

power failure

Was it deception, arrogance or CEO Dick Abdoo's obstinacy that led the once admirable Wisconsin Energy to the biggest environmental pollution penalty in state history? The inside story of a major blunder.

BY MARY VAN DE KAMP NOHL

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Buried under Wisconsin Energy's high-tension lines in West Allis and at two other sites, state officials discovered 26,000 tons of cyanide-laced waste.

It was nearly closing time when the West Allis Fire Department called to report an oily blue sheen floating down Underwood Creek. Pam Mylotta, a Wisconsin Department of Natural Resources (DNR) spill investigator, promised to look into it on her way home.

The firefighters were waiting for her and together they tracked a foamy scum up a giant concrete sewage tunnel, exiting through a manhole south of I-94 and just west of Highway 100, behind the Giddings & Lewis plant.

Cattails grew around the edges of the site behind the heavy-equipment manufacturer's factory (now Quad/Graphics) and a rancid odor hung in the air. A firefighter traced the smell to a small pile of wood chips that looked as if they had been burned. A bubbling, frothy liquid coming from the pile formed a pond nearby and ran into Underwood Creek. "The vegetation around it had all been killed off," recalls Mylotta.

Someone grabbed a rusty shovel and plunged it into the pile. The rust magically melted away, revealing a shiny-new metal surface. At the edge of the pile, there was a massive chunk of "what was obviously concrete, eight inches across with rock and little pebbles," says Mylotta. "But when we touched it, it was like jelly."

Mylotta ran to the car for a pH test kit, the kind high school chemistry classes use. She stuck the litmus paper into the liquid. The reading suggested nearly straight sulfuric acid. How could that be right? Mylotta wondered, opening another test kit. But the reading was just as acidic. She collected a sample in a clean Mason jar for the hazardous waste team and made a note, "Kids on dirt bikes playing nearby."

Everyone at the site on April 17, 1992, knew they were dealing with something dangerous. What they didn't realize was that they had found the tip of a legal iceberg: fifty-two million pounds of cyanide-laced wood chips. By 1999, the case would result in the largest punitive damage award for environmental pollution in state history. The groundbreaking \$104.5 million verdict was only the beginning of a legal battle that may reach the U.S. Supreme Court. Never before had there been such a huge punitive damage award for an act carried out four decades earlier. How the case came to be, and the legal maneuvering to overturn it, is the stuff of Hollywood movies.

MORE AND MORE OF THE MYSTERIOUS wood chips kept turning up – at Wisconsin Energy's nearby substation, at its training station and on the City of West Allis' land at 113th and Greenfield. The properties all had one thing in common: A high-tension transmission line Wisconsin Energy built in 1959 ran through them. Though the land was privately owned, state law allows utilities to put their lines on anyone's property.

Given the contamination's scope, DNR hazardous waste investigator Michael Ellenbecker ordered aerial photographs and sent some wood chips to the state lab with a warning: "This sample may have a low pH and contain a complex cyanide."



Known as Prussian blue, the oxide box waste mingled with ground water, creating a toxic brew that burned like battery acid.

"When the guys at the lab saw that I wanted to test for cyanide, they thought I was crazy," recalls Ellenbecker. But the lab identified iron cyanide. "By itself, that won't do anything. But in a wet environment, with wood chips containing sulfur, it generates a low pH. That was what was pooling up... A low pH can burn you, like battery acid." The acid freed

the cyanide from the iron cyanide, contaminating the ground water.

There were 140 parts per million (ppm) of cyanide in the standing water on Giddings' property. As little as .025 ppm had been found toxic to fish, and there were reports of cyanide fish kills going back to the turn of the century. The City of West Allis and Giddings hired a laboratory to study the liquid. Even after the lab neutralized the acid, the liquid damaged the reproductive ability of the test subjects, water fleas called daphnids. The DNR ordered all 155,000 gallons of the water at the site hauled away for treatment. Giddings, the city and Wisconsin Energy were ordered to clean up the contaminants, and the three shared the expense of drafting a remediation plan.

The wood chip material itself contained as much as 1,000 ppm of cyanide, provoking the DNR to give the sites its highest cleanup priority. DNR called the wood chips "characteristic hazardous waste" because of their extremely corrosive nature, but, it said, "Cyanide was the big kicker."

NO ONE AT GIDDINGS OR THE CITY could remember dumping anything like this. But when the environmental consultants began unearthing the wood chips, it was apparent that they hadn't been dumped one truckload at a time in some haphazard moonlit operation either. They had been spread in even layers three feet deep,

compacted, then covered with a thin layer of soil, another layer of wood chips and more soil. When Judge Patricia McMahon saw a side view of the excavation later, it reminded her of a layer cake.

By 1993, everyone agreed that they were dealing with oxide box waste (OBW), a by-product of the manufactured-gas industry. Before natural gas was piped to the Midwest in the 1950s, gas for heat and light was manufactured by baking coal at high temperatures. But the raw gas contained hydrogen sulfide, cyanides, arsenic, coal tars and other chemicals so corrosive that it ate through steel pipes. The government required gas producers to purify their gas before sending it to customers.

To remove the impurities, plant operators pumped raw gas through giant purification boxes filled with rusted iron shavings layered between wood chips that acted as a fluffing material. The contaminants clung to the material, leaving clean gas for distribution. When the Brillo pad-like metal filings and wood chips became saturated, the material, called oxide box waste (or Prussian blue, for its distinctive color), would be replaced. But disposing of spent oxides was a vexing problem. The material was highly combustible, and municipalities didn't want it in their dumps. So manufacturers often used their spent oxides as fill.

Allen Hatheway, professor emeritus at the University of Missouri, who has spent his career studying old manufactured-gas plant sites and was not involved in this case, says, "When the soil is acidic, that's where oxide box waste is dangerous. It forms the types of cyanide that are mobile, the forms hazardous to humans, and the worst case is when it forms blue water and bubbles up gas" — exactly what was happening in West Allis.

ABOUT THE TIME 26,000 TONS OF OBW was being uncovered in West Allis, officials at Wisconsin Power and Light, across the state in Madison, met with their attorneys to discuss their own oxide box waste. "It all started when we found it along the Rock River, blue crystals that a kid would find very interesting," recalls Nino Amato, then a WP&L senior vice president (now a hospital executive).

"There was an internal debate on whether oxide box waste is poisonous or not. The lawyers said no. We heard all the technical arguments that these things were not harmful... But some of us thought we should put up a fence. Manage our sites. We weren't even sure where all of our oxide box waste was," says Amato. "The lawyers said that was good. If you don't know where it is, that's a great defense."

Amato dropped a few blue crystals into a glass of water. "If you think it's so safe," he said, "take a drink." The glass was passed around the table, but it never touched an attorney's lips. The company's chairman, Erroll B. Davis Jr., decided "WP&L will abide by the rule of law, but if it's in the public interest, we'll do more," remembers Amato.

