?

8 A. It was not in their bid, is what I was eluding to.

9 Q. And you indicated that it would be a minimal expense;
10 did you not?

11 A. That's my impression; yes.

12 Q. And that was your testimony in your deposition;
13 correct?

14 A. Yes. Yes.

15 Q. And of course you're familiar with Waste Management's
16 bid because you're the one who reviewed it and recommended
17 it; correct?

18 A. Yes.

19 Q. And there was not actually a separate charge for
20 running any type of wash water from the pressure washing
21 through the filtrate system; correct?

22 A. Correct.

23 Q. You indicate in your deposition that they did that
24 gratis; right?

25 A. I'm not one hundred percent sure that -- my

1 interpretation of what they do with that water is it would
2 not go through the flow meter that would be recorded.

3 Q. Did any of that wash water even meet the .5
4 micrograms per liter requirement to go through the
5 filtration system?

6 A. I don't know.

7 Q. Are you aware of any testing results that would show
8 that?

9 A. No.

10 Q. But you agree with me, at least based on your
11 understanding, is that Waste Management did not charge
12 anything extra for treating of the wastewater for the
13 pressure washing?

14 A. That is my understanding. I may be mistaken.

15 Q. Now, I think you testified earlier that the digester
16 number 1 was actually the last structure that was cleaned
17 out; is that correct?

18 A. Correct.

19 Q. And the sludge that was contained in digester number
20 1 had actually had a lot of the liquids previously drained
21 from them; correct?

22 A. Correct.

23 Q. So in order to process the biosolids in digester
24 number 1, Waste Management had to add water to it;
25 correct?

1 A. In order to pump it out; correct.

2 Q. Right. And so they took water that wasn't
3 contaminated and added it to the sludge, thereby
4 contaminating the water; correct?

5 A. Correct.

6 Q. And do you know why the water had been removed from
7 the sludge earlier?

8 A. No, I don't.

9 Q. Was that done with AECOM's knowledge or
10 recommendation?

11 A. No.

12 Q. So basically by taking the water out of digester
13 number 1, it created the extra step that actually
14 contaminated additional water that had to be added to that
15 digester?

16 A. I don't know if the water was taken out or the
17 material dried. I don't have any history of that.

18 Q. But your testimony previously was that water had to
19 be added to digester number 1 in order to pump the
20 biosolids out?

21 A. That's still my same testimony; yes.

22 Q. Okay. How much water had to be added?

23 A. I don't have that number handy.

24 Q. The final report shows that there was a total of
25 three hundred and eighteen thousand gallons that was pulled

1 from digester number 1. Is that correct?

2 A. I don't readily know that.

3 Q. I'm happy for you to look -- it's your report. I'm
4 happy for you to look at it and make sure those numbers I'm
5 citing to you are correct. If you want to look at page 12
6 of the final report, which is Exhibit 94?

7 A. Okay. Yeah, I agree.

8 Q. The third paragraph down, or second full paragraph
9 has that number; does it not?

10 A. Yes.

11 Q. And it goes on to say, which included water which was
12 used to dilute the sludge from about fifteen percent solids
13 so that it could be better removed from the tank; correct?

14 A. Correct.

15 Q. But it doesn't identify how much water was actually
16 added to create that three hundred and eighteen thousand
17 gallon number?

18 A. Correct.

19 Q. Do you know where we can find that number?

20 A. The answer to that is we can take the original volume
21 that was in the tank, then how much we transported out, and
22 that additional amount would be water that was added.

23 However, I caution with that because our quantity of sludge
24 that was in that tank was very hard to estimate. It was
25 very unlevel. They couldn't get in and measure around the

1 entire tank, so it was a fairly rough estimate of what
2 volume was originally in the tank. But that would be the
3 way to do it.

4 Q. You haven't performed that calculation; have you?

5 A. No.

6 Q. Okay. On average -- would you agree with me on
7 average the solids that were contained in all of the
8 structures at Pelham was 3.8 percent solids?

9 A. In that neighborhood; yes.

10 Q. Okay. And that translates -- that means it was 96.2
11 percent liquid; correct?

12 A. Correct.

13 Q. Now originally the digester number 1 remediation was
14 not part of Waste Management's contract; was it?

15 A. No. I believe it was in the whole time.

16 Q. You believe it was in the whole time?

17 A. Yes.

18 Q. Remediation of digester number 1, however, didn't
19 fall under TSCA regulations; correct?

20 A. Correct.

21 Q. What is a lake tank?

22 A. I think Joel described it probably better than I
23 could, but it's a temporary tank constructed of fiberglass
24 panels and -- that's used for temporary holding.

25 Q. Was there a lake tank that was actually rented and