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ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
)  
WATER QUALITY STANDARDS AND ) R08-9  
EFFLUENT LIMITATIONS FOR THE ) (Rulemaking-Water)  
CHICAGO AREA WATERWAY SYSTEM )  
AND LOWER DES PLAINES RIVER )  
PROPOSED AMENDMENTS TO 35 ILL. )  
ADM. CODE 301, 302, 303, )  
AND 304. )

TRANSCRIPT OF PROCEEDINGS had in the  
above-entitled cause, taken before MARGARET R.  
BEDDARD, a Notary Public within and for the County of  
Kane, State of Illinois, and a Certified Shorthand  
Reporter of said state, at Room 9-040, James R.  
Thompson Center, Chicago, Illinois, on the 29th day  
of January, A.D. 2008, at 9:09 a.m.  
BEFORE: HEARING OFFICER MARIE TIPSORD.

1     PRESENT:

2             Ms. Marie Tipsord, Hearing Officer  
3             Ms. Alisa Liu, P.E., Environmental Scientist  
4             Mr. Anand Rao, Senior Environmental Scientist  
5             Mr. Tanner Girard, Acting Chairman  
6             Mr. Nicholas Melas

7                     appeared on behalf of the Illinois  
8                     Pollution Control Board;

9                     ILLINOIS ENVIRONMENTAL PROTECTION AGENCY  
10                    (1021 North Grand Avenue East  
11                    P.O. Box 19276  
12                    Springfield, Illinois 62794)

13                    BY: Ms. Deborah Williams  
14                    Ms. Stefanie Diers  
15                    Mr. Robert Sulski  
16                    Mr. Scott Twait  
17                    Mr. Roy Smogor  
18                    Mr. Howard Essig  
19                    Ms. Marcia Willhite

20                    REPORTED BY MARGARET R. BEDDARD, CSR.  
21  
22  
23  
24

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1           HEARING OFFICER TIPSORD: Good morning,  
2 everyone. My name is Marie Tipsord. I've been  
3 appointed by the Board to serve as hearing officer in  
4 this proceeding entitled Water Quality Standards and  
5 Effluent Limitations for the Chicago Area Waterway  
6 System and Lower Des Plaines River Proposed  
7 Amendments to 35 ILL. Adm. Code 301, 302, 303, and  
8 304. This is docket number R08-9. To my right is  
9 Dr. Tanner Girard, acting board chairman and the lead  
10 board member assigned to this matter. To his right  
11 is board member Nicholas J. Melas. To my immediate  
12 left is Anand Rao. To his left is Alisa Liu with our  
13 technical staff.

14                   I'm not going to repeat everything I said  
15 yesterday. Just to remind everyone, we're starting  
16 with Midwest Generation. They're the primary  
17 questioner right now. If you have a follow-up  
18 question, please raise your hand. I'll recognize  
19 you. You need to identify yourself for the record  
20 again today. Then ask your question after I've  
21 acknowledged you. I think that's about everything.

22                   I would remind all the witnesses that  
23 you're still sworn in, and that includes Mr. Sulski,  
24 Mr. Smogor, Ms. Williams, Mr. Twait, and Mr. Essig.

1 And Ms. Willhite is sworn in, too, but I don't see her  
2 right now.

3 With that, I believe we are on page 11 of  
4 your pre-filed questions, question number 7; is that  
5 correct? Or did you have something else you wanted  
6 to say?

7 QUESTIONING ON BEHALF OF

8 MIDWEST GENERATION

9 MS. FRANZETTI: I had one thing. We ended  
10 yesterday by marking Exhibits 5 through 8 that  
11 related to Attachment S to the Agency's Statement of  
12 Reasons. I would like to, just before we go on to  
13 other topics, ask the Agency what they did to get  
14 this additional information and whether they know  
15 it's everything that exists relating to the project  
16 of QHEI scoring with respect to the Upper Dresden  
17 Pool? I'd like to make sure that we've got  
18 everything there is to get given the importance of  
19 that information.

20 MR. SULSKI: Do you mean that there is -- is  
21 there any other QHEI data out there besides this that  
22 we utilized or anything as a part of this package?

23 MS. FRANZETTI: As a part of this package.

24 And, Mr. Sulski, for example, there looked

1 like there were some references to fish data  
2 collection sheets or other type information that  
3 would have captured how they were identifying fish  
4 species during their work, and we're not seeing any  
5 of that in what you've provided yesterday. So that's  
6 an example of one area where -- I guess I'm really  
7 asking who did you talk to to get it? What did you  
8 ask for? Did they say, "Well, we also have this  
9 stuff, but I don't know that you need it"?

10 MS. WILLIAMS: I think it would be helpful maybe  
11 if we went back and kind of went through the  
12 chronology. We talked about it a little bit  
13 yesterday of some of the information that was  
14 requested from Midwest Gen. Do you want to start  
15 with some of the information requested by Midwest  
16 Generation in relation to this Attachment S and then  
17 walk through what we received?

18 MS. FRANZETTI: Okay.

19 MS. WILLIAMS: Do you want to start, Scott? I  
20 think Scott had the first information. And then  
21 maybe Roy and Rob can follow up.

22 MR. SULSKI: Actually I think Howard had the  
23 first information.

24 MS. WILLIAMS: Whoever wants to start.

1           MR. ESSIG: I received the information on May 9,  
2 2007, and it was the fish data and the QHEI scope.

3           HEARING OFFICER TIPSORD: Let me clarify.

4                   That's what was filed, correct?

5           MR. ESSIG: Yes.

6           HEARING OFFICER TIPSORD: As I recall yesterday,  
7 that's what was filed as Attachment S. That was what  
8 was actually filed as Attachment S.

9                   Thank you. I wanted to be clear on that.  
10 Sorry.

11           MR. TWAIT: I don't remember the date offhand,  
12 but then Midwest Generation requested what they  
13 thought was -- should have been a report attached to  
14 it. We checked with US EPA, I believe, and there was  
15 no report. At that point we contacted Chris Yoder of  
16 MBI and requested the data that Midwest Generation  
17 had specifically asked for.

18           MS. WILLIAMS: What did we get? How is that  
19 reflected in these exhibits here?

20           MR. TWAIT: We got Exhibits 5, 6, 7, and 8.  
21 Rob may want to clarify what those are specifically.

22           MS. WILLIAMS: Start with 5 and 6 because we  
23 didn't really go in on the record, did we, into much  
24 detail of what the substance of the details are? I

1 think it would be really helpful for the record for  
2 us to explain starting with 5 and 6 what they are.

3 MR. SULSKI: So 5 and 6 is a redo of the first  
4 couple of pages. Page 1 on Exhibit 5 is a redo of  
5 the first page on Attachment S.

6 MS. WILLIAMS: And what do you mean by a redo?

7 MR. SULSKI: They went back and looked at all  
8 the metrics and did recalculation.

9 MS. WILLIAMS: And then what's Attachment 7?

10 MR. SULSKI: Well, also as a part of Attachment  
11 5 -- I mean, Exhibit 6 there's another page to it  
12 that includes metrics. It's a more detailed support  
13 of the first page.

14 MS. FRANZETTI: Okay. Mr. Sulski, just to  
15 clarify, so the second page is really additional new  
16 information, not something that replaces a page in  
17 the existing Attachment S, correct?

18 MR. SULSKI: These are both replacing the  
19 original attachment.

20 MS. FRANZETTI: Do you know what page of  
21 Attachment S Exhibit 6 replaces and corrects?

22 MR. SULSKI: Well, they're both marked as  
23 page 1, but it's Table 2. So it replaces Table 1 on  
24 the first page of Attachment S and Table 2, which is

1 really the third page of Attachment S. It's just  
2 marked 1 at the bottom.

3 MS. FRANZETTI: Thanks. That helps.

4 MR. SULSKI: Okay. Then we have Exhibit 7,  
5 which is the field sheets for the data presented, the  
6 QHEI numbers. They're the field sheets for each of  
7 the stations. Those were not originally submitted to  
8 us. Those are what we requested.

9 And then Exhibit 8 is the quality assurance  
10 project plan for this -- for the project that  
11 generated this data.

12 MS. WILLIAMS: Can you explain what's contained  
13 in a quality assurance project plan?

14 MR. SULSKI: A quality assurance project plan is  
15 a description of the procedures used to collect data  
16 that should be representative of the conditions  
17 reported. That's how they go about doing the QHEI,  
18 how they view an area, why they decide to go to one,  
19 how they want to cover representative areas when they  
20 do an assessment, especially if it's a more limited  
21 assessment.

22 MS. FRANZETTI: It basically tells you how the  
23 project's going to be performed?

24 MR. SULSKI: Correct. The data sheets that

1 they're going to use and some text on what a QHEI is  
2 and what it represents, et cetera.

3 MS. WILLIAMS: Well, I think then the question  
4 that Ms. Franzetti was phrasing at the beginning was  
5 was there additional information related to IBI that  
6 had not been submitted yesterday?

7 Can you clarify what your original question  
8 was?

9 MS. FRANZETTI: I can. And I've just gotten a  
10 little assistance to maybe be a little more specific  
11 as to why we're concerned that there should be some  
12 more data sheets. Let me see if I can do this  
13 clearly.

14 Exhibit 7, as you pointed out, are the QHEI  
15 field data sheets, and those provide things like  
16 substrate instream cover, maximum depth, ripple  
17 depth, et cetera. As part of doing this project  
18 though, they also were looking at the fish, correct?

19 MR. SMOGOR: Yes.

20 MS. FRANZETTI: If you take Exhibit 8 and if you  
21 go to page 15, you'll see in the QHEI -- in that page  
22 of the QHEI a form that's entitled Figure 4, Field  
23 Data Sheet for Recording Electric Fishing Collection  
24 Data and for entry into the Ohio ECOS Database. It

1 would seem this should have been filled out just like  
2 all these QHEI sheets were filled out, but they  
3 weren't given to you. I mean, it sounds like they  
4 weren't given to you if they were filled out. If you  
5 can --

6 MR. SULSKI: We did not receive them. Nor do I  
7 think we requested them, unless I'm mistaken.

8 MS. FRANZETTI: Well, I think you probably did  
9 because Midwest Gen. asked for all the raw data  
10 underlying the information that was summarized in the  
11 table that was Attachment S, but maybe not as  
12 specifically. Obviously we couldn't tell you that it  
13 was the form or the sheet -- the field data sheet  
14 because we didn't see this before. I guess what I  
15 would ask is -- Well, one more question.

16 Who did you contact at US EPA to obtain  
17 this data -- this additional information?

18 MR. TWAIT: Can I get back to your first point  
19 that you think we should have? I'm telling you that  
20 we didn't. We utilized the data that was presented  
21 in the table to look at species and locations, but we  
22 did not request these sheets.

23 MS. FRANZETTI: I understand. I wasn't  
24 criticizing you. I was pointing out that Midwest

1 Gen's. request was more generally stated as all the  
2 raw data. To the extent you passed that along, as  
3 Mr. Twait said you asked for what Midwest Gen. asked  
4 for, I think this qualifies as asking for all the  
5 wrong data.

6 MR. TWAIT: In that case I apologize that we  
7 didn't have the wherewithal at the time to say we  
8 need these sheets.

9 MS. FRANZETTI: No apology necessary. If they  
10 exist, we'll try and get them now.

11 MR. SULSKI: All right.

12 MS. FRANZETTI: But who did you contact at  
13 US EPA?

14 MR. TWAIT: We did not contact US EPA to get the  
15 raw data. We got that from Chris Yoder.

16 MS. FRANZETTI: Mr. Yoder's going to be here  
17 tomorrow?

18 HEARING OFFICER TIPSORD: Weather permitting.

19 MS. FRANZETTI: For the record, we do want that  
20 data if it exists. It is important data in terms of  
21 reviewing and evaluating the accuracy and quality of  
22 the findings with respect to the fish data that was  
23 collected. I think it sounds like I should reserve  
24 my further questions on that for Mr. Yoder tomorrow.

1 HEARING OFFICER TIPSORD: Okay.

2 MS. FRANZETTI: Returning back then to page 7, I  
3 think, of my questions -- page 11, question 7. My  
4 page numbers are different.

5 I'm sorry. An additional question just in  
6 from my peanut gallery.

7 HEARING OFFICER TIPSORD: That's okay.

8 MS. FRANZETTI: Could one of you call Mr. Yoder  
9 or reach him today and see if these fish collection  
10 data sheets were done? If they were, maybe he could  
11 bring a set tomorrow so that they could be copied and  
12 provided to everyone.

13 MS. WILLIAMS: We can try, yes, on a break.

14 MS. FRANZETTI: And I'm sorry. Another point.

15 Apparently the QHEI field data sheets that  
16 have been marked as Exhibit 7 look like at the top  
17 they have references about reentered, edited. It  
18 appears these are not the actual field data sheets  
19 that were being completed in the field. If you could  
20 just ask him --

21 MS. WILLIAMS: I want to enter these when he  
22 gets here. I mean, I think it's confusing to even  
23 talk about it because we can't authenticate them  
24 actually without him here. I think he's aware that

1 he'll be expected to explain these exhibits.

2 MS. FRANZETTI: This is another request for  
3 documents, Ms. Williams. That's why I want to bring  
4 it out now. If you could also ask him -- We think  
5 there's an underlying actual field set of the  
6 Exhibit 7 sheet that was used by the people who went  
7 out in the field to record this data, and it looks  
8 like we don't have those. Maybe not. We can only  
9 base what I'm saying on what we were given. But,  
10 again, he's coming. If he has them, a phone call  
11 today to ask him to bring them would be appreciated.  
12 And we're more than happy to talk to you in the break  
13 to clarify that, if you need it.

14 Okay. Question 7 --

15 HEARING OFFICER TIPSORD: Mr. Dimond?

16 MR. DIMOND: This is Tom Dimond from Mayer,  
17 Brown on behalf of Stepan.

18 Is it my understanding that the Agency's  
19 position is that it cannot authenticate Exhibits 5  
20 through 8?

21 MS. WILLIAMS: Yeah. I mean, we provided  
22 information that was requested by Midwest Generation,  
23 but we didn't prepare these documents. I will give  
24 everyone more time to review them, if we want to go

1 through that. But, I mean, they were accepted into  
2 the record. We didn't prepare them.

3 MR. DIMOND: Thank you.

4 MS. FRANZETTI: I'm sorry. One additional point  
5 of clarification.

6 Is it still the Agency's position in light  
7 of this new information on Attachment S, for example,  
8 that Mr. Yoder will solely be brought here to respond  
9 to questions one time and that being tomorrow,  
10 Thursday, and Friday?

11 MS. DIERS: That is correct.

12 MS. FRANZETTI: For the record, I'm just going  
13 to note an objection that we just received this  
14 underlying information with respect to Attachment S.  
15 It also includes, as was explained, Exhibits 5 and 6,  
16 which by quick count last night it looks like 17 of  
17 the location scores were changed. All of them were  
18 lowered. We're just trying to get our hands around  
19 that.

20 But my point being, it is significant the  
21 extent to which Attachment S, which the Agency said  
22 it relied on -- relied on in significant ways here  
23 for the determinations it's made as to use  
24 designation for the Upper Dresden Pool, is just now

1 being -- just now being produced. And we are going  
2 to have very little time -- obviously we're all  
3 sitting here and have to sit here 9:00 to 5:00 for  
4 the hearing -- to question Mr. Yoder on this  
5 information. So I do object to the Agency's position  
6 that he's only going to be here for three days.

7           We'll do our best to try and ask questions  
8 about this new information and any other new  
9 information that comes forward. But if by Friday we  
10 feel we have not been given an adequate time to both  
11 review this information and question Mr. Yoder, we  
12 will object to his not being brought back so that  
13 all -- adequate time can be given to review the  
14 information he and/or his team generated and to ask  
15 him questions about.

16           HEARING OFFICER TIPSORD: Obviously,  
17 Ms. Franzetti, you will be given a great deal of  
18 leeway by me to ask the questions you need to ask in  
19 the time that we obviously have. Given this new  
20 information, I'm not going to hold people's feet to  
21 the fire on pre-filed questions. I will let you as  
22 the regulated community and the environmental groups  
23 decide what you think are the most important to ask  
24 Mr. Yoder for the limited time we have him. If we're

1 not done with him on Friday, then we'll discuss this  
2 more on Friday.

3 MS. FRANZETTI: For the Upper Dresden Pool, what  
4 are the existing uses (i.e., the uses actually  
5 attained on or after November 28, 1975) that have  
6 been identified by the Illinois EPA and are to be  
7 protected by the proposed use designation for the  
8 Upper Dresden Pool?

9 MR. SULSKI: The existing uses from an aquatic  
10 life standpoint are those life forms and numbers  
11 identified in the data and reports, the attachments.

12 Do you need the attachments?

13 MS. FRANZETTI: I think it would help.

14 MR. SULSKI: Attachment A, Attachment B --

15 MS. FRANZETTI: Did you mean Attachment B  
16 because this is Upper Dresden Pool?

17 MR. SULSKI: I'm sorry. Attachment A. Let's  
18 scratch Attachment B.

19 Attachment S. There were a couple values  
20 in Attachment R, Attachment -- Well, Attachment D is  
21 a reference guide. That's pretty much it.

22 MS. FRANZETTI: Mr. Sulski --

23 MR. SULSKI: No. Attachment MM, Attachment LL.  
24 I think that's it. I may have missed one.

1 MS. FRANZETTI: Mr. Sulski, you're going to have  
2 to help me a bit to understand that answer.

3 The life forms -- You used the phrase, "The  
4 life forms identified in," and then you read off your  
5 series of attachments. What do you include in the  
6 term -- What's the meaning, as you used it, of "life  
7 forms"?

8 MR. SULSKI: Species, whether they're early-life  
9 stages or not early-life stages, adults.

10 MR. SMOGOR: I think maybe an easier way would  
11 be the biological condition -- we talked about that  
12 yesterday -- the biological condition that has been  
13 documented in these -- in the various attachments  
14 that he mentioned. That is the existing use of the  
15 waterway.

16 MS. FRANZETTI: Okay. I'm sorry. I was trying  
17 to be clear in the question because the way that this  
18 question is using the term "existing uses" is the  
19 way -- is as defined in the Clean Water Act. So I  
20 just want to be clear that you understood it the same  
21 way. I think you did, but I just want to be clear.

22 MR. SMOGOR: Yes.

23 MS. FRANZETTI: So all those attachments contain  
24 data about species that have been identified to exist

1 in the Upper Dresden Pool, and, therefore, your  
2 proposed use designation is aimed at protecting those  
3 species; is that correct? Am I understanding?

4 MR. SMOGOR: No.

5 MS. FRANZETTI: I'm sorry. Can you correct?

6 MR. SMOGOR: Maybe there's a misinterpretation  
7 of "existing use." Our proposed use designation does  
8 not address existing uses actually attained because  
9 our proposed use designation, according to the  
10 information we've presented and our interpretation of  
11 it, is not attained.

12 MS. FRANZETTI: I understand that, that your use  
13 designation may include uses that have not yet been  
14 attained.

15 MR. SMOGOR: And we're talking aquatic life use  
16 here.

17 MS. FRANZETTI: Yes.

18 MR. SMOGOR: Okay.

19 MS. FRANZETTI: But doesn't it also include  
20 protection of what you have defined as existing uses  
21 in the Upper Dresden Pool?

22 MR. SMOGOR: Yes. It covers that by setting a  
23 higher bar, if you will. So if we are achieving --  
24 If it's achieving what it can achieve today, it's

1 achieving the best possible condition -- biological  
2 condition that it can meet today, and if we say the  
3 biological potential is higher than that condition  
4 and that's what our proposed aquatic life use  
5 reflects, then, sure, that proposed use encompasses  
6 all the way down the gradient of biological  
7 conditions.

8 MR. FRANZETTI: One other quick follow-up.  
9 Mr. Sulski.

10 You used the phrase, "A couple of values in  
11 Attachment R." Attachment R, I believe, is a QHEI  
12 report by MBI CABB from approximately 2003 or '04.

13 MR. SMOGOR: '04, I think.

14 MS. FRANZETTI: How do I go there and find those  
15 couple of values? Can you be a little clearer on  
16 what I'm looking for in Attachment R?

17 MR. SULSKI: Sure. If you go to page 2 of the  
18 MBI -- of Attachment R -- oh, page 3 of Attachment R,  
19 you will find a table of summary of data. You will  
20 also see river miles. The river miles that pertain  
21 to the Lower Des Plaines River are 285.5 and 280.7.  
22 Those were the numbers that I -- That's why I said a  
23 couple of values.

24 MS. FRANZETTI: Could I ask you to do the same

1 thing in terms of Attachment A, which is the UAA  
2 report for the Lower Des Plaines? It's a pretty  
3 thick document. Can you either by type of  
4 information or -- If you can be as specific as you  
5 were for Attachment R, that would be great in terms  
6 of what we should look at to look at what aquatic  
7 life uses were deemed existing uses to be protected  
8 by the proposed use designation.

9 MR. SMOGOR: So you're looking for QHEI  
10 scores -- reference to specific QHEI scores in  
11 Attachment A?

12 MS. FRANZETTI: I'm not looking for anything.  
13 I'm asking you what type of information -- where in  
14 Attachment A do I go to look for the information  
15 Mr. Sulski was generally referencing as being present  
16 in Attachment A? I mean, if it's QHEI data in there,  
17 that's --

18 MR. SMOGOR: Yeah. There's Attachment A, QHEI.  
19 Habitat is covered in a chapter, fish condition.  
20 Existing biological aquatic life condition is covered  
21 in a chapter for fish. It's covered in another  
22 chapter for macro-invertebrates. I don't have the  
23 chapter numbers.

24 MS. FRANZETTI: That's fine.

1           MR. SULSKI: And the sources for those data are  
2 spelled out in the report.

3           MS. FRANZETTI: Okay. Attachment LL? Can you  
4 briefly explain what's the relevant information in  
5 Attachment LL for what are existing aquatic life uses  
6 in the Upper Dresden Pool?

7           MR. SULSKI: Attachment LL is the  
8 ichthyoplankton investigation conducted by EA for  
9 Commonwealth Edison Company. It contains -- It  
10 contains data that we looked at and relied on. Do I  
11 need to --

12           MS. FRANZETTI: No. That's sufficient.

13                   And the same question with respect to  
14 Attachment MM?

15           MR. SMOGOR: A similar situation. It contains  
16 fish information that we used.

17           MS. FRANZETTI: Now, that covers the aquatic  
18 life uses. What other uses did the Agency identify  
19 as existing uses which are to be protected by its  
20 proposed use designation for the Upper Dresden Pool?

21           MR. TWAIT: That would be incidental contact  
22 recreation.

23           MS. FRANZETTI: Any others?

24           MR. SULSKI: All the uses defined in the

1 definition of the use within the proposed  
2 regulations.

3 MS. FRANZETTI: Does that include navigation?

4 MR. TWAIT: That would include commercial  
5 activity, navigation, industrial water supply uses,  
6 the highest quality wildlife that is attainable.

7 HEARING OFFICER TIPSORD: Excuse me. For the  
8 record, that is the proposed definition in Section  
9 301.282?

10 MR. TWAIT: That is the purpose in 302.402, but  
11 it is also contained in 303.204.

12 MS. FRANZETTI: Can you explain what's meant by  
13 commercial activity?

14 MR. TWAIT: I think that was -- I'm not sure.

15 MR. SULSKI: Well, I can take a stab at it.

16 MS. FRANZETTI: Mr. Sulski, go right ahead  
17 unless your counsel says don't.

18 MR. SULSKI: Well, I can give you some examples.  
19 I won't cover the full extent.

20 HEARING OFFICER TIPSORD: Excuse me, Mr. Sulski.

21 There is -- In 302.402 it says, "Commercial  
22 activity including navigation, industrial water  
23 supply uses."

24 MR. SULSKI: Well, that's what I was going to

1 say.

2 MS. FRANZETTI: Let's establish that.

3 So commercial activity is kind of the  
4 umbrella phrase that at least includes navigation as  
5 a protected use, industrial water supply as a  
6 protected use, correct?

7 MR. SULSKI: Yes.

8 MS. FRANZETTI: Anything else by way of example  
9 that you can give us or otherwise that is meant to be  
10 included in commercial activity as a protected use in  
11 the Upper Dresden Pool?

12 MR. TWAIT: I think barge fleeting was one of  
13 those not specifically mentioned.

14 MS. FRANZETTI: Anything else? Any other  
15 examples that would be covered by the phrase  
16 "commercial activity"?

17 MR. SULSKI: Any activity that occurs and  
18 requires the waterways on the shoreline of businesses  
19 or industries.

20 MR. SMOGOR: Can I jump in here? I'm a little  
21 confused. Are we now no longer talking about  
22 existing uses that are actually attained? Are we now  
23 talking about uses that we've proposed to protect  
24 for?

1 MS. FRANZETTI: Let me clarify.

2 MR. SMOGOR: Okay.

3 MS. FRANZETTI: As I'm using the phrase  
4 "existing use," it's been attained. It exists out  
5 there. It's an attained use --

6 MR. SMOGOR: Okay.

7 MS. FRANZETTI: -- either on or after  
8 November 28, 1975.

9 Given that, I believe, the Clean Water Act  
10 says that such existing uses must be protected by the  
11 use designation. The whole point of this questioning  
12 is to see what the Agency has from all its work on  
13 this determined are the existing uses in the Upper  
14 Dresden Pool and whether or not what it's proposed as  
15 the use designation covers and protects -- or at  
16 least is intended to protect all of those existing  
17 uses.

18 MR. SMOGOR: Okay. Thank you. Thanks.

19 MS. WILLIAMS: I guess I would just like to add  
20 briefly, from a drafting perspective, I think the  
21 intent in that initial definition at the beginning of  
22 303 where the use is applied throughout the system  
23 that's where we've listed the commercial activity,  
24 including navigation.

1 MS. FRANZETTI: I think I do have some questions  
2 later on specifically on that section. Obviously --  
3 One of the purposes of this questioning is to see  
4 whether or not the language is proposed for the  
5 regulations. Is it appropriate? Maybe we can  
6 improve upon it, change it, et cetera. But the only  
7 way to even begin that or evaluate that is to  
8 understand what you intended to do.

9 HEARING OFFICER TIPSORD: Excuse me,  
10 Ms. Franzetti.

11 303.204, Ms. Williams, is that the section  
12 you're referring to?

13 MS. WILLIAMS: 303.204 and --

14 HEARING OFFICER TIPSORD: You're going to have  
15 to speak up. I can barely hear you.

16 MS. WILLIAMS: 303.204 and 302.402 are very  
17 similar in how they were drafted. So I was referring  
18 to both when I said that.

19 HEARING OFFICER TIPSORD: Thank you.

20 MS. FRANZETTI: Now, the same question as  
21 question 7 is in question 8, but for the Brandon Pool  
22 and the Chicago Sanitary and Ship Canal. What are  
23 the existing uses (i.e., the uses actually attained  
24 on or after November 28, 1975) that have been

1 identified by the Illinois EPA and are to be  
2 protected by the proposed use designation for those  
3 two waterbodies?

4 MR. SULSKI: For aquatic life, the response  
5 would be the same. It's aquatic life identified in  
6 the data and the reports that are the attachments to  
7 the proposal.

8 For recreation, we have in the Cook -- In  
9 the Sanitary and Ship Canal there are two  
10 recreational uses that existed. One is incidental  
11 contact for the Sanitary and Ship Canal. However,  
12 other portions of the Sanitary and Ship Canal have  
13 non-recreation as existing uses.

14 For the Brandon Pool in the Lower  
15 Des Plaines, we have non-recreation as an existing  
16 use.

17 MS. FRANZETTI: Any other protected uses similar  
18 to Upper Dresden? Is it also intended that an  
19 existing use to be protected is navigation, is  
20 commercial activity in the same way as you previously  
21 have explained it for Upper Dresden Pool?

22 MR. SULSKI: Yes.

23 MS. DEXTER: Jessica Dexter with ELPC.

24 You just said that the existing use in some

1 of these reaches is non-recreation?

2 MR. SULSKI: Yes.

3 MS. DEXTER: Is that appropriate, or is that the  
4 use you're proposing?

5 MR. SULSKI: That's the existing use and that's  
6 the use that we are also proposing as attainable.

7 MS. DEXTER: So you have no record of any  
8 existing recreation taking place on any of these  
9 reaches that are proposed as non-recreation?

10 MR. SULSKI: In the uses that we've just went  
11 over -- I mean, the reaches that we've just went  
12 over.

13 MS. FRANZETTI: I have just a follow-up.

14 Would you agree though that the term  
15 "existing use" as used in the Clean Water Act and the  
16 phrase used by counsel in her question as simply any  
17 existing recreation are two different things?

18 MR. SULSKI: We based our -- We based our  
19 determination of existing use on what existed in our  
20 investigation. Those were the existing uses that  
21 occurred -- or were occurring at the time of our  
22 investigations.

23 MR. TWAIT: I think -- To clarify that a little  
24 bit more, if we did our recreational survey and there

1 happened to be one canoe or something, we did not  
2 make the determination that that was a protected use  
3 or an existing use. In those cases we believed that  
4 there wasn't enough of a particular use to protect  
5 for it.

6 HEARING OFFICER TIPSORD: Could you specify  
7 which attachment is the recreational survey?

8 MR. SULSKI: Attachment B has a recreational  
9 survey on it. Attachment K has some recreational  
10 survey and additional data. Attachment L pertains to  
11 recreation because it looks at access locations.  
12 Attachment N pertains to recreation because it is a  
13 written notice of wading as a prohibited use in the  
14 waterways. Attachment P has some regards to  
15 recreation because it's a waterway health precaution  
16 advisory pamphlet for recreators. I may have missed  
17 one.