WP&L merged to create Alliant Energy, but a DNR manufactured-gas waste specialist says the utility is still one of the best at taking responsibility for its sites. The worst? "Wisconsin Energy (WE) and Northern States Power (NSP)," says the source.

THERE ARE 111 FORMER MANUFACTURED-GAS PLANTS in the state, but only two in southeastern Wisconsin generated the volume of waste found in West Allis. One was a Wisconsin Energy predecessor located in downtown Racine. The second was an early subsidiary of Milwaukee's other major local utility, Wisconsin Gas. It was located in Milwaukee's Third Ward. The Racine plant was demolished in 1960; the Third Ward plant ended production in 1958.

Because the wood chips were discovered all along the corridor where Wisconsin Energy had built its transmission lines — property that belonged to Giddings, West Allis and other land owners — Gid-

dings and the city assumed the utility was responsible. They theorized that when Wisconsin Electric constructed the towers in 1959, they used the oxide box waste as fill to level out the land.

But certainly no one could have trucked in 2,600 loads of the stuff and placed it under those 125-foot high-tension towers without their knowledge. Only a small amount of the wood chips was actually located on Wisconsin Energy's property, but they were all over the utility's easement on the city's and Giddings' properties. So the two asked Wisconsin Energy to pay a third of the cleanup costs. It refused, saying the wood chips weren't theirs; they'd buried all of theirs at the Racine plant. Had Wisconsin Energy agreed, its costs would have been \$800,000. The company would have been reimbursed by their customers. And "there never would have been a court case," says attorney J. Ric Gass, who would bring the plaintiffs' suit.

Following the advice of the state's top toxicologist, West Allis officials fenced off their site with a six-foot-high chain-link fence topped by three feet of barbed wire. They posted "Danger, Keep Out" signs and ran warnings in the newspaper, telling residents to stay away. The city's health officials asked the Wisconsin Division of Health whether they should cover the site to prevent particles from being inhaled, but the state warned that covering the material might lead to "an accumulation of toxic gas." The gas they worried about was hydrogen cyanide (HCN), the same gas used in the gas chamber, although it is generated differently there. Hydrogen cyanide gas kills in minutes by replacing the oxygen on he-

the players

WISCONSIN ENERGY'S TEAM

Kevin J. Lyons: lead Cook & Franke attorney

James Zakrajsheck: Wisconsin Energy (WE) staff attorney in charge of the case

Walter Woelfle: WE attorney; Zakrajsheck's boss

Richard Abdoo: WE president, chairman and CEO

James Lingle: WE engineer, expert on manufactured-gas plants

Michael Kaminski: head of WE's insurance department

Hank Jaskulski: retired WE transmission line engineer

Sally Bentley: WE attorney who takes over after jury verdict

Barbara Wrubel: Skadden Arps attorney hired for appeal

Robert H. Friebert: Milwaukee attorney working with Skadden Arps

THE OPPOSITION

J. Ric Gass: lead attorney for the City of West Allis and Giddings & Lewis

Jeannette Bell: mayor of West Allis

Paul Murphy: West Allis common council president

THE BENCH

Patricia McMahon: Milwaukee County Civil Court chief and trial judge

George A. Burns Jr.: retired judge who oversaw mediation

moglobin molecules and essentially suffocating a person.

At the city's site, there *was* evidence of hydrogen cyanide gas. "Our workers were wearing cyanide detectors around their necks," says Geoff Parish, the consulting engineer who oversaw the cleanup. "The alarms did go off – once when we were drilling a well and again when we were removing waste from the site." The workers, wearing Tyvek protective suits, boots, hard hats, gloves and splash protection immediately stopped what they were doing and headed upwind.

"It was the worst environmental site I've seen in my 11 years of this type of work," says Parish. He would tell the jury it was a 9.5 on a 10-point scale.

THE CONTAMINATED WOOD CHIPS found in West Allis were trucked to a licensed landfill in Franklin. There, the thick clay liner and monitoring wells would make sure it stayed put and did not

worthy of Julius Caesar. In fact, with two lawsuits tried at once, it guaranteed that Wisconsin Energy would be fighting a war on two fronts: one attacking the gas company, the other defending itself against the city and Giddings. It also fortified the enemy because now it was in the gas company's interests to help West Allis and Giddings prove that Wisconsin Energy was to blame.

"OF THE 780,000 CASES LIKE THIS FILED each year, only 12,000, or 1.5 percent, ever face a jury.... The whole idea of lawsuits is to settle.... Trials are a corruption of the entire process and only fools with something to prove end up ensnared in them. When I say 'something to prove,' I don't mean about the case but with something to prove about themselves." – John Travolta in *A Civil Action*

It wasn't long before attorneys for both Wisconsin Gas and the plaintiffs began drawing parallels to the Travolta movie (based on an award-winning book by Jonathan Harr) about an East Coast

"It was the worst environmental site I've seen in my 11

foul the ground water. The cost of the cleanup, not including Giddings' diminished property value or the city's lost property taxes, was \$2.5 million. In the spring of 1995, the City of West Allis and Giddings threatened to sue to recover some of those costs. Wisconsin Energy's in-house attorney, James Zakrajsheck, and the company's manufactured-gas plant expert, engineer James Lingle, formed a special investigation team that included top management.

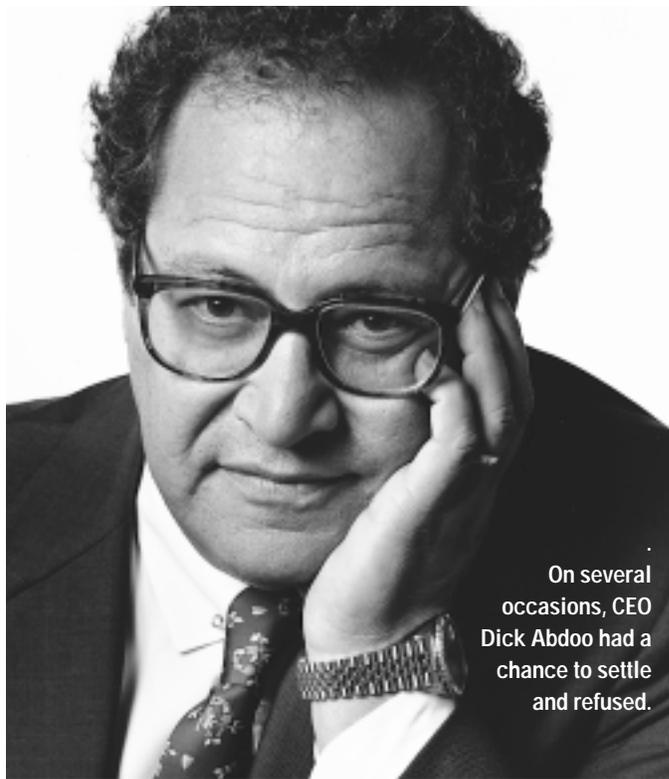
A decade earlier, the Environmental Protection Agency had begun investigating manufactured-gas plant sites because of concern about toxic by-products. In 1986, Wisconsin Energy had hired a Minneapolis firm, ENSR, to look for oxide box waste at five of its former manufactured-gas plants, including the Racine site. ENSR's workers were thorough but cautious. ENSR President William M. Gregg had seen a Duluth plant site where a worker cleaning out an old purification box was overcome by fumes and died.

