

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001773

RECEIVED

JUL 24 2017

SC Court of Appeals

West/Hobby, LLC,..... Respondent,

v.

County of Newberry, Appellant.

RECORD ON APPEAL
(Volume III of III)

Patrick J. Frawley
DAVIS FRAWLEY, LLC
Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: 803-359-2512
pat@oldcourthouse.com
ATTORNEYS FOR APPELLANT

James L. Bruner
jbruner@brunerpowell.com
Benjamin C. Bruner
bbruner@brunerpowell.com
BRUNER, POWELL, WALL & MULLINS, LLC
Post Office Box 61110
Columbia, South Carolina 29260
Telephone: 803-252-7693
ATTORNEYS FOR RESPONDENT

Lexington, South Carolina
July 20, 2017

INDEX

Volume I

	PAGE
<u>INDEX</u>	i
<u>ORDERS</u>	1
Order Denying Rule 59(e) Motion.....	1
Findings of Fact and Conclusions of Law.....	2
Order (Form 4) Denying Motions for Summary Judgment.....	21
Consent Order Restoring Case to Roster (SCRCP 40(j)).....	23
Consent Order Striking Case from Roster (SCRCP 40(j))	25
<u>PLEADINGS</u>	27
Complaint.....	27
Answer.....	43
Amended Complaint.....	51
Answer to Amended Complaint.....	68
<u>TRANSCRIPT OF TRIAL, December 14-15, 2016</u>	76
Opening Statement by Mr. Bruner.....	76
Billye West	
Direct Examination.....	88
Cross Examination.....	101
Re-Direct Examination.....	122
Court Question.....	126
Re-Cross Examination.....	128

David Minick	
Direct Examination.....	129
Cross Examination.....	144
Re-Direct Examination.....	149
Re-Cross Examination.....	155
Re-Direct Examination.....	156
Court Question.....	157
Charles Clymer	
Direct Examination	158
Cross Examination.....	206
Re-Direct Examination.....	211
Re-Cross Examination.....	213
John Abernathy	
Direct Examination.....	214
Cross Examination.....	218
Wayne Adams	
Direct Examination.....	235
Cross Examination.....	238
Michael Pisano	
Direct Examination.....	240
Steve Lamb	
Direct Examination.....	247
Cross Examination.....	250
Re-Direct Examination.....	274
Misty West	
Direct Examination.....	275
Cross Examination.....	282
Re-Direct Examination.....	285
Re-Cross Examination.....	286
Nina Marshtein	
Cross Examination.....	287
<u>EXHIBITS</u>	299
Plaintiff's Exhibit 1.....	299

Plaintiff's Exhibit 2.....	300
Plaintiff's Exhibit 3.....	303
Plaintiff's Exhibit 4.....	313
Plaintiff's Exhibit 5.....	341
Plaintiff's Exhibit 6.....	343
Plaintiff's Exhibit 7.....	363
Plaintiff's Exhibit 8.....	365
Plaintiff's Exhibit 9.....	367
Plaintiff's Exhibit 10.....	369
Plaintiff's Exhibit 11.....	371
Plaintiff's Exhibit 12.....	383
Plaintiff's Exhibit 13.....	392
Plaintiff's Exhibit 14.....	431
Plaintiff's Exhibit 15.....	432
Plaintiff's Exhibit 16.....	466
Index to Plaintiff's Exhibit 16.....	466
Plaintiff's Exhibit 16A.....	468

Volume II

	PAGE
<u>INDEX</u>	i
Plaintiff's Exhibit 16B.....	479
Plaintiff's Exhibit 16C.....	486
Plaintiff's Exhibit 16D.....	487

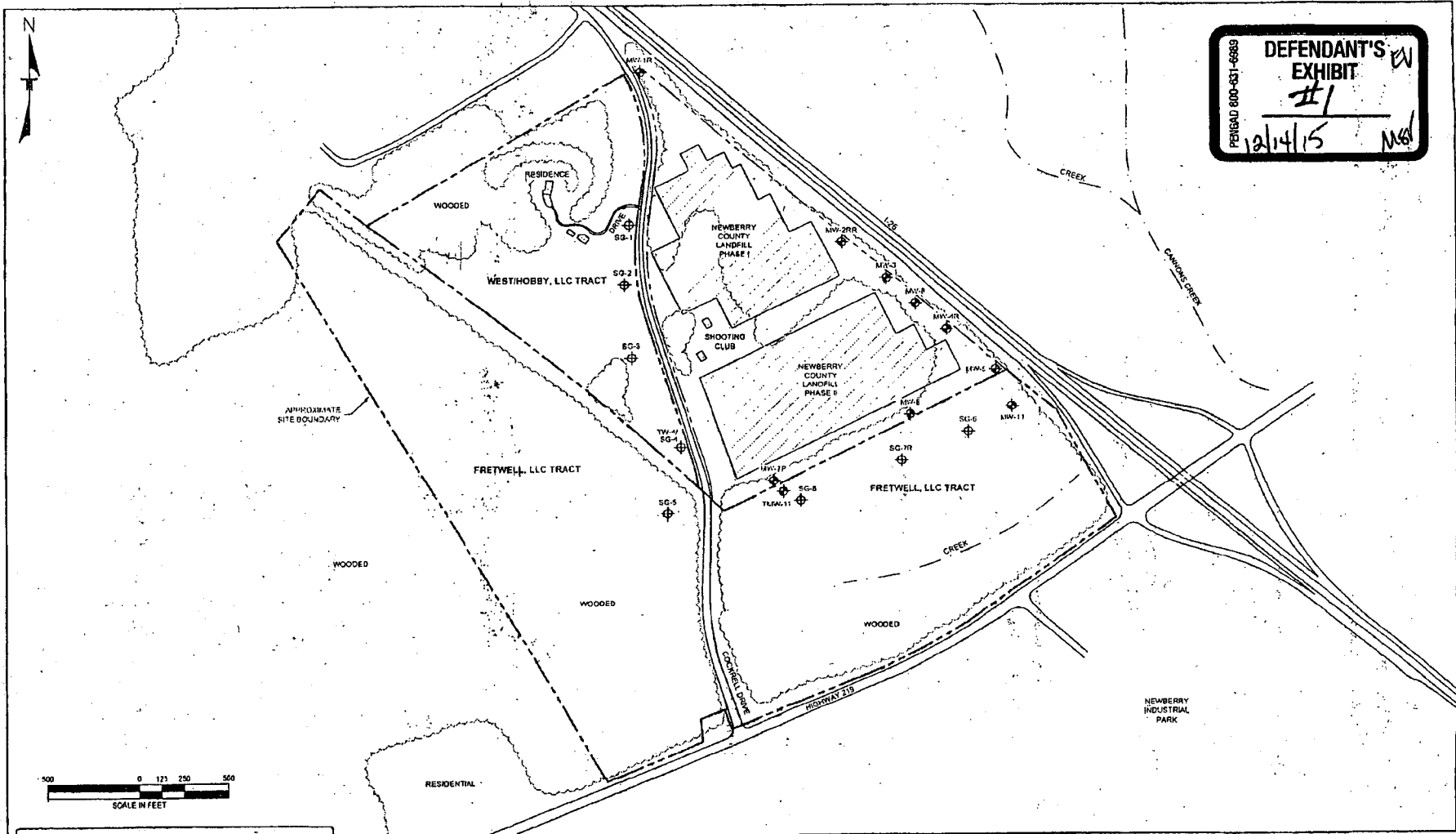
Plaintiff's Exhibit 16E.....	500
Plaintiff's Exhibit 16F.....	514
Plaintiff's Exhibit 16G.....	530
Plaintiff's Exhibit 16H.....	545
Plaintiff's Exhibit 16L.....	561
Plaintiff's Exhibit 16J.....	580
Plaintiff's Exhibit 16K.....	594
Plaintiff's Exhibit 16L.....	612
Plaintiff's Exhibit 16M.....	644
Plaintiff's Exhibit 16N.....	676
Plaintiff's Exhibit 16O.....	705
Plaintiff's Exhibit 16P.....	726
Plaintiff's Exhibit 16Q.....	750
Plaintiff's Exhibit 16R.....	775
Plaintiff's Exhibit 16S.....	808
Plaintiff's Exhibit 16T.....	842
Plaintiff's Exhibit 16U.....	878
Plaintiff's Exhibit 16V.....	896
Plaintiff's Exhibit 16W.....	913
Plaintiff's Exhibit 16X.....	928
Plaintiff's Exhibit 16Y.....	940

Volume III

	PAGE
<u>INDEX</u>	i
Defendant's Exhibit 1.....	958
Defendant's Exhibit 4.....	959
Frawley Letter to Judge with copy Rule 59(e) Motion.....	982

Newberry County's Notice of Motion and Motion to Alter or Amend Pursuant to SCRCP 59(e).....	983
Rule 59(e) Motion Hearing Transcript, May 5, 2016.....	990
<u>PRE-TRIAL MOTIONS</u>	1036
Newberry County Re-Filing Motion for Summary Judgment, August 13, 2015.....	1036
West/Hobby, LLC Motion for Summary Judgment.....	1040
<u>CERTIFICATE OF COUNSEL</u>	1043

DEFENDANT'S EXHIBIT #1
 12/14/15 MGL



EXPLANATION
 ⊕ GROUND WATER / SOIL GAS SAMPLE LOCATION (FEBRUARY 2014)
 ⊕ EXISTING MONITORING WELL

DIAGRAM IS FOR GENERAL LOCATION ONLY, AND IS NOT INTENDED FOR CONSTRUCTION PURPOSES

Project No: 73137006
 Scale: AS SHOWN
 Drawn By: PTK
 Checked By: CBB
 Date: FEBRUARY 2015

Terracon
 Consulting Engineers and Scientists
 411 OAKWOOD ROAD
 COLUMBIA, SC 29919
 TEL: (803) 714-4000 FAX: (803) 714-4000

SITE PLAT WITH SOIL GAS SAMPLE LOCATIONS
 FRETWELL, LLC, AND WESTIHOBBY, LLC
 NEWBERRY, SOUTH CAROLINA

Fig No.
 2

0958

SCS ENGINEERS



**Operation, Maintenance, and
Monitoring Plan**

**Newberry County Landfill
Soil Gas Extraction System**

Presented to:

Newberry County

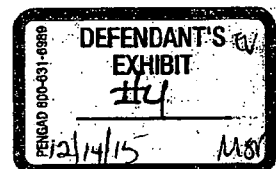
1309 College Street
Newberry, South Carolina 29108

Presented by:

SCS ENGINEERS
2520 Whitehall Park Drive, Suite 450
Charlotte, NC 28273
(704) 504-3107

May 2015
File No. 02212302.02

Offices Nationwide
www.scsengineers.com



SCS ENGINEERS

File No. 02221302.02
May 29, 2015
Revised: June 22, 2015

John Abernathy
South Carolina Department of Health and Environmental
Solid Waste Groundwater Section
Bureau of Land & Waste Management
2600 Bull Street
Columbia, SC 29201

Subject: Operation, Maintenance, and Monitoring Plan - Soil Gas Extraction System
Newberry County Class 3 Landfill
SW Permit #081001-1102
Newberry, South Carolina

Dear Mr. Abernathy:

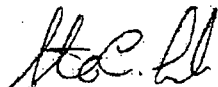
On behalf of Newberry County, SCS Engineers submits the Operation, Maintenance, and Monitoring Plan (OM&M Plan) for the Soil Gas Extraction System for the Newberry County Class 3 Landfill (SW Permit DWP-117). The OM&M Plan includes the Record Drawings for the completed Soil Gas Extraction System as well as the general guidelines for the operation, maintenance and monitoring activities for the system. This OM&M Plan was prepared to address comment #3 in the Corrective Measures Study & Selected Remedy approval letter dated July 8, 2014.

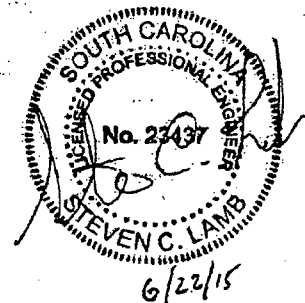
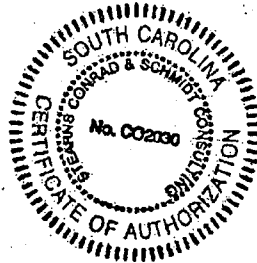
CERTIFICATION

I, Steven C. Lamb, hereby certify the Soil Gas Extraction System for the Newberry County Landfill was construction in general accordance to the "Construction Drawings, Soil Gas Remedial Design" prepared by SCS Engineers dated November 11, 2014. Furthermore, I certify the system was designed in general accordance with the "Corrective Measures Study (CMS) & Selected Remedy" prepared by SCS Engineers dated June 17, 2014.

If you have any questions, please contact me at 704-504-3107.

Sincerely,


Steven C. Lamb, PE
Vice President
SCS ENGINEERS



cc: Mike Pisano, Newberry County, Public Works Director

Enclosure

M:\PROJECT FILES\02212302.02 - newberry soil gas design\OM&M Plan\dhcc omm plan transmittal ltr_revised.docx

**Operation, Maintenance, and Monitoring Plan
Soil Gas Extraction System
Closed Newberry County Landfill**

Presented To:

Newberry County
1309 College Street
Newberry, South Carolina 29108

Presented From:

SCS ENGINEERS
2520 Whitehall Park Drive, Suite 450
Charlotte, NC 28273
(704) 504-3107

May 2015
File No. 02212302.02

Table of Contents

Section	Page
PREFACE	iii
1.0 INTRODUCTION.....	1
1.1 Background	1
1.2 Purpose	2
1.3 Soil Gas Extraction System Overview	2
1.4 General Safety Precautions.....	3
2.0 MAINTENANCE REQUIREMENTS.....	8
2.1 Blower Enclosure.....	8
2.2 Electrical Information.....	8
2.3 Air Compressor.....	8
2.4 Vapor Phase Carbon Canister	8
2.5 Pneumatic Pump and Storage Tank	9
3.0 MONITORING REQUIREMENTS	11
3.1 System Start Up Monitoring.....	11
3.2 Regular System Monitoring	11
3.3 Perimeter Probes	12
4.0 SYSTEM OPERATIONS.....	15
4.1 Normal Operations and System Balancing	15
4.2 System Adjustments Guidelines	15
5.0 REPORTING AND SYSTEM CLOSE OUT.....	17
5.1 Reporting Requirements.....	17
5.2 System Close-Out Procedures.....	17

List of Exhibits

No.	Page
1 Maintenance Checklist Form.....	10
2 System Monitoring Forms.....	13

List of Figures

No.	Page
1 Site Vicinity Plan.....	4
2 Existing Conditions Site Plan.....	5
3 Soil Gas System Site Plan.....	7

List of Tables

No.	Page
T Summary of Equipment.....	6

Appendices

- A Record Drawings of Soil Gas Extraction System
- B Photographs and Well Logs
- C Blower Manual
- D Electrical Information
- E Air Compressor Manual
- F Vapor Phase Carbon Canister Manual
- G Pneumatic Pump Manual
- H Well Head Manual
- I Storage Tank Information
- J Initial Monitoring Round Data

PREFACE

This Operation, Maintenance, and Monitoring (OM&M) Plan has been prepared for Newberry County specifically for the Soil Gas Extraction System at the closed Newberry County Class 3 Landfill in Newberry, South Carolina. The OM&M plan provides a description of the system facilities, procedures for operating and monitoring the system, troubleshooting procedures, and maintenance requirements.

Record Drawings, operating instructions and manufacturer's information for the primary equipment are contained in the Appendices of the Plan.