18 HEARING OFFICER TIPSORD: Thank you.

19 MS. FRANZETTI: Moving on to question 9, in a  
20 March 13, 2006, US EPA memorandum entitled Improving  
21 the Effectiveness of the Use Attainability Process,  
22 US EPA states that, "A credible UAA can result in a  
23 change in designated use in either direction," i.e.,  
24 more stringent or less stringent designated uses, and

1 that could, "Lead to either more or less protective  
2 criteria." Does IEPA agree with that statement?

3 MR. SULSKI: Yes.

4 MS. FRANZETTI: Moving on to question 10. At  
5 page 2 of Mr. Smogor's pre-filed testimony, it is  
6 noted that the Upper Dresden Pool has unique flow  
7 conditions due to the need to maintain the  
8 navigational use and flood control. Given these  
9 unique flow conditions and the impounded nature of  
10 the Upper Dresden Pool, does the IEPA agree that the  
11 Upper Dresden Pool is use-impaired?

12 MR. SMOGOR: Can I ask you for a little clarity,  
13 please? Are you referring to aquatic life use when  
14 you're asking is it use-impaired?

15 MS. FRANZETTI: You can answer the question  
16 based on limiting it to aquatic life use, yes.

17 MR. SMOGOR: The aquatic life use that now  
18 applies to Upper Dresden Island Pool is not impaired.

19 MS. FRANZETTI: Can you explain the basis for  
20 why given the unique flow conditions, the  
21 navigational use, the impounded nature of Upper  
22 Dresden you do not believe that any of those factors  
23 rise to the level of rendering Upper Dresden Pool as  
24 a use-impaired water for aquatic life purposes?

1           MR. ESSIG: What we're talking about here is the  
2 current use designation, which is secondary contact  
3 indigenous aquatic life. It meets that currently.

4           MS. FRANZETTI: Okay.

5           MR. ESSIG: We're not talking about the general  
6 use of aquatic life.

7           MS. FRANZETTI: I'm sorry. I'm not following.  
8 I'm not understanding your answer.

9           MR. ESSIG: The current designation for the  
10 Upper Dresden Island Pool is secondary contact  
11 indigenous aquatic life. The way we assess  
12 indigenous aquatic life use for those waters is based  
13 on water chemistry, the secondary contact indigenous  
14 aquatic life standards. Currently the water quality  
15 samples that have been collected in that pool meet  
16 the secondary contact indigenous aquatic life  
17 standards. That's what we mean by attaining that  
18 use.

19           MS. FRANZETTI: Now, with respect to the  
20 proposed use designation for Upper Dresden with  
21 respect to the Agency's finding that it minimally  
22 meets the Clean Water Act aquatic life goals, how did  
23 the Agency review and evaluate the effect of the  
24 unique flow conditions out there, the navigational

1 use, the flood control, the impounded nature of Upper  
2 Dresden Pool and still conclude that Upper Dresden  
3 does minimally meet the Clean Water Act aquatic life  
4 goals? Why didn't any of those factors prevent Upper  
5 Dresden Pool from minimally meeting the Clean Water  
6 Act aquatic life goals? That's what I'm trying to  
7 understand.

8 MR. SMOGOR: We based our proposed use for Upper  
9 Dresden Island Pool -- our proposed aquatic life use  
10 for Upper Dresden Island Pool primarily on physical  
11 habitat information. We're not saying that  
12 navigational use and other factors are not impacting  
13 that waterbody. But what our judgment is is that  
14 they're not impacting it to the extent that it would  
15 prevent it from attaining the Clean Water Act aquatic  
16 life goal.

17 MS. FRANZETTI: Thank you. That does clarify.

18 MR. SMOGOR: Okay.

19 MS. FRANZETTI: And you're referring generally  
20 to some of the testimony yesterday about QHEI  
21 scoring?

22 MR. SMOGOR: Yes.

23 MS. FRANZETTI: Moving on to number 11 --

24 MS. WILLIAMS: Can I ask a redirect question at

1 this point?

2 Can you tell us whether, in addition to the  
3 attachments and the exhibits you've cited related to  
4 physical habitat, are there other observations or  
5 information regarding the habitat that were  
6 considered by the Agency?

7 MR. SULSKI: Yes.

8 MS. WILLIAMS: Can you explain what those are?

9 MR. SULSKI: Well, as part of our analysis, we  
10 took navigation charts of the area, plotted data,  
11 looked at reports, saw what the data was, looked at  
12 the system in general, be it not just navigation  
13 charts, but actually boating the waterway, flying  
14 over the waterway, driving along the waterway in  
15 various areas on a number of occasions. In addition  
16 to the data and those observations and the  
17 observations of others who collected data that are  
18 made in some of the attachments to the proposal, it's  
19 our understanding and our feeling that the weight of  
20 evidence supports that the Upper Dresden Island Pool  
21 can support Clean Water Act goals.

22 MS. FRANZETTI: Okay. Now, based on that  
23 answer -- And maybe I can explain why what I'm about  
24 to ask you is so important. I'm going to have to or

1 Midwest Gen's. consultants are going to have to try  
2 and review what you looked at and what you concluded  
3 in terms of attainment of Clean Water Act aquatic  
4 life goals for Upper Dresden. I can't do that unless  
5 I clearly understand what you relied on.

6           Now, you've just talked about several  
7 things that, based on your counsel's question, are  
8 also the underlying facts or reasons why the Agency  
9 is proposing the use it is for Upper Dresden Pool.  
10 Are all of those things cited -- or included in the  
11 record here? For example, you talked about  
12 navigation charts. Are those -- Can you tell me what  
13 attachment to the Statement of Reasons those are  
14 contained in?

15           MR. SULSKI: That was a method for us to look at  
16 the -- look at the data in a different format. So,  
17 you know, if you had a table of data, you would make  
18 a graph to help you look at it in a different format.  
19 And the reports are littered with those. We did an  
20 exercise where we took navigation charts and placed  
21 habitat values on those navigation charts to give us  
22 more of a spread-out view of where good habitat  
23 exists and where it doesn't.

24           MS. FRANZETTI: And what the effect is of

1 navigation on good habitats and not so good habitats?

2 That way you're plotting both habitat and navigation?

3 MR. SULSKI: That helped us understand the  
4 difference between this system and the Lower  
5 Des Plaines Upper Dresden Island Pool and the  
6 aquatic A and aquatic B waters. You can look at it  
7 visually -- well, visually in terms of a map. So  
8 that's part of a decision process. You look at  
9 things from different directions. And that is one,  
10 you know, exercise that we did. And it was a very  
11 useful and helpful one.

12 MS. FRANZETTI: Which leads me to my next  
13 question.

14 Do you have those charts still since  
15 they're so useful and helpful?

16 MR. SULSKI: We do have those charts. We have a  
17 set of charts that Midwest Gen. produced as well that  
18 contains habitat areas.

19 MS. WILLIAMS: Is this part of what you were  
20 talking about yesterday? If you had had time, you  
21 would have put together some maps?

22 HEARING OFFICER TIPSORD: They can't hear you at  
23 all.

24 MS. WILLIAMS: I was just asking him whether or

1 not this was what he had referred to yesterday.

2 MS. FRANZETTI: Counsel, it sounds like these  
3 are already put together.

4 MS. WILLIAMS: Well, I'm not sure they are.  
5 That's why I'm asking.

6 MR. SULSKI: If you mean put together in  
7 Post-it notes on a survey map, yes. In terms of a  
8 nice diagram we can put in front of the group to  
9 point things, they are not prepared that way. What I  
10 was referring to yesterday was placing the factors on  
11 the map.

12 MS. FRANZETTI: The UAA factors, I believe?

13 MR. SULSKI: Correct.

14 MS. FRANZETTI: A different subject, right?

15 MR. SULSKI: Yes.

16 MS. FRANZETTI: Well, Counsel, it sounds like  
17 this is a part of the basis for the Agency's finding  
18 that Upper Dresden Pool minimally attains the Clean  
19 Water Act aquatic life goal, and it's not really  
20 addressed in the testimony. I don't really see this  
21 addressed in the Statement of Reasons in terms of  
22 evaluating the interaction between navigation and  
23 habitat locations to come to the conclusion you did  
24 on the proposed use. If I'm wrong, direct me to --

1           MS. WILLIAMS: I think there's two points. One  
2 being that we have our witnesses here to be  
3 cross-examined on everything they considered as far  
4 as their personal experience with the waterway. But  
5 the second point is, if there are -- I mean, we  
6 certainly expect that there are some documents out  
7 there, as we discovered yesterday with some comments  
8 from US EPA, that exist that we just didn't think to  
9 put as one of our 50 attachments to the proposal. So  
10 if there's anything that we've identified here that  
11 for some reason was not included, we certainly will  
12 supplement the record with whatever's there. I was  
13 trying to get at exactly what he was referring to in  
14 terms of a document so we would all know what it was  
15 we were going to provide.

16           MS. FRANZETTI: Okay.

17           MR. SULSKI: What would you like?

18           MS. FRANZETTI: I would like whatever  
19 documentation you've prepared and used and/or relied  
20 on to come to the decision you did on the proposed  
21 use for Upper Dresden Pool.

22           MR. SULSKI: Our decision on the proposed use  
23 came before we went through an added exercise. And  
24 the difference between Upper Dresden Island Pool and

1 the rest of the system is included in the definition  
2 of the system and in the Statement of Reason and in  
3 the pre-filed testimony what makes that water unique.  
4 This was an exercise to look at things a little  
5 differently. It occurred in looking at these  
6 questions. These questions look at things in  
7 different angles as well. So obviously we were  
8 supporting our proposal. So we look at things in  
9 different ways. Whether we have these navigation  
10 charts doesn't change our findings and our  
11 suggestions in the proposal. It simply augments our  
12 personal assurance that these were legitimate  
13 decisions.

14 HEARING OFFICER TIPSORD: Mr. Sulski, I'm going  
15 to step in here. I appreciate that they augmented  
16 your personal decisions, but they do support your  
17 proposal. You need to provide those to the record.  
18 I'm going to go one step further and ask that you  
19 provide them before the March hearing so that the  
20 participants will have an opportunity to further  
21 examine them and perhaps ask questions in March of  
22 the Agency.

23 MR. SAFLEY: Thank you. This is Tom Safley on  
24 behalf of the Illinois Environmental Regulatory

1 Group.

2 Ms. Tipsord, we've just been speaking  
3 specifically to the Upper Dresden Pool. I wanted to  
4 expand the request. If the Agency went through the  
5 same exercises in any other waterways that are  
6 subject to this rule-making, the Board would request  
7 that documents relating to those other waterways that  
8 are in this same vein also be included.

9 HEARING OFFICER TIPSORD: I agree with that. If  
10 you have other information that you used, even in  
11 answering these questions, I would like for you to  
12 provide them before the March hearing, if possible.

13 MR. SULSKI: I would be happy to do so.

14 MR. DIMOND: Tom Dimond on behalf of Stepan.

15 Another category of information that you  
16 referred to, Mr. Sulski, was flying over the site,  
17 having boated the sites, drove by the waterways. Did  
18 you document -- Did you or others at Illinois EPA  
19 document those activities?

20 MR. SULSKI: Photographs were taken.

21 MR. DIMOND: Are those photographs attachments  
22 and in the record?

23 MR. SULSKI: Many of them are contained right  
24 within Attachments A and B of the reports -- the UAA

1 reports.

2 MR. DIMOND: Did you do anything else to  
3 document those activities?

4 MR. SULSKI: Okay. So counsel points out to me  
5 that Attachment CC contains a few photos to document  
6 a particular circumstance.

7 HEARING OFFICER TIPSORD: The next question was,  
8 did you do anything else to document?

9 MR. SULSKI: I can't think of anything right now  
10 that isn't contained in the attachments to the  
11 proposal -- any documentation except that there were  
12 field sheets for logging where recreational  
13 activities were observed. I know that we have some  
14 of those. And those are -- Those were summarized in  
15 the UAA reports. That's something that the  
16 contractor put together. That's the only other.

17 MR. DIMOND: The activities that are documented  
18 in the contractor report, were those undertaken by  
19 contractor employees or by IEPA staff?

20 MR. SULSKI: It was a combination of many staff.  
21 Great Lakes Alliance assisted in some of the  
22 recreation. MWRD assisted in some of the recreation,  
23 US EPA, marina owners, people who showed up at public  
24 meetings, stakeholders, e-mails from stakeholders.

1 So there's a list of those sorts of supporting  
2 documents for recreational activities.

3 In Attachment K -- Well, Attachment JJ is  
4 something that's pertinent to recreational  
5 activities. It involves communications at a safety  
6 and navigation meeting. But K is the main one that  
7 sort of summarizes. There was so many recreation  
8 activities I thought it would be prudent to have a  
9 summary of the various sources. Stakeholders  
10 complained that we were relying on just the  
11 contractor's report summaries.

12 MR. DIMOND: Thank you.

13 MS. FRANZETTI: Question 11. At page 3 of  
14 Mr. Smogor's pre-filed testimony, there is a  
15 reference to a lack of improvements in the conditions  
16 in the Upper Dresden Pool. Given that the  
17 navigational use and flow management controls for the  
18 Upper Dresden Pool will continue for the foreseeable  
19 future, does the Illinois EPA agree that these  
20 constraints are irreversible?

21 MR. SMOGOR: Once again, for clarity, if I may,  
22 I don't see Upper Dresden Island Pool mentioned on  
23 page 3 of my testimony. Can you point me maybe?

24 MS. FRANZETTI: You know, you tell me then that

1 it is your -- at page 3 of your testimony you are not  
2 speaking at all about Upper Dresden Pool? I  
3 obviously thought that you were.

4 MR. SMOGOR: I don't see it mentioned at the top  
5 of page 3.

6 MS. FRANZETTI: Not about whether it's  
7 mentioned, the substance of it. Does your testimony  
8 with respect to lack of improvements and  
9 conditions --

10 MR. SMOGOR: Well, I also don't see the words  
11 "lack of improvement" on page 3. That's why I'm kind  
12 of confused. I should have said that first. Sorry.

13 MS. FRANZETTI: Do you know what I'm thinking?  
14 It may take me a minute. Oh, I see. Thank you.

15 We're referring to the first full paragraph  
16 that begins in the middle of the page.

17 MR. SMOGOR: Okay.

18 MS. FRANZETTI: And I will -- I'll read that  
19 first sentence. "Illinois EPA primarily bases these  
20 proposed aquatic life uses and designations on direct  
21 measurements and observations of the chemical and  
22 physical conditions in these waters and on how  
23 foreseeable improvements in these conditions or lack  
24 thereof relate to the potential biological

1 condition."

2 MR. SMOGOR: Okay. Sorry about that. I was  
3 looking for lack of improvement. I didn't see that  
4 phrase.

5 We do agree -- Bottom line, we do agree  
6 that these constraints are not reversible in the  
7 foreseeable future.

8 MS. FRANZETTI: I was hoping we at least had  
9 common ground on that.

10 MR. SMOGOR: We got there. Sorry. I wasn't  
11 following that.

12 MS. FRANZETTI: Madam Hearing Officer, I think  
13 we decided yesterday that this is where I should  
14 pause and allow others to ask their general  
15 questions.

16 HEARING OFFICER TIPSORD: Before you go, there  
17 were two things that you had questions about  
18 yesterday that the Agency was going to try and  
19 provide for us today. One of those was the impaired  
20 waters and why they're impaired.

21 Were you able to do that?

22 MR. ESSIG: I was not able to do that. I probably  
23 won't be able to do that until next week when I'm  
24 back in the office.

1 HEARING OFFICER TIPSORD: Okay. That would be  
2 wonderful. Again, if that can be submitted so that  
3 if we have questions in March.

4 And the same with the TMDL. There was a  
5 question about the TMDL. I believe Ms. Willhite was  
6 looking into that.

7 MS. DIERS: She was. Hopefully she will have  
8 that information when she's here later this  
9 afternoon. But she was trying to gather it last  
10 night.

11 MS. WILLIAMS: I think there was another maybe  
12 not related to this. But we had also said yesterday  
13 we would provide a report on economics -- I don't  
14 know if report's the right word -- but a document on  
15 economics related to disinfection that US EPA  
16 prepared. We do have that. We have some copies.  
17 We're going to try when we get a break to make a full  
18 set of copies before we enter that, if that's okay.

19 HEARING OFFICER TIPSORD: That's fine.

20 We've actually been at it for about an hour  
21 and 15 minutes. Let's go ahead and take a short  
22 break now, about ten minutes. Then we'll go back on  
23 the record.

24 (WHEREUPON, a recess was had.)

1 HEARING OFFICER TIPSORD: Let's go back on the  
2 record.

3 MS. DEXTER: Can I interrupt and ask two  
4 questions before we get started?

5 HEARING OFFICER TIPSORD: Sure.

6 MS. DEXTER: In Ms. Franzetti's question IV A 9  
7 she referenced a letter from Ephraim King at US EPA.  
8 I'm requesting that that document be entered as an  
9 exhibit by someone.

10 HEARING OFFICER TIPSORD: Could you give us a  
11 page number, too.

12 MS. DEXTER: It's page 12.

13 HEARING OFFICER TIPSORD: Page 12?

14 MS. DEXTER: Page 12 of the Midwest Gen.  
15 pre-filed questions.

16 HEARING OFFICER TIPSORD: She didn't get that  
17 far. She finished with number 11.

18 MS. DEXTER: That was number 11.

19 MS. WILLIAMS: Page 12, number 9; is that right?  
20 Am I right?

21 HEARING OFFICER TIPSORD: Maybe I had the wrong  
22 question. Sorry. Apologies. I looked in the wrong  
23 place.

24 Are you referring to the memo that's

1 available at the website?

2 MS. DEXTER: Yes.

3 MS. FRANZETTI: Madam Hearing Officer, I did put  
4 the website reference in. I believe it can be  
5 obtained off the web.

6 MS. DEXTER: I'm just requesting that it be  
7 produced and entered as an exhibit.

8 HEARING OFFICER TIPSORD: Does the Agency want  
9 to print that off?

10 MS. DIERS: I believe I have a copy of what  
11 she's referring to.

12 MS. DEXTER: It doesn't have to be right now.

13 MS. DIERS: We can make a copy.

14 HEARING OFFICER TIPSORD: If you would, that  
15 would be wonderful. Thank you.

16 MS. DEXTER: My second question is regarding  
17 Mr. Fort's questions. I recognize that the rules for  
18 questioning in this venue are more flexible than in  
19 other venues. But there are a number of questions in  
20 the first section that contain assertions of fact  
21 that are not provided by a sworn-in witness.

22 HEARING OFFICER TIPSORD: I would prefer that  
23 you object to the questions as they come up because,  
24 I mean --

1 MS. DEXTER: Do you want me to object before  
2 they're read into the record?

3 MR. FORT: Counsel, let me do this. Let me  
4 rephrase them a little bit so they're questions. I  
5 noticed that some of the questions should have been  
6 rephrased slightly to make them questions.

7 HEARING OFFICER TIPSORD: And please object if  
8 anything -- We'll address them at that time.

9 MS. DEXTER: All right.

10 QUESTIONING ON BEHALF OF

11 LEMONT REFINERY OF CITGO PETROLEUM CORPORATION

12 MR. FORT: Thank you, Madam Hearing Officer. My  
13 name is Jeff Fort, Sonnenschein, Nath & Rosenthal.  
14 I'm here on behalf of the Citgo Petroleum Refinery in  
15 Lemont, Illinois. I want to, first of all, thank the  
16 Board and thank the Agency for this opportunity.

17 We've talked about this, but this is  
18 obviously a tremendous undertaking and a very complex  
19 set of issues. The Lemont refinery discharges into  
20 the Chicago Sanitary and Ship Canal upstream of the  
21 invasive species barrier into what the Agency would  
22 call Use B waters. Knowing that will probably help  
23 you understand why I'm asking some of these questions  
24 the way I am.

1           I asked the questions yesterday about  
2 what's the difference between Use B waters and the  
3 existing secondary contact designation. I'm not  
4 sure -- I don't think that there is a big difference  
5 or any difference in what those uses are. It doesn't  
6 sound like there is. Really I'm not trying to make a  
7 controversy over the use designations. But in terms  
8 of trying to figure out what we're doing here or how  
9 long we're going to be involved with this, that does  
10 speak to why we're asking some of these questions.  
11 I'm just going to do the first two sets of questions  
12 in my Roman numerals in the pre-filed questions.

13           Obviously a significant undertaking. The  
14 UAA reports recommend numerous additional studies and  
15 evaluation. I didn't see a conclusion that the  
16 aquatic biota would be better after the expenditure  
17 or that recreational use will increase despite the  
18 cost involved. So my basic questions to the Agency  
19 witnesses and whomever wants to take it, why not  
20 complete the studies that were recommended by the  
21 District or by the UAA proceedings before going ahead  
22 with the revised water quality standards?

23           MS. WILLIAMS: Can you please clarify what  
24 studies you're referring to?

1           MR. FORT: Well, I know that the District is  
2 doing some studies on disinfection. I'd have to go  
3 through the attachments, Counsel, and bring them all  
4 out. If the Agency doesn't think there are any  
5 studies to be done, then you can say there are no  
6 studies left to be done.

7           MR. TWAIT: We're not proposing revised water  
8 quality standards for bacteria, and we're trying to  
9 accommodate the District on the epidemiological  
10 studies based on the three-year compliance of the  
11 effluent standard.

12          MR. FORT: But you don't think that there's a  
13 reason -- You want to proceed now to do all the use  
14 designations before you have that information on  
15 epidemiology studies?

16          MR. TWAIT: That was the management decision that  
17 was made, that we would move forward. If the  
18 epidemiological studies produce some information that  
19 we didn't rely on, then they would have an  
20 opportunity to come back to the Board and make any  
21 changes necessary.

22          MS. WILLIAMS: Just for purposes of redirect,  
23 maybe to clarify, Mr. Fort had said he's referring  
24 specifically to primarily the -- which waters? You

1 had said Use B waters, but that's an aquatic life  
2 use. Why don't you clarify for us which recreational  
3 use waters you're looking at.

4 MR. FORT: I just said, as a background, that  
5 the refinery discharges into the ship canal, which is  
6 a Use B water. My question is -- really goes to why  
7 are we doing everything here now and not proceeding  
8 in a more tiered -- or strategic issues that can be  
9 handled more directly or easily?

10 MS. WILLIAMS: So you're asking a new question?

11 MR. FORT: Yes.

12 MR. SULSKI: It seems like question 2 refers  
13 to -- Can you read your question 2?

14 MR. FORT: If you'd rather me read question 2, I  
15 can go to the second question and break it apart,  
16 sure. Would you prefer that?

17 MR. SULSKI: I just recognize that what you're  
18 asking seems to go in line with question 2. If  
19 that's what you'd like to ask, I'd be happy to answer  
20 it.

21 MR. FORT: All right. Go ahead. Why not  
22 prioritize the streams and undertake the changes one  
23 at a time?

24 MR. SULSKI: The reason, in general, is that

1 we're talking about contiguous waterways all within  
2 the secondary contact realm. It was a decision to  
3 look at all the secondary contact waterways from the  
4 get-go even before the UAA's were begun. And that's  
5 what we did. Because they're so contiguous and they  
6 are affected one by the other, we decided to explore  
7 or to analyze all these waterways in one shot.

8 MR. FORT: Why didn't you think about looking at  
9 where you would get the biggest return on your  
10 investment -- or the public's investment in terms of  
11 improving water quality?

12 MR. TWAIT: One of the things that our  
13 contractor suggested was disinfecting that North Side  
14 facility first and then a couple years later  
15 disinfecting at the Calumet facility. And the  
16 District was not interested in that because they  
17 thought they would have environmental justice issues.

18 MR. FORT: Is there -- The next question you may  
19 have already answered. The question is, other than  
20 convenience of doing contact -- getting rid of  
21 secondary contact as a label, is there any other  
22 overarching reason to do this all as once?

23 MR. SULSKI: Again, they're so interconnected,  
24 and one depends on the other. If you clear up a

1 problem in one area, it's likely and it's shown that  
2 you can clear up the problem in another area  
3 downstream. So it makes sense. And it's -- I think  
4 that personally it is a bigger bang for the buck to  
5 study them as a whole and look at their  
6 interrelationships.

7 MS. DEXTER: Would it have resulted in a  
8 duplication of efforts had you looked at these  
9 waterways separately?

10 MR. SULSKI: To some degree, yes.

11 MR. TWAIT: I also want to clarify that the  
12 Agency attempted to do this, just what you suggested.  
13 We started with the Lower Des Plaines UAA and ran  
14 into the temperature issue, and we started the cause.  
15 We're completing them about the same time. But we  
16 had anticipated doing two rule-makings. But just  
17 because of the timing, we rolled it into one  
18 proposal.

19 MR. FORT: You mean because the Lower  
20 Des Plaines UAA took longer than you expected?

21 MR. TWAIT: Yes.

22 MR. FORT: Wasn't that report -- the UAA report  
23 itself completed in 2003?

24 MR. TWAIT: The UAA report was completed.

1       However, there were several outstanding issues.

2               MR. FORT:   And what were those?

3               MR. TWAIT:   Temperature mainly.

4               HEARING OFFICER TIPSORD:   Excuse me.  We had a  
5 follow-up?

6               MS. ALEXANDER:   Yes.  I would just like to  
7 follow up briefly on the question of the District's  
8 epidemiological study.

9               HEARING OFFICER TIPSORD:   Can you identify  
10 yourself for the record?

11              MS. ALEXANDER:   Oh, I'm sorry.  Ann Alexander  
12 from the Natural Resources Defense Council.

13                       An epi study essentially only, at best,  
14 tells you what risks are at current levels of use; is  
15 that correct?

16              MR. TWAIT:   I believe that's what the District is  
17 trying to show.

18              MS. ALEXANDER:   So, in other words, you can't  
19 tell from an epi study, no matter how well it's  
20 designed, what the risk would be from heavier use  
21 that might be associated with a cleaner waterbody; is  
22 that also correct?

23              MR. ANDES:   Fred Andes for the District.

24                       I object because I don't think the witness

1 is qualified to answer questions about  
2 epidemiological studies.

3 MS. ALEXANDER: They've already testified that  
4 they were holding off on ambient water quality  
5 criteria waiting for the District's epi study.  
6 Clearly, they must know some basis about what an  
7 epidemiological study does and doesn't do. My  
8 question goes to the very basic issue of what's the  
9 purpose of an epi study. Obviously, they considered  
10 it significant enough to take some action based on  
11 it.

12 HEARING OFFICER TIPSORD: I think we'll allow  
13 the question with those parameters.

14 MS. DEXTER: Would you like to have the question  
15 back?

16 MR. TWAIT: Yes.

17 MS. DEXTER: In other words, you cannot tell  
18 from an epi study, no matter how well it's designed,  
19 what the risks would be associated -- that would be  
20 associated with heavier use of a waterway that might  
21 result from a cleanup? In other words, if more  
22 people are using the water because they perceive it  
23 to be cleaner, an epi study of current conditions is  
24 not going to tell you what the risks of that heavier

1 use would be?

2 MR. TWAIT: I would have to agree that I'm not  
3 qualified to answer that particular question.

4 MS. ALEXANDER: One --

5 MR. FORT: More?

6 MS. ALEXANDER: Yeah. I have one last question.

7 In reference to your question concerning  
8 return on investment, do you agree that the relevant  
9 consideration for setting standards on this waterbody  
10 is what is the best return on investment, or is it  
11 whether Clean Water Act goals are attainable in light  
12 of the six UAA factors?

13 MR. TWAIT: I would say our desire is to protect  
14 the aquatic organisms.

15 MS. ALEXANDER: Right.

16 But the question is whether the standard  
17 you're using to make these determinations is what's  
18 the best return on investment, or is it the Clean  
19 Water Act standard of whether -- Clean Water Act  
20 goals are attainable in light of the six UAA factors?

21 MR. SULSKI: Our charge is to determine what's  
22 attainable and then to set criteria to protect --  
23 what uses are attainable and set criteria to protect  
24 those uses. That's our charge.

1 MS. ALEXANDER: Thank you.

2 HEARING OFFICER TIPSORD: Go ahead.

3 MR. FORT: Thank you.

4 Mr. Twait, I think you started to answer  
5 this, but I'm not sure you completed it.

6 Since the epidemiological studies are not  
7 available, what's the reason for setting up a  
8 framework and changing the disinfection requirement  
9 now?

10 MR. TWAIT: It was a management decision that if  
11 the epidemiological survey did not bolster a change  
12 in our proposal then the District will have done the  
13 planning for the effluent disinfection to start as  
14 soon as possible. It was not the Agency's intention  
15 to require them to put in hardware before their study  
16 was done.

17 MR. ANDES: Can I follow up on that?

18 HEARING OFFICER TIPSORD: Sure.

19 MR. ANDES: Mr. Twait, under the proposed  
20 regulation, the deadline for compliance with  
21 disinfection standard is March 20, 2011, right?

22 HEARING OFFICER TIPSORD: Mr. Andes, you're  
23 going to have to speak up and slow down a little bit.  
24 It's a little difficult to understand up here with

1 noise in the background.

2 MR. ANDES: Sorry.

3 MR. TWAIT: Yes, I believe that's correct.

4 MR. ANDES: Are you aware of how long it's  
5 expected to take to complete the epi studies within  
6 that time frame?

7 MR. TWAIT: I believe --

8 MR. SULSKI: We're under the understanding it  
9 would take two to three recreation seasons to  
10 complete the study.

11 MR. ANDES: So if the studies are complete in  
12 two to three recreational seasons, does that leave --  
13 how much time does that leave the District to design  
14 and install disinfection facilities if they're  
15 determined to be required?