Although ENSR's engineers tested the ground water and did soil borings all over the Racine site looking for OBW, all they found was six inches of wood chips at the bottom of one old purification box. "I have done these tests at hundreds of old manufactured-gas plants all over the country," Gregg tells *Milwaukee Magazine*, "and the records are always incomplete, but the records at Racine were as good as any." Based on Gregg's report saying "no gas plant waste disposal activities were carried out on this property," the DNR gave the Racine site a clean bill of health.

When the plaintiffs learned about Gregg's report, Wisconsin Energy's story changed. It hadn't buried the oxide box waste in Racine after all. It had put it on the Lake Michigan shoreline "to stop erosion" and it had all washed away. By the time the case would get to court, the records Gregg had seen would also be missing.

If the source of the waste wasn't Wisconsin Energy, it had to be Wisconsin Gas. Like most regulated monopolies, which keep careful track of expenses in order to win rate hikes from the Public Service Commission (PSC), the gas company had records. Attorneys for the plaintiffs spent a day and a half examining them and concluded Wisconsin Gas was not the source of the Prussian blue. On July 5, 1996, the City of West Allis and Giddings & Lewis sued Wisconsin Energy's subsidiary, WEPCO, charging that it had used its OBW as fill during construction of the 1959 transmission line.

Wisconsin Energy hired Cook & Franke attorney Kevin J. Lyons, who was regarded as both smart and capable, as lead trial counsel, but its chief legal strategists remained in-house: Zakrajsheck and his boss, attorney Walter Woelfle. The pair immediately blamed Wisconsin Gas for the waste and sued. It was hardly a tactical move



On several occasions, CEO Dick Abdoo had a chance to settle and refused.

water pollution case. And indeed, there were some. Certainly, there were opportunities to settle.

On November 17, 1998, attorneys for Wisconsin Gas, West Allis and Giddings & Lewis, and Wisconsin Energy met with retired Judge George A. Burns Jr., a state mediator known for his "good street smarts" and "the ability to size up people quickly." Burns had been a defendant's judge, eager to dismiss frivolous lawsuits brought by plaintiffs.

Wisconsin Energy's attorney, Lyons, told Burns it was "just a coincidence" that the waste was found under the utility's towers. He was "very confident he could blame the gas company," recalls Burns. "And I told him, [Giddings' lawyer J.] Ric Gass is a pretty good lawyer. If there was a case against the gas company, he'd be suing them." Gass taught evidence at Marquette University Law School, and he was, according to Burns, "a scholar as well as a good trial attorney and, justifiably, a little cocky."

But it was a gas company witness who convinced Burns that Wisconsin Energy was the source of the cyanide-laced wood chips. The witness showed Burns the gas company's OBW disposal records going back to 1931. Wisconsin Energy didn't have any records and it couldn't explain why not.

Burns told Wisconsin Energy's lawyers: "You have nowhere to go. They were trying to tell me they put it in the lake – thousands of tons of the stuff in downtown Racine's harbor within sight of the courthouse," says Burns. "If you could believe that, you could believe in the Easter bunny!"

Burns told Wisconsin Energy to jump at the city and Giddings' offer to settle for \$3 million. But Wisconsin Energy offered "just \$125,000. That was ridiculous," says Burns. "It was a slap in the face.... They had to know they would have a huge mountain to climb in court." It was "very poor judgment," adds Burns. "I left there feeling they were gonna get whupped."

years of this type of work"— 9.5 on a 10-point scale. — *Geoff Parish, consulting engineer*

Ironically, the gas company had gone to mediation prepared to settle. Big companies fare miserably before juries. Why risk it? Besides, it would cost less to settle the case than to bring in a fancy East Coast lawyer to try it. Company officials were still leaning toward settlement when Burns and then Wisconsin Gas President and Chief Executive Officer Bronson Haase had lunch a few days later. Sources close to the meeting say the judge reassured Haase that Wisconsin Energy had no case against his firm. Afterward, Haase tried convincing Wisconsin Energy Chairman and Chief Executive Officer Richard A. Abdo to settle, but Abdo refused, insisting that his company was innocent.

JURY SELECTION BEGAN ON JUNE 14, 1999 in Judge Patricia McMahon's courtroom. Reading the things Wisconsin Energy called McMahon later in its appeal – "an irrational, vindictive tyrant" – you wonder why the company didn't demand a substitute judge. McMahon's peers thought considerably more of her; they'd chosen her as chief judge of Milwaukee County Circuit Court's civil division. McMahon had graduated first in her class at Atlanta's Emory School of Law and, unlike some judges, she read every document filed in her court. Every short list for appointment to the U.S. District Court that circulated included McMahon's name.

Until 1983, McMahon had served as executive director of Legal Action of Wisconsin, an association that caused some conservatives to view her as a bleeding-heart liberal. But lifelong liberals, some burned in McMahon's court, saw her more as a "moralistic judge" and a stickler for the rules of the judicial system. No one considered Pat McMahon a "settling judge," one who would spot a tough issue and force the sides to settle lest the case end up on appeal. She'd rather try the case.

On the eve of the trial, Wisconsin Energy increased its settlement offer to \$2 million, \$1 million less than the plaintiffs wanted before they went to the expense of preparing for trial. It was too little too late.

In his opening argument, Wisconsin Energy's attorney, Lyons, called the case "a garden-variety negligence case" and an "old-fashioned whodunit." He said the OBW had been placed on the plaintiffs' properties between 1937 and the early 1950s, years before the transmission line construction, and that the waste came from the gas company.

West Allis and Giddings' attorney, Gass, began by showing jurors an enlarged photograph of the tons of waste and pooling blue

water. "Promise me one thing," he said, "that you will never forget this picture." Then Gass called Wisconsin Energy's gas plant expert, Lingle, as an adverse witness. Before Lyons could make any points with his star witness, Gass had Lingle recounting manufactured-gas industry history from 1806 until the late 1950s.