This OM&M Plan has been written as a technical guide for Newberry County and the system operator, who should become familiar with and follow the information contained in the Plan, including the monitoring procedures, equipment maintenance procedures, and instructions for how and when to make operational adjustments. Additionally, Newberry County and the system operator should remain alert to activities and changing conditions at the landfill that could decrease the effectiveness of the soil gas extraction system.

1.0 INTRODUCTION

This Operation, Maintenance & Monitoring Plan (OM&M Plan) was prepared on the behalf of Newberry County for the Newberry County Class 3 Landfill (Solid Waste Permit DWP-117). This OM&M Plan was prepared to address the operation, maintenance, and monitoring requirements for the Soil Gas Extraction System located at the closed Landfill. The Landfill is located at 423 Cockrell Road in Newberry, South Carolina approximately 2 miles east of the City of Newberry (See **Figure 1**).

Due to groundwater contamination (select volatile organic compounds [VOCs] in select wells at concentrations above groundwater protection standards) and methane gas concentrations exceeding the regulatory limit in perimeter monitoring probes, a Corrective Measures Study was prepared and submitted to SCDHEC in June 2014 pursuant to 61-107-19, Part V, Subpart E 258.56. In addition, the Corrective Measures Study included the selected remedy pursuant to 61-107-19, Part V, Subpart E 258.57. SCDHEC approved the Corrective Measures Study and Selected Remedy - a Soil Gas Extraction System.

1.1 BACKGROUND

The Newberry County Landfill is an unlined landfill that accepted MSW from about 1972 until December 1993. The 56.7-acre site includes two disposal areas - Phase I, which is approximately 27.2 acres, is located in the northern portion of the site, while Phase II, about 29.5 acres, is located in the southern portion of the site. As is typical of landfills that operated at that time, both disposal areas are unlined. According to historical documents, both phases were constructed and operated as "trench-style" landfills. The design, construction, and operation of the landfill pre-dated EPA's Subtitle D regulations for MSW landfills, which became effective October 9, 1993.

The Phase II disposal area was closed with a two-foot engineered soil cap in November 1994. In accordance with South Carolina solid waste regulations and the Landfill's Closure and Post Closure Plan, the Landfill has perimeter gas monitoring probes and a network of groundwater monitoring wells. Details concerning closure of the Phase I disposal area are not available. However, Phase I is currently area heavily vegetated and no known visible waste is present indicating an adequate soil cover.

Post-closure care, including subsurface methane gas monitoring at the property boundary and groundwater monitoring and reporting, is being performed in accordance with the South Carolina Class 3 solid waste regulations, and has been ongoing since the mid-1990s. As a result of intermittent elevated methane concentrations in several gas monitoring probes, the County initiated a phased corrective measures approach starting in 2006. An initial corrective measure included the installation of a passive vent trench in the eastern portion of the site, between the waste boundary and the property boundary. While the passive corrective measures have undoubtedly aided the venting of landfill gas (LFG) to the atmosphere, methane concentrations in several gas monitoring probes around Phase II remained above the compliance limit. Thus, the existing passive measures were not sufficient, and a more aggressive approach to LFG

migration control was required to achieve compliance, i.e., to reduce methane concentrations to below the compliance limit (the lower explosive limit or LEL) at the compliance probes.

The next logical step in the phased corrective action program was the installation of an active (as opposed to passive) subsurface soil gas collection system in areas where methane concentrations remain above acceptable limits.

The current monitoring network at the Landfill consists of six (6) gas monitoring probes (GMPs), GMP-1 and GMP-3 through GMP-7, as shown on **Figure 2**. These compliance probes are located to monitor subsurface gas concentrations at the property boundary. These probes are monitored on a semi-annual basis for the presence of methane gas.

1.2 PURPOSE

The purpose of the soil gas extraction system is to extract subsurface gas, including methane and trace VOCs, from the subsurface so that the methane gas monitoring probes stay in compliance (i.e., below 5 percent methane, which equates to 100 percent of the lower explosion limit (LEL)). In addition, the extraction of subsurface gas will reduce the potential for VOCs to migrate to groundwater.

The purpose of this OM&M Plan is to provide Newberry County and its consultants with a comprehensive document that contains the maintenance requirements and the monitoring requirements for the soil gas extraction system. In addition, the purpose of this OM&M Plan is to provide operating guidelines for the system to optimize its effectiveness.

1.3 SOIL GAS EXTRACTION SYSTEM OVERVIEW

The soil gas extraction system includes twenty four (24) extraction wells, spaced about 125 to 150 feet, installed between the limits of waste and the property boundary. A vacuum is applied to the wells via a 10-Hp blower and an underground piping network. The applied vacuum withdraws soil vapor from the subsurface. There are three zones (Zone A, B, and C) each with its dedicated header pipe and a condensate sump, as follows:

- Zone A: Extraction wells EW-1 through EW-8
- Zone B: EW-9 to EW-14, EW-16 and EW-17
- Zone C: ES-18 to EW-25

Passive wells EW-26 and EW-27 were installed to the north of Zone C, and are not connected to the active extraction piping system.

The Treatment Compound includes the blower enclosure, a vapor-phase activated carbon canister, an air compressor, an aboveground storage tank for condensate, a piping control panel with three actuated valves, and an electrical panel. An electronic control system allows automated operation of the three zones, and can be adjusted to control the timing for each zone.

A condensate sump is located at a low point within the header pipe to collect condensate in the gas. Condensate is generated when the extracted gas cools down within the header pipe. A pneumatic pump located in each sump pumps the condensate back to the storage tank located at the Treatment Compound.

A summary of the primary equipment and features of the soil gas extraction system are summarized in **Table 1**. The Record Drawings for the soil gas extraction system are provided in **Appendix A** and a Site Plan showing the extraction wells is shown in **Figure 3**. Soil gas extraction well completion logs and photographs of the construction are provided in **Appendix B**.

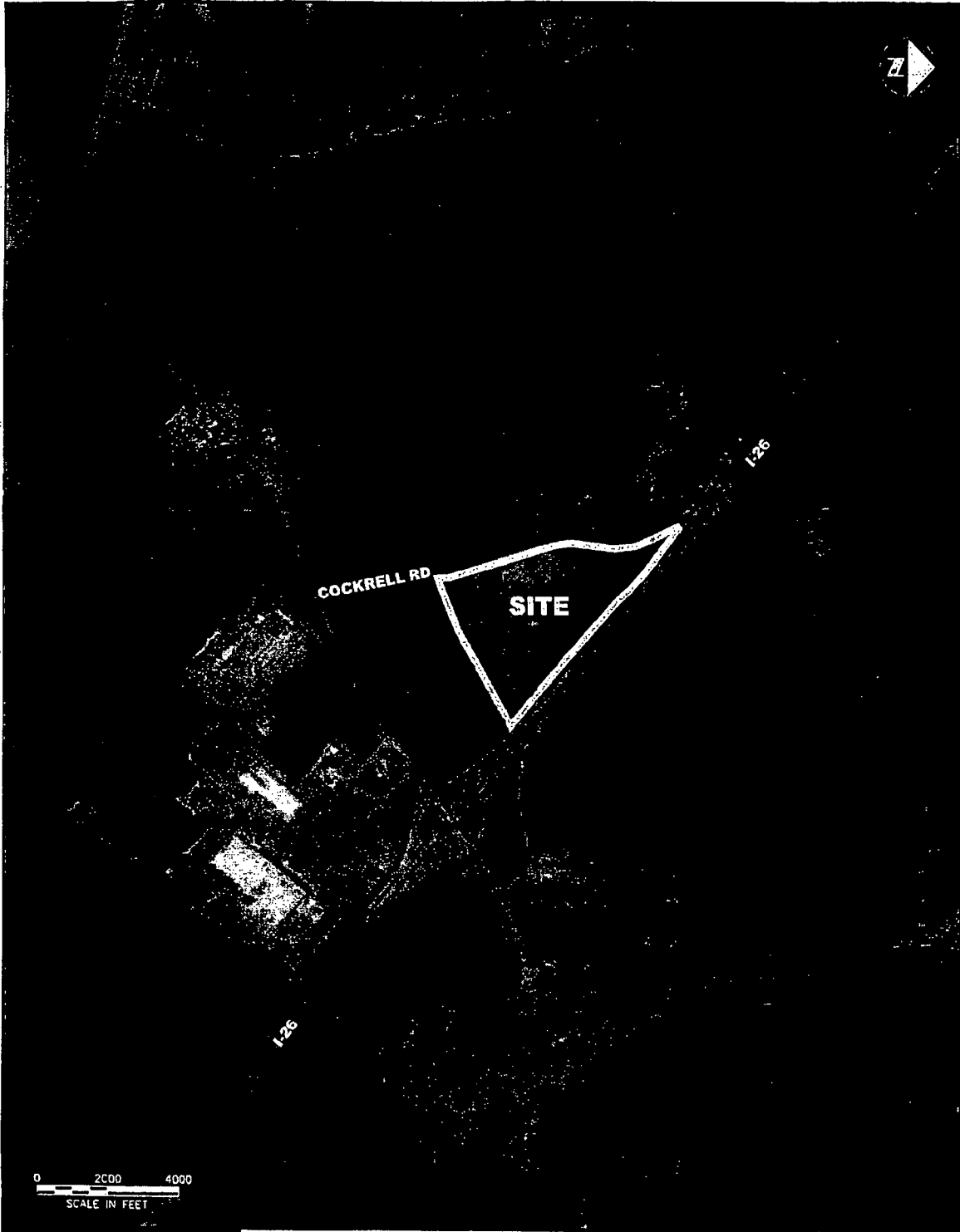
1.4 GENERAL SAFETY PRECAUTIONS

LFG migration and accumulation can create a hazard, since the methane present in LFG is combustible. Methane is a colorless, odorless gas that is explosive at concentrations between 5 and 15 percent by volume in air and when in the presence of oxygen and a source of ignition.

Since methane in LFG is combustible, the guiding criteria when working in areas where the presence of LFG is suspected are to exercise caution, use methane detection instrumentation, and avoid producing a spark in these areas. Smoking should not be permitted while working on or within 25 feet of the LFG collection system. Personnel should use intrinsically safe flashlights or mirrors, never matches or lighters, to assist in visual inspection.

When conducting repairs, the operator should isolate the repair area from LFG by closing appropriate valves, plugging the pipes, and/or shutting down portions of the system. Workers also should remain alert to other nearby maintenance or construction activities that could damage the control system or cause personal injury.

LFG can collect in valve boxes, manholes, electric panel boxes, the condensate collection system, and any above- or below-grade enclosures on or near the landfill. The LFG collection system piping probably will be filled with LFG, whether or not the blowers are operating.



SCS ENGINEERS

ENVIRONMENTAL CONSULTANTS AND CONTRACTORS
 2526 WHITEMALL PARK DRIVE, SUITE 404
 CHARLOTTE, NC 28273
 PHONE: 704.394.2197 FAX: 704.394.3174

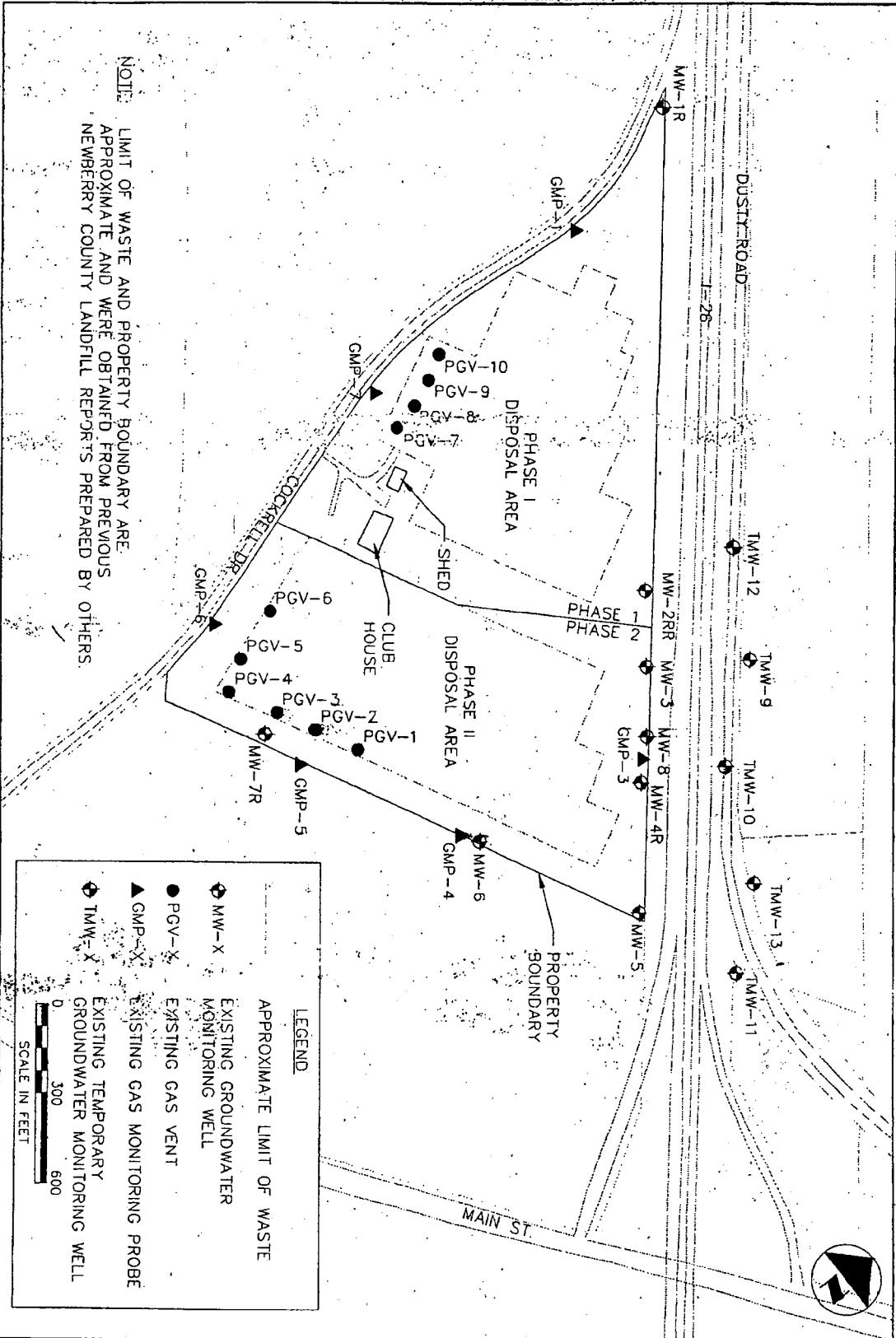
PROJECT NO. 62712302.01
 DRAWN BY DMC

CAD FILE SCALE AS SHOWN
 REMEDIATION FIGURES 1-6

**SITE VICINITY PLAN
 FORMER NEWBERRY COUNTY MSW LANDFILL
 NEWBERRY COUNTY**

DATE	05/23/14
FIGURE	FIGURE 1

NOTE: LIMIT OF WASTE AND PROPERTY BOUNDARY ARE APPROXIMATE AND WERE OBTAINED FROM PREVIOUS NEWBERRY COUNTY LANDFILL REPORTS PREPARED BY OTHERS.