16 MR. SULSKI: We were under the -- We are under  
17 the impression that the District would begin  
18 engineering analysis. Based on some of the reports  
19 that we've seen, they've done some preliminary  
20 engineering analysis to determine what would be, say,  
21 the best technology in their case. And that  
22 engineering analysis for installing the equipment  
23 would be completed over that time frame, too, so that  
24 when we reached the point of the finish of the

1 epidemiology studies we'd be close to a construction  
2 stage. As pointed out earlier, we have a policy for  
3 allowing up to a three-year period of time and a  
4 permit to allow construction to occur to meet a  
5 standard.

6 MR. ANDES: I was under the impression from  
7 yesterday that perhaps that would not be allowed for  
8 the District. Are you saying that once -- if  
9 disinfection were determined to be required, then  
10 they would be given time to complete designing and  
11 installing and operating the units? Would it be  
12 beyond 2011?

13 MR. TWAIT: I believe if the Board puts in  
14 March 1, 2011, that would be the date that  
15 disinfection would be required.

16 MR. ANDES: Thank you.

17 HEARING OFFICER TIPSORD: Mr. Fort?

18 MR. FORT: Did the Agency consider taking the  
19 reaches with the highest water quality recreational  
20 potential first?

21 MS. WILLIAMS: I'd just like to clarify here.  
22 When you list some reaches, you don't list the Upper  
23 Dresden Island Pool. Would that be included in your  
24 list of the reaches with the highest water quality?

1           MR. FORT: I think that the Dresden Pool is a  
2 controversial issue in this proceeding. I wasn't  
3 intending to take sides. I was trying to more convey  
4 where there was perhaps concurrence or agreement in  
5 moving those items first.

6           MS. WILLIAMS: Well, I guess I would like to  
7 answer this question then. I feel like your question  
8 presupposes an agreement and an outcome from this  
9 proceeding about which waters have the highest  
10 quality and which ones don't. I'm not sure that  
11 legally if we were going to do that we wouldn't have  
12 to maybe start with those that are farthest from  
13 their Clean Water Act goals and do it in reverse.  
14 Either way, it would presuppose an outcome of this  
15 proceeding that we would prefer to have decided based  
16 on the record.

17          MR. FORT: I didn't ask you to presuppose. I  
18 just asked if you thought about doing it in a more  
19 stepwise fashion.

20          MR. SULSKI: Both Scott and I responded to that  
21 question just a moment ago. If you have a follow-up  
22 on that.

23          MR. ANDES: Can I ask a follow up on that?

24          HEARING OFFICER TIPSORD: Mr. Andes?

1           MR. ANDES: A moment ago I believe you discussed  
2 contact with the District in which the District  
3 expressed opinions about prioritization of  
4 disinfection at the various facilities?

5           MR. TWAIT: Yes.

6           MR. ANDES: Can you give me more detail about  
7 those communications, when they might have happened  
8 and with whom? Are there written documents?

9           MR. SULSKI: Those discussions occurred in the  
10 stakeholder meetings where the contractor had put  
11 forth that suggestion. CDM in the cause stakeholder  
12 meeting put forth that suggestion. I recall the  
13 District making a statement -- a representative of  
14 the District making a statement along the lines of  
15 environmental justice, that it would never fly to  
16 disinfect the North Side plant and not the Calumet  
17 plant. And I recall agreement amongst the  
18 stakeholders that that is not a great option to  
19 pursue. So I would have to go back to stakeholder  
20 meeting minutes. But I can tell you sitting in the  
21 stakeholder meetings that that's how it came down.

22           MR. ANDES: Are those minutes part of this  
23 record at this point?

24           MR. SULSKI: Not all of them.

1           MR. ANDES: Can we have all of them made a part  
2 of the record? I don't remember any of them.

3           MR. SULSKI: We can make most of the -- I'd say  
4 80 percent of the initial ones available at the end.  
5 The contract money expired, so the discussions were  
6 more along criteria and bantering back and forth  
7 along criteria lines. You know, formal meeting  
8 minutes were not drawn up and sent out to the  
9 stakeholders. But we can certainly make the early  
10 ones available.

11          MR. ANDES: Any meeting minutes that were taken?

12          MR. SULSKI: Certainly.

13          MR. ANDES: Thank you.

14          HEARING OFFICER TIPSORD: Mr. Fort?

15          MR. FORT: Page 1-18 of the Chicago Waterway UAA  
16 Report recommends that the feasibility of wet-weather  
17 exclusions in the water quality standards be  
18 undertaken. Shouldn't this be done before adopting  
19 standards that will result in the waterways being  
20 identified as impaired?

21          HEARING OFFICER TIPSORD: This is question 3?

22          MR. TWAIT: This is only appropriate for  
23 recreation to comment. This could be done. However,  
24 the Agency believes that wet-weather issues will be

1 taken care of by TARP at some time in the future.

2 MR. FORT: Well, the TARP program's completed in  
3 2016 or thereabouts, I believe. Until we see what  
4 the impact of the completed TARP project will be on  
5 bacteria and dissolved oxygen, why adopt water  
6 quality standards that have not been shown to be  
7 achievable during wet water?

8 MR. TWAIT: We are not proposing water quality  
9 standards at this time for bacteria.

10 HEARING OFFICER TIPSORD: Excuse me, Mr. Fort.  
11 I note you moved on to question number 4?

12 MR. FORT: Yes. I'm going to go back.

13 HEARING OFFICER TIPSORD: That's okay.

14 MS. WILLIAMS: We can cross off 4 though.

15 MR. FORT: You mentioned bacteria. What about  
16 dissolved oxygen? I believe there was testimony  
17 yesterday that dissolved oxygen was a critical issue  
18 here, too.

19 MR. SULSKI: Dissolved oxygen was a critical  
20 issue, one of the leading water quality parameters.  
21 We went through dissolved oxygen discussions,  
22 selections of options for dealing with dissolved  
23 oxygen, bearing in mind that TARP would be completed  
24 and it would reduce the loading on the system.

1     However, based on the data in Attachment B, it was  
2     shown that even if TARP -- even after TARP is  
3     completed there would be an incidence of overflows  
4     which would have an effect on oxygen. With that in  
5     mind, we went forward with identifying ways of  
6     ameliorating those effects and came up with the  
7     options that are contained in the proposal for --

8             MR. SMOGOR: May I add something, please?

9             MR. FORT: Sure.

10            MR. SMOGOR: Also, with dissolved oxygen  
11     standards, we've proposed dissolved oxygen standards  
12     that we believe are adequate to protect the proposed  
13     aquatic life use, not necessarily dissolved oxygen  
14     standards that are achievable.

15            HEARING OFFICER TIPSORD: Ms. Dexter, did you  
16     have a follow-up?

17            MS. DEXTER: It wouldn't make sense.

18            HEARING OFFICER TIPSORD: Okay.

19            MR. FORT: What about looking at snow-melt  
20     conditions as part of the wet-weather evaluations?  
21     Is that part of anything that is in the offing here?

22            MR. SULSKI: Snow melt with respect -- How does  
23     snow melt enter into the -- Can you be more specific,  
24     please?

1 MR. FORT: Well, snow melt will certainly have  
2 an effect on wet-weather conditions. Whether they  
3 create the same level of overflows from the combined  
4 system I don't know. Do you?

5 MR. SULSKI: Well, I have experience over  
6 20-some years on what snow melts do and don't do.  
7 They do different things depending on the rate of  
8 snow melt, depending on whether it's rain related. I  
9 mean, there's a whole variety of snow melt. I don't  
10 understand the question.

11 MS. WILLIAMS: I would like to ask a redirect.

12 MR. FORT: Sure. Go ahead.

13 HEARING OFFICER TIPSORD: Speak up.

14 MS. WILLIAMS: Did the Agency consider -- or  
15 does the Agency think it's appropriate to consider  
16 wet-weather exemptions for aquatic life uses?

17 MR. SULSKI: No.

18 MS. WILLIAMS: Okay. Why not?

19 MR. SULSKI: We didn't consider wet-weather  
20 exemptions -- or we didn't adopt wet-weather  
21 exemptions in this case. And it has to do more with  
22 criteria and standards, which Scott would be a better  
23 person to talk to on that.

24 MS. WILLIAMS: Okay. That's fine.

1           MR. TWAIT: I think that what Rob was getting at  
2 was we did not propose wet-weather exclusions  
3 because that would not be protective of the aquatic  
4 life.

5           MR. ANDES: Can I follow up on that?

6           HEARING OFFICER TIPSORD: Mr. Andes?

7           MR. ANDES: Did you consider whether, as other  
8 states have done, wet-weather provisions could be  
9 designed that will be protective of aquatic life  
10 under wet-weather conditions?

11          MS. WILLIAMS: You asked if they considered?

12          MR. ANDES: Did they consider developing  
13 standards that would be protective of aquatic life  
14 under wet-weather conditions, particularly as to DO?

15          MR. TWAIT: Not that I know of.

16          MR. ANDES: Thank you.

17          MR. FORT: Have you considered the implications  
18 that the adoption of these standards might have in  
19 terms of growth projections for the region?

20          MR. TWAIT: No, I don't believe so.

21          MR. FORT: Have you considered anything -- and  
22 I'll call it in the lines of urban planning --  
23 looking at where might be the better location for  
24 industrial dischargers to be located in terms of how

1 you put together the use designations or the water  
2 quality standards?

3 MR. SULSKI: Not that I'm aware of.

4 MR. FORT: And wouldn't it be true that it's  
5 better to locate facilities in places where you  
6 minimize the amount of traffic or transportation  
7 required to get people to the job or the products to  
8 wherever their destination is?

9 MR. SULSKI: That's not part of our analysis.

10 MR. FORT: Your analysis really focused upon the  
11 water uses and aquatic life? It did not really look  
12 at the larger economic issues of the region or even  
13 of the state, correct?

14 MR. SULSKI: That's correct.

15 MR. FORT: Wouldn't you agree that it would be  
16 better to locate any new industrial activities on  
17 something like the sanitary ship canal which has the  
18 use designation that it has as opposed to trying to  
19 cite a new location on a general use waterway or  
20 someplace hypothetically, say, the Kankakee River?

21 MR. TWAIT: I don't believe the Agency has any  
22 authority for land use recommendations.

23 MR. FORT: I won't dispute that. But from a  
24 technical standpoint, from an aquatic life

1 standpoint, wouldn't you prefer those new industrial  
2 facilities to be on something like the sanitary ship  
3 canal or a Use B water as contrasted with a general  
4 use water such as the Kankakee River?

5 MR. SULSKI: We're charged with looking at  
6 attainable uses and setting criteria to meet so that  
7 those uses are achieved.

8 MR. FORT: Okay.

9 MR. ANDES: Can I follow up on that very  
10 briefly?

11 HEARING OFFICER TIPSORD: Sure, Mr. Andes.

12 MR. ANDES: You just stated that the obligation  
13 was to determine attainable uses and to develop  
14 standards to protect those uses. Earlier on DO I  
15 believe you indicated that you were developing DO  
16 standards to attain the use, but those were not  
17 necessarily achievable; is that correct?

18 MR. SMOGOR: Yes. What I said on DO -- or what  
19 I meant on DO is we've proposed dissolved oxygen  
20 standards that we believe will be sufficiently  
21 protective of the proposed aquatic life use.

22 MR. ANDES: And do you believe that those  
23 standards are attainable?

24 MR. SMOGOR: I don't know. We're not being

1 charged to believe whether -- or to make a call on  
2 whether the standards are attainable, the standards  
3 to protect the use. We're being charged primarily  
4 with determining whether the standards we've proposed  
5 are sufficient to protect the use we've proposed.

6 MR. ANDES: So you're saying that you believe  
7 the use is attainable, but the standard may not be?

8 MR. SULSKI: Well, we identified what we thought  
9 was technically reasonable or what technologies were  
10 available to meet those new proposed criteria.

11 MR. ANDES: But Mr. Sulski just indicated that  
12 you were not willing to state that those standards  
13 are achievable.

14 MS. WILLIAMS: Excuse me. Do you mean  
15 Mr. Smogor?

16 MR. ANDES: I'm sorry. Yes.

17 I'm now confused in terms of whether the  
18 standard -- You're saying the use is attainable, but  
19 there is at least a question about whether the  
20 standards are achievable?

21 MR. SMOGOR: We believe that the standards are  
22 achievable.

23 MR. ANDES: Now, you do?

24 MR. SMOGOR: If I said that we didn't believe

1 the standards were achievable before, then I  
2 misspoke. I didn't think I had said that. I said  
3 our decisions weren't based on whether numeric  
4 dissolved oxygen standards are attainable.

5 MR. ANDES: But your determination is that the  
6 DO standards are achievable?

7 MR. SMOGOR: Yes.

8 MR. ANDES: Thank you.

9 MR. FORT: In what period of time? Did you  
10 consider a compliance period 10 to 20 years out so  
11 that the studies could be completed instead of we're  
12 going to set them now and then do the rule-making  
13 later?

14 MR. SULSKI: We adopted criteria with the --  
15 with the knowledge that there were technologies  
16 available and that there was further study going on  
17 by MWRD to look at what was the preferred option and  
18 that if these standards became final they would be  
19 pursued. We didn't consider it being 20 years out.  
20 We also considered that there are ways of allowing  
21 time for construction and engineering and that sort  
22 of thing.

23 MR. TWAIT: This goes back to one of the things  
24 I said yesterday. When we put these together, we

1 understand that some of the standards won't be met  
2 immediately. The Agency did not want to make a  
3 decision that they could be met in 15 years because  
4 we would have one group of people telling us that's  
5 too much time, and we didn't want to say it would be  
6 done in five years because then we'd have the other  
7 side -- or another party telling us that was too  
8 quick. The Agency decided to just propose this and  
9 let the record show whether or not a date was needed  
10 for completion of the projects.

11 MR. FORT: I think question 7 we've done a  
12 couple times, so I'll keep moving.

13 Mr. Sulski, in what areas do you consider  
14 yourself an expert?

15 MR. SULSKI: Any of the -- I could read my  
16 pre-filed testimony. I can tell you what my  
17 background is. In terms of this whole UAA business,  
18 I think I'm more familiar than any other Agency  
19 representative on the Chicago Area Waterway System,  
20 how it operates, what its amenities are, what its  
21 shortcomings are, who uses the system. I'm your  
22 generalist for the Chicago Area Waterway System. I  
23 probably have a more comprehensive understanding than  
24 anybody in the Agency.

1           MR. FORT: So you view yourself as a generalist  
2 on this, but you don't consider yourself an expert on  
3 an engineering issue of what's technically feasible,  
4 for example?

5           MR. SULSKI: I can give you my background, which  
6 is outlined in my pre-filed testimony. I have  
7 degrees.

8           MR. FORT: Do you consider yourself -- Are you a  
9 licensed engineer?

10          MR. SULSKI: I'm not a licensed engineer.

11          MR. FORT: And you don't consider yourself an  
12 expert economist either?

13          MR. SULSKI: No.

14          MR. FORT: In terms of some of these records  
15 then and findings and surveys that Mr. Yoder has  
16 done, do you consider yourself an expert in the  
17 interpretation of the raw data as it comes out of the  
18 field?

19          MR. SULSKI: No.

20          MR. FORT: How did you get involved with the  
21 Des Plaines UAA after being involved in the CAWS UAA?

22                   MS. WILLIAMS: Excuse me. Are we  
23 skipping question number 9?

24          HEARING OFFICER TIPSORD: I think it's been

1 asked and answered.

2 MS. WILLIAMS: I mean, it's a legal question.  
3 I'm not sure I understand it. I mean, I think the  
4 answer is no.

5 MR. FORT: So the answer to number 9 is no?  
6 He's not being proffered as a, quote, expert in this  
7 proceeding?

8 MS. DIERS: Correct. Yes.

9 HEARING OFFICER TIPSORD: Ms Williams, please  
10 answer.

11 You haven't been sworn in, Ms. Diers.

12 MS. WILLIAMS: To me I think it's a legal  
13 question. I'm not sure it requires being sworn in.  
14 But, yes, I was sworn in. I would say no.

15 MR. FORT: Thank you.

16 All right. Going back to number 10 --

17 Thank you for keeping the process orderly.

18 You were the project manager for the CAWS  
19 UAA. How did you get involved in the Des Plaines --  
20 the Lower Des Plaines River UAA?

21 MR. SULSKI: At the time we knew that we were  
22 funded to do the CAWS UAA. And at that point I began  
23 attending -- reading information involving the Lower  
24 Des Plaines and attending some of the later meetings.

1           MR. FORT:  Who is the project manager on the  
2 Des Plaines UAA before you?

3           MR. SULSKI:  Scott Twait.

4           MR. FORT:  Scott was?

5           MR. SULSKI:  Yes

6           MR. TWAIT:  I did not have the title of project  
7 manager.  That was, I believe, more of Toby Frevert's  
8 job.  In the middle of the project I started handling  
9 more than I had at the beginning, but I don't know  
10 that I would be considered the project manager.

11          MR. FORT:  Okay.  Mr. Sulski, are you familiar  
12 with any deaths that may have occurred during small  
13 boats being swamped by wake from barge traffic in  
14 waters presently known as secondary contact waters?

15          MR. SULSKI:  I'm not personally aware of any.

16          MR. TWAIT:  The Agency is aware that there was  
17 an incident several years ago on the Lower  
18 Des Plaines where three fishermen ended up getting  
19 knocked out of their boat by a passing barge and  
20 ended up drowning.

21          MR. FORT:  It was within what we are now calling  
22 the Lower Des Plaines River?  Can you put a reach to  
23 it since we've now become very particular on that?

24          MR. TWAIT:  I believe it was the Upper

1 Des Plaines Pool. I'm sorry. The Upper Dresden  
2 Island Pool.

3 MR. FORT: The incident occurred in the Upper  
4 Dresden Island Pool?

5 MR. TWAIT: Yes, between I-55 and Brandon Road.

6 MR. FORT: Are any of you aware of any human  
7 health effects, other than the boating incident we  
8 just described, due to the existing conditions in  
9 the, quote, secondary contact waters?

10 MR. SULSKI: I'm not aware of health conditions.  
11 The only health conditions were a few things that  
12 were brought out the stakeholders meetings.

13 MR. FORT: So --

14 MR. SULSKI: Sorry.

15 MR. FORT: Just to summarize -- then I'll move  
16 on -- we know of the three fatalities that occurred  
17 in the Brandon Pool, but no other human health  
18 conditions have been attributed to the secondary  
19 contact waters?

20 MR. TWAIT: Yeah. We know of no instances of  
21 illness that have been reported. However, that  
22 doesn't necessarily mean people haven't gotten sick  
23 at their recreation.

24 HEARING OFFICER TIPSORD: I have a follow-up

1 about the boating accident you were referring to.

2 How was the Agency made aware of this? Is there an

3 IDNR report?

4 MR. TWAIT: The Three Rivers Manufacturing Group  
5 e-mail -- Agency e-mailed -- or sent in a letter with  
6 a news clipping.

7 HEARING OFFICER TIPSORD: Is that a part of the  
8 record? If not, could we get it into the record?

9 MS. WILLIAMS: Yes. If it's not in the record,  
10 we will -- If we can find it, we'll provide it.

11 HEARING OFFICER TIPSORD: You don't have to look  
12 for it right now.

13 MR. FORT: Thank you.

14 HEARING OFFICER TIPSORD: Excuse me. We've got  
15 follow-up.

16 MR. HYNES: Kevin Hynes on behalf of the  
17 Chemical Information Company.

18 HEARING OFFICER TIPSORD: Speak up and slower.

19 MR. HYNES: Kevin Hynes on behalf of the  
20 Chemical Information Company. We have a copy of the  
21 newspaper article here.

22 HEARING OFFICER TIPSORD: Okay. That's fine  
23 with me.

24 MS. WILLIAMS: We'll make copies if you give us

1 your copy.

2 HEARING OFFICER TIPSORD: Let's go ahead and  
3 mark this as Exhibit 9. If no one objects, we will  
4 mark it as Exhibit 9. We will get copies at lunch.

5 (WHEREUPON, said document was marked  
6 Exhibit No. 9 as of 1-29-08.)

7 MR. FORT: Mr. Sulski, or, I guess, any other of  
8 the members of the panel --

9 HEARING OFFICER TIPSORD: Mr. Harley has a  
10 follow-up.

11 MR. HARLEY: Are any of you aware of a uniform  
12 statewide system for reporting illnesses which people  
13 who come in contact with waters can report that  
14 they've become sick by virtue of contact with those  
15 waters?

16 MR. TWAIT: Not that I'm aware of.

17 MR. HARLEY: Are you aware of any obligation of  
18 any medical professional who treats a person for  
19 illnesses which can may be caused by exposure to  
20 water to report that to the State?

21 MR. TWAIT: No, I'm not aware of that.

22 MR. HARLEY: Is there any obligation of any  
23 person who uses waters who become sick or believes  
24 that he or she has become sick by virtue of exposure

1 to those waters to affirmatively notify Illinois EPA  
2 that they think that that has happened?

3 MR. TWAIT: No.

4 MR. HARLEY: Thank you.

5 HEARING OFFICER TIPSORD: Mr. Fort?

6 MR. FORT: Thank you.

7 Question to the panel. Are you aware of  
8 whether US EPA even considered the unique  
9 circumstances of the Chicago waterway system,  
10 sometimes known as one of the seven modern  
11 engineering marvels of the world, in developing the  
12 UAA regulation?

13 MS. WILLIAMS: Is that a fact not in the record,  
14 the seven modern --

15 MS. DEXTER: I would agree with that.

16 HEARING OFFICER TIPSORD: I think that it was  
17 not offered as a fact.

18 MR. FORT: If we want to testify to that, I'm  
19 sure we can arrange somebody. I thought that was  
20 just part of the Chicago colloquialism when we look  
21 at our wonderful waterfront and why Milwaukee's is  
22 different.

23 MR. SULSKI: I can't say what US EPA  
24 considered -- I can't say whether they considered

1 this or not.

2 MR. FORT: Okay. Thank you.

3 The UAA criteria adopted by US EPA does not  
4 appear to be justified for being applied to a  
5 man-made waterway such as the Chicago Sanitary and  
6 Ship Canal. Did EPA even consider, when adopting the  
7 UAA rule, how it addressed a major engineering  
8 structure such as the diversion of water from Lake  
9 Michigan and routing the wastewater from millions of  
10 people and hundreds of businesses down a single  
11 stream such as the Chicago Sanitary and Ship Canal?

12 MS. ALEXANDER: I object to the factual  
13 statement, which I do not believe is a factual  
14 statement, regarding the UAA criteria are applicable  
15 to a, quote, unquote, man-made waterway.

16 MR. FORT: All right. I'll remove the first  
17 sentence. The rest of it's a question. And I think  
18 the Agency has testified to each of those things or  
19 else it's in the Statement of Reasons.

20 MS. DIERS: So we're asking the question did  
21 EPA -- Is that where we're going now? And when you  
22 say EPA in your question, US EPA or Illinois EPA?

23 MR. FORT: US EPA.

24 MR. SULSKI: I can't testify on what US EPA

1 considered or didn't consider on this subject.

2 HEARING OFFICER TIPSORD: Excuse me. I have a  
3 follow-up, if you don't mind, Mr. Fort.

4 I'm assuming when the US EPA proposed the  
5 UAA rules there were comments and things like that  
6 involved with the adoption of the UAA rule. Did the  
7 Agency review any of those before applying the UAA  
8 factors here in Illinois?

9 MR. SULSKI: The comments --

10 HEARING OFFICER TIPSORD: Yeah. I mean,  
11 traditionally when the US EPA proposes a rule they  
12 accept comments. Then when they go final they have a  
13 very lengthy discussion of the comments and US EPA  
14 sort of decisions on some of those comments. Did you  
15 review any of that before applying the UAA factors  
16 here in Illinois?

17 MR. TWAIT: I did not personally, and I do not  
18 know that anybody did.

19 HEARING OFFICER TIPSORD: Thank you. That's all  
20 I wanted to know. Thanks.

21 MR. FORT: Thank you.

22 What year was the UAA rule adopted?

23 MS. WILLIAMS: I'm not aware of it. I don't  
24 know if anyone here is aware of when --

1           MR. SULSKI: Well, when you say UAA rule, we're  
2 familiar with a rule that has factors that have to  
3 be --

4           MR. FORT: It's that one with the six factors.

5           MS. WILLIAMS: So we're referring to --  
6 40 CFR 131-10(g) is what we're referring to. Do you  
7 know when that was adopted?

8           MR. SULSKI: I don't know.

9           MR. TWAIT: It may be contained in one of the  
10 UAA reports, but I don't know that I could find it.

11          MR. SULSKI: You could go online and find out  
12 what date exactly it was adopted.

13          MR. FORT: I was just hoping that maybe one of  
14 you actually had the answer because you'd spent so  
15 much time with the thing.

16                    But in terms of these questions on the  
17 Sanitary and Ship Canal, you did conclude that  
18 several factors in the UAA did apply to the Chicago  
19 Sanitary and Ship Canal, correct?

20          MR. SULSKI: Yes.

21          MR. FORT: Do you remember offhand which factors  
22 those were? 2, 3, and 4 maybe?

23          MR. SULSKI: 2, 3, and 4 sounds about right, but  
24 we'd have to go back to the reaches. Let me just

1 look at the factors.

2           Number 3 applies. Number 4 applies.

3 Number 5 we relied on.

4           MR. FORT: If I remember your testimony  
5 yesterday, your conclusion is that if only one  
6 applied that would still justify a lower use than the  
7 optimum use under the Clean Water Act?

8           MR. SULSKI: That's correct.

9           MR. FORT: Thank you.

10           Do you know if the UAA rule that we've been  
11 referring to here has been updated to include  
12 considerations such as homeland security issues as  
13 they could apply to discharges along the Chicago  
14 Sanitary and Ship Canal?

15           MR. SULSKI: Not that I'm aware of.

16           MR. FORT: Was the Coastguard consulted with  
17 respect to recreational boating prospects on the  
18 general Chicago Area Waterway System or the Lower  
19 Des Plaines River?

20           MR. SULSKI: They were.

21           HEARING OFFICER TIPSORD: Mr. Fort, you skipped  
22 question 15.

23           MR. FORT: Thank you. I'll go back.

24           Do you know who was consulted at the

1 Coast Guard?

2 MR. SULSKI: Their name?

3 MR. FORT: Yes.

4 MR. SULSKI: We have an attachment -- and I'll  
5 find it for you -- that includes -- that is meeting  
6 minutes of safety organizations. It's Attachment JJ.

7 MR. FORT: Thank you.

8 Going back to number 15, how does the UAA  
9 rule, if at all, take into account safety issues  
10 associated with the need for road salting and other  
11 safety-related measures for the Chicago region and  
12 their impact on the Chicago Sanitary and Ship Canal?

13 MS. WILLIAMS: And we're still taking about  
14 40 CFR 131-10(g)?

15 MR. FORT: Yes.

16 MS. WILLIAMS: I just wanted to make sure.

17 Go ahead. You can answer.

18 MR. SULSKI: We didn't consider traffic safety  
19 other than listing that it is an issue. We're  
20 dealing with a chloride criteria, which we struggled  
21 with to some extent. I guess, in answer to your  
22 question. We did consider it.

23 MR. FORT: My question is really with respect to  
24 the UAA criteria that we've talked about with the

1 regulatory cite that counsel has made clear in the  
2 record that we're talking about the right thing. But  
3 do you know if that system or that criteria allows  
4 for any safety issues such as what we've ascribed to  
5 road salt or salting of roads to make them passable?

6 MR. SULSKI: It could apply. I don't recall  
7 invoking a factor for that reason in this analysis.

8 MR. FORT: Does the UAA rule that we've been  
9 talking about take into account, if at all, the  
10 problems of invasive species approaching the Chicago  
11 Sanitary and Ship Canal and Lake Michigan?

12 MR. SULSKI: We took the invasive species  
13 barrier, the electrical barrier, into consideration  
14 when we made decisions on recreational use.

15 MR. FORT: But the UAA itself doesn't really  
16 have a provision in it -- or does it -- that would --  
17 say keeping invasive species out of another body of  
18 water where they could do other adverse things?  
19 That's not a factor that you can rely upon for  
20 the UAA -- or under the UAA?

21 MR. SULSKI: I don't know whether -- at this  
22 point whether it does or doesn't.

23 MR. FORT: Okay. Thank you.

24 I'm ready to go to my next set of questions

1 relating to the relationship between the uses and the  
2 water quality standards.

3 HEARING OFFICER TIPSORD: Number 18 you're not  
4 going to ask?

5 MR. FORT: I think we've covered that.

6 HEARING OFFICER TIPSORD: Okay.

7 MR. FORT: Again, these are more questions now  
8 for the panel.

9 What is the basis for, quote, taking  
10 directly from the parallel provisions in Section  
11 302.208, end quote, requirements to adopt, quote,  
12 acute standards, end quote, quote, chronic standards,  
13 end quote, and, quote, human health standards and  
14 including them in a new 302.407? That's Statement  
15 of Reasons, page 62.

16 MS. WILLIAMS: Give us a minute to turn to the  
17 page.

18 MR. FORT: Sure.

19 MS. WILLIAMS: Can you explain, I guess, why  
20 this isn't a standard-setting question? This should  
21 be deferred until we get into that.

22 MR. FORT: I'm sorry?

23 HEARING OFFICER TIPSORD: I think Counsel's  
24 asking to defer this until we get into more specifics

1 on standards.

2 MR. FORT: Well, I viewed it as a general  
3 question because it cut across -- There's a series of  
4 questions here that cut across everything. I suppose  
5 that one because it references a specific section we  
6 could hold till later.

7 MS. WILLIAMS: No, not because it's a specific  
8 question. I'm fine with whatever you want to rule.  
9 But I think we were trying to get to background, why  
10 we designated uses, not how we went about  
11 recommending numeric criteria to protect those uses.  
12 This seems very pointed at how we chose the numeric  
13 criteria. But I may be misinterpreting it.