When he finished, the jurors realized that even in the 1800s, the industry and public health officials knew how dangerous oxide box waste was. By 1880, Milwaukee had passed an ordinance prohibiting the discharge of any manufactured-gas plant refuse into sewers or any body of water. Wisconsin passed a similar law in 1931. That same year, the second edition of the industry bible, *A Textbook of American Gas Practice*, warned that: "If spent oxide is used for fill... sight must not be lost of the fact that in the presence of moisture and oxygen, it is an active source of sulfuric acid and iron sulfates for the contamination of ground water." That was what had happened in West Allis, where the waste had been

more cyanide

AS THE WISCONSIN ENERGY CASE works its way through the courts, more blue water trickles into wells in West Allis. The same oxide box waste may be located around a high-voltage tower on the Jewel Food Store property at 111th and Greenfield.

"There is cyanide in the ground water. So far as we know, it hasn't entered the surface water yet," says DNR hydro-geologist Margaret Brunette. "But we haven't found the source."

In 1996, investigators found a mass of bright-blue tailings under that tower, No. 3804, and a yellow sign at nearby tower 3801 warning that the site was possibly contaminated with a hazardous chemical. The material under numerous other towers in West Allis had recently been excavated and refilled, suggesting the entire right of way may have been used as a dumping ground. Gass says he approached the owners of those properties to do soil borings but says, "No one wanted to go through what my clients have, the millions of dollars to clean it up, the court battles." A worker who helped install Wisconsin Energy's high-tension towers in the 1950s and '60s remembers the same fill under towers near Lake Michigan and in Oak Creek.

Ten thousand tons of Racine gas plant waste remains unaccounted for. When *Milwaukee Magazine* asked the state Public Service Commission about it, they said, "That's not our job, it's the DNR's." But DNR investigators across the state tell *Milwaukee Magazine* that their attempts to make former manufactured-gas plant sites a priority are routinely overruled by higher authorities from Madison "after a five-minute inspection." There is "incredible political pressure.... The state has lost its desire to find these sites and clean them up, given all the lobbying from utilities," says manufactured-gas plant expert Allen Hatheway. In the last legislative session, Wisconsin Energy spent nearly \$1 million on lobbying, more than any other state corporation.

For a list of former manufactured-gas plant sites in the state considered dangerous by the Wisconsin Department of Natural Resources, consult our Web site: www.milwaukee-magazine.com.

"Wisconsin Energy placed itself above the law." – Judge Patricia McMahon

dumped into an old storm water retention pond on city property and into an intermittent pond on Giddings' land.

By agreeing with Gass' account of manufactured-gas plant history, Lingle told the jury the plaintiffs weren't trying to apply today's environmental standards to 1959. They were applying the standards of the day. Lingle also admitted that before he knew his employer planned to use the "we dumped it in the lake" alibi, he called it "unreasonable" to suggest that the gas company might have done exactly that.

At the end of the first week of the trial, Lyons drove to Gass' condo on Fowler Lake in Oconomowoc to suggest a \$5 million settlement. The trial was going better than expected for the plaintiffs, and Gass refused.

BACK IN COURT, WISCONSIN ENERGY'S other star witnesses, two Racine plant retirees, Gottlieb Schafer and William J. Boutell, also failed to support the company's case. Schafer admitted that before the lawsuit began, he couldn't even remember how the Racine plant disposed of its OBW. He agreed that the notion of using wood chips, "stuff that floats away," for erosion control was "laughable" and confessed that the OBW was put on the shore just to "get rid of it." In his deposition, Schafer revealed that "everybody in the company" knew OBW was "bad stuff," and he said, "We were not really pigs. We were polluters."

Together, Schafer and Boutell could account for only a few cubic yards of the more than 36,000 tons of the spent oxide the Racine plant generated. And William Simon, a longtime Racine plant draftsman whose office oversaw the supposed dumping site for decades, testified that he never saw wood chips there. In fact, he

often fished on the shore, something he said he never would have done if he'd seen OBW dumped into the lake.

Boutell was supposed to testify that the Racine plant's waste was brown, not blue like that found on the plaintiffs' properties, but on cross-examination, he admitted he was color blind. "Every one of WEPCO's so-called experts turned out not to be such an expert after all," recalls juror Robert L. Polinske, a retired Harley-Davidson assembly line worker.

Two weeks into the five-week trial, McMahon ruled that the jury would consider punitive damages, and things went from bad to worse. The scientist Wisconsin Energy put on the stand to say that oxide box waste wasn't really dangerous admitted that he never worked with it in his lab without a special hood that drew off hydrogen cyanide gas. The Wisconsin Energy engineer who made sure the cleanup didn't disturb the transmission towers said he "didn't want to get near" the OBW. Wisconsin Energy retiree Schafer had already talked about the "poison gas" in gas plant waste and said, "That stuff can kill you."

Wisconsin Energy insisted that it made no sense to haul waste 35 miles from Racine to West Allis, but back on the stand, gas plant expert Lingle said the company hauled OBW even farther – from Waukesha to Racine – for disposal. And he acknowledged that Wisconsin Energy had nothing "more than supposition" to link the gas company to this OBW. Even if all of the gas company waste sent to "unspecified dumps" in its records ended up on the plaintiffs' property, it would account for only a fraction of what was found.

ON MONDAY JUNE 28, 1999, shocking news surfaced in the newspaper. Wisconsin Energy was buying Wisconsin Gas' parent,

shareholder revolt

THERE WAS SOMETHING surrealistic about the way Wisconsin Energy began its annual meeting last June 27, with the company's silver-haired shareholders pledging allegiance to a large projected image of an American flag. The newspapers had warned of a possible shareholder revolt, and the question over coffee and doughnuts that morning at the Milwaukee Auditorium had been, "How does company Chairman Richard Abdoo keep his job?"

Quoting Dickens, Abdoo told shareholders that the previous year had been "the best of times and the worst of times." The WICOR acquisition had been finalized and the merged company had a net worth of \$8 billion. On Earth Day, Vice President Al Gore had recognized Wisconsin Energy and a handful of other utilities as environmental role models. But the company's stock had lost more than a third of its value. Earnings per share were erratic, and the \$104.5 million in damages from the West Allis cyanide-laced wood chips dumping case threatened to eat into the dividends the company's shareholders re-

lied upon for their retirement.

Abdoo acknowledged that the jury's verdict and judge's sanction might be "upsetting and confusing," but he said, "There was *no direct evidence* of how that [oxide box waste] came to be located on that property."

When it came time for audience questions, a shareholder from Menomonee Falls directed one to Abdoo up on the stage. "Put yourself in our place," he said. "Having to read *The Wall Street Journal* shareholder scorecard that places us 56 out of 58 electric utilities, 907 out of 1,000 corporations in the U.S. If you were down here – I mean, we have drifted from crisis to crisis during your management – wouldn't you feel it was time for the chairman to retire?" His question ignited the biggest applause of the day. Retired Wisconsin Energy executives in the first two rows had to sit on their hands. "There were a lot of us who wished we could applaud, too," says one veteran executive. "I don't think even his own staff supports him."