LEGEND

- APPROXIMATE LIMIT OF WASTE
- MW-X EXISTING GROUNDWATER MONITORING WELL
- PGV-X EXISTING GAS VENT
- ▲ GMP-X EXISTING GAS MONITORING PROBE
- ◆ TMW-X EXISTING TEMPORARY GROUNDWATER MONITORING WELL

SCALE IN FEET

0 300 600

SCS ENGINEERS
 Environmental Consultants and Contractors
 2520 WHITEHALL PARK DRIVE, SUITE 450
 CHARLOTTE, NORTH CAROLINA 28273
 PHONE: (704) 504-3107 FAX: (704) 504-3174

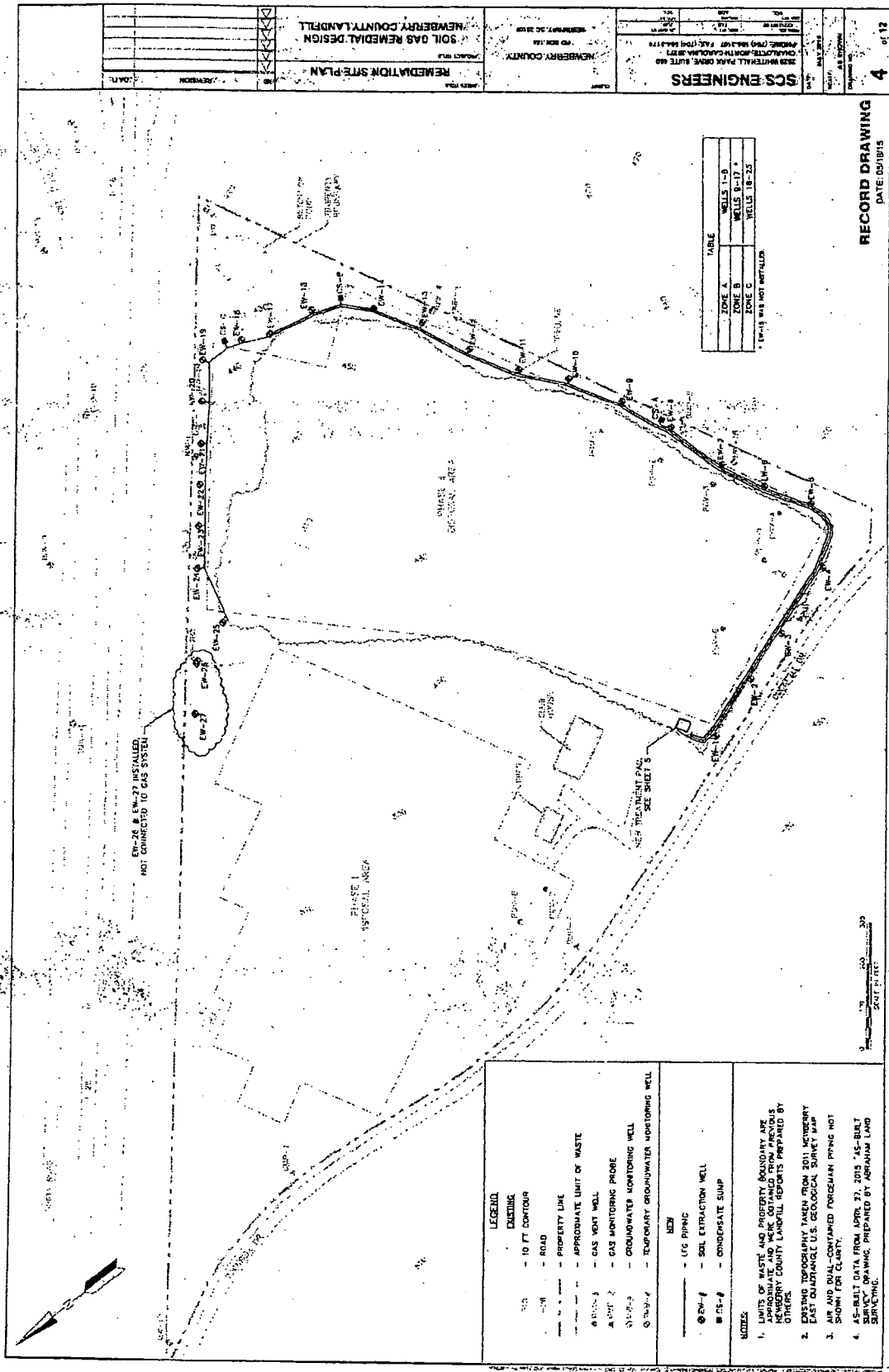
PROJECT NO	02121302.01	REV BY	TAS
SCALE	AS SHOWN	DATE	DMC
EX. COND.		APP BY	SCL

SITE PLAN
 FORMER NEWBERRY CO. MSW LANDFILL
 NEWBERRY, SC

DATE	04/18/14
FIGURE	FIGURE 2

Table 1. Summary of Equipment

Common Name	Detailed Name	Manufacturer	Description
Soil Extraction Well	Soil Gas Extraction Wells EW-1 through EW-27	NA	4-inch diameter slotted PVC pipe within a 10" diameter borehole.
Blower Enclosure			
Blower	10-HP Regenerative Blower	Ametek Rotron Model# EN858BD72WL	Skid mounted, aluminum fan blower, 10 HP, 230 VAC, 3PH, XP with thermal overload
Knock Out Pot (KOP)	Moisture Separator	Geotech	37-gallon steel canister with enamel finish. Protects the motor from excess moisture.
Transfer Pump	Effluent Transfer Pump	Goulds Model #10141	1/2 HP effluent transfer pump, 230 VAC, 3PH. Pumps liquids from the KOP to Storage Tank.
Autodialer	Autodialer	Sensaphone Model 400 Autodialer	Autodialer that calls out when alarms are encountered.
Control Panel	Geotech Environmental Control Module (GECM)	Geotech	NEMA 4X enclosure mounted to blower enclosure. Contains LCD display, on/off/auto switch controls, three valve timers, autodialer.
Other Components			
Carbon Vessel	Vapor Phase Granular Activated Carbon Vessel GAC V-1000	Tetrasolv, Inc. VF-1000	1,000 pounds GAC vessel.
Air Compressor	5-Hp Reciprocating Air Compressor	Ingersoll Rand, Model 2475N5	Air compressor with an 80-gallon tank.
Storage Tank	1,000 gallon Effluent Storage Tank	Poly Processing	Aboveground storage tank for condensate generated in the extracted gas.
Condensate Sump Pump	Condensate Sump Pump	Pump One XP-4-BL	Pneumatic submersible pump
Well Head	Orifice Plate Well Head	QEP, Model ORP-115	Wellhead on well casing. Includes sample ports and control valve.



PROJECT NO.	REMEDIAL DESIGN
CLIENT	NEWBERRY COUNTY, LANDFILL
DATE	11/11/11
SCALE	AS SHOWN
PROJECT LOCATION	NEWBERRY COUNTY, LANDFILL
PROJECT NO.	REMEDIAL DESIGN
CLIENT	NEWBERRY COUNTY, LANDFILL
DATE	11/11/11
SCALE	AS SHOWN
PROJECT LOCATION	NEWBERRY COUNTY, LANDFILL

TABLE	
ZONE A	WELLS 1-9
ZONE B	WELLS 10-17
ZONE C	WELLS 18-23
EW-24 NOT INSTALLED	

RECORD DRAWING
DATE: 05/08/13

- LEGEND**
- EXTRACTING**
- 10 FT CONTOUR
 - ROAD
 - PROPERTY LINE
 - APPROXIMATE LIMIT OF WASTE
 - GAS VENT WELL
 - GAS MONITORING PROBE
 - GROUNDWATER MONITORING WELL
 - TEMPORARY GROUNDWATER MONITORING WELL
- WELLS**
- UC PIPING
 - SOIL EXTRACTION WELL
 - CONDENSATE SUMP
- NOTES**
1. LIMITS OF WASTE AND PROPERTY BOUNDARY ARE APPROXIMATE AND WERE OBTAINED FROM PREVIOUS NEWBERRY COUNTY LANDFILL REPORTS PREPARED BY OTHERS.
 2. EXISTING PROSPECTIVITY TAKEN FROM 2011 NEWBERRY COUNTY LANDFILL SURVEY MAP.
 3. SHOWN FOR CLARITY.
 4. SURVEY DATA FROM APRIL 27, 2013. AS-BUILT SURVEYING. PREPARED BY REMEDIATION LAND SURVEYING.

2.0 MAINTENANCE REQUIREMENTS

This section summarizes the maintenance requirements for the primary equipment. A maintenance checklist form is provided as **Exhibit 1**.

2.1 BLOWER ENCLOSURE

The Blower Enclosure is manufactured by Geotech. The enclosure includes the following:

- 10-Hp Blower
- 37-gallon Knockout Pot (KOP)
- 1/2-Hp effluent transfer pump at KOP
- Vacuum gauges
- Flowmeter

The maintenance requirements are provided in Section 4 of the manufacturer's operations manual, which is provided in **Appendix C**.

2.2 ELECTRICAL INFORMATION

The electrical service along Cockrell Road and at the site is 230V, 1-phase. Since the blower is a 3-phase blower, a static phase converter is included on the electrical panel.

Electrical information on the phase converter and other electrical components is provided in **Appendix D**.

2.3 AIR COMPRESSOR

An air compressor is located in the treatment compound. The air compressor is used to supply compressed air to the pneumatic pumps located in the three condensate sumps. The air compressor is manufactured by Ingersoll Rand. The compressor is 5-HP reciprocating compressor with an 80-gallon receiver tank. According to the compressor literature, supplied by Ingersoll Rand and provided in **Appendix E**, the following pre-operational checks should be performed:

- Drain condensate from air tank
- Check oil level
- Clean air filter

Refer to **Appendix E** for more information.

2.4 VAPOR PHASE CARBON CANISTER

Although not required by regulation or permits, the system is equipped with a vapor phase granular activated carbon (GAC) vessel. The GAC vessel is manufactured by Tetrasolv. The

primary purpose of the GAC vessel is odor control—i.e., to remove (by adsorption) trace concentrations of odiferous organic and sulfur-based compounds. It should be noted that the GAC vessel does not treat/capture methane gas. The methane gas fraction in the extracted soil vapor will not be adsorbed in the GAC vessel; therefore, smoking is prohibited within the treatment compound.

No routine maintenance or testing of the vapor phase activated carbon vessel is required. During any monitoring event or site visit, the vessel should be visually inspected for normal wear and tear, and odor levels, if any, should be documented. If/when odors become significant, the carbon should be replaced.

Information on the GAC vessel is provided in **Appendix F**.

2.5 PNEUMATIC PUMP AND STORAGE TANK

Three condensate sumps, designated CS-A, CS-B, and CS-C, are located at the low points within each header system zone. The sumps are designed to collect condensate from the extracted soil gas. Each sump is equipped with a pneumatic pump. A 2-inch diameter pipe supplies compressed air to operate the pump. A dual contained force main (2³/₄"") is used to convey the condensate back to the treatment compound and in a 1,000-gallon dual-walled above ground poly storage tank.

Pneumatic pump inspection and cleaning intervals depend upon condensate quality, which varies from site to site. Initially, the pneumatic pumps should be pulled, inspected, and cleaned about every 6 months. This interval can be adjusted based on experience. Procedures for removing the pump and re-installing the pump are provided in the literature (**Appendix G**) provided by the pump supplier, PumpOne Environmental, LLC.

Information on the storage tank is provided in **Appendix I**.

Liquids in the storage tank shall be disposed of by the County. Prior to disposal, the County should contact the local POTW and determine the wastewater profiling or analytical testing requirements, if any.

Monitoring Form

**Newberry County Landfill
Soil Gas Extraction System**

Date	
Technician	

Weather	
---------	--

Equipment	Comments/Condition
Blower Enclosure	
Blower	
KOP	Liquid Level <input type="text"/>
Transfer Pump	
Gages	
Inlet vacuum	<input type="text"/>
Outlet vacuum	<input type="text"/>
Carbon Vessel	
Storage Tank	Liquid Level <input type="text"/>
Air compressor	
Air Compressor Shed	
Process Control Panel	
Actuated valves	
Process Control Panel	

Process Control Panel Gauges	Vacuum	Methane	Temp.
Zone A			
Zone B			
Zone C			
Blower Inlet			

Inlet Gage at KOP (in. WC)	
Outlet Gage at KOP (in. WC)	
Differential Pressure (in. WC)	
Flow rate (SCFM)	

3.0 MONITORING REQUIREMENTS

This section describes the routine monitoring for the soil gas extraction system.

3.1 SYSTEM START UP MONITORING

For the first three months, the system was monitored twice a month. The system was substantially completed on May 8, 2015. On May 12, 2015, the first monitoring round was conducted by SCS. Data from the initial rounds of monitoring are contained in **Appendix J**.

The objective of the initial three months of monitoring is to balance the well field and gain a better understanding of how the extraction wells and overall system performs.

3.2 REGULAR SYSTEM MONITORING

The soil gas extraction system should be monitored at least on a monthly basis. The following monitoring should be performed on the system on the monthly basis:

1. Measure and record the system vacuum, methane content and oxygen content at the sample ports located on the Header A pipe, Header B pipe, Header C pipe, and the blower inlet. These ports are located in the Treatment Compound. Perform this prior to and after monitoring the well field.
2. Record the system flow rate from the flow meter located inside the Blower Enclosure.
3. Record the vacuum gauge readings on the inlet and outlet pipe at the knock out pot located in the Blower Enclosure.
4. Measure and record the system vacuum, wellhead vacuum, methane content, and oxygen content at each soil extraction well wellhead using a LandGEM gas analyzer, or equivalent. Information on the well head is located in **Appendix I**.
5. Measure and record the differential pressure across the orifice plate located on the wellhead. The LandGEM gas analyzer should convert this reading to a flow rate in standard cubic feet per minute (scfm).
6. Record the liquid level in the knock out pot, if any.
7. Record the liquid level in the storage tank, if any.
8. Record the pressure gauge reading on the air compressor.
9. Record the stroke counters on the three condensate sumps (CS-A, CS-B, and CS-C).

Monitoring forms are provided in **Exhibit 2** that could be used to document the monitoring activities.

3.3 PERIMETER PROBES

As stated previously, there are six (6) permanent perimeter monitoring probes around the Landfill. These probes are designated GMP-1, GMP-3, GMP-4, GMP-5, GMP-6, and GMP-7. These probes are monitored twice a year by the County and their results are included in the Semi-Annual Groundwater Report, which is submitted to SCDHEC. The most recent probe monitoring was performed by Rogers & Callcott on February 4, 2015.

It is recommended to monitor and record the methane gas concentrations and the static pressure on a monthly basis at the four perimeter probes that are adjacent to the soil gas extraction wells: GMP-3, GMP-4, GMP-5 and GMP-6.

Monitoring Form

**Newberry County Landfill
Soil Gas Extraction System**

Date		Weather	
Technician			

Equipment	Comments/Condition		
Blower Enclosure			
Blower			
KOP	Liquid Level		
Transfer Pump			
Gages			
Inlet vacuum:			
Outlet vacuum			
Carbon Vessels			
Storage Tank	Liquid Level		
Air compressor			
Air Compressor Shed			
Process Control Panel			
Actuated valves			
Process Control Panel			

Process Control Panel Gauges	Vacuum	Methane	Temp.
Zone A			
Zone B			
Zone C			
Blower Inlet			

Inlet Gage at KOP (in. WC)	
Outlet Gage at KOP (in. WC)	
Differential Pressure (in. WC)	
Flow rate (SCFM)	

Monitoring Form

**Newberry County Landfill
Soil Gas Extraction System**

Date	
Technician	

Weather	
----------------	--

Equipment	Comments/Condition	
Blower Enclosure		
Blower		
KOP	Liquid Level <table border="1" style="display: inline-table; vertical-align: middle;"><tr><td></td></tr></table>	
Transfer Pump		
Gages		
Inlet vacuum		
Outlet vacuum		
Carbon Vessel		
Storage Tank	Liquid Level <table border="1" style="display: inline-table; vertical-align: middle;"><tr><td></td></tr></table>	
Air compressor		
Air Compressor Shed		
Process Control Panel		
Actuated valves		
Process Control Panel		

Process Control Panel Gauges	Vacuum	Methane	Temp.
Zone A			
Zone B			
Zone C			
Blower Inlet			

Inlet Gage at KOP (in. WC)	
Outlet Gage at KOP (in. WC)	
Differential Pressure (in. WC)	
Flow rate (SCFM)	

4.0 SYSTEM OPERATIONS

As previously stated, the primary objectives of the Soil Gas Extraction System are to:

- Extract methane gas from the subsurface so that the methane gas perimeter monitoring probes stay in compliance (i.e., below 5 percent methane, which equates to 100 percent of the lower explosion limit (LEL)).
- Capture traces of VOCs in the subsurface gas, thereby reducing the possibility of migration to groundwater.