14 HEARING OFFICER TIPSORD: Well, I think  
15 that's -- Mr. Fort, do you have a response? I'm  
16 being pointed out here by my technical guys that they  
17 think perhaps these questions are more technical and  
18 standard related. Do you have a problem with  
19 deferring them now?

20 MR. FORT: No. If we're going to get to -- The  
21 reason I was asking these now was because they apply  
22 sort of generally across everything. It seemed to be  
23 more of almost a philosophical approach that was  
24 being taken. And I don't understand how these things

1 relate to the use designations for Use B waters. I  
2 don't know how those standards relate to the uses.  
3 If we're going to go to a three series of uses, then  
4 standard setting philosophy, then the individual  
5 numbers themselves, whatever you wish.

6 MS. WILLIAMS: We can answer any of the  
7 questions that are in these. I mean, I don't have a  
8 problem. It's up to you as far as order.

9 HEARING OFFICER TIPSORD: Why don't we go ahead  
10 and we'll go through these questions to page 6 where  
11 we start again with Questions to Testimony. We'll  
12 do up to that point, and then we'll move on to Corn  
13 Products.

14 MR. FORT: That would be fine. Thank you.

15 Do you have the question there?

16 MR. TWAIT: Yes. I think your question is why  
17 do we have a stand-alone section rather than  
18 referring back to general use. And that was a  
19 management decision to have a stand-alone rule so  
20 that if general use is updated or changed we wouldn't  
21 necessarily have to go back and update and change  
22 these rules. When I say that, I'm referring to the  
23 other uses.

24 MR. FORT: Well, my question, I guess, is, how

1 does the acute standards, for example, relate to  
2 Use B waters which are only for non-recreational  
3 uses?

4 MS. WILLIAMS: Is your question what are acute  
5 standards and why are they applicable here? Can we  
6 ask that question?

7 MR. FORT: That would be fine, yes.

8 MR. TWAIT: Acute standards that we've proposed  
9 are to protect aquatic life from lethality. The  
10 chronic standards are to protect the -- in a longer  
11 term, and human health was to protect human health  
12 for fish consumption.

13 MR. FORT: And those three items that you just  
14 referred to are not presently a requirement for  
15 discharges into secondary contact waters, correct?

16 MR. TWAIT: That is not currently required in  
17 the water quality standards.

18 HEARING OFFICER TIPSORD: For secondary contact  
19 waters?

20 MR. TWAIT: For secondary contact waters.

21 MR. FORT: And so if the uses here for the  
22 Sanitary and Ship Canal are limited to  
23 non-recreational uses, what's the basis for requiring  
24 this sort of analysis or water quality standard in

1 the Sanitary and Ship Canal?

2 MS. WILLIAMS: Mr. Fort, I have to object.  
3 You're, again, referring to recreational uses. He's  
4 explained these are for aquatic life. There's also  
5 an aquatic life use proposed for this stream. I  
6 think your question is mixing apples and oranges.

7 MR. TWAIT: The acute and chronic standards are  
8 for protection of aquatic life. The human health  
9 standard is for protection of human health through  
10 consumption of fish.

11 MR. FORT: We went through a lot of testimony  
12 yesterday on the uses, and I don't remember any  
13 description of aquatic uses for the Sanitary and Ship  
14 Canal or Use B waters.

15 MR. TWAIT: The Use B waters, I believe, are for  
16 tolerant types of fish.

17 MS. WILLIAMS: I mean, I hate to -- I think  
18 the -- I guess I'd just like to clear up the  
19 misunderstanding. I don't think it's necessary for  
20 me to testify here. I feel like there's some maybe  
21 fundamental misunderstanding about what we're doing.  
22 I mean, we have laid out three different aquatic life  
23 uses, one of which is applicable to each segment, and  
24 three different recreational uses, one of which is

1 applicable to each segment. To some degree an  
2 individual segment may not have the same -- they may  
3 be different. It will depend on segment by segment  
4 which one is applicable. So when we say the Use B  
5 waters, that is one of the aquatic life use  
6 designations we are proposing, as is non-recreational  
7 use.

8 MR. FORT: Maybe this is something we have to  
9 wait to get to the individual regulations. When I  
10 looked at the definition that you had for uses for  
11 Use B waters, I didn't see anything that was  
12 descriptive of those things. It said things like  
13 whatever -- attainable or very general language.

14 HEARING OFFICER TIPSORD: Could you specifically  
15 refer in the regulation what you're talking about?

16 MR. FORT: I should, but I'm probably not going  
17 to find it fast enough.

18 MS. FRANZETTI: Mr. Ford, if I may, I actually  
19 think the next questions that I'm going to ask are  
20 going to get into precisely this issue. I don't know  
21 if you might want to hold, and I'll be covering it, I  
22 guess, later today.

23 MR. FORT: It's fine with me if we put it off  
24 till later. That's fine. That's fine. But

1 let me -- In light of this exchange here, let me see  
2 if there are any questions in here that we need to do  
3 now as opposed to waiting till after we go through  
4 the regulatory language for the uses.

5 HEARING OFFICER TIPSORD: Okay.

6 MR. FORT: Let me ask you about question  
7 number 5. And this is referring to a statement that  
8 is in the Statement of Reasons at page 67. "Toxic  
9 metals do not appear to be a toxicity problem with  
10 the exception of cadmium (just upstream of the  
11 Brandon Road Lock and Dam) depositional zone."

12 With that sort of statement of existing  
13 conditions, why are you making any changes on water  
14 quality standards for secondary contact waters,  
15 specifically the Use B waters?

16 MR. TWAIT: Could you rephrase that question?

17 MR. FORT: Well, in light of the statement  
18 that's in the Statement of Reasons, that toxic metals  
19 do not appear to be a problem except for cadmium in  
20 one particular location -- with that sort of a  
21 statement, why are you proposing changes to the  
22 secondary contact water quality standards at least as  
23 they apply to the Sanitary and Ship Canal?

24 MR. SULSKI: I'd like to just rephrase a general

1 response that I kicked out earlier and then elaborate  
2 just a little more and see if that answers your  
3 question.

4           We were charged with defining what uses are  
5 attainable in all these waterways. We worked it  
6 reach by reach. Once we defined what was attainable  
7 in terms of uses, we set criteria to protect those  
8 uses. In addition, where we found that the water  
9 quality was excellent and met Clean Water Act  
10 guidance -- Clean Water Act achievable goals for  
11 particular chemicals, we adopted criteria along those  
12 lines. In other words, the water was clean  
13 chemically to that goal. We adopted those clean  
14 criteria. We're compelled to.

15           MR. FORT: Even though those are not necessary  
16 to protect the use?

17           MR. SULSKI: In some cases, yes.

18           MR. TWAIT: It was a management decision that  
19 since we had not updated these water quality  
20 standards for over 30 years that we would use the  
21 most recent water quality standard -- or most recent  
22 criteria, especially if they were achievable.

23           MR. FORT: So that was a decision made by  
24 Illinois EPA management to do that? It wasn't

1 something that you were required to do under the UAA  
2 process?

3 MR. TWAIT: I believe that would be an accurate  
4 statement.

5 MR. FORT: Thank you.

6 How much sampling data do you have for this  
7 Chicago Sanitary and Ship Canal in terms of these  
8 other chemical parameters that apply in secondary  
9 contact waters now?

10 MS. DIERS: Is this a question on here, or is it  
11 a follow-up --

12 MR. FORT: It's more of a follow-up. Thank you.

13 MR. SULSKI: Well, what we have in the reports,  
14 the A and B -- Attachment A and -- or B report in  
15 case of cause. Additionally, as we began to  
16 establish criteria for protecting the uses, we  
17 received -- and have included as attachments to the  
18 proposal -- more current chemistry -- chemical data.  
19 Those can be found in Attachment W, for example,  
20 Attachment BB. That's all I can see. There may  
21 be --

22 MR. FORT: Do you have a recollection of how  
23 many sampling locations within the Chicago Sanitary  
24 and Ship Canal you had in those reports?

1 MR. SULSKI: It's outlined. I would have to  
2 look at the UAA report. But there is a diagram in  
3 there that shows where they're at.

4 MR. FORT: Do you know how frequent those waters  
5 quality standards were collected?

6 MR. ESSIG: I believe we're talking about  
7 MWRDGC, they're ambient monitoring program. I  
8 believe, unless I'm wrong, they sample monthly.

9 MR. SULSKI: But they sample continuously for  
10 some parameters.

11 MR. FORT: The reason for asking is we had this  
12 discussion yesterday about temperature and monthly,  
13 and there was some testimony from the Agency that  
14 monthly wasn't good enough to really know. So I'm  
15 asking it the other way back here.

16 If you've got monthly sampling and assuming  
17 it's for all these parameters on a monthly basis, how  
18 do you know enough to know that it really is being  
19 achieved?

20 MR. TWAIT: Temperature is different because of  
21 the type of water quality standard that we're  
22 proposing with --

23 MR. SULSKI: The short answer is we took the  
24 data that we had within the stakeholder forum. We

1 requested additional data where we believed there  
2 were gaps. As far as I'm concerned or the Agency is  
3 concerned and I think I can speak for the  
4 stakeholders, we had filled in most of the gaps  
5 pretty well. There may be some exceptions. But we  
6 were satisfied with the amount of data that we had.  
7 In fact, we were overjoyed with some of the amounts  
8 of data that we had.

9 MR. FORT: The question though is, do you have  
10 enough data to know if there's going to be an impact  
11 such as requiring a zone of initial dilution analysis  
12 being done or even a mixing zone analysis in terms of  
13 what is there in terms of the general water quality  
14 standards?

15 MR. SULSKI: We didn't perform theoretical  
16 mixing zone analysis or determinations.

17 MR. TWAIT: I believe we have enough data to  
18 know what the background levels are.

19 MR. FORT: But you don't -- Do you have enough  
20 data to know whether or not one of these requirements  
21 is going to create an additional requirement in the  
22 permitting process?

23 MS. WILLIAMS: One of what requirements?

24 MR. FORT: One of the water quality standards is

1 going to trigger something in the permitting process  
2 that would require activities.

3 MR. TWAIT: We did not go back and look at each  
4 individual discharger to find out how much mixing  
5 they would need to meet the water quality standard  
6 nor how much mixing they had.

7 MR. FORT: Question number 6 talks about, in  
8 light of the lack of fishing from the ship canal and  
9 the Brandon Pool, as reflected in your findings for  
10 Use B, what is your basis for limiting mercury and  
11 benzene based upon, quote, fish consumption, end  
12 quote, and establishing the standard, quote, exactly  
13 the same as the existing general use standard?

14 MR. TWAIT: The Use B waters has nothing to do  
15 with fishing use.

16 MR. FORT: I agree. As I read the proposal, it  
17 looks like there is a standard being proposed based  
18 upon fish consumption.

19 MS. WILLIAMS: We may want to come back to this  
20 when Marcia is here. I think she maybe has a better  
21 understanding than we do about the relationship  
22 between fish consumption and the other programs  
23 unless you guys think you can explain better.

24 HEARING OFFICER TIPSORD: We have a follow-up

1 back here in the back.

2 MS. BARKLEY: Traci Barkley with Prairie Rivers  
3 Network. I'd like to ask the Agency if fish in Use B  
4 waters are able to move outside of the Use B waters  
5 into other waterways?

6 MR. TWAIT: Yes.

7 MS. BARKLEY: Are fish fished for and eaten in  
8 other connected waterways?

9 MR. SULSKI: Yes.

10 MR. FORT: I think I have several questions here  
11 on water quality standards that are better off just  
12 to leave till later whether Marcia's back or when we  
13 get to the water quality standards discussion. I'm  
14 going to jump down then to number 10.

15 The Statement of Reason states that it is  
16 not uncommon for the system (the water levels in the  
17 Chicago Sanitary and Ship Canal and these three  
18 reaches) to fluctuate 4 to 6 feet in level over a  
19 48-hour, storm-related period. That's on -- That's  
20 on page 49.

21 With respect to this statement, first, what  
22 stress does this change in water levels put on the  
23 quality of life in the Chicago Sanitary and Ship  
24 Canal?

1           MR. SULSKI: In general, it will take -- It  
2 depends on what time of the year it's happening. If  
3 you're saying in a spawning period where fish are  
4 spawning, it will make it dry sometimes, make it wet  
5 sometimes. That's the only thing that I can think of  
6 right now unless one of our fisheries people --

7           MR. SMOGOR: You're saying that it can disrupt  
8 fishing spawning?

9           MR. SULSKI: Correct.

10          MR. FORT: And it may do other things which are  
11 just not coming to mind at the moment?

12          MR. SMOGOR: If water's going up and down and  
13 because of those fluctuations there's certain foods  
14 that are not consistently available to the fish, it  
15 could affect fish feeding, for instance.

16          MR. FORT: And you've cited that as one of the  
17 reasons why the Chicago Sanitary and Ship Canal was a  
18 low habitat potential? I'm sort of paraphrasing. Is  
19 that correct?

20          MR. SULSKI: We cited it as sort of a unique --  
21 To the degree that it occurs, it's sort of unique in  
22 some of the areas of the Chicago Area Waterway  
23 System.

24          MR. FORT: How do the adverse effects from this

1 fluctuation compare against any documented or  
2 promised benefits of adopting the proposed water  
3 quality standards in the Chicago Sanitary and Ship  
4 Canal and Brandon Pool Use B in waters?

5 MR. SMOGOR: I'd have to say we haven't really  
6 promised benefits in aquatic life. We've established  
7 what we believe is an attainable aquatic life use.  
8 Maybe I'm not understanding what you're asking.

9 MR. FORT: I accept your statement of what  
10 you've said and not said. But wouldn't this  
11 condition, this 4- to 6-foot fluctuation, occur  
12 regardless of what standards the Board adopts here?

13 MR. SMOGOR: Yes.

14 MR. FORT: And that's going to continue to have  
15 a great stress on the aquatic life in this reach of  
16 the system? And the reach that I'm looking at are  
17 the Use B waters.

18 MR. SMOGOR: We believe that that stress will  
19 continue on the aquatic life, and we've set our  
20 expectations for aquatic life use based on that  
21 belief.

22 MR. FORT: Were any of the US EPA water quality  
23 standard criteria (the Gold Book, for example)  
24 developed using waters that had this turbulence and

1 physical limitations that the Use B waters have?

2 MS. WILLIAMS: I think this is a Scott question.

3 MR. TWAIT: Yeah. The national criteria  
4 documents are developed using lab studies, and they  
5 are for the protection of aquatic life. So I don't  
6 know that the condition of the water that you're  
7 setting -- I don't know that the habitat requirements  
8 of the stream matter for protection of the aquatic  
9 life.

10 MR. FORT: You mean they are setting the  
11 criteria based upon things other than the physical  
12 condition such as we've talking about for the  
13 Sanitary and Ship Canal, correct?

14 MR. TWAIT: Yes.

15 MR. FORT: And that's why we sometimes call  
16 these criteria the trout stream criteria?

17 MR. TWAIT: Well, I don't know that I've heard  
18 that language. However, we've removed the cold water  
19 species from the criteria that we've proposed.

20 MR. FORT: But you're not aware of any of the  
21 procedures that US EPA uses to establish  
22 recommendations for water quality criteria to have a  
23 replication of this sort of dramatic change in water  
24 level that we have in the Sanitary and Ship Canal,

1 correct?

2 MR. TWAIT: I don't know that they try to  
3 replicate that in the lab studies that they do for  
4 toxic effects to the fish.

5 MR. FORT: Thank you.

6 If there are benefits from applying more  
7 stringent water quality standards, even if not  
8 needed, to attain the designated uses, will improving  
9 water quality standards increase the likelihood of  
10 invasive species migrating toward Lake Michigan up  
11 through the Chicago Sanitary and Ship Canal?

12 MR. TWAIT: I don't know the answer to that.

13 MR. FORT: Is there a risk of that occurring?

14 MR. TWAIT: We don't know.

15 MR. FORT: Has the Agency attempted to address  
16 that or figure out what might happen if the water  
17 quality was improved coming through the area from the  
18 ship canal into the Lower Des Plaines where this  
19 barrier -- so-called barrier exists?

20 MR. TWAIT: No.

21 MR. FORT: Do you have any plans to do that?

22 MR. TWAIT: We are setting our water quality  
23 standards for protection of aquatic life.

24 MR. FORT: If that aquatic life includes

1 invasive species, they'll be one of the other species  
2 to benefit, correct?

3 MR. TWAIT: That's a possibility.

4 MR. FORT: And it's a possibility that if the  
5 water gets better there will be more invasive species  
6 headed up the ship canal towards Lake Michigan,  
7 correct?

8 MR. TWAIT: I don't know.

9 MR. FORT: Question number 11 --

10 HEARING OFFICER TIPSORD: Excuse me. We have a  
11 follow -up.

12 MS. BARKLEY: Traci Barkley with Prairie Rivers  
13 Network.

14 Has anyone from the Agency participated in  
15 barrier advisory panel meetings?

16 MR. SULSKI: Yes, I have.

17 MS. BARKLEY: And have invasive species or a  
18 particular invasive species been considered in those  
19 meetings?

20 MR. SULSKI: Yes, they have.

21 MS. BARKLEY: Have different water quality  
22 scenarios been discussed as part of those meetings  
23 and the effect the different water quality scenarios  
24 might have on specific invasive species?

1           MR. SULSKI: The only discussions I recall  
2           pertain to increasing temperature or decreasing DO to  
3           thwart invasive species migration. But that was an  
4           early, early option that was explored.

5           MS. BARKLEY: Were there specific species that  
6           were discussed as part of that DO temp deliberation?

7           MR. SULSKI: I don't recall what species exactly  
8           were discussed.

9           MS. BARKLEY: And what was determined by the  
10          advisory panel to be possible with either an increase  
11          in temperature or a decrease in dissolved oxygen?

12          MR. SULSKI: They determined that those methods  
13          were not going to do what was required and then  
14          switched to the installation of an electrical barrier  
15          to serve the purpose of stopping the movement of  
16          invasive species.

17          MS. BARKLEY: And has the idea of improvement  
18          in the water quality systemwide been talked about as  
19          either benefit or detriment to the spread of invasive  
20          species throughout the system?

21          MR. SULSKI: I don't recall discussions within  
22          those meetings regarding that.

23          MS. BARKLEY: Okay. Thanks.

24          MR. FORT: Thank you.

1           Going to question 11, the Statement of  
2 Reasons also states that, quote, Use B waters, end  
3 quote, have a very poor to poor habitat attributes  
4 and that, quote, such conditions are irreversible, in  
5 combination with other factors, prevent Use B waters  
6 from maintaining a biological condition that meets  
7 the Clean Water Act's aquatic life goal, end of  
8 quote, page 50.

9           In light of these findings, one, were any  
10 of the US EPA water quality criteria developed using  
11 waters that had the limited habitat and physical  
12 limitations that these Use B waters have?

13           MS. WILLIAMS: How is this different from what  
14 we've just answered?

15           MR. TWAIT: The answer --

16           MR. FORT: The prior set of questions were  
17 talking about the 4- to 6-foot change in elevation.  
18 Now, we're talking about the very poor to poor  
19 habitat attributes as stated in the Statement of  
20 Reasons.

21           MR. TWAIT: The answer to your question would  
22 be, yes, dissolved oxygen had limits as to the growth  
23 potential.

24           MR. FORT: Any other criteria or pollutants that

1 were so assessed?

2 MR. TWAIT: I cannot think of any other criteria  
3 that were based on growth.

4 MR. FORT: Does the Agency have any assurances  
5 that if the general use water quality standards are  
6 adopted that there would be any change in aquatic  
7 life in the Chicago Sanitary and Ship Canal and the  
8 Brandon Pool?

9 MR. TWAIT: No, because the waterway is  
10 currently meeting most of the proposed standards.

11 MR. FORT: So the habitat is very poor to poor  
12 regardless of the chemical water quality standards  
13 that have been adopted?

14 MR. TWAIT: Yes.

15 MR. FORT: And the poor habitat goes to things  
16 like lack of ripples, the concrete side walls, the  
17 physical conditions of the ship canal?

18 MR. SULSKI: Yes.

19 MR. FORT: Well, the same question, I guess,  
20 here on the Subpart F criteria. If those were  
21 applied to the Chicago Sanitary and Ship Canal and  
22 Brandon Pool, would there be any difference in  
23 aquatic life in the Use B waters?

24 HEARING OFFICER TIPSORD: Could you specify?

1 Subpart F of what section?

2 MR. FORT: I think it's part 302.

3 HEARING OFFICER TIPSORD: Thank you.

4 MS. WILLIAMS: We're trying to figure out who's  
5 best to answer because it starts out looking like  
6 it's a question about the standard we've selected,  
7 but really I think you're getting at what will the  
8 impact be on the aquatic life, right?

9 MR. SULSKI: I don't want to answer a question  
10 with a question. If this is clear, let me know.  
11 Then I think we can give you an answer.

12 Are you saying that, because of the habitat  
13 limitations and other limitations in the system  
14 ongoing, if we -- if we don't do any water quality  
15 improvements or if we do it doesn't matter? They're  
16 going to stay the same? Is that kind of what you're  
17 getting at?

18 MR. FORT: That would be a good question to  
19 answer, yes.

20 MR. SULSKI: Well, in addition to the habitat  
21 limitations, we found that there are limitations from  
22 chemistry, dissolved oxygen and temperature. And so  
23 the existing aquatic life out there is based on  
24 living in those conditions. It is our understanding

1 that if we improve those conditions we will have  
2 better fisheries than we do currently have despite  
3 the limitness of it based on habitat.

4 MR. FORT: My question really is -- because it  
5 was focused upon Subpart F, was really looking at  
6 chemicals as contrasted with dissolved oxygen  
7 temperature. So do I hear you saying that we think  
8 that there may be improvements from temperature and  
9 dissolved oxygen improvements, but we don't know of  
10 any improvements from adopting the chemical standards  
11 that are here?

12 MR. SMOGOR: Yes. We don't know.

13 MR. TWAIT: I believe that the current chemical  
14 water quality is as good as what we're proposing for  
15 most parameters. So if we propose a standard and  
16 it's already meeting it, I don't know that there  
17 would be an improvement.

18 MR. FORT: Okay. The last question I'm going to  
19 ask relates to -- Well, I guess I have two short  
20 ones.

21 Attachment R is a report prepared by Edward  
22 Rankin. Are you going to make that an exhibit, or  
23 are you planning to bring Mr. Rankin in to testify?

24 MS. WILLIAMS: Well, as far as the first

1 question, I guess that's for the Hearing Officer.  
2 Does she intend that attachments to our Statement of  
3 Reason should be made -- I mean, I don't know how the  
4 Board looks at that.

5 HEARING OFFICER TIPSORD: I don't traditionally  
6 readmit attachments from the Statement of Reasons as  
7 exhibits because they are a part of the record. And  
8 I don't know that it would be given any additional  
9 weight as an exhibit than it is as an attachment to  
10 the Statement of Reason. It just makes it confusing  
11 to have to write it up if I have the same thing with  
12 two different numbers and letters. So I tend to not  
13 do that. If you feel strongly that it should be an  
14 exhibit versus an attachment --

15 MR. FORT: Well, I don't think so, but let me  
16 ask a couple more questions.

17 HEARING OFFICER TIPSORD: Okay.

18 MR. FORT: I've taken several statements out of  
19 Mr. Rankin's exhibit there.

20 Does the Agency disagree with Mr. Rankin's  
21 assessment that the Chicago Sanitary and Ship Canal  
22 has a habitat that is rated poor? Do you disagree  
23 with that?

24 MR. SULSKI: I'm sorry. I was conferring.

1 Could you please repeat it? I do apologize.

2 MR. FORT: Do you agree with Mr. Rankin's  
3 assessment that the Chicago Sanitary and Ship Canal  
4 has a habitat that is poor?

5 MR. SULSKI: I do.

6 MR. FORT: You do agree?

7 MR. SULSKI: I do.

8 MS. DIERS: It says see Table 1 accompanying  
9 text. Is that referring to what's in Attachment R?

10 MR. FORT: Yes.

11 MS. WILLIAMS: And are you asking if he agrees  
12 with what's in Table 1?

13 MR. FORT: Well, let me ask you this question.  
14 I've got a series of questions here. Maybe this will  
15 shorten it.

16 Is there anything in Mr. Rankin's  
17 assessment of the habitat conditions of the Chicago  
18 Sanitary and Ship Canal that you disagree with?

19 MR. SULSKI: There are no -- There's nothing  
20 that I disagree with in Rankin's report that I've  
21 seen.

22 MR. FORT: And you keep talking about agreeing  
23 that the habitat is poor or very poor and has the  
24 barge influences, all of which is what he says in

1 Attachment R, correct?

2 MR. SULSKI: Correct.

3 MR. FORT: Thank you.

4 HEARING OFFICER TIPSORD: Mr. Fort, if I may.

5 We did sidestep the question about whether  
6 or not you would have Mr. Rankin here to testify?

7 MS. WILLIAMS: He was never someone we  
8 contracted with. Maybe it can be explained.

9 Where did this report come from, Rob?

10 MR. SULSKI: This report was generated on a side  
11 contract that US EPA agreed to fund during the CAWS  
12 UAA. It was decided in the stakeholders group that  
13 we just simply did not have enough habitat data to  
14 get our hands around use designations and that it  
15 would be a very valuable thing. So US EPA hired  
16 Mr. Rankin to do such a survey for us.

17 MS. WILLIAMS: Does the Agency have a  
18 contractual relationship with Mr. Rankin?

19 MR. SULSKI: We do not.

20 MR. FORT: Was Mr. Rankin's report approved by  
21 US EPA?

22 MR. SULSKI: You would have to ask US EPA  
23 whether they approved it or not. I don't know.

24 MR. FORT: Who did you get the report from?

1 MR. SULSKI: It either came directly from  
2 Mr. Rankin or it came from US EPA. I don't recall  
3 exactly.

4 MR. FORT: To the best of your knowledge and  
5 belief, it was a report that US EPA paid for and  
6 vetted through its internal approval process and  
7 allowed to be published?

8 MR. SULSKI: I don't know. I don't know how  
9 exactly -- what the pathway was, how it came by us.  
10 I know that it was prepared and brought forth to the  
11 stakeholders, and the stakeholders were allowed to  
12 look at it. And we made decisions based on that  
13 report.

14 MR. FORT: I just had a clarification here about  
15 Attachment S that there were a lot of questions  
16 earlier today and Exhibits 5, 6, 7, and 8.

17 There's no data in that report, is there,  
18 dealing with the Chicago Sanitary and Ship Canal?

19 MR. SULSKI: Which report?

20 MR. FORT: Attachment S or Exhibits 5 -- Let's  
21 do Attachment S first.

22 MR. SULSKI: I don't think that Attachment S has  
23 any data on anything but on the Chicago Area Waterway  
24 System.

1           MR. FORT: It has no data on the things you've  
2 called the Chicago Area Waterway System?

3           MR. SULSKI: Correct.

4           MR. FORT: And the same is true for Exhibits 5,  
5 6, 7, and 8?

6           MR. SULSKI: That's correct.

7           MR. FORT: Thank you. I'm done.

8           HEARING OFFICER TIPSORD: Okay. We're done for  
9 lunch. We'll start after lunch at about 5 after 1:00  
10 with Corn Products.

11                       (WHEREUPON, at 12:05 p.m. the hearing  
12                       was recessed until 1:05 p.m., this date,  
13                       1-29-08.)

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1           MR. SAFLEY: As the Agency's aware, Corn  
2 Products discharges into the Sanitary and Ship Canal  
3 in Chicago. Many of the questions that we pre-filed  
4 on behalf of Corn Products are very specific with  
5 regard to water quality standard issues and  
6 compliance with water quality standard issues. So I  
7 do not intend right now to go through those more  
8 specific water quality questions in the interest of  
9 trying to get through more general questions.

10           Also, several of the general questions that  
11 we pre-filed have already been asked and answered,  
12 and I obviously don't intend to repeat those. I have  
13 a relatively small number of questions right now  
14 while reserving the right to come back at a later  
15 time when we're discussing those more specific  
16 subjects and ask specific questions on water quality  
17 standards, compliance issues, and other things that  
18 are in those areas. Before proceeding, however, to  
19 the few more general questions that are still pending  
20 from Corn Products, I wanted to follow up on  
21 Mr. Fort's questions this morning briefly.

22           This morning Mr. Fort, on behalf of Citgo,  
23 was talking with the Agency witnesses regarding the  
24 question of location of facilities close to -- I

1 think, if I heard the questions right, close to the  
2 end users for their products or in the area where the  
3 facility's -- results of the facility's manufacturing  
4 operations were going to be used. And my  
5 understanding was, the Agency stated that they had  
6 not considered that issue in performing the use  
7 attainability analysis. Did I get that right?

8 MR. SULSKI: I believe so.

9 MR. SAFLEY: What I wanted to follow up on about  
10 that, we also talked yesterday to some extent about  
11 UAA factor 6 which, as the Agency is aware, raises as  
12 a consideration in setting a use lower than the full  
13 use of the Clean Water Act the social -- economic and  
14 social impact -- pardon me -- widespread economic and  
15 social impact, quote, unquote, of more stringent  
16 controls. Would the Agency consider the issue raised  
17 by Mr. Fort regarding location of facilities relative  
18 to users of the products of those facilities as  
19 something that would be relevant to considering  
20 whether or not a proposal would have a widespread  
21 social and economic impact?

22 MR TWAIT: There's a clarifying question. Are  
23 you talking if these are proposed that they would  
24 have to move and then cause widespread impact?