Abdoo ignored the applause and leaned

into the microphone. "No," he said, "I don't. Next question."

By October, Abdoo would face a real shareholder revolt on two fronts. One group of shareholders would file suit against Abdoo and the five key employees involved in the West Allis case (Zakrajscheck, Lingle, Kaminski, Woelfle and Bentley – see main story). The suit alleges the six defrauded the court, the plaintiffs and the jury, costing shareholders millions of dollars, and demands payment from Wisconsin Energy's executive liability insurers. A consortium of law firms from Milwaukee, Texas and California would file a second shareholders' suit against Abdoo and his board of directors.

"It's rare that you find as widespread a group of people clearly acting illegally," says attorney Robert L. Elliott, who brought the first suit. Elliott is known as "a smart and tenacious attorney," and if his suit goes ahead, Judge Patricia McMahon's 77-page sanction diatribe against Wisconsin Energy management will give the plaintiffs a compelling case.

WICOR. Wisconsin Energy promptly moved for dismissal, saying the news biased jurors. After all, here they were saying how awful the gas company was and now they were buying it. McMahon said the problem was all of Wisconsin Energy's making and refused to adjourn. "We knew Wisconsin Energy was suing itself, and either way, the shareholders were going to pay," says one juror now.

At noon, Lyons and Gass met at Elsa's on the Park. Over lunch, they agreed to advise their clients to accept a \$7.5 million settlement. The West Allis common council approved the amount in a rushed closed session. Gass tracked down Giddings' CEO on vacation in Montana to get his okay. It was almost 11 p.m. when Gass called Lyons back and tried to eke out a little more money. Lyons responded angrily, Gass says, so he quickly said his clients would accept the offer. Lyons said he needed one more approval.

In court the next morning, Lyons kept his distance. When Gass approached, Lyons said, "They won't pay it." Wisconsin Gas' lawyers said Abdoos had nixed the deal. (Rick White, Wisconsin Energy vice president of public relations, says it wasn't Abdoos who killed the settlement but Gass by demanding more money.)

Back in court, Wisconsin Energy tried another strategy. Lyons said that everyone was dumping OBW and that the plaintiffs' properties were dumps anyway, given the concrete waste and foundry sand found there. Gass said the argument that his clients' properties were dumps was just more evidence of Wisconsin Energy's corporate arrogance.

That arrogance came up again when the jury learned that cleanup engineers had found oxide box waste everywhere around tower 3810 behind Giddings but that the material had been carefully removed from around the tower legs and replaced with clean fill. Wisconsin Energy was unable to explain when the corrosive substance was removed "in order to protect its property, while leaving the plaintiffs' property and the environment to suffer."

If the jury were to give a Mr. Congeniality award, William P. Earley would have won it. Earley was the only living manufactured-gas plant operator the gas company could find, an animated East Coast elder who'd married the daughter of a gas plant operator and devoted his entire life to the business. When he said that any gas plant operator who dumped oxide box waste on another person's property without their permission would have been "a rogue... condemned by the industry" and that "they'd have to pay the piper for that," the jury believed him.

The transmission line construction records were just as damaging. Before it builds heavy towers, Wisconsin Energy takes soil borings.

The borings taken on Giddings' property in 1959 went to 19.5 feet without finding a trace of the oxide box waste Lyons said the gas company had buried there years earlier.

The construction records also showed that Wisconsin Energy had insisted on providing its own fill before construction began, which was highly unusual. "The subcontractors always provide the fill. It's part of their job," engineer Hank Jaskulski, a retired Wisconsin Energy transmission line engineer, tells *Milwaukee Magazine*. The specs identified four locations from which the company would get the fill. Lab reports show there is evidence of cyanide at three of the locations. The fourth was paved.

Jaskulski was hired by Wisconsin Energy's in-house attorney, Zakrjshcek, as part of the company's investigation team to "find out who did this," but Jaskulski's findings troubled him. In a May 1995 memo to Zakrjshcek, Jaskulski wrote: "W.E. chip dumpsites are allegedly unknown - that seems too convenient." And later, noting that the Racine plant had no records of the disposal sites for its wood chips, he wrote, "I wonder if this isn't a little too self-serving." Jaskulski concluded that the wood chips were put in a landfill somewhere, but Wisconsin Energy never called him to testify, nor did it call the company's librarian to explain why the "good" records seen in 1986 had disappeared by 1995. Gass told the jury the missing records were like the 18-minute gap on the Watergate tapes.

THE MEMORY OF WHAT IT WAS like to work on the 1959 tower construction behind Giddings is still etched in 72-year-old Clifford Wolfgang Rhode's mind. But the jury would never hear his story. In his memo to Zakrjshcek, Jaskulski identified two brothers who'd worked on the transmission line but wrote that he couldn't locate them. Robert Rhode died in 1998, but *Milwaukee Magazine* found his brother Cliff in Escanaba, Michigan, via the Internet.

"I was the foreman on that job, laying the foundations for those high-tension towers. That was the baddest water I ever seen... smelt like battery acid," Rhode says of the intensely yellow liquid that accumulated in the 10-foot-deep excavation in which he was working. Each morning, Rhode had to pump out several feet of water in order to lay the footings, and a tarry matter would clog his hose. It was the same black and brown textured material that covered the area, he says, along with ash. The area wasn't normal undisturbed land. There was no grass or vegetation, Rhode says, and the workers had to dig down five or six feet before they came to normal soil.

Rhode's fingernails turned soft and peeled

away from touching the water. His skin became raw and burned. "My eyes got all sore; my nose blistered. I wouldn't send any of my men down there. I told the boss, 'There's something awful bad down there,' but he didn't care. I had to dig in the water to put in the earth anchors. Maybe that's why I haven't been able to breathe right for decades."

Rhode was never called to testify, even though, he says, a lawyer came to talk about the case in 1995. The plaintiffs' lawyers wouldn't begin looking for former workers until 1997. In 1995, only Wisconsin Energy's Zakrjshcek knew Rhode had worked on the project.

It wasn't just the absence of a paper trail that convinced Wisconsin Energy's Abdoos that his company didn't do it, says PR man White. "We searched for eye witnesses; there weren't any." On June 30, 1999, the plaintiffs subpoenaed Abdoos to ask him about his company's net worth and whether it had insurance for punitive damages. Abdoos's signature shows up on the bottom of every annual Wisconsin Energy insurance review. Internal memos say he provided input on other insurance issues, and when *Milwaukee Magazine* tried to reach Abdoos last June, White said he was "out of town chairing an industry insurance conference." But Abdoos's attorneys told the court that he was not the proper person to testify about insurance.

Still, Lyons promised that Abdoos's subpoena would be "hand-delivered." One of Lyons' colleagues faxed the subpoena and the insurance question to Zakrjshcek, who was to give it to Abdoos.