To meet these objectives, the vacuum applied to the soil gas extraction wells should be such that it captures subsurface gas before it reaches the property boundary. However, the vacuum applied should be minimal so that excess methane gas is not also drawn out the waste mass.

4.1 NORMAL OPERATIONS AND SYSTEM BALANCING

Normal operations should be as follows:

- All three zones are open (valve A, B, and C are open).
- In general the applied vacuum at each well should be initially set between -1 inches of water column (in. WC) and -10 in. WC. Alternatively the well could be balanced based on an average flow in the 10 scfm range.

Based on the initial rounds of monitoring, this results in approximately 200 to 250 scfm of soil gas being extracted from the 24 wells, or about 10 scfm per well.

It is recommended to operate the system in this range for at least 6 months, possibly longer.

4.2 SYSTEM ADJUSTMENTS GUIDELINES

After six months of system operation under these normal conditions, it may be beneficial to re-balance the system based on the perimeter probe readings, the individual wellhead readings, or the methane content within each of the three zones. For example, if the methane content from a particular well, say EW-5, is less than 2 percent, EW-5 could be turned off or its applied vacuum reduced to less than 1 in. WC.

The methane content for each zone should also be examined. If the entire zone has methane content in the 2 percent range, the entire zone could be operated less than 24 hours/day. Each zone is equipped with an electric actuated valve which operates on a timer. The timer could be set to allow the zone to operate only a few hours a day instead of 24 hours a day.

The goal of these two system adjustments is to allocate more blower capacity to areas of the system where methane gas concentrations remain high, or where the perimeter probes are not in compliance.

After any adjustment, the effects of the adjustments should be examined. This would typically involve comparing the methane gas concentration at the six perimeter probes.

5.0 REPORTING AND SYSTEM CLOSE OUT

5.1 REPORTING REQUIREMENTS

Quarterly reports should be prepared and submitted to SCDHEC. The quarterly reports shall include the following:

- A general description of the system.
- Summary of the flow and methane content at the blower inlet.
- Perimeter probe monitoring results.
- Summary of well head data (methane, oxygen).

In addition, the system data should be provided in the Semi-Annual Groundwater and Methane Monitoring Report, and an Annual Groundwater and Methane Monitoring Report for the Landfill to SCDHEC.

5.2 SYSTEM CLOSE OUT PROCEDURES

Pursuant to 61-107.19, Part V, Subpart E 258.58 (e):

e. Remedies selected pursuant to Section 258.57 shall be considered complete when:

(1) The permittee complies with the groundwater protection standards established in Section 258.55j or k at all points within the plume of contamination that lie beyond the groundwater monitoring well system, established in Section 258.51.a.

(2) Compliance with the groundwater protection standards established in Section 258.j or k has been achieved by demonstrating that concentrations of Appendix V constituents have not exceeded the groundwater protection standard(s) for a period of three consecutive years using statistical procedures and performance standards in Section 258.g and h. the Department may specify an alternative length of time during which the permittee shall demonstrate the concentrations of Appendix v constituents have not exceeded the groundwater protection standard(s) taking into consideration:

- (a) Extent and concentration of the release(s)
- (b) Behavior characteristics of the hazardous constituents in the groundwater.
- (c) Accuracy of monitoring or modeling techniques, including any seasonal, meteorological, or other environmental variabilities that may affect the accuracy; and
- (d) Characteristics of the groundwater.

James Randall Davis
Patrick J. Frawley
Jeff M. Anderson
John J. McCaulley ◊
Carey M. Ayer Δ
Ryan M. Wingard
W. Joseph Maye

* American Board of Trial Advocates
^ Certified Circuit Court Mediator

Davis | Frawley ^{LLC}
Attorneys of Law

Of Counsel
Robert K. Bouknight
George S. Nicholson, Jr.

Francis C. Jones
(1919 - 1968)

Hubert E. Long
(1921 - 2000)

Since 1961

Direct Dial No.: (803) 951-7419
E-mail: pat@oldcourthouse.com

VIA EMAIL ONLY
March 8, 2016

The Honorable Donald B. Hocker
Circuit Court Judge
Email: dhockerj@sccourts.org

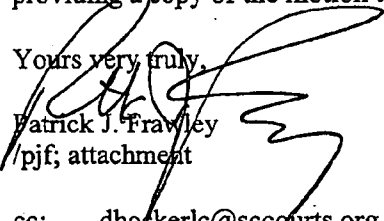
RE: *West/Hobby, LLC vs. County of Newberry*; Civil Action No. 2012-CP-36-0046;
IRF Claim No. 81978; Our File No. 25712.16.

Dear Judge Hocker:

Attached, please find a clocked-in copy of my Rule 59(e) Motion to Alter or Amend in the referenced matter, which I filed and served upon Jim Bruner by U.S. Mail yesterday, March 7, after receiving the Order February 26. I am providing this copy to Your Honor pursuant to SCRCF Rule 59(g).

By copy of this letter and the attachment to Mr. Bruner, I am apprising him of my providing a copy of the motion to Your Honor.

Yours very truly,


Patrick J. Frawley
/pjf; attachment

cc: dhockerlc@sccourts.org

James L. Bruner, Esquire
jbruner@brunerpowell.com

Dennis Elledge
Claims Supervisor
South Carolina Insurance Reserve Fund
delledge@irf.sc.gov

Wayne Adams

Jay Tothacer, Esquire

Old Courthouse Place | 140 East Main Street | Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: (803) 359-2512 | Facsimile: (803) 359-7478 | www.oldcourthouse.com

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

West/Hobby, LLC,)
)
Plaintiff,)

Docket No. 2012-CP-36-0046

-vs-

NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND
PURSUANT TO SCRCR RULE 59(e)

County of Newberry,)
)
Defendant.)

FILED
NEWBERRY COUNTY
2016 MAR 7 AM 11:00
JONIE S. [unclear]
CLERK OF COURT

TO: JAMES L. BRUNER, ESQUIRE AND BENJAMIN C. BRUNER, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant Newberry County, by and through its undersigned attorneys, will move before the Honorable Donald B. Hocker, Presiding Judge of the Court of Common Pleas for the Eighth Judicial Circuit, on the tenth day after service hereof, or as soon thereafter as Counsel may be heard, at the Newberry County Courthouse, College Street, Newberry, South Carolina, or at such other place and time as the Court may establish, for an Order altering and amending the Court's Findings of Fact and Conclusions of Law in the captioned matter, dated February 11, 2016, filed February 25, 2016, and received by Counsel for the Defendant Newberry County on February 26, 2016, as follows:

I. The Court misconstrued the Statute of Limitations and application of the Discovery Rule, in that the Plaintiff should have known of the installation of the clay cap and any risks inherent with a clay cap on a closed municipal solid waste landfill contiguous to the property the Plaintiff was purchasing for investment purposes had it gotten a Phase I Environmental Site Assessment in 2001 when it acquired the property, or even after that, in

2006, when the County inquired into placing monitoring wells on the Plaintiff's property, had the Plaintiff exercised due diligence in checking County and SCDHEC records which were available to it at either time, and had it gone to comparable lengths as Kiswire had gone when it contracted to purchase the property in 2011, or as the Plaintiff finally went to in retaining its expert witness in this lawsuit.

A. Testimony at trial indicated that the propensities of the clay cap in blocking the vertical movement of landfill gasses and causing such movement to be horizontal and possibly migrate to the Plaintiff's property were as prevalent in 2001 as in 2011 when Kiswire commissioned its Phase I and in 2014-15, when the Plaintiff hired its expert, Terracon, for this lawsuit;

B. Testimony at trial indicated that the County and State (SCDHEC) records regarding the closed landfill, which included the installation of the clay cap, were available to the public, and Billye West testified that he relied upon the County and State, yet did not check the records that were available to him, thereby failing to exercise the level of diligence expected by Courts in applying the discovery rule with regard to the statute of limitations.

C. Even if the Plaintiff is excused from the due diligence expected when the property was purchased in 2001, in 2006 the Plaintiff should have been alerted in 2006, when evidence indicated that the County contacted the Plaintiff inquiring into putting monitoring wells on the Plaintiff's property, and the Plaintiff should have then been on notice from County and State records available to the public and to the Plaintiff, and the statute of limitations should have begun to run in 2006.

Handwritten signature and date: "2/2/17" and a signature.

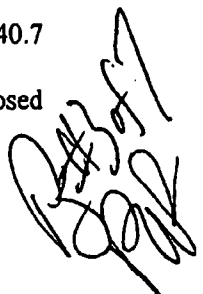
D. There was no evidence at trial that the County deliberately withheld any information from the Plaintiff, as is inferred on page 17 of the Conclusions of Law in the citation and parenthetical of *Strong v. University of South Carolina School of Medicine*, 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994)(statute of limitations is tolled where defendant deliberately withholds information from a potential plaintiff). To the contrary, the evidence at trial was that the reports and documentation upon which the Plaintiff relied at trial was available from the County and the State—the Plaintiff simply chose not to protect itself and failed to act with any reasonable degree of diligence.

E. The Plaintiff had pled that the complained of taking was, “in all likelihood *permanent*,” Amended Complaint ¶25 (emphasis added), yet at trial argued the alleged taking was abateable, after the County had spent a half million dollars on a vapor extraction system. If the alleged taking was permanent, as the Plaintiff had alleged, the statute of limitations should have barred the action entirely.

F. The Court’s finding as a matter of law that the statute of limitation was tolled until 2011 is error because there was no evidence that the Plaintiff, exercising the requisite diligence required by the discovery rule, having been put on notice by the County’s inquiry into placing monitoring wells on the Plaintiff’s property, should have followed up to check available County and State records which were available to the public.

G. The Order should be altered or amended to dismiss the Plaintiff’s claim to taking pursuant to the statute of limitations.

II. The Court misconstrued the evidence of the Plaintiff’s understanding of the 40.7 acre tract it purchased for investment purposes in 2001 being situated contiguous to a closed



municipal solid waste landfill, and other facts and information available to the Plaintiff in 2001, which information the Plaintiff disregarded in purchasing the property, as constituting a business risk that the Plaintiff assumed in purchasing the property, and misapplied the applicable law, including *Cutchin v. South Carolina Department of Highways and Public Transportation*, 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990); and the Order should be altered or amended to bar the Plaintiff's claim pursuant to the doctrine of assumption of the risk.

III. The Court misconstrued and misapplied evidence of the Plaintiff's alleged positive aggressive act triggering the alleged taking and the applicable law, and if any act or omission on the part of the County led to migration of landfill gases to the Plaintiff's property, it was a *failure* by the County to implement an active remediation system, as opposed to the passive system it had in place from 1994 forward, including 2001, when the Plaintiff acquired its property; and a *failure* to act will not trigger a taking under South Carolina law.

A. The Plaintiff's alleged positive aggressive act allegedly triggering the claimed taking was the placing of the clay cap on the closed landfill, see, Amended Complaint, ¶22, which pre-dated the Plaintiff's acquiring the 40.7 acre tract subject of this action by seven years.

B. Evidence at trial established that the County initially implemented a passive treatment system, in which it monitored and complied with directives from SCDHEC as required.

C. Evidence at trial indicated that the passive system was in keeping with standards in the industry in the 1990's, and complied with SCDHEC requirements at the time.

Handwritten signature and initials, possibly "B. J. of 7" and "P. J.", written in black ink.

D. Evidence at trial indicated no migration of possible landfill gasses until 2003 and 2006.

E. Evidence at trial indicated that, since the active remediation system has been implemented, the migration, however minimal it had been anyway, has all but ceased.

F. Evidence at trial indicates, if anything, that any migration of alleged landfill contaminants is not due to the placing of the clay cap seven years before the Plaintiff acquired its property, during which time there is no evidence of migration of contaminants through 2003, but to the *failure* of the County to implement an active remediation system.

G. South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by affirmative, positive, aggressive acts by the governmental agency. *Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (2004). Mere failure to act is insufficient. *Id.*

H. Despite the Plaintiff's attempt to portray the placing of the clay cap—which occurred seven years before the Plaintiff even acquired its property—as the positive aggressive act triggering the alleged taking, the cap was already in place, with no evidence of contamination, by the time the Plaintiff acquired its property in 2001 through 2003, then later 2006. There is no evidence that the clay cap caused any migration of contaminants. If the trace amounts of contaminants the Plaintiff relies upon were sufficient to support its claim, they were not the product of the clay cap, but were due to a failure by the County to implement the active remediation system sooner. That failure by the County was still in compliance with SCDHEC directives at the time, as evidence at

trial established; but it was not the positive aggressive act required by South Carolina case law.

I. The Order should be altered or amended to dismiss the Plaintiff's claim for lack of proof of a positive, aggressive act triggering the alleged taking.

IV. There is no evidence of the geographical limits nor of the "metes and bounds" of any alleged contamination, with the only evidence being that there were trace amounts detected at the property boundary of the 40.7 acre tract, and there is no way for the Court to determine how much of the 40.7 acre tract was affected, even had there been a taking. The Order should be altered or amended to dismiss the Plaintiff's claim for lack of proof of a defined taking.

V. The contract with Kiswire was not an arms length contract, and was the only offer to purchase received by the Plaintiff for the 40.7 acre tract from November 2000 through January 2011, or since. The General Manager of Kiswire was a personal friend of the Plaintiff's principle, Billye West, with whom Kiswire did business, and continues to do extensive business through West's electrical contracting company.

A. David Minick, the General Manager of Kiswire, admitted in his testimony that the April, 2011 letter backing out of the contract to purchase did not state the Environmental Site Assessment as reason for his cancelling the contract, and he further testified that there were other contingencies to the contract that he had not completed at the time that he backed out of the contract.

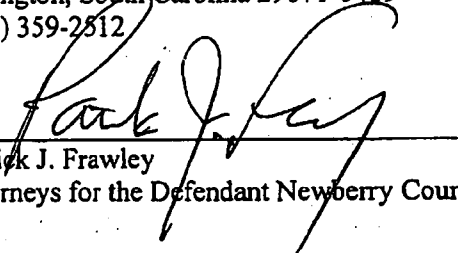
B. The contractual price was nearly twice the purchase price the Plaintiff had paid for the property in 2001, after having received no offers to purchase in over ten years, at the height of the 2008 recession, and only a month after the Plaintiff had petitioned the County to have the tax value of the property reduced to less than \$200,000.

C. The Order should be altered or amended to indicate that the purported contract of sale with Kiswire was not a bona fide arms length contract, and is not evidence of a taking.

VI. After the contract fell through, evidence at trial indicated that the Plaintiff approached the County and offered to sell the 40.7 acre tract to the County for \$750,000, and *that is what the County said it was not interested in doing.*

This Motion is based upon the evidence at the trial held December 14-15, 2015, including testimony of the witnesses and documentary evidence, statutes, case law, Rules of Court, memoranda of the parties, if submitted, oral argument of Counsel, if allowed, and such other and further authority as the Court may deem appropriate.