1           MR. SAFLEY: Again, I may have misunderstood  
2 Mr. Fort's questions. I think that one of his points  
3 was that -- To start out with, facilities further  
4 away have to have more transportation of their  
5 products resulting in emissions from local sources,  
6 et cetera, et cetera, where facilities which produce  
7 products located closer to the end users of those  
8 products those kind of concerns are lessened.  
9 Whether or not these rules would result in facilities  
10 having to close and move or whether or not these  
11 proposed standards here might lessen the chance that  
12 another facility would locate in this area I think is  
13 probably an issue for debate. I was just trying to  
14 ask more broadly.

15           The Agency stated that it had not  
16 considered that issue with regard to the UAA. Would  
17 the Agency consider that issue -- those kind of  
18 issues relevant to that factor 6, the social and  
19 economic impact, not getting into any specifics of  
20 whether a particular facility is going to move or  
21 not?

22           MS. WILLIAMS: Are you asking about cross-media  
23 environmental impact or economic?

24           MR. SAFLEY: I think, in part, cross-media

1 environmental impacts and any other impacts that  
2 might result from a facility being located further  
3 away from its -- the users of its product as opposed  
4 to closer to the users of its product.

5 MR. TWAIT: Well, I think if you make the  
6 argument for widespread social and economic impacts,  
7 then we -- we'd have to consider it.

8 MR. SAFLEY: That was my only question. Thank  
9 you.

10 Moving on to our pre-filed questions,  
11 question number 1 under Roman numeral I on the first  
12 page, as noted in the Agency's Statement of Reasons  
13 in evaluating proposed rules, the Board is required  
14 to take into account the existing physical  
15 conditions, the character of the area involved,  
16 including the character of surrounding land uses,  
17 zoning classifications, the nature of the existing  
18 air quality or receiving body of water, as the case  
19 may be, and the technical feasibility and economic  
20 reasonableness of measuring or reducing the  
21 particular type of pollution. And then citing to the  
22 Statement of Reasons. And we've discussed some of  
23 those factors previously in this rule-making.

24 But, in addition, has the Agency provided

1 the Board with any information regarding the proposed  
2 rule's impact on existing air quality?

3 MR. TWAIT: No.

4 MR. SAFLEY: Did the Agency make any conclusions  
5 with regard to the proposed rule's impact on air  
6 quality?

7 MR. TWAIT: No.

8 MR. SAFLEY: Did the Agency consider that the  
9 installation and operation of certain control  
10 technologies which may be necessary in order to  
11 comply with the proposed rules will affect the air  
12 quality in the region?

13 MR. TWAIT: I don't believe that was brought up  
14 as an issue.

15 MR. SAFLEY: You mean brought up as an issue  
16 internally within the EPA or brought up as an  
17 issue --

18 MR. TWAIT: At the stakeholders groups.

19 MR. SAFLEY: And that issue has not been brought  
20 up and discussed internally at EPA either?

21 MR. TWAIT: No.

22 MS. WILLIAMS: I guess I would add to that a  
23 little.

24 MR. SULSKI: Yeah. Because some of those

1 concerns were actually brought up in reports that are  
2 being -- that had been prepared by MWRD, for example,  
3 that I recall. Not whether the Agency took those  
4 into consideration, but that these matters should be  
5 considered.

6 MR. SAFLEY: The issue was -- Let me make sure I  
7 understand.

8 Some of those issues were raised, for  
9 example, by MWRD?

10 MR. SULSKI: Yes.

11 MR. SAFLEY: But the Agency --

12 MR. SULSKI: Air quality.

13 MR. SAFLEY: But the Agency did not factor those  
14 considerations into its analysis?

15 MS. WILLIAMS: I would like to answer here  
16 because I feel like this is -- the question's being  
17 asked as far as interpretation of the language in  
18 27(a), whether we addressed this factor. I would  
19 just like to add, to the best of my knowledge, when  
20 the Act talks about providing the Board information  
21 on the nature of existing air quality or receiving  
22 body of water, as the case may be, that historically  
23 we have interpreted this as the case may be in the  
24 statute to -- in a water rule-making, not typically

1 provide information on air quality to the Board. I  
2 think that's a typical interpretation that we've had  
3 in the past, at least within the Bureau of Water,  
4 about what we're supposed to provide in our petition  
5 to the Board.

6 MR. SAFLEY: Would the question of air quality  
7 be relevant to, quote, the character of the area  
8 involved, closed quote, in Section 27 of the Act?

9 MS. WILLIAMS: So then if you look at the  
10 character of the area involved, including land uses,  
11 zoning -- I mean, there is a list there -- I don't  
12 think typically we considered that as part of the  
13 character of the area involved in the past in the  
14 Bureau of Water, no.

15 MR. SAFLEY: You say you typically have not  
16 considered it. Does the Agency think that the  
17 questions of pollution or potential contamination or  
18 increases in discharges in other media are  
19 irrelevant? You only look at the media that's at  
20 issue in your rule-making?

21 MS. WILLIAMS: I think typically we have  
22 primarily looked at only the media that's at issue in  
23 the rule-making. Now, there may be -- I mean, I  
24 can't say there aren't exceptions. I can speak to

1 the water rule-makings that I and my coworkers have  
2 worked on within the last few decades.

3 MR. SAFLEY: Excuse me. I'm skipping ahead now  
4 to question number 8, which is on page 5 of our  
5 pre-filed questions. That question states, in  
6 regards to the CAWS UAA study, the Agency reiterates  
7 several of the UAA's management options that would  
8 need to be implemented before all of the CAWS could  
9 achieve the recommend obtainable uses, which options  
10 consider activities at the Metropolitan Water  
11 Reclamation District of Greater Chicago and Midwest  
12 Generation facilities. And it cites to pages 95 and  
13 96 of the Statement of Reasons.

14 I wanted to read a little bit in just to  
15 make clear what I'm talking about from those pages.  
16 Near the bottom of page 95 the paragraph begins,  
17 "CDM" -- And this is under the heading CAWS UAA  
18 Study Findings and Recommendations. The paragraph  
19 begins, "CDM further concludes that several  
20 management options would need to be implemented  
21 before all of CAWS could achieve the recommended  
22 attainable uses. One, supplemental aeration and/or  
23 flow augmentation would be needed to meet dissolved  
24 oxygen standards in the Chicago River system. Two,

1 effluent disinfection at MWRDGC, Calumet, Stickney,  
2 and North Side treatment plants would be required to  
3 meet bacteria standards during dry and wet weather in  
4 most of CAWS. Three, CSO controls beyond what is  
5 existing would be needed to meet bacteria standards  
6 during wet weather in most of CAWS. CDM recommends  
7 that the completion of TARP should be the first step  
8 in controlling CSO's." In moving to page 96 of the  
9 Statement of Reasons, "Four, evaluation of  
10 temperature control at the Midwest Generation power  
11 plants would be needed to meet temperature standards  
12 in the Chicago River system."

13           Now, going back to the question, did the  
14 Agency consider any management options when it says,  
15 "That may be available" -- I think it should have  
16 read, "That may be applicable to other dischargers  
17 along the CAWS"?

18           MR. TWAIT: I think the Agency did realize that  
19 the proposed rule-making would require some cooling  
20 towers possibly at other facilities. And I know we  
21 considered disinfection at the two Joliet facilities,  
22 and we have notified them that is what we are  
23 expecting out of this rule-making.

24           MR. SAFLEY: Mr. Twait, when you say Joliet

1 facilities, you mean wastewater treatment plants?

2 MR. TWAIT: Yes.

3 MR. SAFLEY: Okay.

4 MR. TWAIT: I'm sorry. That's not along the  
5 CAWS. Sorry.

6 MR. SAFLEY: That's fine.

7 Then moving on to the next question here,  
8 if so, did such consideration include the costs to  
9 dischargers to implement those management options?

10 MR. TWAIT: We did not figure the costs.  
11 However, cooling towers are used throughout the state  
12 for industries, so we felt that that would be  
13 economically reasonable.

14 MR. SAFLEY: And we've talked to some extent  
15 about the cooling tower issue yesterday. I don't  
16 want to repeat. Let me quickly ask the last question  
17 here. Then you can tell me whether there's anything  
18 to add to the discussion that we've already had.

19 The question printed here is, what were the  
20 Agency's conclusions regarding management options for  
21 dischargers other than the District and Midwest  
22 Generation? You've mentioned cooling towers,  
23 Mr. Twait, in the discussion that we had.

24 Were there any other specific management

1 options that the Agency considered with regard to  
2 other dischargers along the CAWS other than MWRD and  
3 Midwest Generation?

4 MR. TWAIT: I can't think of any. But I do want  
5 to mention that we have not determined which  
6 facilities -- which industrial facilities would have  
7 to put in cooling.

8 MR. SAFLEY: Okay.

9 MR. SULSKI: We also have some very small  
10 disinfection separate and private wastewater  
11 treatment plants along that system, a few of them.

12 MR. SAFLEY: Okay. Have you requested  
13 information from any of those dischargers in order to  
14 make a determination as to whether or not cooling  
15 towers would be required?

16 MR. TWAIT: No, I do not believe we did.

17 MR. SAFLEY: Pardon me. I'm just going to leaf  
18 through here and make sure that there aren't any more  
19 that I want to ask right now.

20 No. I think that the rest of our questions  
21 are more specific and are better asked at the time  
22 we're talking about more specific issues.

23 HEARING OFFICER TIPSORD: Thank you, Mr. Safley.

24 MR. SAFLEY: Thank you very much.

1           HEARING OFFICER TIPSORD: Then we move on to  
2 Chemical Industry Council.

3           And I personally want to thank all of you  
4 for taking the time to go through your questions and  
5 helping to organize the area in this manner. It's  
6 greatly appreciated.

7           Go ahead. Introduce yourself.

8                           QUESTIONING ON BEHALF OF  
9                           CHEMICAL INDUSTRY COUNCIL OF ILLINOIS

10          MR. HYNES: Good afternoon. My name is Kevin  
11 Hynes, H-y-n-e-s. I'm with O'Keefe, Lyons & Hynes.  
12 I'm here on behalf of Chemical Industry Council.

13           Thank you for making yourself available to  
14 answer our questions. I probably only have a few  
15 questions like Mr. Safley. Most of our questions  
16 have already been asked and answered. Just a  
17 follow-up on Mr. Safley's last question.

18           Is there a reason why you didn't ask for  
19 the cooling tower data?

20          MR. TWAIT: I do not know the reason for that.

21          MR. HYNES: Do you believe the information would  
22 have been of any value to your decision-making  
23 process?

24          MR. TWAIT: For setting water quality standards,

1 I don't know that it would have been beneficial. For  
2 determining the costs, it would have been beneficial.

3 MR. HYNES: A follow-up to one of Mr. Fort's  
4 questions from this morning.

5 There were a number of occasions where IEPA  
6 management was referenced as being the reason that  
7 this proposal was pushed forward. Who in -- Who is  
8 IEPA management that you were referring to?

9 MR. TWAIT: My earlier statements would have  
10 been for Toby Frevert. He was my manager, and he  
11 spearheaded this whole program -- or whole process.  
12 And he retired at the end of 2007.

13 MR. HYNES: Was his decision to move this  
14 forward made at the time of his retirement, or was it  
15 prior to?

16 MR. TWAIT: No. I'm talking about the last  
17 decade, the last ten years or so, of issuing --  
18 putting out the RFP's, finding a contractor, and  
19 attending all the meetings.

20 MR. HYNES: I believe that your testimony  
21 earlier was, at least with regard to some of the  
22 questions, that the decision was made by -- through  
23 Mr. Frevert in this case to move forward without  
24 waiting for any of the data that Mr. Fort referenced,

1 whether it be the MWRD study. Is there a reason why  
2 he didn't want to wait?

3 MR. TWAIT: It's hard to say what he was  
4 thinking and what he was not. However, for  
5 disinfection, his idea there was to give the District  
6 an opportunity to perform their study. If it didn't  
7 go as planned or they couldn't -- they needed to  
8 disinfect anyway regardless of their study, they  
9 would have done the planning already and be able to  
10 start construction in a relatively quick manner.

11 MR. HYNES: To your knowledge, was Mr. Frevert  
12 under any instruction by anybody higher up in IEPA or  
13 the administration to move this process forward?

14 MR. TWAIT: No, not to my knowledge.

15 MR. HYNES: Mr. Twait testifies at page 15 in  
16 his pre-filed testimony -- I'll just paraphrase it --  
17 that the Board might need to consider additional  
18 data -- and this is largely in reference to the  
19 thermal standards -- that might be developed on the  
20 record before they can make a decision on this  
21 proposal.

22 What other data or information do you  
23 anticipate the Board is going to have to consider?

24 MR. TWAIT: For economic --

1 HEARING OFFICER TIPSORD: Excuse me. Mr. Hynes,  
2 is that one of your pre-filed questions?

3 MR. HYNES: It is. Two of them. Number 6 and  
4 number 15. They're largely repetitive.

5 HEARING OFFICER TIPSORD: Thank you.

6 MR. TWAIT: That statement was trying to refer  
7 to the economic considerations under the sixth UAA  
8 factor. Also, IEPA is anticipating Midwest  
9 Generation to have a proposal to the Board.

10 MR. HYNES: So let me just recap.

11 What you're saying is that was only  
12 applying to economic data that you anticipated  
13 somebody else providing, nothing that the Agency  
14 anticipated providing during this process?

15 MR. TWAIT: No.

16 MS. WILLIAMS: And I think I explained  
17 yesterday, as far as getting back to what Toby had  
18 laid out for the stakeholders, I think he had been  
19 very clear from the beginning that it was his hope  
20 that all stakeholders who were concerned would bring  
21 that type of information to these proceedings so that  
22 they could be taken into account.

23 MR. HYNES: Which brings me to question 8.

24 There's been a number of statements

1 regarding stakeholder involvement. As part of the  
2 stakeholder process, did the Agency consult with any  
3 local municipal or county governments in developing  
4 this proposal?

5 MR. SULSKI: Yes, we did.

6 MR. HYNES: Which ones?

7 MR. SULSKI: Well, we sent a letter out to  
8 municipalities, park districts, other government  
9 agencies in addition to -- that weren't necessarily  
10 at the stakeholders meetings to determine whether  
11 there were additional recreational facilities, plans,  
12 activities in the near future that were flushed out  
13 that would have a bearing on how we would look at the  
14 recreational use.

15 MR. HYNES: Did you solicit or obtain comments  
16 to the actual proposal from any municipal or county  
17 governments?

18 MR. SULSKI: I think Evanston is one that comes  
19 to mind, and the City of Chicago is another.

20 MR. HYNES: Are those comments in the record?

21 MR. SULSKI: I think that -- Well, those sorts  
22 of comments came verbally at stakeholders meetings.  
23 They came after our initial standard package proposal  
24 between what we put out to the stakeholders and then

1 what we provided to the Board. So some presentations  
2 were made, for example, by the City of Chicago,  
3 comments on the initial first cut of proposed  
4 standards.

5 MR. HYNES: So that would be the January 2007  
6 draft?

7 MR. SULSKI: Well, even prior to the --

8 MS. WILLIAMS: Just to clarify for the record  
9 the time line, in January of 2007 we -- I don't want  
10 to say published -- but sent out a draft. And then  
11 in March 2007 is when we held outreach meetings to  
12 discuss it and obtain comments. So those are the  
13 same -- It's the same draft, but those are the two  
14 dates.

15 MR. HYNES: But you're referring to something  
16 earlier than January 2007?

17 MR. SULSKI: Well, in respect to your earlier  
18 question were municipalities solicited for input  
19 basically, yes, they were on various elements of this  
20 project.

21 MR. HYNES: Then, to my understanding, it's only  
22 Chicago and Evanston providing comments?

23 MR. SULSKI: That's all I can recall right now.  
24 Except MWRD is a public agency.

1 MR. HYNES: Right.

2 This morning -- I can't recall who  
3 testified, but somebody --

4 HEARING OFFICER TIPSORD: Excuse me. Mr. Harley  
5 has a follow-up.

6 MR. HARLEY: Do you recall what the nature of  
7 those comments were that you received --

8 HEARING OFFICER TIPSORD: We can't hear you.

9 MR. HARLEY: I'm sorry. For the record, Keith  
10 Harley, Chicago Legal Clinic, on behalf of the  
11 Southeast Environmental Task Force.

12 Do you recall what the comments were of  
13 Evanston and the City of Chicago?

14 MR. SULSKI: Are they comments -- I mean, are  
15 they covered in -- Excuse me.

16 Evanston provided written comments.  
17 Chicago provided written comments.

18 MR. HARLEY: And what were the nature of those  
19 comments?

20 MR. SULSKI: The nature of the comments from  
21 Evanston, as I recall, was that they wanted to see  
22 the North Shore Channel as a swimmable area. But to  
23 the question of whether there were any planned  
24 facilities on the books to install such facilities,

1 they had none. And neither did any of the other  
2 agencies that responded indicate that there were any  
3 plans in the next ten-year time frame to install  
4 facilities that would allow and promote primary  
5 contact activities.

6           The rest of the responses involved other  
7 forms of recreational activity, including a boat dock  
8 here, for example, a reiteration of the City's water  
9 agenda, and some of the facilities that they had  
10 promoted or their zoning for, what types of  
11 activities would occur along the waterway, and that  
12 sort of thing.

13           So the response for recreational activity  
14 in short, I guess, is that there are supported  
15 incidental contact facilities -- incidental contact  
16 recreation facilities in some areas. None for  
17 primary. And that about sums it up.

18           MR. HARLEY: That's the position in the letter  
19 of the City of Chicago and Evanston?

20           MR. SULSKI: I told you that Evanston was  
21 advocating for primary contact protection in the  
22 North Shore Channel.

23           MR. HARLEY: And did you understand that  
24 implicit within that position they would seek to

1 support a disinfection proposal?

2 MR. SULSKI: I would have to go back to their  
3 original proposal -- I mean, their original  
4 submission to see if that -- those words are there  
5 exactly.

6 MR. HARLEY: In the answer you previously gave,  
7 your longer narrative answer, did you include in that  
8 answer any information that you received from the  
9 City of Chicago, or are you going to address that  
10 separately now?

11 MR. SULSKI: To the best of my knowledge -- And  
12 I would have to go back to the responses. And you  
13 have to understand that the responses that are in my  
14 head right now involve their close participation as a  
15 stakeholder, various submissions when they became  
16 available, their long-range plan for the waterways,  
17 the Mayor's, you know, plans and ideas for the  
18 waterways, and that sort of thing. You know, it's  
19 spread out amongst those documents that we received  
20 and considered during both the stakeholder process  
21 and if -- whatever was included in comments to our  
22 draft regulations.

23 MR. HARLEY: In terms of the responses that you  
24 received from the City of Chicago and from Evanston,

1 would it be fair to characterize those responses as  
2 anticipating greater human recreational use of the  
3 waterways in the future than in present?

4 MR. SULSKI: Yes, that would be a fair  
5 characterization.

6 MR. HARLEY: Thank you.

7 HEARING OFFICER TIPSORD: Are those responses  
8 anywhere summarized in what you've provided to the  
9 Board? I guess my question is that initially  
10 Mr. Hynes asked the question and your response was,  
11 "Well, they were part of the stakeholders," which led  
12 me to believe they must have been oral comments.  
13 Now, they're written comments that seem to have some  
14 relevance here. I'm just wondering if those have  
15 been included in the record? If not, can they be?

16 MS. WILLIAMS: I think the answer is no and yes.

17 HEARING OFFICER TIPSORD: Thank you.

18 MR. SULSKI: Can I add that, because of the  
19 volume of input, we put an attachment together that  
20 summarizes various recreational uses and the sources  
21 of those. And those sources are contained in that  
22 attachment, which is Attachment --

23 HEARING OFFICER TIPSORD: Is it K?

24 MR. SULSKI: Yes, Attachment K and L.

1 HEARING OFFICER TIPSORD: Thank you.

2 Mr. Hynes?

3 MR. HYNES: This morning -- I can't recall which  
4 of you stated that the Agency consulted with the  
5 Coast Guard in the development of this proposal. What  
6 did you mean by consult?

7 MR. SULSKI: The CAWS UAA had a special meeting  
8 with safety-oriented people, and the minutes of that  
9 meeting are contained as an attachment.

10 MR. HYNES: Do you recall the date of that  
11 meeting?

12 MR. SULSKI: Minutes from -- It's JJ, Minutes  
13 from November 19, 2003, SAC Meeting on Safety and  
14 Navigation Issues.

15 MR. HYNES: Is that the only consultation you  
16 had with the Coast Guard regarding safety on CAWS of  
17 the Des Plaines River?

18 MR. SULSKI: That's the only direct  
19 consultation. Although we attended several port  
20 development and safety council meetings where the  
21 Coast Guard was represented. You know, they have  
22 minutes probably. We have some minutes from some --

23 MR. HYNES: Are those in the record as well, or  
24 can they be made available for the record?

1           MR. SULSKI: I don't know that they're relevant  
2 for your purpose. The nature of the meetings are all  
3 the events that are planned in the ports and in the  
4 city and in the main stem and all this. It was how  
5 to work out competing uses in the waterways.

6           MR. HYNES: But did they form your  
7 decision-making process in developing this proposal?

8           MR. SULSKI: No.

9           MR. HYNES: The proposal was made -- you said  
10 published -- or made available January 2007. When  
11 was the last stakeholder group meeting prior to the  
12 proposal?

13          MS. WILLIAMS: We'd have to clarify which one  
14 probably, right, because we did meet separately?

15          MR. SULSKI: Two of them after that. One with  
16 the CAWS in the CAWS group area and one in the Lower  
17 Des Plaines group area.

18          MR. HYNES: Prior to January 2007?

19          MR. SULSKI: Oh, when was the last stakeholders  
20 meeting?

21          MR. TWAIT: Attachment E is the time line of the  
22 Lower Des Plaines River and the Chicago Area Waterway  
23 System stakeholders advisory committee meetings and  
24 outreach activities.

1 MR. HYNES: I don't have that in front of me.

2 Can you just tell me the date?

3 MS. WILLIAMS: Can you repeat the question?

4 MR. HYNES: Prior to January 2007 when was the  
5 last stakeholder meeting prior to January 2007?

6 MS. WILLIAMS: Do you mean for the Chicago  
7 Waterway or the Lower Des Plaines?

8 MR. HYNES: If there were two held, one held for  
9 each, what was the last one for each?

10 MR. TWAIT: EPA held a CAWS UAA SAC meeting on  
11 May 9, 2006.

12 HEARING OFFICER TIPSORD: Mr. Hynes, would it  
13 help you to be looking at this while they're looking  
14 at it? I have my copy here if you'd like to look at  
15 it while they're looking at it in case you have  
16 additional follow-up.

17 MR. HYNES: Thanks.

18 MR. TWAIT: On November 20, 2003, we have stated  
19 here that IEPA held its final Lower Des Plaines River  
20 UAA SAC meeting with 30 members present for proposal  
21 presentation.

22 MR. HYNES: So it's fair to say that it was over  
23 three years between the time of the last stakeholder  
24 group meeting for the Lower Des Plaines and the

1 actual January 2007 proposal?

2 MR. TWAIT: Unless there was another meeting  
3 that I missed, that would be accurate.

4 MR. HYNES: Was there any consultation with that  
5 stakeholder group in that three-year period?

6 MR. TWAIT: Yes, there was. We sent temperature  
7 proposals out and -- from Midwest Generation and also  
8 Chris Yoder during that time period because  
9 temperature was the critical reason that we weren't  
10 meeting anymore.

11 MR. HYNES: Would you agree that in this record  
12 there's data missing that we've pointed out -- at  
13 least questions have been pointed out to the Agency  
14 that needs to be made available?

15 MS. WILLIAMS: I don't understand the question.

16 MR. HYNES: I guess my -- My real question is,  
17 do you believe the record's complete at this point,  
18 from your perspective, to support this --

19 MR. SULSKI: I think so.

20 MR. HYNES: Despite yesterday's testimony that  
21 there was some methodologies being reviewed to  
22 determine if they were correct?

23 MR. SULSKI: I think that --

24 MS. WILLIAMS: What are you referring to?

1 MR. HYNES: I believe yesterday you testified  
2 that --

3 MS. WILLIAMS: So with respect to cadmium?

4 MR. HYNES: At least that methodology was being  
5 reviewed to determine if it was -- actually performed  
6 correctly.

7 MR. SULSKI: My answer is that in this proposal  
8 the information that we had when we made this  
9 proposal we are using and believe is sufficient to  
10 support what we're proposing.

11 MR. HYNES: I think all my questions have been  
12 answered.

13 HEARING OFFICER TIPSORD: Thank you very much,  
14 Mr. Hynes.

15 That moves us on next to --

16 Go ahead.

17 MR. DIMOND: Tom Dimond on behalf of Stepan.

18 I think it was Mr. Twait who indicated that  
19 temperature proposals from Midwest Gen. and Mr. Yoder  
20 were distributed to the stakeholders group. When did  
21 that occur roughly?

22 MR. TWAIT: I don't know offhand. I'd have to  
23 go back through my e-mail and find out.

24 MR. DIMOND: Was it about the same time as the

1 January 2007 proposal?

2 MR. TWAIT: No. I believe it was earlier than  
3 that for some of the communications, but I don't  
4 know.

5 HEARING OFFICER TIPSORD: Before we went to  
6 lunch, you were going to have a copy made of  
7 something that Ms. Dexter asked if we could put in  
8 the record. Can you get that in the record? I  
9 forgot about that.

10 MS. DIERS: So we're on Exhibit --

11 HEARING OFFICER TIPSORD: This will be  
12 Exhibit 11.

13 This is a memorandum that was referenced in  
14 Ms. Franzetti's Midwest Generation questions. Its  
15 subject is Improving the Effectiveness of the Use  
16 Attainability Analysis Process. It's dated March 13,  
17 2006. It's a US EPA memo.

18 If there's no objection, we'll mark this as  
19 Exhibit No. 11. Seeing none, it's Exhibit No. 11.

20 (WHEREUPON, said document was marked  
21 Exhibit No. 11, as of 1-29-08.)

22 MS. DIERS: We also have a copy of the document  
23 that was referenced yesterday on the technical  
24 memorandum disinfection that was prepared by US EPA.

1 We want to enter it at this time.

2 HEARING OFFICER TIPSORD: Okay. I've been  
3 handed Review of Technical Memorandum 1WQ  
4 Disinfection Evaluation prepared on behalf of the  
5 Metropolitan Water Reclamation District of Greater  
6 Chicago, Final Report, April 26, 2006.

7 If there's no objection, I will mark this  
8 as Exhibit 12. Seeing none, it's marked as  
9 Exhibit 12.

10 (WHEREUPON, said document was marked  
11 Exhibit No. 12, as of 1-29-08.)

12 HEARING OFFICER TIPSORD: And I think with that  
13 we're ready to start with the District

14 QUESTIONING ON BEHALF OF THE METROPOLITAN WATER  
15 RECLAMATION DISTRICT OF GREATER CHICAGO

16 MR. ANDES: Thank you. This is Fred Andes from  
17 Barnes & Thornburg. I'm counsel for the Metropolitan  
18 Water Reclamation District of Greater Chicago, or  
19 we'll just refer to the District going forward. I'd  
20 like to start with a few follow-up questions from  
21 issues others have raised.

22 First, on disinfection, the Agency  
23 testified yesterday, I believe, that disinfection is  
24 widely used in the state. The CDM UAA report

1 indicates the size of the three district facilities  
2 as being -- two of them being 400 mgd and one over a  
3 billion mgd.

4 Are you aware of disinfection being  
5 implemented at facilities of that size?

6 MR. SULSKI: Well, I know that they used to  
7 disinfect, and then they weren't required to at a  
8 point in the '80s. So disinfection was used at those  
9 facilities.

10 MR. ANDES: Is there any information in the  
11 record concerning that?

12 MR. SULSKI: Yes.

13 MR. ANDES: Just a statement that they  
14 disinfected them previous?

15 MR. SULSKI: We'll look.

16 MR. ANDES: Okay. Are you aware of any other  
17 facilities of that size?

18 MR. SULSKI: As far as I know, it is. But I may  
19 be mistaken, however.

20 MR. ANDES: Are you aware of any other  
21 facilities of that size in the state and disinfection  
22 being implemented?

23 MR. TWAIT: I don't know that we have any other  
24 facilities that size in the state.

1           MR. ANDES: Are you aware of facilities anywhere  
2 of that size with disinfection information?

3           MS. WILLIAMS: In the world?

4           MR. ANDES: Sure.

5           MR. SULSKI: I'm aware that there were some in  
6 New York that were looked at or came to a  
7 stakeholders meeting that are of a large size. And  
8 in Detroit as well.

9           MR. ANDES: Is there any information in the  
10 record about those?

11          MR. SULSKI: No, not that I know of.

12          MR. ANDES: Was there information relied on in  
13 this process?

14          MR. SULSKI: No.

15          MR. ANDES: If there's information in the  
16 minutes of the stakeholder meetings, I assume we'll  
17 see that?

18          MR. SULSKI: Yes.

19          HEARING OFFICER TIPSORD: Before you proceed,  
20 Mr. Harley?

21          MR. HARLEY: To your knowledge, the removal of  
22 the disinfection requirements at the District's  
23 facilities was accomplished through a rule-making  
24 before the Pollution Control Board?

1 MR. SULSKI: Yes.

2 MR. HARLEY: And so the documents relating to  
3 that would actually be in the Board's records; is  
4 that correct?

5 MR. SULSKI: Yes.

6 MR. HARLEY: Do you recall around what time it  
7 was that the District stopped disinfecting?

8 MR. SULSKI: It's the 1983-84 time line.  
9 Somewhere in there.

10 MR. HARLEY: So in answer to the question of  
11 whether or not there are any examples of any  
12 facilities of this size in this state disinfecting,  
13 the answer is yes, correct?