Zakrjshcek later testified that he was leaving for vacation, merely glanced at the fax and left it in his in-basket. No one delivered the subpoena to Abdoos.

Lyons offered to give the court a sworn statement about insurance coverage instead of having Abdoos appear. After nine days, Lyons still had no response on the insurance question. Facing a court deadline the morning of July 9, he phoned Zakrjshcek's boss, who referred him to Michael Kaminski, the head of WE's insurance department. Kaminski sat on important industry insurance committees, did complicated insurance coverage testing using Wisconsin Energy's various policies under hypothetical disaster scenarios and maintained a data base of the company's policies. But when Lyons, fighting a big environmental pollution case on the company's behalf, asked if Wisconsin Energy had punitive damage insurance, Kaminski spent no more than 30, and perhaps as few as six minutes, researching the answer. He reviewed a single policy - which expressly covered punitive damages - but, he said later, skipped over that section and read that fines and penalties were excluded. He told Lyons

the company had no coverage.

Lyons conveyed the information to the court in a sworn stipulation. Jurors were told that Wisconsin Energy's pre-merger net worth was \$1.7 billion and that the company's post-merger nearly two million gas and electric customers wouldn't end up paying for punitive damages. "We didn't want the rate payers to suffer," says a juror who works as a property assessor. "But the stockholders, yes, they should know what kind of management they have running their company."

ON JULY 14, 1999, ALL OF THE PARTIES involved agreed to allow the two alternates to join the 12 jurors in deciding the case. Twelve of the 14 would have to agree in order to reach a verdict. One elderly male juror couldn't point his finger at either the gas or electric company, and he sat out of the deliberations, say four jurors who spoke to *Milwaukee Magazine*. A twentysomething man faulted the gas company for the OBW on the city's land, but he blamed Wisconsin Energy's electric subsidiary for the waste on Giddings'.

For the rest, says Harley-Davidson retiree Polinske, "Mr. Gass' witnesses were so good it was almost an open-and-shut case that the electric company did it." Twelve jurors quickly agreed to award \$4.5 million to cover cleanup costs and the diminished value of

Giddings' property. For punitive damages, each juror threw a piece of paper into the center of the table with an amount on it. The young juror joined in because he thought WEPCO was responsible for the waste on Giddings' property. The amounts ranged from \$15 million to \$300 million. The group negotiated its way to \$100 million, an amount equal to Wisconsin Energy's average annual earnings in the years since 1959.

One juror, a quiet, middle-aged woman who worked at M&I Data, dissented. A hundred million dollars is a lot of money, she said. With that much on the line, Wisconsin Energy would appeal, and she wanted the plaintiffs to get their money. "That was the only reason I voted against it – not because Wisconsin Energy didn't deserve to pay that much," she says now. The jurors counted the remaining votes, and with the twentysomething juror, they had the needed 12.

If Wisconsin Energy had punitive damage insurance, several jurors say, they would have awarded even more. "We were convinced they did it, and a slap on the wrist was not going to solve anything. We still aren't convinced they got the message about accepting responsibility, yet," says the former motorcycle assembler. Another juror, a 1972 University of Wisconsin-Madison graduate, says, "We definitely wanted to hurt them

enough that it would be painful. That was the only way we thought we could get their attention. They must have spent a couple million dollars defending that case, when they could have paid to clean it up... but they never took responsibility for anything... Management seemed to just want to buy that company and get its profits, not its liabilities."

The *Journal Sentinel* article the following day quoted Michael John, Wisconsin Energy's vice president of public relations, saying the company had insurance but that it was unclear whether the \$104.5 million verdict would be covered. When Gass saw the quote, he fired off a letter to Lyons asking, "Does Wisconsin Energy have punitive damage insurance?" If it does, he told Lyons, you have an obligation to tell the judge. Lyons' partners immediately faxed Gass' letter to Zakrajscheck, but it would be months before the court would learn the answer.

JULY 15, 1999, THE DAY of the verdict, would go down in Wisconsin Energy history as "the day of the fiasco." The entire internal legal department was shell-shocked. The in-house attorneys had insisted "there would be no punitive damages," says a Wisconsin Energy board member.

The legal shock wave set off fireworks in

Wisconsin Energy's boardroom over "the idiot strategy" the company had taken. "It was nuts to ever let it come to a trial," says one board member. Another, Robert A. Cornog, the real power on the board, had gotten his job as chief executive officer of Snap-on Incorporated after his predecessor screwed up a lawsuit, says the first WE board member, so Cornog was acutely aware of the seriousness of the situation. The board intervened just as it had in the past when it forced Abdo to hire former shadow governor James Klausner to provide lobbying help after the aborted NSP merger, and Paul Donovan, former Sunstrand Corp. executive vice president, as chief financial officer [and Abdo's understudy].

This time, the board ordered Abdo to dismiss the local Cook & Franke law firm and hire "the best law firm in the business." He brought in the 1,424-attorney New York firm Skadden Arps. In the legal world, Skadden was known as "a shark tank on speed."

"When the legal strategy blew up, Dick [Abdo] didn't point a finger within the organization. He said the buck stops here," recalls the board member. Earlier, when Wisconsin Energy's nuclear reactor went down, Abdo had gotten no bonus. "That's like ringing a bell in this business," says the board member. The new fiasco "definitely impacted Dick's bonus," too, but in 1999, his income was still close to \$1 million.

Abdo was already embattled, his 10-year tenure as CEO marked by one public corporate misstep after another. When he took over, the company appeared on lists of the nation's best-run utilities, but under his guidance, it had sunk to *The Wall Street Journal's* corporate "laggards" list. And now this.

Some of Abdo's peers likened him to the Pigpen character in the Peanuts comic strip – a cloud of dust followed him everywhere. A cadre of former employees called the "Phoenix Group" barraged Wisconsin Energy's directors with letters saying, "Kill Abdo." "When they recounted all his public sins," says one board member, "I felt sorry for the poor guy, getting lambasted by them in addition to the whole world, but I did not feel sorry for him on this lawsuit."

The board was irked. "It's not that Dick is arrogant. It's just that he's a true believer," adds the board member. "He looks at the world only through his glasses.... Well, you've got to look at it other ways, too, like how the jury would see it. If he doesn't change, he won't keep his job."

Attorney Sally Bentley joined Wisconsin Energy only one year earlier. She had no courtroom, appellate or insurance experience, but in the wake of the disaster, she took over as legal director. Within 24 hours of the jury's verdict, she hired a New York law

firm specializing in insurance to review the company's policies. The firm got back to Bentley five days later with a preliminary finding: It looked like Wisconsin Energy had coverage for the \$100 million.

During pretrial discovery, Wisconsin Energy told the court it had just one policy, but nine days after the verdict, Kaminski – the executive who said the company had no coverage for punitive damages – notified 40 insurance carriers on 150 policies that Wisconsin Energy believed the \$104.5 million verdict was covered. The company had \$937 million in liability coverage. No one would tell Judge McMahon for another three months.