DAVIS, FRAWLEY, LLC
140 East Main Street, P.O. Box 489
Lexington, South Carolina 29071-0489
(803) 359-2512

BY: 
Patrick J. Frawley
Attorneys for the Defendant Newberry County

Lexington, South Carolina

March 7, 2016.



TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:28 a.m.)

THE COURT: All right. We're on the record this morning. This is in the *West/Hobby, LLC v. County of Newberry*. The defendant has filed a -- a motion to alter or amend the order of -- that I issued sometime back in, I guess, February. And, Mr. Frawley, this is your motion?

MR. FRAWLEY: It is, Your Honor.

THE COURT: Okay. I'll be glad to hear from you.

I -- I do want -- and -- and I -- I'm sure that you -- you fellas are not going to rehash everything in this pretty involved matter. But I do want particular emphasis on the issue of statute of limitations. That's -- that was an issue that I -- I greatly struggled with when -- when I issued the order.

So that's -- I -- I know you can cover some other things too. But that -- that's -- particular emphasis on that, if ---

MR. FRAWLEY: Yes, sir.

THE COURT: --- if -- if you would, please.

MR. FRAWLEY: All right. Thank you. May it please the Court. Your Honor, we -- we filed our motion, I think, March 7th. I think I had -- I had received the order from the county, I think, late February -- I think February 26th, I think, we said in our -- in our motion.

1 Your Honor, we -- we've raised several grounds for the
2 motion. But -- but the main two that would be focusing on
3 are statute of limitations -- that's the one we lead with
4 -- and also, the assumption-of-the-risk issue that we
5 raised. Those -- those would be the -- the main two.

6 I'll address the other ones briefly. And I'll go in
7 the same order as they are set out in my -- in my motion,
8 Your Honor. We have ---

9 THE COURT: Okay.

10 MR. FRAWLEY: --- Roman numerals in there. We'll --
11 we'll -- we'll take it that -- that same order.

12 Your Honor, with regard to the statute of limitations,
13 I would refer Your Honor to our memorandum that we filed in
14 support of our motion for summary judgment, which Your
15 Honor heard before the trial back in August. We had filed
16 it August 24th, 2015. Specifically, I'd refer Your Honor
17 to pages 8 to 11. That's the portion that deals with --
18 with the statute of limitations. And I've set forth the --
19 the *Cutchin* case and the -- the discovery-rule issues in
20 there. So that would be pages 8 to 11 of our motion for
21 summary judgment filed August 24th of 2015.

22 When we get to the assumption-of-the-risk argument, we
23 would still refer you to that -- pages, I think, 12 to 13
24 are the -- I'm sorry -- 11 to 13 of -- of that same
25 memorandum. And we -- we cite *Cutchin* and then, the

1 *Fuller-Ahrens* case in there.

2 Your Honor, the statute of limitations for an inverse-
3 condemnation claim, which was the only issue we -- we tried
4 in this case, is three years. And that's set out in the
5 *Cutchin v. SCDHPT* case cited at 301 S.C. 35 at page 37, 389
6 S.E.2d 646 at page 648. That's a Supreme Court case from
7 1990. Also, the *Fuller-Ahrens* -- that's F-u-l-l-e-r,
8 hyphen, A-h-r-e-n-s -- *Partnership v. SCDHPT* case, that's
9 311 S.C. 177 at page 179, 427 S.E.2d 920 at page 921.
10 That's a Court of Appeals case from 1993.

11 The *Cutchin* case says that if it is a permanent
12 injury, there's a single cause of action and they cannot be
13 split -- if it's a permanent injury. And, of course, in
14 the plaintiff's complaint, they alleged, in Paragraph 25 of
15 their amended complaint, that -- that the -- that it was
16 permanent injury. Now, that -- that shifted a little bit
17 as we got to trial because there was the active remediation
18 system, which supposedly had -- had sucked some of that
19 back. But in their allegation in the amended complaint,
20 Paragraph 25, they had alleged permanent injury.

21 Now, *Cutchin* says if it's a permanent injury, it's a
22 cause of action; you can't split it. That's 301 S.C. at
23 36, 389 S.E.2d at 648. *Cutchin* also says if it's abatable,
24 then each injury gives rise to a new cause of action.

25 So if there's a -- a finding that the -- that the --

1 the injury was a -- was, in fact, a permanent injury, once
2 -- once the clay cap went on, once whatever took place, was
3 an injury and it was permanent at that point, they can't
4 split the cause of action. But -- but according to *Cutchin*
5 -- and it's the same pages -- it says that if it is
6 abatable, each -- each additional injury gives rise to a
7 new cause of action. So that may be a pivotal issue Your
8 Honor will look at it.

9 Now, again, West/Hobby alleged permanent injury in its
10 amended complaint. That's Paragraph 25 of the amended
11 complaint. Your Honor, in the *Fuller-Ahrens* case -- in
12 that case, the -- the plaintiff -- well, the Court
13 dismissed an inverse-condemnation claim against SCDHPT,
14 resulting from 140 feet of 18-inch reinforced-concrete pipe
15 that had been installed in 1956 that conveyed stormwater
16 off of the highway about 140 feet into this piece of
17 property, where it was released.

18 Now, that was done before the plaintiff bought its
19 property in that point. The property was bought in 1985.
20 And then, the plaintiff said he later found out that the
21 pipe was in there and the release of stormwater was on his
22 property and that that amounted to an inverse condemnation.
23 The plaintiff claimed that it only discovered that pipeline
24 and the release of the water on its property after the
25 purchase of the property.

1 Now, the Court in *Fuller-Ahrens* found that there were
2 public records that DHPT had, indicating plans that showed
3 this 140 feet in there and, had the purchaser looked at
4 those public records or found that out, he would have known
5 about this pipe and therefore he was time-barred from --
6 from raising that issue in 1985.

7 Now, in *Fuller-Ahrens* that discussion shows up at page
8 311 -- or I'm sorry -- Volume 311 South Carolina at 179 to
9 182 and 427 S.E.2d at page 921 to 923. In this case, Your
10 Honor, Billye West testified that when West/Hobby bought
11 the property in 2001 -- if you remember, Mr. West and Mr.
12 Hobby individually bought the property in 2000 and did not
13 get a Phase I at that time. Then in 2001 they conveyed the
14 property to West/Hobby, LLC, which they created to hold --
15 to hold the -- their commercial properties that they'd
16 bought, one of which was this 40.7-acre tract.

17 They got the property in 2001. That would be
18 West/Hobby. There was no Phase I done. Had they done so,
19 they could have discovered from public records that there
20 was a clay cap. Now, they already knew that -- that across
21 the street was a -- a landfill, which I argued at trial
22 should've put them on inquiry: Well -- well, let's check
23 what they've got it -- with the county or with DHEC.

24 Even Mr. West admitted that he thought that the -- the
25 county and the state would -- would look out for him. But

1 he -- he also said he never checked with the county and he
2 never checked with DHEC about any public records. They
3 didn't do a Phase I.

4 Had they done a Phase I, which they did do for this
5 lawsuit -- they got Mr. Clymer in there. Clymer found some
6 stuff out that he admitted was -- would've been available
7 back in 2001. Mr. Abernathy from DHEC, whom we put up as a
8 witness, he testified that these records were available in
9 2001.

10 Now, part of the argument that the -- the plaintiffs
11 made was that in 2001, there was no evidence of any
12 contamination migration in -- in 2001. Well, there wasn't.
13 But the propensities of a clay cap -- that it -- it could
14 cause lateral migration, where it -- where the -- the
15 methane goes -- goes up to the cap and it -- the cap's
16 impermeable so it -- it migrates in a lateral motion, that
17 Mr. Clymer could've told them that; S&ME told -- told
18 Kiswire that when they did their Phase I in -- in 2011.
19 They could've found that out at that time.

20 Now, the discovery-rule cases, which -- which we've
21 cited in our -- in our summary judgment memorandum, they
22 provide that it's -- it's not when you actually discovered
23 it; it's when, exercising reasonable diligence, you
24 should've discovered it. And had they exercised reasonable
25 diligence when they bought this property, had they gotten

1 the Phase I, they would've found these -- these public
2 documents, that there was a clay cap there.

3 Once they got the clay cap, they could've found out,
4 had they -- they gotten someone like Clymer, what's the
5 import of a -- of a clay cap? What can a clay cap do with
6 regard to disintegrating solid waste that's in this solid-
7 waste municipal landfill? What does it do with the methane
8 gas there that's across the street from the 40.7-acre tract
9 you're planning on buying?

10 And what Mr. Clymer told them, what he told us back in
11 December -- and what he told me on deposition a year before
12 that -- is what comes up isn't going to go through the cap
13 and it's going to go laterally, under the road, possibly,
14 and into your -- your property.

15 Now, we're not saying that's what did happen. But
16 that's something he could've found out at that point. So
17 once he determined that there was an issue, there was a
18 wrongdoer, he could've known as early as 2001, had he
19 exercised reasonable diligence.

20 Your Honor, we cited a case in our memorandum --
21 *Wiggins* -- *Wiggins v. Edwards*. It's W-i-g-g-i-n-s v.
22 Edwards. It's 442 S.E.2d 169 at 1170. And what *Wiggins*
23 says is with regard to the discovery rule, exercise of
24 reasonable diligence means simply that the injured party
25 must act with some promptness where facts and circumstances

1 of the injury would put a person of common knowledge and
2 experience on notice that some right of his has been
3 invaded or that some claim against another party might
4 exist.

5 *Wiggins* goes on to say that the statute of limitations
6 begins to run from that point and not when advice of
7 counsel is sought or a fully blown theory of recovery is
8 developed. You're -- you're held to that reasonable
9 diligence at the time that you should've known about it.

10 Now, Your Honor, we argue that there are two points in
11 time that Mr. West and -- and his West/Hobby, LLC, company
12 should have found out about this -- or -- or should've been
13 on notice and -- and be time-barred from that point. The
14 first is 2001, when West/Hobby got the property. They
15 didn't do a Phase I. They could've found out then.
16 Exercising reasonable diligence, they could've known as of
17 that time that there -- if there was a wrongdoer, that it
18 -- it was probably the county or whoever ran that -- that
19 landfill across the street.

20 But the other time is 2006. There was -- there was
21 testimony that in 2006, B.P Barber did its testing. Once
22 -- once the county closed this landfill, they -- they --
23 the testimony at trial was that they treated it in -- in a
24 passive manner, which John Abernathy of DHEC and our own
25 Steve Lamb of SCS, our expert witness, said that was the

1 standard in the industry in the 1990s.

2 They closed this in 1994, the second phase. They put
3 the -- the clay cap in there in 1994. And they treated it
4 passively. What that meant was they put monitoring wells
5 out there and they -- they checked it periodically for --
6 for methane gas, which was an indication of -- of landfill
7 -- landfill gases.

8 If it -- if it looked like it -- that wasn't working
9 enough, DHEC told them, "You need to ramp it up." They put
10 trenches in at some point. They -- they -- they added
11 other -- other -- other monitoring wells.

12 Well, in 2006 B.P. Barber, who was doing their
13 monitoring at that point, found some methane levels that
14 they thought were a little out of line. So February 6th of
15 2006, the county sent a letter to West/Hobby. It's -- it's
16 Plaintiff's Exhibit No. 5. It -- it's in evidence.

17 And in that letter the county asked West/Hobby: We'd
18 like to do some offsite drilling or testing. You know, do
19 we have your permission to do that?

20 Now, you've bought property across the street from a
21 landfill; haven't done a Phase I. But you haven't gotten
22 any offers for it. You know it's across the street from a
23 landfill. And then you get a letter from the county,
24 saying: We've got this landfill across the street and
25 would like go on your property and begin drilling.

1 If -- if that didn't put a -- if -- if -- if it didn't
2 put them on notice when they bought the property in 2006,
3 it had to. Mr. West, if Your Honor remembers -- or if you
4 review the -- the -- the transcript, Mr. West initially
5 kind of waffled over whether he actually got that letter,
6 until you look at page 2 of the letter. And page 2 of the
7 letter has him signing his consent to it.

8 So as of February of 2006, Billye West of West/Hobby
9 knows that the county is asking to do drilling on his
10 property with regard to the landfill that's across the
11 street.

12 Now, what was available to him at that point, if he
13 wanted to do some further exercise and further diligence?
14 Everything that came into evidence with regard to B.P.
15 Barber's findings in 2006 at trial.

16 B.P. Barber did their monitoring report, which --
17 which they put into evidence, showing the methane levels
18 along -- along the property line. That was available
19 through DHEC or through the county in 2006, had Mr. West
20 and West/Hobby chosen to protect themselves, chosen to
21 investigate, chosen to -- to go a step beyond simply
22 signing his consent to that February 6th, 2006, request.

23 He -- he -- he didn't do that. He testified he -- he
24 didn't go to the county. He -- he didn't go to -- to DHEC
25 to check anything out.

1 All of that stuff that Mr. Clymer put into evidence --
2 that they put into evidence in our trial in December of --
3 of 2015 was available in February of -- of 2006 or shortly
4 after that when they did the testing. I think the B.P.
5 Barber report was April of 2006. He could've checked
6 anytime after 2006 and found it.

7 Now, one of the things that was in Your Honor's order
8 -- and I'm -- I'm jumping ahead a little bit. But there's
9 a -- in the statute of limitations, there was a case that
10 is cited on pages 17 and 18 of Your Honor's order. It's
11 *Strong v. University of South Carolina School of Medicine*,
12 316 S.C. 189 at page 191, 447 S.E.2d 850 at page 852. It's
13 a 1994 Supreme Court case.

14 It has a parenthetical in there, where it says: "The
15 statute of limitations is tolled when the defendant
16 deliberately withholds information from a potential
17 plaintiff." And Your Honor mentioned something in there.
18 But that's cited as a parenthetical.

19 There's no evidence at trial indicating that -- that
20 the -- the county willfully or -- or deliberately withheld
21 any information from Mr. West or West/Hobby.

22 Now, there's evidence -- there's testimony that they
23 didn't send it to him. But it was available to him. It
24 was available to him through the county. It was available
25 to him through DHEC. It wasn't being withheld. It wasn't

1 being obscured.

2 We checked -- we checked -- Newberry County sent him
3 their request in February of 2006 to allow the drilling.
4 He consented. Newberry County did the drilling through
5 B.P. Barber, issued a report, and it was public record. He
6 could've checked it any time.

7 It wasn't stuck in an envelope and hand-delivered to
8 him or mailed to him. But that's not deliberately
9 obscuring that information. The Strong case is not
10 applicable to this at all.

11 That -- that information was available to Mr. West and
12 his company. And had they chosen to do it, they would've
13 found out what the B.P. Barber test results were in 2006.

14 So our -- our second position is 2001 it should've
15 stuck. 2006, for sure, it should've stuck be he's got
16 correspondence from the county, saying we need to test.
17 And then after the testing, there's the results that were
18 there in 2006.

19 Now, we still maintain -- and Steve Lamb testified --
20 that even if there were methane-gas measurements at that
21 point, they were still -- they were trace measurements.
22 They -- they were trace elements. And -- and it was not
23 something that -- that should've amounted to a taking.

24 But it was some indication that if Mr. West and
25 West/Hobby were going to look for a wrongdoer, they knew as

1 of 2006. They should've known as of 2006, had they
2 exercised reasonable diligence under the discovery rule.

3 And again, the discovery rule, for statute of
4 limitations purposes, is also set out in *Young v. SCDC*, 333
5 S.C. 714 at page 718, and 511 S.E.2d 413 at page 415.
6 That's a 1999 Court of Appeals case.

7 That was as of 2006. Now, Your Honor found in your
8 order that the -- the -- the statute of limitations tolled
9 in 2011, I -- I guess, because of the S&ME reports and the
10 -- the Kiswire contract having fallen through.