14 MR. SULSKI: Yes.

15 MR. HARLEY: It would be the District's own  
16 facilities; is that correct?

17 MR. SULSKI: Yes.

18 MR. HARLEY: Thank you.

19 MS. ALEXANDER: Are you aware of any major  
20 metropolitan areas in the United States that do not  
21 disinfect their effluent other than Kansas City and  
22 Memphis?

23 MR. TWAIT: Yes.

24 MS. ALEXANDER: What would those be?

1           MR. TWAIT: I believe St. Louis does not  
2    disinfect.

3           MS. ALEXANDER: Okay. Are you aware of any  
4    others besides St. Louis that do not disinfect their  
5    effluent?

6           MR. SULSKI: How large are you considering  
7    large?

8           MS. ALEXANDER: A population over a million  
9    approximately.

10          MR. SULSKI: Seasonal, yes.

11          MS. ALEXANDER: But that do not disinfect at  
12    all? Are you aware of any besides the ones we've  
13    just mentioned?

14          MR. TWAIT: We have facilities throughout the  
15    state that don't disinfect year round, but I don't  
16    know that we'd have any of that size.

17          MS. ALEXANDER: I'm aware of the facilities  
18    around the state. My question pertains to major  
19    metropolitan areas around the country.

20                 I'm trying to establish whether you know of  
21    any besides the three that we just mentioned that do  
22    not disinfect their effluent at all -- major  
23    metropolitan areas?

24          MR. SULSKI: I cannot think of any.

1           MS. ALEXANDER:  And are you aware that Memphis  
2 has recently announced plans to commence  
3 disinfection?

4           MR. SULSKI:  No.

5           MR. HYNES:  I'm going to go back.

6                    Are you aware of the reasons why the  
7 requirement to disinfect was removed from the  
8 District in the previous rule-making?

9           MR. SULSKI:  To the best of my knowledge, it was  
10 because the bacteria water quality standard was  
11 removed.

12          MR. ANDES:  And why would that have been?

13          MR. SULSKI:  I can't tell you that.

14          MR. ANDES:  And the Agency now is not currently  
15 proposing to issue a new bacteria water quality  
16 standard; am I right?

17          MR. SULSKI:  Not at this point.

18          MR. ANDES:  Let me shift to aeration for a  
19 moment.  I want to clarify a statement made  
20 yesterday.

21                    I think the statement was made that the  
22 District had been aerating its effluence.  I think  
23 what was meant was the District had been aerating a  
24 portion of the waterways; am I correct?

1           MR. SULSKI: Yes. If I said effluence, what I  
2 meant was the waterways themselves.

3           MR. ANDES: Okay. As to feasibility of  
4 aeration --

5           HEARING OFFICER TIPSORD: Excuse me. Mr. Harley  
6 has a follow-up.

7           MR. HARLEY: Do you know approximately how many  
8 aeration stations the District presently operates?

9           MR. SULSKI: I believe there's five -- five or  
10 six.

11          MR. HARLEY: And the duration of the operation  
12 of those aeration stations?

13          MR. SULSKI: The duration is when --

14          MS. WILLIAMS: Excuse me. Can we just clarify?  
15 Do you mean duration, like, how long they've been in  
16 existence, or how long they are operating?

17          MR. HARLEY: How long those stations have been  
18 in existence?

19          MR. SULSKI: I don't -- There's in-stream  
20 aeration systems on the North Side. I don't recall  
21 exactly when they came into being. There are  
22 side-stream elevated pool aeration stations along the  
23 Calumet system. I think the last ones were brought  
24 online somewhere in the early to mid '80s, perhaps

1 the late '80s. I don't know the exact date, but  
2 around that time frame.

3 MR. ANDES: Let me ask.

4 In terms of the areas that are aerated, can  
5 you give me an approximate range of the DO levels --  
6 the ambient DO levels in those areas currently?

7 MR. SULSKI: I would have to go back to the data  
8 and look at each specific point to tell you.

9 MR. ANDES: The DO levels that are in the  
10 proposed standard would be higher, 3 1/2 to 4.0,  
11 correct?

12 MR. SULSKI: Than the existing standards?

13 MR. ANDES: Right. I think that's part of the  
14 point here.

15 MR. SMOGOR: Are you asking if the proposed --  
16 Sorry. Are you asking if the proposed dissolved  
17 oxygen standards represent --

18 MR. ANDES: Higher levels than currently the  
19 case, either ambient or in the current standards.

20 MR. SMOGOR: Actually I wouldn't characterize  
21 the proposed standards as higher -- you're talking  
22 about the concentration levels -- as representing  
23 higher concentration levels than the existing  
24 standard.

1           MR. ANDES:  Isn't part of the purpose to  
2 increase the DO saturation level in the waterbody?

3           MR. SMOGOR:  The purpose of --

4           MR. ANDES:  The proposed standards.

5           MR. SMOGOR:  The purpose of the proposed  
6 standards is to protect at a level that will ensure  
7 attainment of the aquatic life use that's been  
8 proposed.

9           MR. ANDES:  So part of the intent is to increase  
10 the DO levels in the waterbody; am I right?

11          MR. SMOGOR:  If the current levels in the  
12 waterbody do not meet what's needed to protect  
13 aquatic life at that new proposed use, then yes.

14          MR. ANDES:  And are you aware of information  
15 indicating that the efficiency of aeration would  
16 decrease as the DO saturation level increases in a  
17 waterbody?

18          MR. SULSKI:  Yes.

19          MR. ANDES:  Has the Agency assessed the impacts  
20 of that in terms of the efficiency of aeration under  
21 the new proposed standard versus the current?

22          MR. SMOGOR:  Not that I'm aware of.

23          MR. ANDES:  Let me ask the follow-up question on  
24 another issue, and this really goes towards the air

1 issues that were raised earlier by Mr. Safley.

2           Has the Agency done any analysis of either  
3 sustainability or carbon footprint impacts of the  
4 proposed standards?

5           MR. TWAIT: Not that I'm aware of.

6           MR. ANDES: An issue that was raised yesterday  
7 concerning installation of new treatment equipment  
8 was space constraints. And I believe that the  
9 testimony was that space was considered, but not as  
10 part of the economic -- I'm sorry -- not as part of  
11 technical feasibility, but it was considered. I  
12 wanted to go back to that and clarify.

13           How were space constraints considered in  
14 determining what requirements to impose?

15           MS. WILLIAMS: Do you recall who of our panel  
16 said that?

17           MR. ANDES: No, I don't.

18           MS. WILLIAMS: I'm not sure we know what you're  
19 referring to from yesterday.

20           MR. ANDES: Okay. Well, it was in the  
21 discussion of technical feasibility.

22           HEARING OFFICER TIPSORD: Actually I believe it  
23 was Mr. Twait who responded to that and talked  
24 about --

1           MR. TWAIT: I think that was on temperature and  
2 cooling towers, but I don't think that we took space  
3 into account.

4           MR. ANDES: Okay. Did you take it into account  
5 with regard to disinfection?

6           MR. TWAIT: No. I don't believe that issue was  
7 brought up by the District.

8           MR. ANDES: Okay. Another follow-up.

9                        There was a statement in the Statement of  
10 Reasons that Mr. Safley referred to earlier on  
11 page 95 concerning management options that would need  
12 to be implemented before all of CAWS can achieve the  
13 recommended attainable uses. One of those was  
14 number 3, CSO controls beyond what is existing would  
15 be needed to meet bacteria standards during wet  
16 weather in those CAWS. CDM recommends that the  
17 completion of TARP should be the first step to  
18 controlling CSO's. I know that was the CDM report,  
19 but I wanted to follow up on that.

20                        Is that in any part of this proposal? Is  
21 there something in this proposal that would require  
22 additional CSO controls? If so, beyond TARP, what  
23 would they be?

24           MR. TWAIT: I do not believe that this proposal

1 addresses disinfection of CSO's.

2 MR. ANDES: Okay. In terms of the wet-weather  
3 water quality standards issue that was raised  
4 earlier, has the Agency looked at wet-weather water  
5 quality standards that have been considered or  
6 adopted in other states?

7 MR. TWAIT: I'm aware of other states trying to  
8 have wet-weather standards, but I'm not sure that I'm  
9 aware of any that actually do have wet-weather  
10 standards.

11 MR. ANDES: In terms of our highly modified  
12 waterbodies particularly in urban areas, has the  
13 Agency looked at water quality standards and UAA's  
14 that have been developed for those types of  
15 waterbodies elsewhere?

16 MR. SULSKI: Through our contractor CDM I know  
17 that they looked at other UAA's being performed, but  
18 I didn't personally look at those UAA's.

19 MR. ANDES: Is there information in the record  
20 concerning that analysis by CDM?

21 MR. SULSKI: I don't think so.

22 MR. TWAIT: In regards, I've been to a couple  
23 UAA workshops that have been put on by US EPA that  
24 addressed some of the current work that's being done

1 by states or cities.

2 MR. SULSKI: Ditto.

3 MR. ANDES: As to -- I want to follow up on  
4 recreational data.

5 I believe it was stated this morning that  
6 recreational data the Agency was relying on was  
7 primarily in Attachment B and Attachment K; is that  
8 correct?

9 MS. WILLIAMS: Was that in response to a  
10 question about the CAWS?

11 MR. ANDES: I believe so.

12 MR. SULSKI: B, K, and L. L is an inventory of  
13 public access locations, so we did rely on that --  
14 the information in that table.

15 MR. ANDES: Okay. Let me go back for one  
16 moment. I think this is my last follow-up question.

17 HEARING OFFICER TIPSORD: Excuse me. We have a  
18 follow-up on that question.

19 MR. ANDES: Sure.

20 MR. WELCH: Lyman Welch, Alliance for the Great  
21 Lakes.

22 I have a note that you had relied on  
23 Attachments B, K, L, N, and P?

24 MS. WILLIAMS: Did you say M or N?

1 MR. WELCH: N.

2 MR. SULSKI: B, K, L -- I'm sorry. Yes.

3 There's Attachment N, the written notification of  
4 wading prohibition.

5 MR. TWAIT: While we're at it, let's go ahead  
6 and put Attachment A in there for the Lower  
7 Des Plaines UAA.

8 MR. ANDES: And I was asking particularly about,  
9 in essence, recreational use information --  
10 recreational surveys and other use information. So  
11 is that in all of those places, or some of them are  
12 related to it?

13 MR. SULSKI: Well, the reason for Attachment K  
14 is because of the volumes of e-mails and -- Well,  
15 yes, I guess is the short answer.

16 HEARING OFFICER TIPSORD: Mr. Harley, you have a  
17 follow-up?

18 MR. HARLEY: Yes.

19 I was wondering if you could characterize  
20 an issue based on --

21 HEARING OFFICER TIPSORD: Excuse me.

22 Mr. Harley, I'm not sure they can hear you in the  
23 back of the room. Remember witnesses aren't just  
24 talking here. We're all talking back there, too.

1 Thank you.

2 MR. HARLEY: I'd like to ask you a question  
3 relating to characterizing Attachments B, K, and L  
4 specifically.

5 You previously testified that in the mid  
6 1980s time frame disinfection requirements were  
7 removed from the NPDES permits for the Metropolitan  
8 Water Reclamation District facilities; is that  
9 correct?

10 MR. SULSKI: Yes.

11 MR. HARLEY: In reviewing the attachments that  
12 characterize recreational use, is it fair to say that  
13 there is a much greater intensity of human use of the  
14 Chicago area waterways today than there was in the  
15 mid 1980s when those limitations were removed?

16 MR. SULSKI: I can't answer that question  
17 because I wasn't surveying recreation in the mid  
18 '80s.

19 MR. HARLEY: Do the reports tend to indicate an  
20 increasing level of human activity as in the Chicago  
21 Area Water System or a decreasing level of human  
22 activity?

23 MR. SULSKI: From when to when?

24 MR. HARLEY: Over the time of the review.

1 MR. SULSKI: Over the time of the analyses?

2 MR. HARLEY: Yes.

3 MR. SULSKI: I think it established a set  
4 amount, and I can't tell you whether it  
5 significantly has gone up or gone down.

6 MR. HARLEY: Thank you.

7 MR. ANDES: Go back for a moment to the  
8 disinfection issue.

9 Is it accurate to say that when the  
10 District was disinfecting it was using chlorination?

11 MR. TWAIT: Yes.

12 MR. ANDES: Is it possible that the change to no  
13 longer chlorinate is one of the things that has had a  
14 positive impact on the biological community and the  
15 system?

16 MR. TWAIT: Yes. I think that is an accurate  
17 statement. However, at the time that they were  
18 chlorinating they were not dechlorinating. We have  
19 facilities throughout the state now that chlorinate  
20 and dechlorinate before discharge. That's part of  
21 the -- Part of the whole disinfection process now is  
22 the dechlorination.

23 MR. ANDES: Thank you.

24 To move into our questions -- And we've

1     tried to trim these down as well so as not to  
2     duplicate on issues that have been asked and  
3     answered.

4             HEARING OFFICER TIPSORD:   Again, it's  
5     appreciated.

6             MR. ANDES:   We'll skip number 1 because I think  
7     we covered this one elsewhere, particularly on  
8     question 9.

9             Question number 2, on page 18 of the  
10    Statement of Reasons, the IEPA states that 75 percent  
11    of the waterway length consists of human-made canals  
12    where no defined stream channel existed previously.  
13    Please tell us what types of fish and benthic  
14    populations the Agency considers to be indigenous to  
15    this type of waterway?   Please provide the basis for  
16    the response.   I would add, in particular, wherein  
17    any documents that may be explained.

18            MS. WILLIAMS:   Did you --

19            MS. DIERS:   Would you like us to do this one  
20    question at a time?   That's, like, three or four  
21    questions.   So we'll take the first one, being,  
22    "Please tell us what type of fish."   That's the first  
23    question you'd like us to answer?

24            MR. ANDES:   Sure.

1 MR. SMOGOR: By indigenous, do you mean native?

2 And there are multiple definitions for that term.

3 MR. ANDES: What definition have you been using  
4 in the context of these regulations?

5 MR. SMOGOR: I don't know if we've -- I'm not  
6 aware that we've used -- Have we used the word  
7 "indigenous" in our proposed uses?

8 MS. WILLIAMS: What regulations are you  
9 referring to when you say "these regulations"?

10 MR. ANDES: Well, I think that indigenous is  
11 certainly used in the context of the temperature,  
12 balanced indigenous population. But I think we're  
13 talking about a concept that's used in developing  
14 water quality standards and in doing use  
15 attainability analyses.

16 MS. WILLIAMS: Okay. That's very different than  
17 secondary contact and indigenous aquatic life -- All  
18 right. So that's not what you're asking about?

19 MR. ANDES: Right.

20 MS. WILLIAMS: Okay.

21 MR. SMOGOR: If by indigenous you mean native, I  
22 don't know off the top of my head going through the  
23 fish list. I don't have a complete fish list in my  
24 head of the fish that occur in those waters. I can

1 give you a couple examples. Common carp is typically  
2 considered non-native, which would make it not  
3 indigenous.

4 MR. ANDES: And what fish and benthic  
5 populations are the rules intended to protect? That  
6 includes species that are not indigenous to this type  
7 of waterway?

8 MR. SMOGOR: I don't know for sure. I don't  
9 know if the Clean Water Act specifies -- Well, I  
10 think a question yesterday -- To our knowledge, the  
11 Clean Water Act does not specify that in the Clean  
12 Water Act language. Nor does it specify which  
13 species are indigenous or non-indigenous in  
14 40 CFR 131.

15 MR. ANDES: But there's an assemblage that you  
16 were trying to protect with these regulations; am I  
17 right? You had to define it somehow?

18 MR. SMOGOR: We weren't trying to protect a  
19 particular assemblage. Overall we weren't trying to  
20 protect for a particular assemblage. Meaning, we  
21 weren't thinking of, "Here are the 42 fish species  
22 we're protecting with these concepts." What we were  
23 trying to protect for is a level of biological  
24 condition that is what we believe is consistent with

1 the goals -- the aquatic life goals of the Clean  
2 Water Act.

3 MR. ANDES: And don't those goals have to be  
4 defined as to what is attainable in this waterbody?

5 MR. SMOGOR: Yes.

6 MR. ANDES: And you must have defined an  
7 assemblage that you think is an attainable condition  
8 in the waterbody?

9 MR. SMOGOR: Well, there's no one assemblage  
10 that -- For instance, for a given level of biological  
11 condition using the indicators that we used, there's  
12 no one assemblage that defines that level. Different  
13 combinations of the types of animals that live there  
14 and their relative abundances can result in the same  
15 level of biological condition.

16 MR. ANDES: Where is this all explained in the  
17 record?

18 MR. SMOGOR: I'm not sure off the top of my  
19 head. These are concepts that are part of some of  
20 the biological indicators that we use. For example,  
21 a fish index of biotic integrity.

22 MR. ANDES: For the record, I'm going to want  
23 some type of explanation at some point of how that  
24 entire selection process was done even if that can't

1 be reached at this point.

2           Let me move on to the next question. I'll  
3 skip over number 3 because I believe we have  
4 discussed this one. Number 4, on page 33,  
5 paragraph 3, of the Statement of Reasons, IEPA  
6 states that the most severe physical barriers to  
7 waterway recreation exist in the Chicago Sanitary and  
8 Ship Canal from its confluence with the Calumet-Sag  
9 Channel down to its confluence with the Des Plaines  
10 River.

11           Given that the severe physical barriers to  
12 waterway recreation outlined there are the same for  
13 both segments of the canal, can you explain and  
14 provide reasons why two different recreational uses  
15 were proposed for the same waterway?

16           MR. TWAIT: This would be based on a new boat  
17 launch downstream of Stickney, which encourages  
18 recreation.

19           MR. ANDES: Do you have data on the use of that  
20 boat launch?

21           MR. SULSKI: We have an e-mail that indicated  
22 there's no restrictions on the types of recreation  
23 that are allowed to occur there in terms of boating?

24           MR. ANDES: Imposed by whom?

1           MS. WILLIAMS: Can we go maybe go back and  
2 ask -- When you say you have an e-mail, who's it  
3 from?

4           MR. SULSKI: We had heard that the Summit boat  
5 launch was reopened, so we had an exchange with the  
6 District on whether that was true, in fact. When we  
7 found out, in fact, it was true, did they have any  
8 information on what it was -- on whether there were  
9 any restrictions on its use? And the e-mail which I  
10 can provide to you indicated that there are no  
11 restrictions on the type of boating activity that can  
12 occur there. In other words, can a canoe launch  
13 there? There's no restrictions that a canoe can't  
14 launch there.

15          MR. ANDES: Do we know anything about the extent  
16 of use of the boat launch?

17          MR. SULSKI: I do not have values on how much  
18 that boat launch is used.

19          MR. ANDES: Any other reasons why two different  
20 uses were proposed?

21          MR. SULSKI: The City had plans to put a boat  
22 launch on Western Avenue --

23          MR. ANDES: The City of Chicago?

24          MR. SULSKI: The City of Chicago.

1                   -- and on the upper reach. And the --

2           MR. ANDES: I'm sorry. The upper reach?

3           MR. SULSKI: The upper reach of the Chicago  
4 Sanitary and Ship Canal near the south branch.

5           MR. ANDES: Okay.

6           MR. SULSKI: And that didn't have a restriction  
7 on the types of boats that could actually be put in  
8 there. So we assumed that canoes could be put in  
9 there, that nobody was prohibiting anybody from  
10 putting a canoe in there or a paddle boat.

11                   In addition, the sculling teams used the  
12 upper reach of the Sanitary and Ship Canal when  
13 they're doing their sculling exercises. That's why  
14 the upper reach of the Sanitary and Ship Canal and  
15 the lower reach, which constitutes basically  
16 everything up to Stickney, was --

17           MR. ANDES: Do you know what the status of the  
18 plans are for the City that you mentioned?

19           MR. SULSKI: I do not know at this point.

20           MR. ANDES: And do you have any information on  
21 the extent of the sculling activity?

22           MR. SULSKI: I have some information in e-mails  
23 on event dates and statements that they used the  
24 waterways early and late to avoid interference with

1 barges and other sorts of traffic, you know.

2 MR. ANDES: Early and late?

3 MR. SULSKI: Early and late meaning -- I  
4 think --

5 MR. ANDES: Do they have the barge schedule?

6 MR. SULSKI: Late February/early March is when  
7 they do their practicing and then into November. It  
8 was the subject of discussions at the stakeholder  
9 meetings, and it's why the recreational season was  
10 expanded.

11 MR. ANDES: And we can get copies of e-mails and  
12 other communications on that issue?

13 MR. SULSKI: Yes. Everything that's outlined on  
14 Attachment M -- K. Yes. Attachment K is a summary  
15 of those sorts of informations.

16 HEARING OFFICER TIPSORD: Mr. Harley, you had a  
17 follow-up?

18 MR. HARLEY: Yes.

19 As to the proposal to put a boat launch on  
20 Western Avenue, do you recall if that was a proposal  
21 for a private control development, or was it a Park  
22 District proposal that would allow public access to  
23 the river through that point?

24 MR. SULSKI: I know that it was to allow public

1 access.

2 MR. HARLEY: Thank you.

3 MR. ANDES: Let me move to question number 6.

4 On page 34, paragraph 4, of the Statement of Reasons,  
5 the IEPA states that these activities include small  
6 human-powered watercraft boating, fishing, and other  
7 shoreline uses, such as wading.

8 How many times was the recreational use  
9 wading observed in the CAWS during the 2003  
10 recreation and navigation surveys?

11 MR. SULSKI: I would have to go back to the  
12 numbers. However, wading was most frequently  
13 observed, and it was associated with launching and  
14 pulling boats out of the waterway at the launch  
15 areas. In addition, there were some periodic wadings  
16 up in the North Shore Channel around where the  
17 north -- the north branch enters into the North Shore  
18 Channel. But throughout the Calumet system where  
19 there were boat launches, we observed people wading  
20 to launch and take their boats out.

21 HEARING OFFICER TIPSORD: Mr. Harley, you had a  
22 follow-up?

23 MR. HARLEY: In terms of the locations where  
24 wading was observed during the boat launching

1 process, would that include the Beaubien Woods boat  
2 launch?

3 MR. SULSKI: I don't recall whether I saw -- I  
4 don't recall whether I saw wading at the Beaubien.

5 MR. HARLEY: Would that include the Worth boat  
6 launch?

7 MR. SULSKI: Yes.

8 MR. HARLEY: Would it include the Alsip boat  
9 launch?

10 MR. SULSKI: Yes.

11 MR. HARLEY: Can you describe generally the  
12 number of boat launches which would occur in Alsip  
13 and Worth in a day during the summer?

14 MR. SULSKI: On the weekends I could say that it  
15 could be as many as 100 boats.

16 MR. HARLEY: Per day?

17 MR. SULSKI: Per day.

18 MR. HARLEY: On a summer day?

19 MR. SULSKI: Yes.

20 MR. HARLEY: From both launches?

21 MR. SULSKI: Yes.

22 MR. HARLEY: All of which may involve some  
23 wading activity?

24 MR. SULSKI: I don't know that all of them

1 involved wading activity. However, we did observe  
2 and record wading activity associated with boat  
3 launching.

4 MR. HARLEY: To be clear, both the Worth and  
5 Alsip boat launches are downstream from the Calumet  
6 Water Treatment Facility; is that correct?

7 MR. SULSKI: Yes.

8 MR. HARLEY: They're on the Cal-Sag channel?

9 MR. SULSKI: Yes.

10 MR. ANDES: Question number 7. On page 35,  
11 paragraph 4, of the Statement of Reasons, the IEPA  
12 states all CAWS and Lower Des Plaines River reaches  
13 are subject to an average of about 15 CSO events per  
14 year and that bacteria levels in the waterways exceed  
15 the draft federal water quality bacteria criteria  
16 nearly everywhere in the waterways following CSO  
17 events.

18 First, identify the agencies that provide  
19 the information on the number of CSO events and the  
20 bacteria levels in the waterways following these  
21 events.

22 MR. SULSKI: That's a two-part question.

23 As far as the number of CSO events, the  
24 number of CSO events comes from general knowledge

1 that I believe was presented in stakeholders meetings  
2 as well that the frequency of CSO discharge on an  
3 average across the system prior to the tunnels was  
4 about once every three days. After the completion of  
5 the tunnels, it was somewhere in the neighborhood of  
6 12 to 15 CSO's per year on average considering all  
7 the CSO's. In other words, some popped more. Some  
8 popped less. But on average.

9 MR. ANDES: When you talk about an event, is  
10 that a discharge from one outfall?

11 MR. SULSKI: I'm talking about an average  
12 discharge when you pool in all of the CSO's. In  
13 other words, on average. Some CSO's may never  
14 discharge. Some CSO's may go 30 times a time. Some  
15 may go five. But on average.

16 MR. ANDES: The average CSO outflow of discharge  
17 is 15 times a year?

18 MR. SULSKI: 15 times a year on average  
19 considering pooling in all the CSO's.

20 MR. ANDES: And how many CSO outfalls are there?

21 MR. SULSKI: There's approximately 300.

22 MR. ANDES: 300?

23 MR. SULSKI: Not all those are in CAWS.

24 MR. ANDES: How many are in CAWS?

1           MR. SULSKI: I would have to look back at CDM's  
2 report. I don't know.

3           MR. ANDES: And is there information -- I'll  
4 summarize -- on the bacteria levels in the waterways  
5 following the CSO discharge that would be relative to  
6 the proposed standard -- Well, never mind relative to  
7 the proposed standard.

8                     Is there information on the bacteria levels  
9 in the waterways following those events?

10          MR. SULSKI: Is there information in the record?  
11 Is that the question?

12          MR. ANDES: Or are you aware of any?

13          MR. SULSKI: Of information in -- Yes, I am  
14 aware of some information on increase in bacteria in  
15 the waterways following CSO's.

16          MR. ANDES: Is that in the record?

17          MR. SULSKI: I would have to look at the CDM  
18 report to see if they analyzed that specifically. I  
19 don't know.

20          HEARING OFFICER TIPSORD: Excuse me. Ms. Liu,  
21 did you have a follow-up?

22          MS. LIU: If I might, I do have a follow-up  
23 question.

24                     In the section that Mr. Andes quoted, you

1 mentioned the federal water quality criteria. I was  
2 wondering, that draft federal water quality criteria,  
3 was that contained in the US EPA 2002 implementation  
4 guidance for ambient water quality criteria for  
5 bacteria? It's EPA 823(b)-02-003. It's cited in  
6 your Attachment A. There's a Table 7.1. But it  
7 contains multiple criteria that are calculated based  
8 on illness rates bearing from 8 to 14 per 1,000 as  
9 well as the degree of contact. I was just wondering  
10 which of those federal criteria you were using for  
11 comparison?

12 MS. WILLIAMS: I'm not sure we understand the  
13 question.

14 MR. TWAIT: Well, her question was which ones  
15 were we comparing for --

16 MR. SULSKI: In the draft guidance.

17 MS. WILLIAMS: Are you asking which ones the --  
18 in Attachments A and B they were looking at to  
19 compare to?

20 MS. LIU: There's a whole table of ranges  
21 depending on which illness rate you decide to go  
22 with, whether it's 8 per 1,000 or 14 per 1,000, what  
23 the degree of contact was.

24 MR. TWAIT: Those criteria were draft when our

1 consultants were working on the bacteria standard.  
2 This last -- I believe it is this last summer US EPA  
3 pulled its draft and has informed everyone that it's  
4 not going to reissue that draft or finalize the  
5 draft. And they are currently doing a study to look  
6 for a new indicator organism for water quality  
7 standards. That was one of our other reasons for  
8 holding off on a bacteria water quality standard.

9 HEARING OFFICER TIPSORD: If I may, what you're  
10 saying now is that those are not even draft federal  
11 criteria anymore? They've been withdrawn?

12 MR. TWAIT: I believe they've been withdrawn,  
13 and I don't know that EPA considers them draft any  
14 longer. But they did not go finalized.

15 MS. LIU: Well, when you say, in your wording,  
16 that the levels exceed these draft criteria, we were  
17 just wondering which levels you were looking at to  
18 decide which ones exceeded?

19 MR. TWAIT: I would have to look at Attachments  
20 A and B to determine that.

21 HEARING OFFICER TIPSORD: Do you know what?  
22 We've been at it for about an hour and a half  
23 already. Time flies when you're having fun. Why  
24 don't we take about a ten-minute break while you look

1 at that and see if you can answer the question.

2 (WHEREUPON, a recess was had.)

3 HEARING OFFICER TIPSORD: Okay. If you could  
4 respond to the question from Ms. Liu.

5 MR. TWAIT: Yes.

6 In regards to the Lower Des Plaines River,  
7 the consultant had only data for fecal coliform, so  
8 he compared that against the current general use  
9 fecal coliform water quality standard of 200. And  
10 then he went on later to recommend that the Agency  
11 switch over to E. Coli.

12 And then for the CAWS data the consultant  
13 had E. Coli data, and he separated them into  
14 different levels of compliance using different levels  
15 of swimmer's risk. I believe he used 8 and 15 -- or  
16 8 and 14 -- Or I'm sorry. I believe he used 10 and  
17 14 illness per 1,000 swimmers.

18 MS. LIU: Could you point us to where that might  
19 be in your documentation?

20 MR. TWAIT: There's a figure on 7-17 of the  
21 Lower Des Plaines UAA.

22 MS. DIERS: Attachment A.

23 MR. TWAIT: Attachment A.

24 And then Attachment B it's on page 4-28 and

1 4-29.

2 MS. LIU: Thank you, very much, Mr. Twait.

3 HEARING OFFICER TIPSORD: Mr. Andes, we are back  
4 to you.

5 MR. ANDES: Thank you. Two follow-up questions.  
6 First, going back for a moment to question number 2.

7 I think, Mr. Sulski, we talked about fish  
8 populations, and you discussed the indigenous or  
9 non-indigenous and your analysis of those issues. I  
10 assume the same analysis you stated earlier -- And we  
11 don't have to reread it. But I assume that the same  
12 analysis holds true for the benthic populations as  
13 for the fish?