But Wisconsin Energy did tell the state, which had to approve its merger. On July 29, Bentley reassured officials that the \$100 million verdict would not interfere with the company's ability to close the deal. She said Wisconsin Energy's "initial belief" had been that it did not have coverage but that it was now reviewing "all policies which might... provide coverage for all or part of the award."

Four days later, Bentley was in court with Skadden Arps attorney Barbara Wrubel, who asked McMahon to decrease the \$104.5 million award. McMahon had yet to approve the jury's findings. "No one was hurt or killed," said Wrubel. McMahon asked whether Wrubel knew how the waste was discovered. Wrubel confessed that she hadn't finished reading the transcript. "Judge McMahon ate her up and spit her out for not doing her homework," says one Wisconsin attorney, gloating at the hotshot outsider's comeuppance.

Wrubel was back in McMahon's court later that August – again, not to explain that the stipulation about the insurance had been wrong but because Wisconsin Energy wanted a second crack at suing the gas company over the OBW. McMahon denied the motion, saving shareholders from once again suing themselves. (PR man White refuses to discuss that "legal strategy.")

In early November 1999, Gass met with Bentley's boss, attorney Larry Salustro. Gass had a surprise for him. He had had four former Supreme Court justices review the case and speculate on how it would fare on appeal. All concluded that the verdict would stand. Getting such an opinion was unheard of, but it was similar to the mock trial jury testing done by insurance lawyers. When Salustro asked Gass if he had "any more surprises," Gass joked, "One a day."

The next day, Wisconsin Energy planned to tell the court it was filing an appeal. Perhaps fearing another surprise from Gass, it also made a confession. In a strained moment where it tried unsuccessfully to make its former attorney, Lyons, the scapegoat,

Wisconsin Energy told the court its insurance stipulation had been "made in error."

Gass promptly asked McMahon to sanction Wisconsin Energy for lying about coverage. Her decision to consider whether Wisconsin Energy should be punished would trigger another 18 depositions, three more days of testimony and more than 100 pages of exhibits. It would also push the case into February of 2000.

WITH JUDGE MCMAHON'S pending ruling hanging over his head, Abdo arranged to meet the plaintiffs at the Milwaukee Athletic Club. He insisted that West Allis Mayor Jeannette Bell, Common Council President Paul Murphy and Giddings & Lewis' CEO come alone, without their attorneys.

In his somewhat tarnished tenure as Wisconsin Energy's CEO, Abdo had had one shining moment. A decade earlier, he had personally settled another major lawsuit for the company. To this day, Abdo's public announcement that his company would accept responsibility for an accident where 5-year-old Mathew Brown was badly burned after he got into an unlocked Electric Company transformer box is regarded as a model of civic responsibility.

Abdo might never have "taken responsibility" if the boy's attorneys hadn't had proof that the unlocked transformer had not been checked since its installation 14 years earlier and that the utility ignored a warning that it was unlocked. Not only that, says a source close to the little boy who lost his arms, "The company had 300 more boxes that it couldn't prove had been inspected either." The utility's attorneys conducted a mock jury trial, says another source, and knew "they'd get killed in court." Wisconsin Energy paid \$28 million. This critical information never became public until now, and the company's stature for doing the right thing grew.

On the day Abdo went to the Athletic Club, sources inside the company say he carried a carefully prepared settlement offer, and perhaps, once again hoped to come to his company's rescue.

He had recently rejected two settlement offers. Gass and the plaintiffs believed that Abdo was keeping his board in the dark. To make sure the board knew what was going on, they agreed to wait for payment of the \$104.5 million provided each board member got a copy of their offer, along with a summary of the case. When that failed, Gass prepared a second, more palatable offer on videotape. At least some of the directors never saw it.

Abdo met the plaintiffs in a private dining room on the MAC's fifth floor. Mayor Bell had been so upset by Wisconsin Energy's "failure to act responsibly with this site

and pay a third of the cleanup costs," she'd testified publicly against the company's proposed NSP merger. But when she entered the meeting room, she thought Abdoo wanted to "get back on good terms."

Abdoo was calm, reserved and methodical, but he wasn't ready to put the case behind him. "He kept saying, 'The jury got it wrong. The judge got it wrong.' I pointed out some of the evidence," says council president Murphy, a practicing attorney, "and he seemed familiar with the case, but he was absolutely in denial."

Giddings & Lewis' CEO tried to get Abdoo back on track, saying, "The trial is over. Let's get this settled." But Abdoo was stuck. He couldn't stop talking about the case. The three blamed Abdoo for the failed \$7.5 million settlement. After all, they had all approved it. They were flabbergasted when Abdoo said, "It never happened," denying there had been any settlement offers. Murphy was struck by Abdoo's "professed lack of knowledge of any settlement negotiations." This was more than revisionist history. Abdoo's behavior reminded Murphy of the disconnected "Where am I? Why am I here?" performance of Ross Perot's running mate, retired Navy Vice Adm. James Stockdale in the 1992 presidential debate.

"Abdoo was just obsessed with the case, saying how unfair it was," adds Murphy. "I said, 'Do you realize Judge McMahan is considering motions that could cause you great harm in terms of any recovery from your insurance carriers?' He didn't care."

Abdoo left the room to talk to his people and came back with a proposal. "It was totally unacceptable," says Bell. "He didn't even acknowledge that we'd won the case." Abdoo didn't apologize; he kept saying, "We didn't do anything wrong." Finally, the other three gave up and left.

DÉJÀ VU. THAT'S WHAT Judge McMahan must have been thinking. She and Wisconsin Energy had already crossed paths, just before the West Allis case went to trial. Another case involving Wisconsin Energy had been referred to her by a higher court. It involved the death of a 36-year-old truck driver named Glenn DeRuyter, who'd been killed when his tanker truck of jet fuel exploded after a Wisconsin Energy lineman, high on drugs and alcohol and speeding to work, passed in the icy right emergency lane and triggered a multicar accident. DeRuyter's widow and her two small boys sued.

Before Wisconsin Energy turned over the lineman's employment records during discovery in another judge's court, it removed a pre-hiring drug test the lineman had failed. The missing document came to light only after an anonymous Wisconsin

Energy employee tipped off the widow's attorney. McMahan's job was to consider a charge of litigation fraud. Again, Wisconsin Energy blamed its outside attorney for the "oversight." McMahan didn't buy it, and she ruled that a jury should decide. Wisconsin Energy settled before it could.

Now, McMahan had to consider the insurance stipulation in the current case – and more. Discovery on the sanction question had revealed other documents Wisconsin Energy had withheld, documents the company claimed were "misfiled." Some revealed that Kaminski, the insurance chief who checked

a single policy, was well aware the company had numerous policies. He'd personally filed claims against seven of them for the cleanup of the same OBW on Wisconsin Energy's land. Other documents showed that Wisconsin Energy had ignored letters from its insurers asking whether they faced any more environmental litigation even though the cyanide wood chip case was pending.