11 But it's our position that it should've tolled at
12 least five years before that and possibly five years before
13 that in 2001 and 2006. And -- and their claim should be
14 time-barred with regard to the statute of limitations.

15 Now, obviously, a pivotal issue is: Was it a
16 permanent harm or was it something that can be abrogated or
17 -- or -- or -- or fixed? And -- and clearly, one of the
18 issues that came out is we've finally gotten to a -- to an
19 active remediation system at a price tag of a half-million
20 dollars for the county, which they implemented and they're
21 still -- still working on now and -- and that now the
22 active system seems to be working.

23 But with regard to that issue, Your Honor, we would --
24 we would point out whether the -- the contract itself
25 amounts to a taking -- and -- and we'll talk about that at

1 -- in a moment -- the -- the metes and bounds of the
2 taking. There's -- there's evidence that there were trace
3 elements of contaminants that could be landfill
4 contaminants along the property line, along the road.

5 There was one that was a little bit into the -- the --
6 the tract. But it wasn't far into the tract. We got a
7 40.7-acre tract. And we got no idea what the metes and
8 bounds of this alleged contamination is.

9 They've got petroleum based contaminants that there
10 was testimony at trial that they could've been from other
11 sources; that they -- they could've been from -- from
12 petroleum based vehicles going up and down the asphalt road
13 that separated the two lots.

14 So I would have to concede that -- that's an issue:
15 whether -- whether it's something that -- that can be
16 abrogated or whether it's -- it's of a permanent nature.
17 Our position is they alleged it was of a permanent nature.
18 They alleged that -- that the -- the clay cap -- that's not
19 going anywhere. Okay. That was put in there in 1994.

20 Even as to the clay cap -- and we'll talk -- well,
21 we'll -- I'll talk about it later. I don't want to get too
22 confused down there.

23 But -- but that's our position on the statute of
24 limitations: that in 2001, before he bought it, he -- he
25 -- he had notice that the -- that the -- the -- the closed

1 landfill was there. He knew who operated it, because he
2 drove there and he -- he dropped the stuff off.

3 And -- and if not 2001, for sure, in 2006, they had
4 indication not only that there's a landfill and potential
5 issues, we're getting letters from the county at this point
6 that says we want to test. And had he followed up on those
7 letters -- and -- and, Your Honor, if -- if you look at his
8 testimony, his explanation for why he didn't do that is --
9 is just totally insufficient.

10 He -- he got a letter from -- from an entity that ran
11 a closed landfill. They want to do drilling on his
12 property.

13 And I asked him: "Did you follow up with that?"

14 "No, I didn't. I expected the county and the state to
15 take care of me."

16 That -- that's paraphrasing what he said. But he had
17 the opportunity, and he chose not to do it. He exercised
18 no more diligence in 2006 than he had in 2001 when he
19 bought the property without getting a Phase I.

20 Your Honor, the second ground that we have is
21 assumption of the risk with regard to his purchase -- I say
22 his -- with regard to the West/Hobby acquisition of this
23 property in 2001. In our motion or our memorandum for
24 summary judgment, we addressed the -- the case law and the
25 authority there on pages 11 to 13.

1 And the cases we discuss, again, are the *Cutchin* case,
2 which -- which I've cited already, 301 S.C. at 389; and
3 then, 389 S.E.2d at 648. And then, we also -- or really,
4 that -- that's -- that's the main case we're -- we're
5 citing in that, is *Cutchin*.

6 And -- and *Cutchin* is the case, if Your Honor
7 remembers, that there was a inverse -- or a -- assumption
8 of the risk was a defense that was raised in this inverse-
9 condemnation case. And the Supreme Court in that case
10 doesn't say, you know, we've gotten rid of assumption of
11 the risk a few years ago and -- and that's not an
12 appropriate defense. They discussed the -- the defense
13 without dismissing it.

14 But they said there was insufficient evidence to
15 support it, so we're not going to address that defense.
16 But they did not say in that opinion that defense is not
17 applicable to a -- an inverse-condemnation claim. And by
18 virtue of the fact that they even went to the lengths of
19 discussing it and saying there's no evidence at trial
20 supporting it, Your Honor, we take the position that it is
21 a viable defense to an inverse-condemnation claim.

22 Now, on inverse condemnation -- and -- and assumption
23 of the risk, Your Honor, in your order, found that there
24 was no assumption of the risk because no evidence of
25 contamination in 2001 when he brought the property. Well,

1 that's right. There wasn't.

2 But there was evidence of the clay cap being there,
3 had he gone to the trouble of checking with the public
4 records. That was there. Had he done a Phase I, which
5 Kiswire did, which his own expert witness, Mr. Clymer, was
6 a -- a big proponent of Phase I's for purposes of
7 exercising due diligence when you buy a commercial property
8 or -- or -- or resale property across the street from a
9 closed landfill.

10 He could've done it then, and he didn't. Had he done
11 it then, he'd have found out the same stuff we found out in
12 December. He would've found out that there was a clay cap.
13 And he could've found out the propensities of a clay cap
14 and what could result from a clay cap and from passive
15 treatment of the closing of the landfill.

16 Now, Mr. Clymer testified that he -- he could've told
17 Mr. -- Mr. West and West/Hobby about the clay cap in 2001
18 because -- because it was public record. Mr. Abernathy
19 said DHEC had the records; it was public record. It --
20 it's -- it's in all of these semi-annual reports we've been
21 doing since -- since the late '90s that there's a clay cap
22 there.

23 S&ME picked up the same information when they did
24 their Phase I and then their limited soil and gas review a
25 month later in 2011 when Kiswire wanted that to be a -- a

1 -- a -- a contingency in their contract. And -- and that
2 was available in -- in 2001. The same stuff that S&ME
3 found in 2011 was there and was available in 2001.

4 Now, if -- if -- if Your Honor looks at the --
5 Plaintiff's Exhibit No. 13, which is the S&ME Phase I
6 report, not -- not the soil and gas, which is the second
7 step, but the Phase I -- all Phase I is, is a -- a review
8 of public records: what's out there to tell us whether
9 this is -- this piece of property is environmentally sound.

10 Everything that S&ME found in Exhibit -- Plaintiff's
11 Exhibit 13 was available in 2001. And what S&ME says in
12 its -- Plaintiff's Exhibit No. 13 is -- is that buying a
13 piece of property across the street from a known closed
14 municipal solid-waste landfill is a business risk. They
15 say it's a business risk, you know, and which caused
16 Kiswire to say, Well -- well, let's take the next step,
17 which was the limited soil and gas review, which I think is
18 Exhibit 14.

19 But they don't get into any testing with that Phase I.
20 It's just you're across the street from a closed landfill.
21 And if you buy it, it's a business risk so you better
22 assess what your business risks are. And they had the
23 opportunity to do that. Mr. West chose not to.

24 So our position, Your Honor, is that there was
25 evidence on -- on assumption of the risk that -- that he

1 knew in 2001 -- and this is not just a -- an unsavvy
2 property purchaser when he bought this property in 2001.
3 They had several pieces of property that he and Mr. Hobby
4 had when they bought it in 2000.

5 And they conveyed -- I -- I forget what we said at
6 trial, but it was up to like 18 pieces of commercial
7 property that West/Hobby had at some point that eventually
8 got conveyed out. By the time we got to trial, there was
9 only one piece of property they had, and that was the 40.7-
10 acre tract, subject of this lawsuit.

11 But -- but they were savvy businesspeople. And they
12 -- he -- he's got his own electrical-contracting business.
13 He's a very successful man. And -- and he -- he knew or
14 should've known enough at that point to have protected
15 himself with a Phase I. He could've found out at that
16 point.

17 And -- and we got an argument that he knew when he
18 bought it that it was across the street from a landfill.
19 And that information alone is a business risk and is -- is
20 him knowingly and -- and with appreciation of the risk,
21 assuming that risk when he bought it.

22 So our -- our second prong of our argument is that
23 their claim should be barred because of assumption of the
24 risk, citing *Cutchin* as it being a valid defense and that
25 there is evidence on the assumption-of-the-risk issue.

1 This -- this man should've known and -- and he -- he went
2 through the -- the purchase anyway. And -- and that was
3 assumption of the risk.

4 Now, I -- I mentioned earlier whether -- whether this
5 amounts to a taking -- and -- and we raise it as our -- our
6 third issue in our -- in our motion, which shows up on page
7 4, that there was no positive, aggressive, affirmative act
8 that triggered the taking.

9 In their complaint the -- or amended complaint, the --
10 the plaintiffs have alleged that the positive, affirmative,
11 aggressive act that triggered the taking was the putting on
12 of the clay cap in 1994, when Phase II was closed. Now, if
13 Your Honor remembers, there was testimony at trial that
14 this landfill was closed. It's it's a 56-acre tract. And
15 there were actually two phases of the closing.

16 The first phase was done. And then the second phase
17 was done and completed in or -- in or around 1994. The
18 clay cap, we have evidence, is that that was put on there
19 sometime around '93 or '94, according to Mr. Clymer's
20 testimony.

21 There is no testimony of when or if a clay cap was put
22 on Phase I, which is, if Your Honor remembers, the layout
23 of the -- of the land, it's kind of a -- a -- a
24 parallelogram with -- with -- that's bisected, where the --
25 the wider portion of the -- of the landfill tract is the

1 southernmost portion. It's like a triangle.

2 And the -- the -- the -- to the west of that is the
3 West/Hobby property, which has the wider portion at -- at
4 -- on the north end. And then, it tapers down to just a
5 tip at the bottom. The -- the -- the -- Phase II of the
6 landfill that was closed is the southernmost portion of the
7 landfill property, which is that portion of the West/Hobby
8 property, which is tapering down to almost nothing.

9 Steve Lamb talked about that: that -- that the
10 portion -- if -- if they're talking about the clay cap
11 being the -- the positive, aggressive act that -- that --
12 that triggered the -- the taking, you're talking about the
13 bottommost portion of the landfill, which affects the --
14 the tapering and narrowing portion of the West/Hobby
15 property, when the evidence is uncontroverted at trial that
16 -- that the groundwater flow is from the northwest to the
17 southeast; in other words, away from the -- the West/Hobby
18 property.

19 Now, they argue that the clay cap is the positive,
20 aggressive act. But that was done in 1994. Now, they cite
21 *W.R.B. Limited Partnership v. County of Lexington* as
22 support for their proposition that the placing of a clay
23 cap can be or is the triggering event for a taking.

24 But, Your Honor, *W.R.B. Limited Partnership* -- it's --
25 it's basically a page-and-a-half case that deals with

1 summary judgment having been granted and the Court reverses
2 that summary judgment. And in the last paragraph of that
3 opinion, the Court says: Here the county undertook a
4 permanent, public project in capping the landfill -- in
5 other words, putting on the -- the clay cap. Whether this
6 action resulted in a taking is not before us. That's what
7 the Court said. We simply find on the single element of an
8 affirmative, aggressive, positive act that county's action
9 meets this requirement and summary judgment should not have
10 been granted.

11 So they reverse summary judgment. They found an issue
12 of fact, and they found that the placing under the clay cap
13 could've been that. We're not talking about whether it is
14 or is not a taking. But it could've been that positive,
15 aggressive act.

16 So for purposes of this case, the clay cap could be
17 the positive, aggressive act. So let's look at what
18 evidence they've got and what evidence Your Honor found in
19 your case.

20 What -- what they really argued at trial wasn't the
21 clay cap. It was the passive treatment of -- of the closed
22 landfill. It was the failure to do something: the failure
23 to be more active about it.

24 They put in the trenches, and they didn't work either,
25 did they, Mr. Abernathy? Well, no, I guess they didn't.

1 The -- the county's position was: We did what was the
2 standard of the industry at that time -- which Steve Lamb
3 agreed with; Abernathy agreed with; Clymer agreed with it
4 -- in the mid-'90s was passive treatment. You start with
5 passive treatment. If that doesn't work, you ramp it up.
6 You go to the next stage. And then, whatever that -- what
7 -- what works there, if -- if it's not what you need, you
8 ramp it up again.

9 If you -- if Your Honor reviews the -- the evidence at
10 trial and the testimony, the passive resistance wasn't
11 working, according to them. 2006 B.P. Barber comes out and
12 says we got methane readings. You need to do something
13 else.

14 DHEC says put a couple more monitoring wells out
15 there. Put a trench out there. The trench didn't work.
16 And they made -- made a point of -- of pointing that out.

17 We eventually get to an active remediation system,
18 which they were -- they've put in and they had put in by
19 the time of trial. But they argued throughout the case
20 that county -- you're not doing enough. You're failing to
21 do what you're supposed to do.

22 Now, Your Honor, when Mr. Abernathy testified, I asked
23 him, you know, did the county do what you told them to do.
24 If -- if you told them to do something else, did they do
25 it. And he said yes, they did.

1 So what we were doing was complying with what DHEC
2 wanted. That -- that's -- that's not entirely a defense.
3 But it's something.

4 But the argument the plaintiff was making was that
5 whatever we were doing, even with DHEC's blessing and at
6 DHEC's direction, was not enough until we got to the end,
7 where we -- we implemented the -- the active remediation
8 system -- not the clay cap, but -- but the -- the -- the
9 maintenance or whatever we're supposed to do after the clay
10 cap was put in. They said we failed to do enough to take
11 care of that problem.

12 Your Honor, in -- in Your Honor's order, on page 8,
13 the -- the -- the numbering gets a little out of whack
14 here. I think early on you have some -- some numbers and
15 then it -- it gets -- it started over again, I think, with
16 No. 6.

17 But on page 8 of Your Honor's order, Findings 16, 17,
18 and 18 -- Finding 16 (As read): "Evidence clearly
19 demonstrates that while landfill gas was first shown to be
20 present on the plaintiff's property in March 2006, the
21 county did not install an active subsurface soil-gas-
22 extraction system until May of 2015." That's a failure to
23 do something.

24 Number 17 (As read): "The active subsurface soil-gas-
25 extraction system was known by the county to be an

1 available remedy for landfill-gas migration in September
2 2005, when its consulting engineer issued the methane-
3 remediation plan, Plaintiff's Exhibit 4, page 12." We
4 didn't put that in in 2005, another failure.

5 Number 18 (As read): "Based upon" -- and this is the
6 -- the pivotal one -- "based upon the testimony and other
7 evidence presented at trial, it is apparent the county did
8 not install an active subsurface soil-gas-extraction system
9 earlier than 2015 in an effort to save money at the time."

10 And this next sentence is pivotal (As read): "That
11 delay, however, prolonged the contamination of the property
12 and cost West/Hobby the sale to Kiswire."

13 They argued for two days that the -- the indication of
14 the taking was the lost sale to Kiswire and, with that
15 finding, the delay -- the failure to do something is what
16 triggered that purported taking.

17 Now, Your Honor, we've cited the *Hawkins v. City of*
18 *Greenville* case, 358 S.C. 280, 291; 594 S.E.2d 557, pages
19 562 to 563. It's a 2004 Supreme Court case.

20 And, Your Honor, in *Hawkins* the Court says -- they're
21 talking about allegations at this point (As read): Most of
22 the city's, quote, acts, closed quote, support his inverse-
23 condemnation claim are merely failures to act. And then,
24 they go on to say that: Allegations of mere failure to act
25 are insufficient.

1 That's why it's got to be a positive, aggressive act,
2 not just we didn't clean out the storm sewers in the town
3 of Greenville and you can sue us for it. We should've done
4 something affirmatively in *Hawkins*. And in this case there
5 -- there should've been something affirmatively that we
6 did.