14 MR. SMOGOR: Yes.

15 MR. ANDES: I'm sorry.

16 MR. SMOGOR: That's okay.

17 MR. ANDES: I forgot which one of you I spoke  
18 with.

19 MR. SMOGOR: We both have weird names. His is  
20 weirder.

21 MR. ANDES: Andes isn't easy either.

22 Now, going back also to the chlorination  
23 issue earlier, am I correct, Mr. Twait, that  
24 dechlorination does not remove the risk of the

1 disinfection by-products in chlorination? Am I  
2 right?

3 MS. WILLIAMS: Can we clarify? Are we on your  
4 questions, or is this follow-up?

5 MR. ANDES: This is follow-up.

6 MS. WILLIAMS: Okay.

7 MR. ANDES: Disinfection by-products aren't  
8 removed by dechlorination; am I right?

9 MR. TWAIT: I would think that's correct.

10 MR. ANDES: Thank you.

11 Question number 8. On page 40,  
12 paragraph 3, of the Statement of Reasons, the IEPA  
13 states for the Calumet River segment currently  
14 designated as general use, the portion of the Calumet  
15 River from Torrence Avenue to the O'Brien Locks and  
16 Dam is being proposed for designation as incidental  
17 contact recreation, because some smaller craft  
18 recreational boating is believed to occur in this  
19 portion.

20 First, can you explain what the Agency  
21 intended by the phrase, "Some smaller craft boating  
22 is believed to occur in this portion"?

23 MR. SULSKI: When I say smaller craft, I mean  
24 hand-powered and powered canoes, for example. And

1 that sums it up, canoes, kayaks.

2 MR. ANDES: As to "some," do you have any idea  
3 of the extent of that use?

4 MR. SULSKI: I have some correspondence that  
5 there was a canoe event planned for bird watching in  
6 the -- in Lake Calumet that launched from the -- from  
7 Torrence Avenue on the north side of the Calumet  
8 connecting channel. It's the only public access  
9 area, I think, for hand-powered that's safe to get  
10 into Lake Calumet in that whole region for bird  
11 watchers and that.

12 MR. ANDES: Was there any other information, or  
13 was that it?

14 MR. SULSKI: That was it.

15 MR. ANDES: On question number 9 -- And I'm  
16 going to compress this a little bit. On page 42,  
17 paragraph 2, of the Statement of Reasons, IEPA  
18 states the Agency declines proposing a numeric  
19 standard at this time for bacterial water quality.

20 How does the Agency then arrive at effluent  
21 limits when no associated water quality criteria have  
22 been developed?

23 MR. TWAIT: Although the Agency doesn't know  
24 what level is protective, we believe that

1 disinfection is needed to reduce the bacteria levels  
2 of the effluent.

3 MR. SULSKI: Can I add to that?

4 MR. ANDES: Yes.

5 MR. SULSKI: And in that decision we know that  
6 they are dominated -- well, they consist of  
7 wastewaters that contain human originating --  
8 pathogens of human origin.

9 MR. ANDES: Okay. Now, are you aware of any  
10 basis for effluent limits for PSW's other than either  
11 secondary treatment or limits based on water quality  
12 standards?

13 MS. WILLIAMS: Anywhere or in Illinois?

14 MR. ANDES: In Illinois or in federal law.

15 MR. TWAIT: The State has an effluent standard.

16 MR. ANDES: Well, what you're proposing to adopt  
17 is an effluent standard. I'm asking, what's the  
18 legal basis for it if it's not linked to a water  
19 quality standard?

20 MS. WILLIAMS: Are you asking him for a legal  
21 conclusion?

22 MR. ANDES: Well, the Statement of Reasons, I  
23 believe, is supposed to discuss the basis for the  
24 requirements. There must be some legal basis for

1 this requirement. I'm trying to find that.

2 MS. WILLIAMS: Okay. Are you asking for the  
3 basis in Federal law or State law?

4 MR. ANDES: Pick one. Either one or both.

5 MS. WILLIAMS: Okay.

6 MR. ANDES: I take it it's not explained in the  
7 Statement of Reasons?

8 MS. WILLIAMS: I wouldn't say that. I'm not  
9 sure.

10 If the Hearing Officer doesn't mind, I  
11 think this is the type of question we would answer  
12 based on looking at the Environmental Protection Act  
13 and may be more easily answered in written public  
14 comments, if that's acceptable to you.

15 HEARING OFFICER TIPSORD: Is that acceptable to  
16 Mr. Andes?

17 MR. ANDES: An explanation in writing from the  
18 Agency is acceptable.

19 MS. ALEXANDER: I have just a quick follow-up.

20 Would you say that the purpose of the  
21 technology-based standard is to protect this  
22 designated use that you have identified -- the  
23 designated use of incidental contact regulation? Is  
24 that the purpose of the technology-based standard for

1 disinfection?

2 MR. TWAIT: Yes.

3 MS. ALEXANDER: And are there other instances in  
4 other rule-making standards settings in which you  
5 have designated a -- or required technology-based  
6 controls in the absence of numeric water quality  
7 criteria?

8 MR. TWAIT: Yes.

9 MS. ALEXANDER: Are there many? Would you say  
10 this is reasonably common?

11 MR. TWAIT: I would say yes.

12 MR. ANDES: Can I ask for you to provide those  
13 instances?

14 MR. TWAIT: On total suspended solids?

15 MR. ANDES: Okay. Is that a technology-based  
16 standard?

17 MR. TWAIT: That's an effluent standard.

18 MR. ANDES: And which category does it fit under  
19 under the Clean Water Act? Is it a technology-based  
20 standard or a water quality-based standard?

21 MS. WILLIAMS: I think that calls for a legal  
22 conclusion.

23 MR. ANDES: I'd like an explanation in the  
24 written document of the other instances where the

1 Agency has adopted technology-based standards and to  
2 what extent they are linked to numeric water quality  
3 standards.

4 MR. SULSKI: Or not linked.

5 MR. ANDES: Or not linked.

6 MR. SULSKI: Yeah.

7 MR. ANDES: An explanation of the legal basis  
8 for each.

9 MR. TWAIT: Another example that we have is the  
10 phosphorus effluent standard that the Board adopted  
11 in 2003.

12 MS. WILLIAMS: And I do think we explain in the  
13 Statement of Reasons that we have a very identical  
14 effluent technology-based bacteria standard  
15 applicable to the rest of the state. But, as you've  
16 pointed out, there is also a water quality. I'm not  
17 aware that those were tied to each other.

18 MR. ANDES: You're not aware that the  
19 justification for that effluent standard is the  
20 numeric water quality standard?

21 MS. WILLIAMS: Not as far as I'm aware.

22 MR. ANDES: Okay.

23 MS. WILLIAMS: I understood it to be a  
24 technology-based disinfection requirement. That's my

1 understanding. But, like I said, it would probably  
2 be better to flush that out in written comments,  
3 which we will do.

4 MR. ANDES: To further expand on that, will the  
5 disinfection requirement lead to attainment of the  
6 designated use during dry weather in all the relevant  
7 segments?

8 MR. SULSKI: Of the effluence?

9 MR. ANDES: No. Will it lead to attainment of  
10 the designated uses in the waterbodies?

11 MR. TWAIT: I don't know if it would.

12 MR. ANDES: Would it lead to attainment of the  
13 designated uses during wet weather?

14 MR. TWAIT: No, I don't think it would.

15 MR. ANDES: Thank you.

16 HEARING OFFICER TIPSORD: Mr. Harley, do you  
17 have a follow-up?

18 MR. HARLEY: To your knowledge, does Illinois  
19 EPA have to regulate every source of a pollutant in  
20 order to regulate any individual source category?

21 MR. TWAIT: No.

22 MR. HARLEY: Thank you.

23 MR. ANDES: Question 10. On page 43,  
24 paragraph 2, of the Statement of Reasons, the IEPA

1 states as of today US EPA has not determined what the  
2 indicator organism should be for all surface waters.

3 In light of the above, what assurance can  
4 the Agency offer that its proposed effluent standard  
5 provides any protection to recreational users --  
6 Well, let's just stop there.

7 MR. TWAIT: The fecal coliform effluent standard  
8 is to ensure that disinfection is accomplished.

9 MR. ANDES: The question was, do you know what  
10 the proper indicator organism should be to provide  
11 protection for recreational users?

12 MR. TWAIT: No.

13 MR. ANDES: Thank you.

14 Question No. 11 -- Well, let's skip  
15 question No. 11. I'll come back to that. And  
16 question 12 I think we've already discussed.

17 Question 13. On page 46 of the Statement  
18 of Reasons, the IEPA states waters designated as  
19 Chicago Area Waterway System Aquatic Life Use A  
20 waters are capable of maintaining aquatic-life  
21 populations predominated by individuals of tolerant  
22 or intermediately tolerant types.

23 Given the use of the word "or," does this  
24 statement mean that a waterway could be designated

1 Aquatic Life Use A even if it is only capable of  
2 maintaining tolerant types of aquatic life?

3 MR. SMOGOR: I think the more appropriate word  
4 there would be "and" rather than "or."

5 MR. ANDES: Okay. So it would need to be  
6 capable of maintaining tolerant and intermediately  
7 tolerant types?

8 MR. SMOGOR: Yes. The intent was a mixture of  
9 those types.

10 MR. ANDES: So then the difference between A and  
11 B would be B waters only need to be capable of  
12 maintaining tolerant types?

13 MR. SMOGOR: Typically, yes.

14 MR. ANDES: And can you give examples of fish  
15 and benthic organisms that are considered  
16 intermediately tolerant and, therefore, could thrive  
17 in Use A waters, but not Use B waters?

18 MR. SMOGOR: I'm hesitant to do that off the top  
19 of my head.

20 I'd just like to say that the intention of  
21 this language was not to represent this exact set of  
22 species or that exact set of species in these exact  
23 numbers or those exact numbers. The intention was  
24 to -- was to reflect a lack of balance in these two

1 uses because they are -- the expectation is less than  
2 the aquatic -- than the Clean Water Act's aquatic  
3 life goal.

4           And the intent was to reflect, in general,  
5 a pattern that is typical as waters become more and  
6 more impacted. And that pattern goes from having  
7 waters in which intolerant organisms can live with a  
8 mixture of intermediately tolerant and tolerant  
9 organisms. As more and more human impact occurs, the  
10 intolerant organisms can no longer live in the  
11 system. Then you have a mixture of intermediately  
12 tolerant and tolerant organisms. If that level of  
13 human impact continues, the pattern eventually  
14 results in a system dominated by tolerant types.

15           MR. ANDES: Okay. And can you name any -- I  
16 understand that answer. But can you give just one  
17 example of an intermediately tolerant organism  
18 relevant to these waterbodies that we might expect to  
19 see in the A waters, but not the B waters?

20           MR. SMOGOR: Excuse me.

21           MR. ANDES: Just one.

22           MR. SMOGOR: Channel catfish.

23           MR. ANDES: Thank you.

24           Question 14 I think we've dealt with and

1 I'm sure we'll deal with again tomorrow. Question --  
2 The next few questions are fairly specific to --  
3 through 17 are fairly specific to criteria, so we'll  
4 let those go for now.

5 Question 18. On page 55 of the Statement  
6 of Reasons, the IEPA indicates that the unnatural  
7 sludge standard (Section 302.403) is to serve the  
8 necessary purpose of preventing future additional  
9 accumulations of unnatural pollutants.

10 In practical terms, how does the IEPA  
11 propose to distinguish between legacy and recent  
12 accumulation of sediment?

13 MR. SULSKI: I don't know that we can make a  
14 definitive cut on those.

15 MR. ANDES: Okay.

16 MR. SULSKI: The intention is to prevent further  
17 accumulation of unnatural sludges, not to just say  
18 that anything can accumulate. It's a requirement of  
19 the criteria.

20 MR. ANDES: Is there an issue between  
21 contaminated sediment that has been put there in the  
22 past and discharges were higher versus solids that  
23 are depositing now when the level of contamination  
24 wouldn't be nearly as high? And I recall yesterday

1 there was discussion about the cleaner sediment  
2 covering the more contaminated sediment. How are we  
3 to figure out which is clean and which is not?

4 MR. SULSKI: Well, I can't tell you how -- I can  
5 tell you how we may determine, but I can't tell you  
6 right now which is clean and which isn't clean and  
7 which is legacy and which isn't legacy. The point of  
8 the standard is that -- to prevent an accumulation  
9 in -- of unnatural sludges. It's just -- It's a  
10 criteria that we have to adopt.

11 MR. ANDES: Let me ask you -- Particularly going  
12 back to a question that was raised earlier about the  
13 sediments, I heard two different rationales for how  
14 the sediment situation may be getting better. In the  
15 absence of data, one was it's resuspended. It gets  
16 aerated and, therefore, treated. On the other hand,  
17 I've heard that it will be capped. How can it be  
18 both resuspended and capped?

19 MR. SULSKI: Well, those processes will occur  
20 simultaneously in different portions of the waterway  
21 depending on where you're at. In quiescent areas,  
22 in eddy areas that aren't subject to severe  
23 turbulence, capping will occur. In areas where a  
24 barge goes through and resuspends, the other process

1 applies. It's not one thing across the board.

2 MR. ANDES: So capping will happen in some areas  
3 and not others?

4 MR. SULSKI: That's correct.

5 MR. ANDES: Resuspension will happen in some  
6 areas and not others?

7 MR. SULSKI: Yes.

8 MR. ANDES: Would the aeration -- Assuming for a  
9 moment that that does result in treatment, would  
10 aeration do anything for metals?

11 MR. SULSKI: Aeration could improve metals. In  
12 sediments where you have an anaerobic situation  
13 reducing environment, metals will tend to be more  
14 soluble.

15 MR. ANDES: Do we know -- Do we have any  
16 information about whether anaerobic situations exist  
17 in sediment?

18 MR. SULSKI: I don't have direct DO  
19 measurements. We have some sediment oxygen demand  
20 values that were provided as a part of the data. All  
21 I can tell you is my personal accounts of being on  
22 the river and dragging up sediments and having the  
23 hydrogen sulfide nearly knock me out. That's an  
24 anaerobic environment. So I have personal experience

1 in that regard.

2 MR. ANDES: Would aeration do much for PCB  
3 levels?

4 MR. SULSKI: I don't know. I'm not a PCB  
5 breakdown expert.

6 MR. ANDES: Okay. On -- I'm trying to -- Well,  
7 we'll go to question number 19. On page 61 of the  
8 Statement of Reasons, the IEPA states during periods  
9 when weather caused the CSO discharges to impact the  
10 CAWS and Lower Des Plaines River, dissolved oxygen  
11 can drop to zero. It is highly likely the proposed  
12 dissolved oxygen standards will be violated. It may  
13 be necessary for MWRDGC to implement additional flow  
14 augmentation and aeration treatment technologies in  
15 order to achieve compliance with these dissolved  
16 oxygen standards.

17 Has IEPA confirmed whether CSO's or  
18 resuspended sediment or both caused the DO depletion  
19 during wet weather?

20 MR. SULSKI: Well, we have some. In the  
21 Attachment B report, we have an analysis of a  
22 post-CSO event and what happens to the DO in  
23 accordance with the District's continuous DO  
24 monitoring data. And we show that the DO does drop

1 down following one of these events and subsequent  
2 discharges sometimes as low as zero and it continues  
3 for a stretch down the waterway.

4 MR. ANDES: Do we know to what extent -- Now,  
5 resuspension of sediment takes place during those  
6 events as well, correct?

7 MR. SULSKI: Yes.

8 MR. ANDES: So you don't really know what part  
9 of that is due to the resuspension versus the CSO's?

10 MR. SULSKI: I don't know what is due to  
11 resuspension, no. I can't tell you what element of  
12 that is.

13 MR. ANDES: Would IEPA consider allowing a  
14 wet-weather exception to the standards due to the  
15 unique hydrological conditions that apply for  
16 operating the system during wet weather? If not, why  
17 not? I'm just asking DO.

18 MS. WILLIAMS: Is this for DO?

19 MR. TWAIT: I'm sorry. Could you restate the  
20 question?

21 MR. ANDES: Would the Agency consider adopting a  
22 weather exception to the standards for DO -- this  
23 question concerns DO -- due to the hydrological  
24 conditions that apply during wet weather?

1           MR. TWAIT: I don't know whether it would be  
2 really the Agency accepting the proposal as opposed  
3 to the Board. If we got -- If we saw the proposal,  
4 we'd consider whether or not to support it.

5           MR. ANDES: And is there a reason that the  
6 Agency hasn't included that in its current proposal?

7           MR. SULSKI: One of the aspects here is that we  
8 have no room in the criteria to adopt a zero DO  
9 standard. We can only go so low with the DO  
10 criteria.

11          MR. ANDES: Are you aware of states that have  
12 had wet-weather exceptions to their standards where  
13 certain criteria would not apply during particular  
14 time periods?

15          MR. TWAIT: I'm not aware of any for DO. I am  
16 aware of states trying to do that for bacteria.

17          MS. WILLIAMS: Can I ask a redirect to the  
18 panel?

19                    Is there a difference between having a  
20 wet-weather exemption for bacteria and for dissolved  
21 oxygen? If so, what is it?

22          MR. TWAIT: I think the answer to that would be  
23 yes. The difference would be the wet-weather  
24 standard for bacteria would not kill fish whereas low

1 DO could kill fish and other aquatic organisms.

2 MR. ANDES: Have there been any studies or are  
3 there any studies in the record indicating the impact  
4 of low DO during wet-weather events for short time  
5 periods?

6 MR. TWAIT: I'm not aware of any.

7 MR. ANDES: Well, let me move on to question 21.  
8 We'll come back to bacteria. On page -- I'll trunk  
9 it just a little bit.

10 On page 93, the IEPA states in the proposal  
11 the Agency included an effluent standard for the  
12 disinfection of all existing effluents discharged to  
13 incidental contact recreational waters and  
14 non-contact recreational waters by the recreational  
15 season 2011.

16 First, with respect to indicator and pathogenic  
17 microorganisms, what data shows -- or proves that  
18 wastewater effluent disinfection will result in  
19 measurable improvements in bacterial water quality in  
20 the CAWS?

21 MR. TWAIT: I don't know that the Agency has  
22 scientific data as opposed to data that we have seen  
23 for disinfection throughout the state.

24 MS. WILLIAMS: Are you asking what proof there

1 is or what data there is that disinfection will kill  
2 bacteria? Is that the question?

3 MR. ANDES: No, that it will lead to measurably  
4 different bacteria levels in the waterways.

5 MS. WILLIAMS: Okay.

6 MR. SULSKI: Well, I have an answer, and it just  
7 refers to flow ratios. Since the system is dominated  
8 by MWRD effluent flows, if you remove that source of  
9 bacteria, you no doubt will see a reduction in the  
10 bacteria numbers within the system.

11 MR. ANDES: But you haven't quantified that?

12 MR. SULSKI: No, I have not.

13 HEARING OFFICER TIPSORD: Ms. Alexander has a  
14 follow-up.

15 MS. ALEXANDER: As a proximate matter -- I  
16 understand you don't have all the data in front of  
17 you. But in the absence of disinfection, using the  
18 currently used fecal coliform or E. Coli indicators,  
19 what kind of numbers are you going to see coming out  
20 of the pipe? For instance, would you on occasion see  
21 numbers that are north of 100,000 fecal coliform  
22 colony-forming units in the effluent in the absence  
23 of disinfection?

24 MR. TWAIT: It really depends on the quality of

1 the effluent. In a poorly managed treatment  
2 facility, yes, I would expect to see 100,000 fecal  
3 coliform per 100 milliliters.

4 MS. ALEXANDER: And in this waterbody --

5 MR. TWAIT: Well, I'd like to -- And then also  
6 for better run facilities it can be much lower, near  
7 5,000 to 10,000.

8 MS. ALEXANDER: In this waterbody though, the  
9 numbers measured by the District's own sampling  
10 indicate that in the area near the outfalls the  
11 numbers have been at times north of 20,000  
12 colony-forming units in the ambient water? Is that  
13 consistent with your recollection?

14 MR. SULSKI: That's fair to say, yes.

15 MS. ALEXANDER: Now, if you disinfect the  
16 effluent, can you give me an approximation of about  
17 what bacteria level you're going to expect to see in  
18 the effluent in terms of the indicator bacteria?

19 MR. TWAIT: In the effluent it would be  
20 somewhere below 400.

21 MS. ALEXANDER: And likely well below 400?  
22 Often below 100?

23 MR. TWAIT: Yes.

24 MS. ALEXANDER: So, in other words, it's really

1 kind of binary? If you don't disinfect, you're going  
2 to have these very high numbers that are higher than  
3 5,000 in many cases and could be as high as 100,000?  
4 If you do disinfect, they're going to be at least as  
5 low as 400 and often lower than 100?

6 MR. TWAIT: Yes.

7 MS. ALEXANDER: Okay.

8 MR. ANDES: Question B. Did IEPA take into  
9 account the impacts of all of the sources of  
10 microorganisms to the CAWS, including lingering  
11 effects of wet weather, in their assessment of water  
12 quality improvement and risk reduction expected to  
13 result from effluent disinfection?

14 MR. TWAIT: We did not look at all sources.

15 MR. ANDES: Okay. What science is available to  
16 demonstrate the public health benefits of effluent  
17 disinfection as required in the rule? Has there been  
18 any analysis of that?

19 MR. TWAIT: I don't know that I'm prepared to  
20 answer that. I'm sure there's literature out there  
21 put out by US EPA, but I'm not sure that I could  
22 quote it.

23 MR. ANDES: Is there anything in the record?

24 MR. TWAIT: No, I don't believe there is.

1           MR. ANDES:  What basis exists to show that  
2 requiring disinfection at these plants will not  
3 result in other significant environmental impacts?  
4 What analysis has been done on that issue?

5           MR. TWAIT:  What other significant environmental  
6 impacts are you referring to?

7           MR. ANDES:  Whether it's air emissions, waste  
8 issues, et cetera.

9           MR. TWAIT:  I don't know that the Agency looked  
10 at that.

11          MR. ANDES:  What information is there,  
12 particularly in the record, that indicates there is  
13 currently a public health concern for recreators in  
14 the waterways proposed as incidental contact or  
15 non-contact recreation?

16          MR. TWAIT:  I think the Agency is just relying  
17 on the fact that it is undisinfected effluent.

18          MR. SULSKI:  That is human in origin.

19          MR. ANDES:  Okay.

20          HEARING OFFICER TIPSORD:  Mr. Harley has a  
21 follow-up.

22          MR. HARLEY:  To your knowledge, is it necessary  
23 for Illinois EPA to produce sick people in order to  
24 justify imposing pollution controls?

1 MR. TWAIT: No.

2 MR. HARLEY: Thank you.

3 MR. ANDES: That's a surprise.

4 Question 22. On pages 92 to 93 of the  
5 Statement of Reasons, IEPA states it was noted at  
6 stakeholder meetings that there were activities, such  
7 as sculling, being performed as early as March and as  
8 late as November. It was determined that  
9 disinfection was needed to correspond to these known  
10 recreational activities.

11 Does IEPA have any evidence to support that  
12 disinfection would protect the recreators  
13 participating in these activities, such as sculling?

14 MR. SULSKI: We lumped sculling in with a class  
15 of recreation that included hand-powered boating  
16 where you're close to the water, canoeing, kayaking,  
17 and that.

18 MR. ANDES: Have there been any disease  
19 outbreaks reported to the Agency in the past three  
20 years from people recreating in the CAWS?

21 MR. SULSKI: I know of no requirements that  
22 people are to report to us.

23 MR. ANDES: The answer is, no, you're not aware  
24 of any incidents?

1 MR. SULSKI: Correct.

2 MR. ANDES: Okay. Thank you.

3 Question 23. On page 100, paragraph 2, of  
4 the Statement of Reasons, IEPA states in the  
5 August 26, 2005, report Technical Memorandum MWRDGC  
6 produced a cost estimate to disinfect the effluent at  
7 the North Side, Stickney, and Calumet treatment  
8 plants of total present worth between \$963,000 and  
9 \$2,702 million for capital costs and operation and  
10 maintenance costs.

11 Based on the estimated number of current  
12 CAWS recreators and the information the Agency  
13 currently has on risk assessment, how many incidents  
14 of illnesses are likely to be prevented annually by  
15 effluent disinfection at these facilities?

16 MR. TWAIT: I don't know.

17 MR. ANDES: Let me skip to question D.

18 Is IEPA aware it would take longer than  
19 three years to construct disinfection facilities at  
20 these facilities due to the size of the facilities  
21 and the scale?

22 MR. TWAIT: I don't know.

23 No. The Agency was not aware that it would  
24 take more than three years.

1           MR. ANDES: Okay. I'm going to move to some  
2 general questions for Mr. Sulski on page 10 of our  
3 questions.

4           MS. WILLIAMS: Can we clarify at least on  
5 this -- Have we covered everything, or are there  
6 things you're flagging to come back to?

7           MR. ANDES: There are some that we may come back  
8 to later. I don't expect that to be the case right  
9 now, but I don't want to waive the right to come back  
10 to them at some later point in this process.

11          MS. WILLIAMS: Well, I mean, you have the right  
12 to follow up on anything. I have no problem with  
13 that. I just like to keep track.

14                    I'm sorry. We don't object to your right  
15 to ask follow-up on any other issues that come up. I  
16 just, for my recordkeeping, would like to know  
17 whether we're done with question 23 or if certain  
18 subparts of that question are being saved till later?

19          MR. ANDES: It's likely that if we go back to  
20 that topic it would be more in the nature of  
21 follow-up.

22          MS. WILLIAMS: Thank you.

23          HEARING OFFICER TIPSORD: Mr. Harley, you have a  
24 follow-up?

1 MR. HARLEY: Yes.

2 Before we move on to additional lines of  
3 inquiry for Mr. Sulski, I have a question for  
4 Mr. Sulski to follow up with what's already been  
5 exchanged.

6 HEARING OFFICER TIPSORD: Let me point out,  
7 first of all, Mr. Sulski is not a witness.

8 MR. SULSKI: Yes, I am.

9 HEARING OFFICER TIPSORD: I'm sorry. I  
10 apologize. Late in the day.

11 Yes, as a matter of fact, he is a witness.

12 And, Mr. Harley, yes, please.

13 MR. HARLEY: My question is this.

14 On more than one occasion in responding to  
15 questions you have emphasized the point that it is an  
16 effluent dominated waterway and it is human  
17 originated pathogens. And you seem to attach some  
18 importance to the concept that the effluents contains  
19 human originated pathogens. Could you please  
20 explain, for the record, why that's so important?

21 MR. SULSKI: Well, it's human pathogens  
22 generally that cause human diseases. That's the  
23 simple answer.

24 MR. HARLEY: Thank you.

1           HEARING OFFICER TIPSORD: Back to Mr. Andes, who  
2 is not a witness.

3           MR. ANDES: Thank you. I feel better.

4                   I'm going to skip to question number 3 on  
5 page 10.

6                   On page 3-4 of your pre-filed testimony,  
7 you state there was and continues to be sound  
8 reasoning to custom tailor water quality standards  
9 for this system to coincide with its own unique  
10 configuration and functions as we establish  
11 environmental uses and goals to achieve and protect  
12 its ecological and recreational potential. The  
13 system must still support other critical functions,  
14 particularly urban drainage, flood control, and  
15 navigation.

16                   The first question is, what are the current  
17 procedures -- or what's the rationale that you're  
18 using to establish microbial standards that are  
19 tailored to those uses of the waterway? How are you  
20 addressing those uses in establishing microbial  
21 standards?

22           MR. TWAIT: The Agency is not establishing  
23 microbial standards for the CAWS waterways.

24           MR. ANDES: But you are establishing effluent

1 standards?

2 MR. TWAIT: Yes.

3 MR. ANDES: So answer the question as to the  
4 effluent standards.

5 MR. TWAIT: The Agency is using the same  
6 effluent standard as for general use waters.

7 MS. WILLIAMS: Can you -- Would you like him to  
8 cite for the record to the standard he's referring  
9 to?

10 MR. ANDES: Sure.

11 In the general use waters, there is a  
12 numeric or a quality criterium, correct?

13 MR. TWAIT: Yes.

14 MR. ANDES: Let me skip to question C there.

15 Do you foresee that the current --

16 MS. DIERS: Are we still waiting for him to  
17 answer the last question?

18 MR. ANDES: Oh, I'm sorry. Go ahead.

19 MR. TWAIT: It's 304.121.

20 MR. ANDES: Do you foresee that the current  
21 physical conditions and primary functions of the CAWS  
22 and the Lower Des Plaines River could be changed to  
23 accommodate more recreational uses in the near  
24 future?

1           MR. SULSKI: Physical conditions and primary  
2 functions? I don't know what its primary functions  
3 are. If you could --

4           MR. ANDES: Would it be fair to say those are  
5 urban drainage, flood control, and navigation?

6           MR. SULSKI: Well, recreators would say that  
7 recreation is a pretty primary function for them.

8           MR. ANDES: It's not one of the -- Okay.

9           MR. TWAIT: To answer that question, I think it  
10 would be fair to say that the Agency looked and asked  
11 other entities if they had plans for more  
12 recreational facilities. And I don't believe that --  
13 We do have some, but I don't know that they're going  
14 to be new beaches or anything.

15           MR. ANDES: Okay. Question 4. On page 4 of  
16 your pre-filed testimony, in reference to the CAWS,  
17 you state its potential continues to be somewhat  
18 tempered by its unique physical and habitat  
19 characteristics as well as lingering, albeit  
20 diminishing, legacy contamination from prior decades  
21 of neglect.