If what Wisconsin Energy was arguing was true, McMahan would have to believe that a hired lawyer (Lyons) was the only one to ask about insurance coverage and that there was no internal inquiry in a billion-

dollar company whose CEO was active in insurance matters. She'd have to believe that the head of the insurance department couldn't read a policy – since the one he looked at expressly covered punitive damages – and that he forgot that the company had scores of policies. Or that he didn't think a case involving 52 million pounds of cyanide-laced waste was a big deal and that all of that was fine with his superiors, since he still works there.

McMahon would also have to believe that the in-house attorney, Zakrjshcek, would leave town and not tell his boss there was a subpoena for the CEO on his desk. And that his boss wouldn't be checking on the case while he was away. Or that Zakrjshcek, who'd prepared five years for the case, would be allowed to go on vacation in the middle of it.

The picture that emerges from Wisconsin Energy's explanation of how the "mistaken" insurance stipulation came about is not one of a finely tuned billion-dollar corporate enterprise but a disturbing image of rampant incompetence in a company that also oversees sensitive nuclear reactors. "I had this unshakable image of people working with blinders on," McMahon said after reviewing the testimony. "People who didn't want answers, people who never asked questions. They were curiously unconcerned and deliberately indifferent. The picture that was painted was of an organization consciously avoiding having information." The law, said McMahon, doesn't excuse collective corporate stupidity. She called Zakrjshcek's sworn testimony "unbelievable" and Kaminski's "evasive." (Zakrjshcek has taken early retirement; his boss, Walter Woelfle, transferred to another division.)

The plaintiffs' explanation was far more plausible. Wisconsin Energy didn't admit it had coverage because that would have brought to court its other insurers – all of whom had clauses in their policies saying there is no coverage for intentional acts – to help prove Wisconsin Energy's subsidiary had known what it was doing.

Even if the stipulation was made in error, "which I decline to find," McMahon said, "the failure to disclose the truth during [Wrubel's] motions after verdict... is equally egregious." McMahon blamed Wisconsin Energy management, not the dismissed Cook & Franke attorneys, for "the callous and cavalier" conduct. She said the utility "acted in bad faith" and "with reckless disregard for the truth" when it filed the false stipulation, which "not only harmed the plaintiffs but undercut the entire system of justice.

"What message are we sending... if we do not impose serious sanctions on one who

violates... that promise to tell the whole truth and nothing but the truth?" She called Wisconsin Energy's assertion that "one doesn't know one has insurance until a court or arbitrator says so" a position that "defies common sense."

McMahon said Wisconsin Energy had ignored the warning of the DeRuyter case, continuing its "pattern of deciding to withhold or provide information based on what was in the company's best interest," not according to what was the truth or its obligation to the judicial system. At the conclusion of a steamy 77-page tirade, she ordered Wisconsin Energy to withdraw all of its claims of insurance coverage. She would make the company live by the stipulation it had offered. It would now have no coverage.

One day after the jury sent it a \$104.5 million message, McMahon said, Wisconsin Energy "once again placed itself above the law" by pursuing the insurance it said it did not have, and she slapped the company with a default judgment equal to the jury's \$104.5 million verdict. "If on appeal, the original punitive damage award is overturned, Wisconsin Energy will still owe \$104.5 million.

If Wisconsin Energy management was shocked by the original verdict, it was staggered by the second. Only two cases in Wisconsin jurisprudence came remotely close to the sanction and both involved Judge McMahon, though the largest had been for \$1.6 million. "The insurance thing was an honest mistake," says one board member. "The trouble is, it was one of many."

WISCONSIN ENERGY INSISTS it will get the verdict and "draconian sanctions" thrown out on appeal. I visited attorney Robert H. Friebert, Skadden Arps' local legal contact, to talk about that in his 12th-floor office at the Park East building, and he offered to show me what oxide box waste looks like. "I've sniffed it, the stuff found on these properties, and I'm still alive to talk about it," he boasted. Friebert produced a small glass jar containing finely decomposed blue wood chips. "They argued one whiff of this stuff can kill you, but they couldn't produce so much as a single dead fish. We would have done an autopsy."

He held the jar at arm's length, closer to my face than his. Then, without warning, he opened it. A downdraft carried the strong offensive odor across the table to my nose. "Smells like shit," Friebert said. When I complained that my eyes and throat burned, he shut the jar, but the area beneath my nose stayed chapped for days.

Wisconsin Energy still insists this waste is safe. An industry group filed a friend of the court brief on Wisconsin Energy's be-

half, arguing that the iron cyanide in oxide box waste is so benign that it is used in eye shadow. "The stuff in eye shadow is a processed form with very different properties," says William Gregg, the environmental chemist hired by Wisconsin Energy in 1986. "It's used as a dye, and it's not going to leech into someone's skin or eyeballs." The raw skin around my nose, he says, is typical of exposure to sulfuric acid fumes.

Wisconsin Energy's appeal argues that iron cyanide isn't even technically hazardous waste. Of course, it never mentions the recent Illinois Supreme Court case where particulate matter from an oxide box waste site was found to have caused a rare form of childhood cancer in the offspring of pregnant women who lived within four miles of the site.

Friebert says Wisconsin Energy's strongest argument is that the jury did not have the 12 votes it needed for the damage award: that the young juror, who felt Wisconsin Energy contaminated only Giddings' property, shouldn't have voted on damages. As precedent, Skadden Arps cites a case where the Wisconsin Supreme Court ruled that an "inconsistent verdict" requires a new trial. Former Supreme Court Chief Justice Nathan Heffernan wrote that opinion, but he has no difficulty distinguishing it from the current case because Wisconsin Energy never objected to the form of the questions given the jury. "The award should stand in toto," Heffernan wrote when he reviewed this case for the plaintiffs.

Wisconsin Energy will also argue legal technicalities and that the \$100 million award is "grossly excessive." But all four of the former state Supreme Court justices who reviewed the case say that argument won't fly. This case "is a textbook example of the proper application of both federal and state constitutional law as it relates to punitive damages," wrote one in a typical comment.

Retired Justice William Callow, one of the four, told *Milwaukee Magazine* that an appellate court is not allowed to question a damage amount "unless it shocks the conscience, and this does not. Oh, it's big bucks to me, but... This could have killed all kinds of people. It was like hiding a loaded gun."

A conservative friendly to business, Callow has trouble believing the case even got this far. "I can't imagine why Wisconsin Energy wouldn't have settled this case for almost any amount they could have," he says. "Fighting this case was like jumping off a cliff hanging onto a spider web." M

Mary Van de Kamp Nohl is a senior editor of Milwaukee Magazine.