7 Now, they tried to -- to bootstrap the 1994 imposition
8 of the clay cap, which was the standard in the industry,
9 according to Clymer and -- and Steve Lamb and -- and Mr.
10 Abernathy -- that -- that's what was supposed to be done.
11 They're trying to treat that as the positive, aggressive
12 act. But throughout the trial they argue -- and -- and
13 Your Honor found -- that what led to the purported taking,
14 the loss of this contract with Kiswire, was not that clay
15 cap. It was the failure to maintain that area after the
16 clay cap was in there.

17 We didn't do enough. We should've put the gas-
18 extraction system in there in 1995. And maybe that
19 would've taken care of it. That's a failure to act, and
20 that's not something that should've supported their taking.
21 It was not the positive, aggressive act.

22 So our argument there is that there was no taking.
23 Now, again, the cap was installed in 1994. There's no
24 evidence of any migration of alleged contaminants until the
25 2003-to-2006 period of time.

1 So from that point forward, they've alleged and they
2 argued that we didn't do enough. We failed to do what we
3 should've done. Under *Hawkins* that should not have been a
4 taking.

5 There also -- there -- there was no evidence at trial,
6 even with Mr. Clymer -- I think Mr. Clymer was -- was
7 standup in his conceding this, that -- that he did -- he
8 couldn't testify to how much whatever he saw as possible
9 landfill contaminants, how far they extended into the
10 tract, if at all. The measurements were pretty much along
11 the easternmost property line. There was one that I think
12 S&ME did that went in -- I can't remember if it's 50 or 75
13 feet. But it didn't go far into a 40.7-acre tract.

14 And there was -- there was no evidence at trial from
15 which Your Honor could've determined what the metes and
16 bounds, if this was a taking and it wasn't barred by
17 assumption of the risk or statute of limitations, I -- what
18 -- what's the extent of it? How far in does it go? Do --
19 do we give them credit for the whole 40.7-acre tract when
20 it's only in the first 10 to 20 feet of -- of the property
21 line?

22 I won't go into detail on that. We -- we've pointed
23 it out in our -- in our -- our motion. Mr. Clymer's
24 testimony that -- that his measurement was only at the
25 perimeter near the road -- there was testimony from Mr.

1 Clymer and from Steve Lamb. Steve Lamb indicated could've
2 come from other sources. The petroleum based contaminants
3 that were there could've come from other sources. And
4 there's no metes and bounds evidence with regard to the --
5 the migration.

6 The other thing we've alleged is this -- this Kiswire
7 contract, which -- which they're -- they're using that as
8 indication of -- of when the taking manifested itself. And
9 -- and our argument has been and continues to be that that
10 contract was -- was not a arm's-length contract.

11 It -- it -- it -- the -- if you look at several
12 elements of it -- first, Mr. Minnick testified. Mr.
13 Minnick, if you remember, was the general manager of
14 Kiswire. Mr. Minnick admitted he was a personal friend of
15 -- of Mr. -- Mr. West. Mr. West's contracting business,
16 West Contracting, did not only a lot of business with
17 Kiswire, but I think either Misty West or maybe Mr. West
18 said they do pretty much all their business for Kiswire
19 before and after this January 2011 contract.

20 They bought this property in 2000. And then a year
21 later, Hobby and West conveyed it to the West/Hobby, LLC.
22 But -- but there are never any offers to purchase; never
23 any contracts to -- to buy this property, up through and
24 including the 2008 recession we had, where property values
25 went through the floor.

1 This is undeveloped property in an area that -- that
2 is plentiful with undeveloped property. Yet if you believe
3 that this was a valid contract, you believe that -- that
4 the -- the \$290,000 investment in 2000 that got no offers
5 to purchase it in ten years and within a month after
6 West/Hobby petitioned Newberry County to reduce the tax
7 value of the property to below \$200,000, suddenly in
8 January of 2011, generates a \$520,000 offer to purchase the
9 property with several contingencies, one of which is it's
10 got to pass a Phase I.

11 It -- the Phase I doesn't flat out flunk it. It just
12 says that there's a -- there's a -- a business risk; need
13 to look a little further. They do the next step. And
14 there's some trace elements that are found there.

15 Mr. Minnick issues a letter in April of 2011
16 withdrawing his offer and -- and -- and backing out of the
17 offer. But that letter, which is Plaintiff's Exhibit No.
18 14 at trial, does not say in there it flunked the Phase I.
19 It flunked our environmental test.

20 He gives no reason why in his letter. Now, he
21 supplements that, when called as a witness, in his friend's
22 trial. But he does not indicate anything in any
23 documentation as to why he backed away. And he admitted at
24 trial and he admits in his letter and -- and the affidavit
25 that we asked him questions about that there were other

1 contingencies that had not yet been completed; that at the
2 time he backed out and issued this April 2011 letter
3 backing out of it, there were other things that still
4 would've had to have been done before he could've closed
5 that contract.

6 So this is not a ready, willing, and able purchaser
7 who's ready to go forward and buy that property right then.
8 There's other things that could've had to happen that
9 didn't happen that he -- that -- that they never went any
10 further with.

11 So we would argue, based on -- based on the
12 circumstances surrounding that contract, that it -- it was
13 -- it was not -- it was not an arm's-length contract and --
14 and -- and should not have been treated as -- as the -- the
15 issue with regard to this.

16 Now, my last point, Your Honor -- and this is kind of
17 a minor point, but it -- it's one that the county wanted me
18 to address. In Your Honor's order, there is mention of --
19 and there was testimony at trial from, I think, Misty West
20 and -- and Mr. Adams, my county administrator, that after
21 the Kiswire deal didn't go through, Misty West and her
22 father met with some county people, one of whom was -- was
23 Wayne Adams, and asked that the matter be resolved. What
24 would the county do to resolve it?

25 And in Your Honor's order, what's in there was that

1 the county was asked to resolve it and the county simply
2 said not interested. When we cross-examined Misty West and
3 when we asked Mr. Adams, the response not interested was --
4 was not in response to we have this issue, county, can --
5 that you caused; can you help us.

6 It was in response to Misty West saying we have this
7 issue; what can you do to help us? And we'll sell it to
8 you for \$750,000, 250 almost -- almost half again of -- of
9 whatever the -- the proposed sale price was with -- with
10 Kiswire and three try -- times whatever the -- the tax
11 value was..

12 Mr. Adams testified that's what he said they weren't
13 interested in doing. We're not going to pay you three
14 times the value of this property. We weren't interested in
15 that.

16 And -- and that -- that's a minor point. But it is a
17 point that I -- I think is a little different in there, not
18 that the county wasn't interested in -- in helping out to
19 resolve the issue, but that they certainly were not going
20 to be interested in -- in paying \$750,000 for the property.

21 That's our argument, Your Honor. Again, for -- for
22 authority, I've -- I've -- I think I've cited the cases, so
23 -- so they're in there. We've got that for Your Honor.

24 And I would refer Your Honor to pages -- I think it's
25 8 to 13 of my summary judgment memorandum, which -- which

1 is filed. I think we filed it August 24th. And -- and
2 that -- that has the same case law, rather than you have to
3 read something else. So thank ---

4 THE COURT: Okay.

5 MR. FRAWLEY: --- you, Your Honor.

6 THE COURT: All right. Thank you, Mr. Frawley. Mr.
7 Bruner, your turn.

8 MR. JAMES BRUNER: Your Honor, May it please the
9 Court: First of all, I'd -- I would -- if there are any
10 particular points you would like me to address, I would
11 like to address those first because, as we know, Mr.
12 Frawley's argument was a rather rambling argument. If
13 there's anything particular, other than statute of
14 limitations, which I intend to address, if -- if you'd
15 simply call it to my attention, I'll be glad to.

16 First, let me say, with respect to the statute-of-
17 limitations argument he has made, I think your order
18 specifically and directly addressed those issues and dealt
19 with them in a proper fashion. The first point I would
20 make is notwithstanding my amended complaint alleging that
21 the taking was apparently permanent, what became clear was
22 the only reason the county did anything to address this
23 issue was because they got sued. And they did not take the
24 action necessary to abate this contamination until 2015.

25 And Mr. Frawley is correct. The *Cutchin* case clearly

1 says that if it's an abatable issue, then there is a
2 continuing statute of limitations. What that means is each
3 injury is a new claim. So that means every single day that
4 there's a contamination, you have a new claim. You have a
5 continuing triggering of the statute of limitations, up
6 until the time this case was -- was filed.

7 So since that is so and since the evidence at trial
8 clearly showed that this was an abatable contamination, I
9 think you need go no further in the statute-of-limitations
10 argument than to understand, that being so, there's no way
11 the statute of limitations could bar this claim.

12 Second is my tolling argument. And you -- you
13 addressed this in the order in the *Strong* case, which held
14 that if you withhold the information from the potential
15 claimant, the statute of limitations for the claim he would
16 have is tolled during that period.

17 I guess we could argue about the niceties or the
18 meaning of the word "deliberate." What we do know is that
19 in 2006, Newberry County knew for a fact that its landfill,
20 its closed landfill, had contaminated the West/Hobby
21 property. That had been confirmed by tests. And that was
22 the offsite methane-gas report.

23 We also know that there is no evidence that Newberry
24 County gave a copy of that report or otherwise conveyed the
25 information in that report to Mr. West. And Mr. West says

1 he never got it. But he expected, once he signed that
2 letter, if there was something he needed to know, that they
3 would tell him. I think that's a very reasonable
4 expectation, as opposed to some sort of triggering of a
5 duty to act in response to that.

6 So we know the county did not tell him anything in
7 2006. And we know that it must have been on purpose
8 because they had the information and they decided not to.
9 That being so, the statute of limitations was tolled during
10 that time and -- and thereafter, until 2011, when they were
11 given -- West/Hobby was given a copy of the S&ME report by
12 Kiswire.

13 They -- since the contamination that took place
14 relates to landfill gas, which is methane, carbon dioxide,
15 and both of which are colorless and odorless, there's no
16 reason for them -- for the Wests to know that their
17 property has been contaminated. Yet you have the county,
18 who has actual knowledge that their property has been
19 contaminated and they're arguing that not they, but rather
20 the Wests have a duty to investigate to find out what the
21 county found.

22 I think the -- the law is exactly the opposite. If
23 they had that information, they have an obligation to come
24 forward and present it to the landowner and say, "Look,
25 this is what we're found -- what we found, and this is what

1 we plan on doing about it." They didn't do that.

2 So the first two arguments I would make on the statute
3 of limitations is: (1) the -- the contamination was
4 abatable; therefore, it was a continuing trigger of the
5 statute of limitations every day there was new injury; (2)
6 that it was tolled because the county withheld the
7 information when it should have given that information to
8 the landowner.

9 Mr. Frawley argues there were two points in time when
10 he thought that the statute of limitations would begin to
11 run: first, at the purchase, which, in fact, was in 2000.
12 And if understood his argument, he's saying if Mr. West had
13 checked the public records of the adjacent property, he
14 would have found that they installed a clay cap and he
15 could have further investigated and understood that,
16 because of that cap, that if he bought the property, it
17 potentially could've been -- could suffer damage in the
18 future.

19 That's not the way the statute of limitations works.
20 The statute of limitations starts to run when you know or
21 you have reason to know that you have a claim against
22 someone else. There is nothing about what I just said that
23 -- that Mr. Frawley's argument that would trigger that
24 statute of limitations.

25 There was no damage. There was no -- there was no

1 reason to know they had a claim. They hadn't even bought
2 the property yet. So he's saying that the statute of
3 limitations would start to run sooner than when he even
4 bought the property.

5 If his argument is true, and if any prospective
6 purchaser had that obligation to -- to investigate DHEC's
7 records and that once they saw those records, they would
8 have known that the -- the property could be damaged in the
9 future, if that's true, then the people who sold -- the --
10 nobody would've bought this property, first. And he's
11 arguing that the statute of limitations would've already
12 run against the people who owned the property because it
13 started when the clay cap was installed.

14 The fact of the matter is neither of those is true.
15 We know that if -- he -- he argued the *Fuller-Ahrens* case
16 as -- as giving a -- putting an obligation on a purchaser
17 of land to check the public records. That's not the
18 proposition that case stands for.

19 That was a case where a -- a partnership bought a
20 piece of land. And on that piece of land was a culvert
21 under a road that put stormwater onto their property.
22 There was a statute in existence that said the highway
23 department could give notice of its easement to have that
24 storm-drainage pipe under the road and that it would file
25 its easement in a -- in records at the highway department

1 down on Park Street and that if they do that, that is
2 public notice of that.

3 Now, what the Court found was if you buy property, you
4 have an obligation to check those because you have an
5 obligation to check the chain of title. If they had
6 checked the chain of title, and if they had checked the
7 highway department records, they would have seen that they
8 -- the highway department had an easement for that storm-
9 drainage pipe under the road and, therefore, they took it
10 with full notice of what was in the chain of title.

11 There, it was a statute that imposed the obligation to
12 check that public record. And it had to do with an -- an
13 element that was on the property they were buying. There
14 was nothing in that case that imposed an obligation on a
15 buyer of property to check the public records with respect
16 to an adjacent piece of property to the one they're buying
17 -- nothing.

18 And, in fact, that's not the law in this state. He
19 had the title checked to his piece of property. He knew
20 that there was an old closed landfill over there. But even
21 if he'd had a Phase I done, there would've been nothing in
22 that Phase I to have put him on notice that there was
23 contamination or any problem coming from the landfill
24 towards his property. Because at that point in time, not
25 even the tests on their own property was showing elevated

1 landfill-gas levels.

2 There was no contamination on this property until late
3 2003. That's on the landfill property. That's the first
4 time their own tests on their own property showed any
5 elevation levels.

6 And it wasn't confirmed to have migrated under the
7 road until 2006. And that's when it was first confirmed
8 that there was contamination on the West/Hobby property.

9 With that report, instead of giving a copy or calling
10 Billye West and tell him what they found, they simply filed
11 away with DHEC and kept their mouth shut. It wasn't until
12 nine years later, in 2015, that the county took the action
13 they needed to take to abate this contamination.

14 And we think it's working. Everything we see, the
15 test results, seem to indicate that -- that that was the
16 appropriate action and that it's working.

17 Now, what they -- now what he argues is now that I've
18 -- I've taken this action to abate this contamination,
19 that's really -- because I didn't do it sooner, that's
20 really a failure to act so you can't sue me for a failure
21 to act. We're not suing for a failure to act. No. We're
22 suing them for contaminating the property.

23 If they had done something back in 2006, when they
24 knew this action was available, they could've avoided all
25 this mess. But they tried to save money. Now they got to

1 pay the price.

2 We're not suing -- we did not argue at trial and we're
3 not arguing now that the reason for the taking was the
4 failure to act. The reason for the taking was the
5 contamination of the landfill gas on the West/Hobby from
6 the closed landfill. That's the reason. And that's what
7 we argued at trial.

8 Mr. Frawley mentioned the -- there was no evidence
9 about the extent of the taking. That's true. That's true.
10 There is none. We don't know how far in the property it
11 went.

12 However, it is my burden of proof to show that the
13 property was contaminated. If Mr. Frawley thinks the area
14 of contamination is less than the entire property, it's his
15 burden to come forth with evidence demonstrating that is
16 so. He did not do that.

17 Therefore, he cannot turn around and try to impose on
18 the plaintiff the burden of coming forward with evidence
19 which is his. I carried my burden of proof in showing that
20 the property was contaminated. He proved -- he showed no
21 evidence about the extent of contamination.

22 And the last thing he argued was that they think that
23 the Kiswire contract was -- was a sham contract. Nothing
24 could be further from the truth. Your Honor heard the
25 witnesses and was able to judge the credibility of the

1 witnesses.

2 Mr. Minnick made it very clear that the reason he was
3 interested in this piece of property was because it was so
4 close to his other, established manufacturing plant just
5 across 219. That's what made it attractive to him from the
6 standpoint of managing the affairs of both plants. And he
7 testified to that effect.

8 He testified that he evaluated himself what the
9 property was worth. And he determined what -- what the
10 purchase price would be. And that's what he put in the
11 contract.

12 So I think there is -- Mr. -- while Mr. Frawley tries
13 to draw inferences from the evidence to show that this was
14 a sham contract, the direct evidence is altogether
15 different. These men knew each other, yes. But they --
16 when it came to doing business, they -- they would have an
17 arm's-length transaction, and that's what they did.

18 There's nothing to show that it was a sham contract.
19 I think that the -- I think the -- a statute-of-limitations
20 argument is -- is a red herring. I find in his arguments
21 the -- the -- the county is arguing the facts whichever way
22 suit them best but their alternative theories in -- in
23 statements of -- of the case.

24 The fact remains that -- that my folks never knew of
25 the contamination until the spring of 2011. Although the

1 county had that information, it did not provide it as early
2 as 2006, when they had that information. They could have,
3 but they didn't.

4 Up until they lost this sale, my clients did not have
5 any damage that resulted from the taking. Arguably, it
6 might've been some nominal damage just by virtue of the --
7 of the contamination itself. It would have to do with the
8 diminution in the fair market value of the property or --
9 or some theory like that.

10 But practically speaking, in real life, there was no
11 significant impact on my clients until they lost this sale
12 because of the contamination. There's nothing unfair or
13 inappropriate for seeking damages in that situation. And
14 to -- to come up with defenses such as sham contract and --
15 and other issues is just -- it doesn't make any sense to
16 me.

17 I -- I would say again on the statute of limitations
18 two key points: It was an abatable contamination;
19 therefore, there was a -- a continuing trigger of the
20 statute of limitations every day. Second, because they
21 didn't provide that information to the plaintiffs when they
22 had it, the statute of limitations was tolled until the
23 plaintiffs got information in 2011.

24 THE COURT: Okay.

25 MR. JAMES BRUNER: Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Bruner. Anything in brief
2 reply, Mr. Frawley?

3 MR. FRAWLEY: Just real briefly, Your Honor. The --
4 the issue about that I'm now arguing, well, it's failure to
5 act and you can't get us on that: There -- there was a
6 cause of action they could've had for failure to act. And
7 it's called negligence, which they did assert. And then
8 they -- they dismissed just before this case went to Your
9 Honor on the only issue being inverse condemnation.

10 Had they -- they thought that we had some kind of
11 negligence issue there, after going through discovery, he
12 could've pursued that. But he chose not to. So once he's
13 in inverse condemnation, the issue on a taking is a
14 positive, aggressive act. That's why we're arguing you
15 haven't proven a positive, aggressive act.

16 If we didn't put this thing in quickly enough, the --
17 the active remediation system, that might be fodder for his
18 -- for -- for his negligence claim, which he chose to
19 abandon. So -- so for us say that we're -- oh, you -- you
20 can't get us now because we didn't act, that's not true.
21 He had the opportunity to do that; he chose not to.

22 On the burden of proof as to how far it extends in
23 there, if he's got a case that says that once he proves
24 that just the perimeter is -- is -- is -- is contaminated,
25 if that's the case, that he gets credit for the whole 40.7-

1 acre tract, and then I have to come in and prove and take
2 borings all over his 40.7-acre tract that it is or is not
3 -- is -- is not a -- a -- contaminated, I'd to hear that
4 case. But I'm not aware of that.

5 There was evidence on the perimeter that there may
6 have been some landfill contamination, but not the rest of
7 the 40.7-acre tract. That's all I've got.

8 THE COURT: Okay.

9 MR. FRAWLEY: Thank you, Your Honor.

10 THE COURT: Thank you very much, guys. I continue to
11 appreciate your hard work. And so I'm going to continue to
12 study on this and I'll take it under advisement and let you
13 guys know something as soon as I can.

14 MR. FRAWLEY: All right.

15 MR. JAMES BRUNER: Can I inquire if it's -- if it is
16 still an open question whether or not we may have a damages
17 hearing before we go to the code of -- Court of Appeals?
18 Have you made a decision ---

19 THE COURT: Did ---

20 MR. JAMES BRUNER: ---on that?

21 THE COURT: Did I not address that? I -- I know that,
22 Mr. Bruner, your position is -- is go ahead and do the
23 damages now. Mr. Frawley, because of -- you know, it --
24 assuming I were to deny your motion for reconsideration it
25 has certainly been your indication that -- that Newberry

1 County has instructed you to -- to carry it further. And
2 you -- you don't want anything done with respect to damages
3 until the appeal can be decided.

4 MR. FRAWLEY: That's correct ---

5 THE COURT: Okay.

6 MR. FRAWLEY: --- Your Honor. I -- I think the issue
7 of whether there was or was not a taking is a clean issue
8 when we -- with finality. And we -- and we -- my --- my
9 marching orders are to -- to appeal it ---

10 THE COURT: Sure.

11 MR. FRAWLEY: --- if it comes to that. So -- so
12 should Your Honor come back and -- and affirm the order
13 denying my motion, we would -- we would file a notice ---

14 THE COURT: And -- and ---

15 MR. FRAWLEY: --- of appeal.

16 THE COURT: And say -- I thought I had addressed that
17 maybe in an e-mail that -- that my -- my preference is --
18 is to go with Mr. Frawley and not -- and -- and I -- and I
19 understand where you're coming from, Mr. Bruner, but not to
20 deal with the damages until, you know, the -- the appeal is
21 heard -- again, assuming that I affirm my -- my -- my
22 previous order.

23 MR. FRAWLEY: And, Your Honor, if the Court of Appeals
24 finds that -- that it's interlocutory, they're going to
25 kick me back here anyway ---

1 THE COURT: Right.

2 MR. JAMES BRUNER: I -- I don't ---

3 MR. FRAWLEY: --- at that ---

4 THE COURT: Right.

5 MR. FRAWLEY: --- point.

6 MR. JAMES BRUNER: I -- I -- I tend to agree with Mr.
7 Frawley. I don't think it's interlocutory. I think it's
8 an appealable order.

9 THE COURT: Right.

10 MR. JAMES BRUNER: But I don't think there's any
11 reason why the -- the rest of the issues in the case -- in
12 -- in this case it's not as if the damages issue is
13 particularly complex.

14 THE COURT: Right.

15 MR. JAMES BRUNER: So I think it can be done nonjury
16 and done very efficiently. I -- I just hate to see the
17 thing dragged out another three years.

18 THE COURT: I -- I understand. I understand. But my
19 preference would be -- is to not deal with the damages ---

20 MR. JAMES BRUNER: I understand.

21 THE COURT: --- until ---

22 MR. JAMES BRUNER: All right.

23 THE COURT: --- until that.

24 MR. FRAWLEY: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. FRAWLEY: Thank you for ---

2 THE COURT: Thank you ---

3 MR. FRAWLEY: --- your patience.

4 THE COURT: --- guys.

5 MR. JAMES BRUNER: Thank you, Judge.

6 THE COURT: Appreciate it. Y'all be careful going
7 back home.

8 MR. FRAWLEY: Yes, sir.

9 (Whereupon, the proceeding was concluded at 10:34 a.m.)

10 --- END OF TRANSCRIPT OF RECORD ---

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

West/Hobby, LLC,)
)
Plaintiff,)
)
-vs-)
)
County of Newberry,)
)
Defendant.)

Docket No. 2012-CP-36-0046

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT BY THE
DEFENDANT NEWBERRY COUNTY

TO: JAMES L. BRUNER, ESQUIRE, COUNSEL FOR THE PLAINTIFF WEST/HOBBY, LLC:

YOU WILL PLEASE TAKE NOTICE that the Defendant Newberry County, by and through its undersigned attorneys, will move before the presiding Judge of the Court of Common Pleas for the Eighth Judicial Circuit, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, at the Newberry County Courthouse, College Street, Newberry, South Carolina, for an Order granting the Defendant Newberry County Summary Judgment and dismissal of the Plaintiff's claims in the captioned matter against Newberry County. This Motion is based upon the same grounds as set forth in this Defendant's January 26, 2014 Motion for Summary Judgment, a copy of which is attached hereto as "Exhibit A," and was served upon Plaintiff's Counsel by mail January 27, 2014 and filed with the Court January 28, 2014, then was withdrawn when the Plaintiff requested and this Defendant consented to a 40(j) strike of the case.

This Motion is based upon the pleadings in this matter, statutes, case law, Rules of Court, Answers to Interrogatories, documents produced through discovery or pursuant to subpoena, depositions, affidavits if applicable, and such other and further authority as the Court may deem appropriate.

DAVIS, FRAWLEY, LLC

BY: 

Patrick J. Frawley
140 East Main Street (29072)
PO Box 489
Lexington SC 29071-0489
803-359-2512
pat@oldcourthouse.com

Lexington, South Carolina
August 10, 2015.

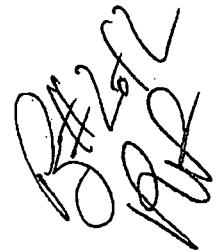


EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

West/Hobby, LLC,)
)
Plaintiff,)
)
-vs-)
)
County of Newberry,)
)
Defendant.)

Docket No. 2012-CP-36-00

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT BY THE
DEFENDANT NEWBERRY COUNTY

2012 JUN 28 AM 11:50
JACKIE S. BOWERS
CLERK OF COURT

FILED
NEWBERRY COUNTY

2012 JUN 13 AM 12:12
JACKIE S. BOWERS
CLERK OF COURT

FILED
NEWBERRY COUNTY

TO: JAMES L. BRUNER, ESQUIRE AND MATTHEW H. STABLER, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFF:

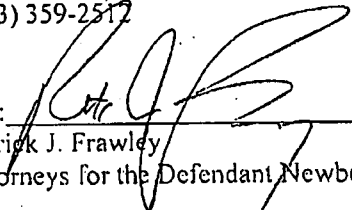
YOU WILL PLEASE TAKE NOTICE that the Defendant Newberry County, by and through its undersigned attorneys, will move before the presiding Judge of the Court of Common Pleas for the Eighth Judicial Circuit, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, at the Newberry County Courthouse, College Street, Newberry, South Carolina, for an Order granting the Defendant Newberry County Summary Judgment and dismissal of the Plaintiffs' claims in the captioned matter against Newberry County, in whole or in part. This motion is made on the grounds that 1) there is no genuine issue of material fact but that the Plaintiff's claims against Newberry County are time barred by the applicable statute of limitations; 2) that there is no genuine issue of material fact or evidence supporting the Plaintiff's claim that Newberry County was grossly negligent in any act or omission of its agents or employees within the applicable statute of limitations period; 3) that there is no genuine issue of material fact or evidence supporting the Plaintiff's claim of inverse condemnation against Newberry County; 4) that there is no genuine issue of material fact or evidence supporting the

Handwritten signature/initials: RA/af2 RR

Plaintiff's claim of trespass and damage to the 40.7 acres it claims is damaged; 5) that there is no genuine issue of material fact but that the Plaintiff, by and through its agents and employees, was itself grossly negligent as a matter of law in failing to exercise even slight care in its acquisition of the property it now claims damage to, given the facts and circumstances existing at the time of its acquisition.

This Motion is based upon the pleadings in this matter, statutes, case law, Rules of Court, Answers to Interrogatories, documents produced through discovery or pursuant to subpoena, depositions, affidavits if applicable, and such other and further authority as the Court may deem appropriate.

DAVIS, FRAWLEY, LLC
140 East Main Street, P.O. Box 489
Lexington, South Carolina 29071-0489
(803) 359-2512

BY: 
Patrick J. Frawley
Attorneys for the Defendant Newberry County

Lexington, South Carolina

January 26, 2014.

Handwritten notes:
P# 2 of 2
JRF

STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)
)
 West/Hobby LLC,)
)
 Plaintiff,)
)
 vs.)
)
 County of Newberry,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

Case No.: 2012-CP-36-00046

**NOTICE OF MOTION AND
 MOTION FOR SUMMARY JUDGMENT**

REC'D MAY 21 10 38
 JACQUELINE B. BROWN
 CLERK OF COURT
 NEWBERRY COUNTY, SC

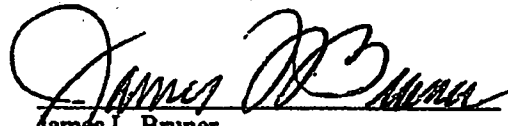
**TO: THE DEFENDANT ABOVE-NAMED AND PATRICK J. FRAWLEY, ESQUIRE
 IT'S COUNSEL.**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through its undersigned duly authorized counsel, will move before the Presiding Judge, Eighth Judicial Circuit, at the Newberry County Courthouse, Newberry, South Carolina, on the tenth (10th) day following service hereof, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56, SCRCP, granting the Plaintiff summary judgment on its claim for inverse condemnation on the grounds that there are no issues of material fact and that the Plaintiff is entitled to judgment on its claim for inverse condemnation as a matter of law, in that:

1. The Plaintiff sued the Defendant for inverse condemnation of 40.7 acres ("the Property") it owns arising out of contamination emanating from the closed Newberry County landfill on Cockrell Road;
2. The Defendant operated a municipal solid waste landfill on Cockrell Road in Newberry County from 1970 until 1993;
3. Plaintiff bought its Property on Cockrell Road for \$290,000 in December 2000 for investment purposes;

4. Plaintiff's Property is across the road from the closed landfill;
5. On January 19, 2011, Plaintiff signed a contract to sell the Property to Kiswire, Inc. for \$520,000;
6. An examination of the property for Kiswire by S&ME in March 2011 revealed the presence of volatile organic compounds in landfill gas on the Property including benzene, tetrachloroethene and trichloroethene which had migrated laterally from the closed landfill under Cockrell Road to the Property;
7. The landfill gas migrated from the closed landfill to the Property because the Defendant had installed a clay cap on top of the closed landfill;
8. The cap prevented the landfill gas from migrating vertically and rather caused the gas to migrate laterally onto the Property;
9. The installation of the clay cap was a permanent public project undertaken by the County;
10. The installation of the clay cap constituted an affirmative, aggressive and positive act by the County;
11. Because of the presence of VOC's in the landfill gas on the Property, Kiswire cancelled its contract to buy the Property;
12. As a result of the cancelled contract, the Plaintiffs lost the profit on their sale to Kiswire of \$230,000;
13. The County's act constituted a physical taking of the Property without just compensation;
14. The Court should inquire into the grounds stated above and determine that there was a physical taking of private property by the County without compensation and that the damage to the Plaintiff caused by the taking was \$230,000 plus reasonable attorney's fees and costs.

This motion will also be supported by such affidavits as are hereafter filed and served, such memorandum as may be filed and served and the law in such cases as have been made and are provided.



James L. Bruner
Bruner, Powell, Wall & Mullins, LLC
Post Office Box 61110
Columbia, South Carolina 29260
(803) 252-7693
jbruner@brunerpowell.com
Attorneys for the Plaintiff

May 19, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

JUL 24 2017

Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2016-001773

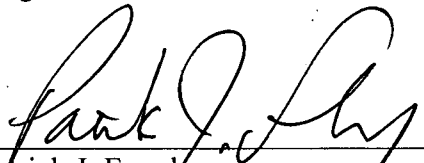
West/Hobby, LLC,..... Respondent,

v.

County of Newberry, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by the parties and not any other material. I further certify that this Record on Appeal complies with the April 15, 2014 Revised Order of the South Carolina Supreme Court, Concerning Personal Identifying Information in Appellate Court Filings.



Patrick J. Frawley
DAVIS FRAWLEY, LLC
Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: 803-359-2512
pat@oldcourthouse.com
ATTORNEYS FOR APPELLANT

Lexington, South Carolina
July 20, 2017