22                   Legacy contamination, I assume, refers to  
23 polluted sediments?

24           MR. SULSKI: Yes.

1 MR. ANDES: I think we touched on this before.

2 Is there evidence in the record to  
3 indicate -- evidence that the legacy contamination is  
4 diminishing?

5 MR. SULSKI: We don't have sampling evidence  
6 comprehensive enough to make that determination.

7 MR. ANDES: Okay. Question 5. On page 6 of  
8 your pre-filed testimony, you present the six factors  
9 identified in the UAA model that preclude a waterbody  
10 from achieving Clean Water Act goals. Please explain  
11 whether and how the following issues were addressed  
12 while considering the six factors identified in the  
13 UAA model. We'll take these one by one.

14 First, sediment resuspension caused by  
15 commercial navigation in the CAWS can cause increased  
16 levels of metals and persistent organics in the  
17 waterway and can lead to depletion of dissolved  
18 oxygen in the water column.

19 MR. SULSKI: We focused on the dissolved oxygen  
20 element of that and proposed supplemental aeration to  
21 deal with oxygen criteria that we believed were  
22 appropriate to meet the proposed attainable uses.

23 MR. TWAIT: In addition to -- I'm sorry. Never  
24 mind.

1           MR. ANDES:  Second, wastewater plants account  
2 for the majority of the flow in the CAWS.  
3 Restrictions on Lake Michigan supplemental water  
4 limit the ability to maintain flow for aquatic life  
5 or to dilute wastewater treatment plant effluents.

6           MR. SULSKI:  When we considered that, we  
7 recognized that there were two reaches in the  
8 waterway that suffered from lack of flow, but that  
9 there were management options that we believed could  
10 overcome those flow -- those low flow conditions.  
11 And that's why supplemental flow in those two  
12 reaches, which would be part of the North Shore  
13 channel and the South Branch south fork, were  
14 explored and are being suggested as management  
15 options.

16          MR. ANDES:  Let me ask as a follow-up to that,  
17 the Great Lakes compact that is being adopted in the  
18 various states concerning withdrawals from the Great  
19 Lakes basin, particularly new and increased  
20 withdrawals from the Great Lakes basin, is that  
21 considered in any way in this analysis in terms of  
22 further possible restrictions on withdrawals?

23          MR. SULSKI:  Did you say there will be the  
24 ability for increased withdrawals?

1 MR. ANDES: No. Limitations.

2 MR. SULSKI: How will that affect?

3 MR. ANDES: Was that factored into this  
4 analysis?

5 MR. SULSKI: Yes, it was.

6 MR. ANDES: I'd like to find out where that is  
7 in the record.

8 MR. SULSKI: Where is it in the record? Can I  
9 say -- Can you give me a chance to look for it  
10 because I recall the record better than I can put my  
11 finger on that?

12 We recognized and mentioned that there was  
13 some international agreements on the withdrawal of  
14 water from Lake Michigan and that that withdrawal  
15 amount would be reduced over time and recognized that  
16 that would occur. And so we didn't look at that  
17 option for putting flow into the waterways. That's  
18 why we came up with augmenting flow as an option for  
19 improving flow conditions in those two reaches of the  
20 waterway.

21 MR. ANDES: So the assumption was that no  
22 increased withdrawals would be allowed?

23 MR. SULSKI: That's correct.

24 MR. ANDES: The next factor was historically

1 impacted sediments contributing to high levels of SOD  
2 in stagnant reaches of the waterway.

3 MS. DEXTER: For the record, can we translate  
4 SOD?

5 MR. SULSKI: Sediment oxygen demand.

6 Again, the stagnant reaches of the waterway  
7 where that is a more significant factor, we looked at  
8 the waterway management option of increasing flow  
9 through those portions -- those reaches.

10 MR. ANDES: Doesn't that have the potential for  
11 resuspension of those historically impacted sediments  
12 and levels in the water column?

13 MR. SULSKI: It has the potential to create a  
14 greater oxygen demand on those waterways if they get  
15 suspended, but the flow augmentation is coupled with  
16 supplemental aeration to provide oxygen.

17 MR. ANDES: But it also means that some of the  
18 metals, for example, then would be more likely in the  
19 dissolved form and have impacts on the fish?

20 MR. SULSKI: The metals are in the dissolved  
21 form when they're in the anaerobic low oxygen state.  
22 If you bring them to the surface and oxygenate them,  
23 they get converted to less soluble forms. So that's  
24 a good thing.

1 MR. ANDES: I guess one question on all of this.

2 This analysis is where -- this might be in  
3 the record in terms of looking at this factor?

4 MR. SULSKI: In terms of looking at the factor  
5 of whether -- changing conditions from anaerobic to  
6 aerobic?

7 MR. ANDES: No. It sounds like -- I'm trying to  
8 understand the full analysis. It seems like some  
9 places we're saying, well, if the sediment gets  
10 kicked up, that's a good thing. In some areas we're  
11 saying, well, if the sediment doesn't get kicked up,  
12 that's a good thing. I'm trying to understand the  
13 full analysis of where it's a good thing and where  
14 it's a bad thing and how that all contributes to  
15 attainment of the new uses.

16 MS. WILLIAMS: One thing I think would help that  
17 analysis might be if, Rob, you explained, for the  
18 record, what flow augmentation is and how it works,  
19 technically what it does. Could you do that for me  
20 at this point?

21 MR. SULSKI: In areas of low DO that involve  
22 stagnation as one of the causes, you would not be  
23 able to raise DO to any reasonable levels without --  
24 with aeration in itself. You would also need to

1 augment the flow to carry that oxygenated water and  
2 to create mixing so that oxygen could go into  
3 solution. And that's primarily in the -- Well, it's  
4 all over. You need mixing. You can't just stick  
5 oxygen in one spot and leave it right there and  
6 expect it to diffuse through a lawn system. So the  
7 supplemental aeration and flow augmentation go hand  
8 in hand to increasing the dissolved oxygen levels  
9 within the system.

10 MS. WILLIAMS: I just want you to explain what  
11 flow augment means, what it is in this context.

12 MR. SULSKI: In this context -- Well, in this  
13 system it means taking a portion of the North Side  
14 treatment plant flow, which currently discharges at  
15 around Howard Avenue in the North Shore channel, and  
16 putting it into the North Shore channel near the  
17 Wilmette controlling structure to take care of that  
18 stagnant reach between Wilmette and Howard Street or  
19 the North Side Water Reclamation Plant effluent.

20 The other flow augmentation involves the  
21 south fork south branch of the Chicago River, which  
22 begins at the Racine Avenue pump station on the south  
23 and goes to the south branch Chicago River. That's a  
24 stagnant reach as well. And flow augmentation would

1 involve removing a portion of the main channel flow  
2 and putting it to the Racine Avenue south end and  
3 along that flow to be -- to go through that system,  
4 so augmenting flow.

5 MS. WILLIAMS: By flow, do you mean it's also  
6 the effluent, or do you mean something else?

7 MR. SULSKI: It's the main channel flow, which  
8 is dominated by effluent. But it is waterway water.

9 MS. WILLIAMS: Thank you.

10 MR. SULSKI: I need a follow-up on your  
11 question, Fred. Can you please repeat it? I lost  
12 the train.

13 MR. ANDES: I was trying to get a clear  
14 understanding of -- It seems like, with regard to the  
15 sediment, in some places the Agency is saying it's a  
16 good thing if we let it be and let it be capped --  
17 the contaminated sediments. Although it's hard to  
18 define by an earlier question legacy versus none.  
19 Some areas you're saying it's a good thing that it's  
20 going to be capped. In other areas you're saying  
21 it's a good thing that it's going to be resuspended  
22 because it can be aerated.

23 I'm trying to figure out, in the scope of  
24 this whole system, is the fix that the Agency's

1 proposing, including the aeration of flow  
2 augmentation -- how does that correlate to here's how  
3 we're achieving the designated use, the target, in  
4 each of those segments? And particularly with regard  
5 to the sediment situation is what I'm focusing on  
6 right now. How are we making sure that it's tailored  
7 to leave those areas alone and stir those areas up?

8 MR. SULSKI: Currently our dissolved oxygen  
9 criteria is focused on improving water quality  
10 conditions so that the aquatic life can meet the  
11 potential which we've -- we've proposed that is  
12 commensurate with the type of habitat that is there.  
13 So we -- We have to raise the dissolved oxygen  
14 somehow. A benefit to raising the dissolved oxygen  
15 is that improvement of the sediment will occur at a  
16 quicker rate over time if -- You heard yesterday the  
17 factors that go to improving the sediment over time  
18 that we talked about. That being, you know, it gets  
19 resuspended. It gets taken out of an anaerobic  
20 environment. In some cases it gets capped. Raising  
21 dissolved oxygen will speed that improvement along.

22 That's not to say we want to go in there  
23 with mixers and churn it all up and give a load of  
24 these legacy sediments. But it kind of goes hand in

1 hand. It's an added benefit that will occur through  
2 the implementation of these management projects.

3 MR. ANDES: Now, to take that back for a moment  
4 to one of the issues we were talking about before our  
5 break, it sounds like the goal there is to raise DO  
6 levels?

7 MR. SULSKI: Yes.

8 MR. ANDES: So earlier when we were talking  
9 about the standards and I was saying, "Well, we're  
10 going toward more stringent DO standards," we are  
11 going to more stringent DO standards, right? That's  
12 the whole point here?

13 MR. SULSKI: In some reaches we are going to  
14 more stringent DO standards, yes.

15 MR. ANDES: Okay. Let me move on. I'm going to  
16 skip through some of the others because I think we  
17 have talked about them before. I'm going to go to  
18 question number 7.

19 On page 8 of your pre-filed testimony, you  
20 stated that Illinois EPA decided that the Brandon  
21 Pool warranted no recreational use protection and  
22 designated that reach as non-recreational.

23 Can you first go through the reasons why  
24 the Brandon Road navigational pool was designated

1 non-recreational?

2 MR. SULSKI: Do you want to address that?

3 MR. TWAIT: I'll give it a shot.

4 The Brandon Pool was a -- or it is a  
5 straight-walled, deep-draft channel that has no  
6 recreational facilities and has barge traffic that  
7 makes it dangerous to use small boats.

8 MR. ANDES: Now, to go to the next question,  
9 distinguish that from the Chicago Sanitary and Ship  
10 Canal.

11 MR. SULSKI: The Chicago Sanitary and Ship Canal  
12 down below the junction with the Cal-Sag Channel,  
13 it's configuration is almost identical to the Brandon  
14 Road Pool.

15 MR. ANDES: Okay.

16 MR. SULSKI: In addition, there are -- We didn't  
17 find recreation potential there. We didn't find  
18 public access areas. We didn't find incidents of  
19 people recreating there. We didn't find anybody with  
20 ideas of doing it or plans to do it unlike the  
21 Sanitary and Ship Canal upstream of that point where  
22 we talked about the Summit boat dock and we talked  
23 about the Western Avenue boat dock.

24 And, in addition, the surveys that we

1 performed showed that on some weekends a large number  
2 of boats launching at the Worth and the Alsip boat  
3 dock use both routes going through the O'Brien Lock  
4 and Dam and the Calumet River to get out to the lake  
5 and use the Sanitary and Ship Canal to get downtown  
6 during special events in the city. And we stood  
7 there and watched a number of boats using that route,  
8 but we never saw boats going downstream and into the  
9 Brandon lower Sanitary and Ship Canal.

10 MR. ANDES: In terms of the physical conditions,  
11 those are basically very similar to the lower reach?

12 MR. SULSKI: Yes.

13 MR. ANDES: Okay. Let me go to question 9.

14 On page 9 of your pre-filed testimony, you  
15 state -- and this applies to the CAWS -- CDM  
16 recommended two aquatic life uses, one composed of  
17 fisheries consisting of some important species, and  
18 another where straight-walled, deep-draft shipping  
19 channels limit the fisheries to predominantly  
20 tolerant species. And I know that you're free to  
21 distinguish between what CDM said and any changes you  
22 folks have made to explain what the changes were.

23 The first question we had there,  
24 particularly because this is a document that's cited

1 as the basis for a lot of the proposal, what are the  
2 important sport fish species?

3 MR. SULSKI: I can recall two that CDM mentioned  
4 in the report, and that is channel catfish and  
5 large-mouth bass.

6 MR. ANDES: Okay. And the contrast was to  
7 predominantly tolerant species, and are there  
8 examples of those?

9 MR. SULSKI: I have to go back to the CDM report  
10 to get his -- They did add some species in there.

11 MR. ANDES: Okay.

12 MR. SULSKI: Would you like me to do that?

13 MR. ANDES: Sure.

14 MR. SULSKI: I think I can do it fairly quickly.

15 Fred, I'm having difficulty just finding  
16 where in the CDM report they proposed the species  
17 that they proposed.

18 MR. ANDES: You can provide that later. That's  
19 fine.

20 MR. SULSKI: Okay.

21 MR. ANDES: Now, go to G.

22 The Agency did not include the phrase,  
23 "Some important sport fish species," in its  
24 definition of Use A waters, correct?

1 MR. SULSKI: Correct.

2 MR. ANDES: So what's the rationale behind the  
3 change?

4 MR. SMOGOR: The presence or absence of  
5 important fish species doesn't directly relate to the  
6 water's ability or inability to attain the Clean  
7 Water Act aquatic life goal.

8 MR. ANDES: Okay.

9 MR. SULSKI: Can I add to that?

10 MR. ANDES: Sure. Go ahead.

11 MR. SULSKI: What's an important sports species  
12 to one person is not as important to another. It  
13 depends who's doing the fishing.

14 MR. ANDES: Was there a basis originally in  
15 terms of different DO tolerance between those two  
16 classes? I'm trying to get at the basis for that and  
17 how that then changed and what you ended up doing.

18 MR. SULSKI: Well, CDM's analysis looked at  
19 dissolved oxygen. And whether it's coincidental or  
20 on purpose, some of the species that they list in  
21 their definition of what -- their proposed definition  
22 of the use coincides with what we -- what we  
23 determined. A species like channel catfish would  
24 have -- you know, have a dissolved oxygen requirement

1 that would fit a certain sort of habitat. So it so  
2 happens that they listed that as an important sport  
3 fish, but that may be coincidental.

4 MR. ANDES: Okay. Question 10 I think we've  
5 already discussed.

6 Question 11. On page 11 of your pre-filed  
7 testimony, you stated that the CAWS UAA demonstrates  
8 that through recreational surveys and other  
9 investigations that primary contact recreation is not  
10 attainable in the CAWS. According to Attachment B,  
11 there were limited observations of swimmers and  
12 hand-powered boaters in the Cal-Sag Channel and the  
13 canal. And on page 3-3 of the UAA report warns of  
14 dangers to hand-powered boating in the canal. Let's  
15 discuss those issues for a moment.

16 First, let's just go through what are some  
17 primary contact activities?

18 MR. SULSKI: Primary contact activities would be  
19 swimming, water-skiing, activities similar to  
20 water-skiing, diving into the water.

21 MR. ANDES: Okay. And kayaking is not  
22 considered primary contact activity?

23 MR. SULSKI: We are not considering kayaking in  
24 this proposal -- in these waterways as a primary

1 contact activity.

2 MR. ANDES: Okay. And I think this is an issue  
3 Mr. Twait got into a little bit yesterday.

4 Where is the dividing line? How many  
5 observed recreators constitute a frequent enough  
6 occurrence to warrant factoring that into the  
7 designated use or protecting that use? Is that kind  
8 of -- What's the Agency thought process on that  
9 issue?

10 MR. TWAIT: Well, every -- I think my comment  
11 from yesterday was if we had one use we weren't  
12 necessarily protecting.

13 MR. SULSKI: Our evaluation of the recreational  
14 uses involved looking at what uses existed. And  
15 it -- It's a weight of evidence analysis. So when we  
16 went out -- And the weight of evidence involves what  
17 you actually saw, what people plan for the future,  
18 what areas are available for certain types of  
19 activities, which areas are allowable for certain  
20 types of activities. So you take that into  
21 consideration with the numbers.

22 Now, in the case of primary contact  
23 activity, well, there were a few instances where they  
24 were observed. None of the other sources of data

1 support that that is unattainable activity. In fact,  
2 they kind of push against it. So I can count on my  
3 hand the numbers of primary contact activities we saw  
4 during all of our work.

5 MS. WILLIAMS: Was that on one hand or both of  
6 them?

7 MR. SULSKI: One hand.

8 HEARING OFFICER TIPSORD: Ms. Alexander has a  
9 follow-up.

10 MS. ALEXANDER: I want to make sure to clear up  
11 a potential point of confusion.

12 And existing use is not the same thing as  
13 an attainable use; is that correct?

14 MR. SULSKI: Well, an existing use -- If it's an  
15 existing use, it is an attainable use.

16 MS. ALEXANDER: But it's possible to have an  
17 attainable use that's not an existing use; is that  
18 correct?

19 MR. SULSKI: That's correct.

20 MS. ALEXANDER: In other words, if you had a  
21 situation where nobody's using a waterbody for a  
22 particular use, that use, say kayaking or swimming or  
23 whatever it happened to be, might still be  
24 attainable; is that correct?

1           MR. SULSKI: It might be attainable. I would be  
2 comfortable having evidence that somebody had plans  
3 for that activity or data. For example, I don't see  
4 anybody kayaking. But if somebody has a kayak  
5 launched there and there's the kayaks, that tells me  
6 something.

7           HEARING OFFICER TIPSORD: Ms. Dexter and then  
8 Mr. Harley.

9           MS. DEXTER: Is it possible that there might be  
10 more plans for expanded use in the future if the  
11 water was cleaner?

12          MR. SULSKI: I can't answer that. I can only  
13 answer you in terms of our outreach to the  
14 stakeholders and then the owners of the property  
15 along the waterways on what their intentions were in  
16 terms of types of uses that they were promoting.  
17 That's all I can answer to.

18          HEARING OFFICER TIPSORD: Mr. Harley?

19          MR. HARLEY: How would you classify jet skiing  
20 as between primary contact and not?

21          MR. SULSKI: In terms of jet skiing on the  
22 waterways that we examined, I would classify that as  
23 similar to hand-powered boating. It was being  
24 utilized as a way to get from point A to point B as

1 opposed to when I'm in Lake Michigan and people are  
2 using their jet skies to shoot waves and they end up  
3 in the water from time to time.

4 MR. HARLEY: Could you describe, for example, a  
5 recreational rower or boater who's using a  
6 hand-powered craft how it is that that individual  
7 would be exposed to pathogens in that waterbody? For  
8 example, would it be through dermal contact? Would  
9 it be through ingestion? Would it be through both?

10 MR. SULSKI: It could be through both.

11 MR. HARLEY: And would there be diseases which  
12 would potentially occur by virtue of exposure to  
13 pathogens through dermal contact?

14 MR. SULSKI: Are you asking me if there's  
15 diseases that are caused by dermal contact?

16 MR. HARLEY: Yes.

17 MR. SULSKI: I know that they are. I don't know  
18 that I want to translate that into the water quality  
19 in our waterways.

20 MR. HARLEY: I'm simply asking potentially.

21 MR. SULSKI: Is it possible?

22 MR. HARLEY: Yes.

23 MR. SULSKI: Yes, it's possible, especially if  
24 you have a cut on your hand.

1           MR. HARLEY: And what about through ingestion of  
2 those pathogens?

3           MR. SULSKI: Yes.

4           MR. ANDES: The next question.

5                     Did the UAA report indicate that  
6 hand-powered boating in the canal and the Cal-Sag  
7 Channel were dangerous?

8           MS. DIERS: Is this a follow-up, or is this --

9           MR. ANDES: Question F.

10          MS. DIERS: Okay.

11          MR. SULSKI: Okay.

12          MR. ANDES: That's accurate, correct? The UAA  
13 report indicated that hand-powered boating in those  
14 waterbodies is dangerous?

15          MR. SULSKI: It reports that hand-powered  
16 boating in areas that we classified as non-recreation  
17 is dangerous. That's what I recall.

18          MR. ANDES: I think it specifically talked about  
19 it in the channel -- in Sanitary and Ship Canal?

20          MR. SULSKI: In the Chicago Sanitary and Ship  
21 Canal?

22          MS. WILLIAMS: Are you referring to in  
23 Attachment B?

24          MR. ANDES: Yes.

1           MR. SULSKI: Page 3-3 in the Statement of  
2 Reasons or --

3           MR. TWAIT: No.

4           MR. ANDES: 3-3 in the CDM report.

5           MR. SULSKI: In the CDM report. Okay.

6           MR. ANDES: I'll read the quote. Recreational  
7 small boating is limited and dangerous in the CSSC  
8 as the wakes from large commercial and recreational  
9 boats can create hazardous paddling conditions. In  
10 the event of a capsized, a paddler would have an  
11 extremely difficult time getting out of the water due  
12 to the steep banks.

13          MR. SULSKI: Okay.

14          MR. ANDES: Given that statement --

15                   And you don't dispute that statement,  
16 right?

17          MR. SULSKI: I don't dispute that it could be  
18 dangerous.

19          MR. ANDES: Given that, why is -- And the report  
20 recommended that the Sanitary and Ship Canal be  
21 designated recreation and navigation. The Agency has  
22 upgraded that to incidental contact recreation  
23 despite that statement. I'm trying to understand the  
24 basis for that.

1           MR. SULSKI: Well, because I can't ignore  
2 existing uses.

3           MR. ANDES: Even if they're dangerous?

4           MR. SULSKI: That's correct.

5           MR. ANDES: That's the Agency's legal  
6 interpretation?

7           MR. SULSKI: Well, I can't ignore existing uses  
8 that are --

9           MS. WILLIAMS: I think there's -- I think  
10 there's a misstatement. I think you said that we  
11 designated the Sanitary and Ship Canal for  
12 incidental. I don't think the whole thing, right?

13           MR. ANDES: Not the whole thing, but part of it?

14           MR. SULSKI: Not the whole thing, but from the  
15 junction all the way through.

16           MR. ANDES: You upgraded part of the Sanitary  
17 and Ship Canal?

18           MR. SULSKI: The upper part of it, yes.

19           MS. WILLIAMS: What's the question pending?

20           MR. ANDES: The question was, given that it's  
21 dangerous, why is the designated use allowing for  
22 that dangerous activity?

23           MR. SULSKI: In the analysis we looked for  
24 existing uses. If they were existing at a frequency

1 enough to determine that they were a use, then we had  
2 to protect for that use. That's an attainable use.  
3 In addition, if there's any potential other uses that  
4 aren't existing. Well, what we found was the  
5 existing uses were what was attainable because we  
6 didn't find that any more than the existing uses that  
7 exist are going to.

8 MR. ANDES: Isn't there a risk that by  
9 designating this way and sort of stating that it's  
10 okay to have incidental contact recreation there  
11 we're promoting the dangerous activity?

12 MR. TWAIT: I don't know that the Agency's  
13 promoting the use of the water. I think the Agency  
14 is protecting the uses -- or the recreators.

15 MR. ANDES: Is it more likely that by protecting  
16 that use you are making it more likely that more  
17 people will do it?

18 MR. TWAIT: I don't know. There's people out  
19 there doing it now when it's definitely not  
20 advisable. But is it -- The question that we've  
21 relied on -- or the facts that we've relied on is  
22 there's a boat dock -- or a boat launch there that  
23 can have small craft into that section of water even  
24 though it, as you say, may not be safe.

1           MR. SULSKI: I would look at the persons who  
2 install boat docks as promoting it.

3           MR. ANDES: And you're enabling it?

4           MR. SULSKI: We're not a -- You know, this issue  
5 came up. I don't mean to digress. But this issue  
6 came up in the special SAC meeting we had with safety  
7 individuals. We wanted -- The reason for that  
8 meeting was to find out whether there were any laws  
9 on their books that would prohibit any kind of uses  
10 that we were -- that we were exploring from  
11 occurring.

12          MR. ANDES: But at that time the Agency wasn't  
13 proposing to designate this part of the ship canal  
14 for incidental contact recreation, right?

15          MR. SULSKI: Well, I'm getting to the safety  
16 issue now.

17          MR. ANDES: Okay.

18          MR. SULSKI: You find similar conditions in the  
19 Chicago River, for example, straight walls, steep,  
20 deep draft. You find that in the Lower North Branch.  
21 You find that in the South Branch. Yet, there's  
22 recreational activities that occur there. They  
23 exist. We have to protect them.

24          MR. ANDES: And more opportunities for access

1 and egress, correct, than the Chicago River?

2 MR. SULSKI: On the north part of the Chicago  
3 River and the Chicago River itself I don't know of  
4 any public boat docks. But they had scheduled  
5 activities where they actually do go in and out of  
6 there and along the south branch. So those  
7 activities exist in those reaches, and we need to  
8 protect them.

9 From a safety standpoint, that involves  
10 competing uses, and we met with the folks. The way  
11 that they deal with competing uses is they put  
12 together their own stakeholder groups. They say  
13 we're going to canoe this period of time. Will the  
14 barge people -- you know, are they going to have  
15 barges going through? So that's handled on a  
16 case-by-case stakeholder basis. And that's not our  
17 job to protect the safety of boaters from drowning or  
18 not drowning.

19 MR. ANDES: So safety is not one of the IEPA's  
20 purposes?

21 MR. SULSKI: Safety is our purpose when it comes  
22 to consuming fish or getting into waters that will  
23 burn you or will cause you problems when you ingest  
24 it. So, yes, safety is --

1 MR. ANDES: Let me ask you this.

2 Were agencies, such as the Coast Guard,  
3 consulted during this process, including since the  
4 Agency decided to designate part of the ship canal as  
5 incidental contact?

6 MR. SULSKI: The safety agencies were consulted,  
7 and they came up with the same -- They didn't come up  
8 with any laws that prohibited those activities from  
9 occurring either. They said that it was a  
10 case-by-case decision. If they, for example, saw a  
11 barge going through an area and all of the sudden  
12 kids were putting in canoes, they would make a case  
13 decision and decide that's not a safe situation. You  
14 kids get out.

15 MR. ANDES: Do we know how they would react to  
16 the proposal to designate part of the ship canal for  
17 recreation?

18 MR. SULSKI: Well, are you talking about that we  
19 since have taken the Chicago Sanitary and Ship Canal  
20 and added into this this limited contact recreation?

21 MR. ANDES: Right.

22 MR. SULSKI: This is what you're focusing on?

23 MR. ANDES: Right.

24 MR. SULSKI: All along and when they were part

1 of the meetings or were consulted, we had the limited  
2 contact recreation designation for other reaches of  
3 the waterway with similar conditions that involved  
4 potential safety issues. So the answer to your  
5 question is, yes, they knew.

6 MR. ANDES: Well, the Coast Guard was involved  
7 how?

8 MR. SULSKI: The Coast Guard attended some or one  
9 of the meetings.

10 MR. ANDES: Are we talking about the one in  
11 2003, that meeting, or are we talking about  
12 subsequent stakeholder meetings?

13 MR. SULSKI: Stakeholder meetings. There is an  
14 attachment -- There is reference -- And we will  
15 provide the rest of the SAC meeting minutes that we  
16 have. But there's reference to a particular SAC  
17 meeting that involved the safety agencies, and that  
18 is JJ, Minutes from the November SAC Meeting on  
19 Safety and Navigational Issues Applicable to CAWS.  
20 It's Attachment JJ, November 19, 2003.

21 MR. ANDES: So that's four-and-a-half years ago.  
22 Have they been involved in the discussion since then?

23 MR. SULSKI: I don't know.

24 HEARING OFFICER TIPSORD: Before we go ahead,

1 you had a question?

2 MS. GRISBY: Margaret Grisby with Friends of the  
3 Chicago River.

4 When you were looking at the recreational  
5 use designations, did you take into account legal  
6 public access provided by navigable waterways that  
7 allows for shared access of these waterways?

8 MR. TWAIT: I think that's what we've said, yes.

9 HEARING OFFICER TIPSORD: Mr. Safley?

10 MR. SAFLEY: If I could follow up.

11 Regarding the November 2003 safety meeting,  
12 was that only considering the CAWS, or was that also  
13 considering safety issues in the Lower Des Plaines  
14 River?

15 MR. SULSKI: I believe that was considering just  
16 CAWS.

17 MR. SAFLEY: Was there a subsequent or other  
18 time when a safety meeting was held with the  
19 Coast Guard or anyone else intended to consider safety  
20 issues?

21 MR. SULSKI: Not to my knowledge.

22 MR. SAFLEY: And one final question.

23 That November 2003 meeting, who was invited  
24 to that?



1 HEARING OFFICER TIPSORD: Let's go back on the  
2 record.

3 MR. ANDES: Let me digress for a moment. I just  
4 wanted to mention, for the record, there were some  
5 questions I have passed over, which I've passed over  
6 because they are specific questions dealing with uses  
7 or criteria that I do anticipate we will go back to  
8 later.

9 11I concerns barge traffic. The question  
10 was, did the Agency consider any quantitative data  
11 regarding commercial barge traffic in the CAWS  
12 similar to the recreational observation data? If so,  
13 what were the agency's conclusions about commercial  
14 use in the CAWS?

15 MR. SULSKI: We did consider data. It was  
16 provided in the lockage data, what went through the  
17 locks. We also had observations. So we did consider  
18 barge traffic, yes.

19 MR. ANDES: Have issues been raised by the barge  
20 traffickers, folks involved in that business, about  
21 the conflicts here between the various uses?

22 MR. SULSKI: I want to say that, yes, they were.  
23 But I can't recall an instance. It was probably in a  
24 stakeholder meeting that they wanted us to consider

1 that in this rule-making. They did attend some of  
2 the SAC meetings, and they wanted to consider that  
3 barge traffic is a use. And we recognize that it is  
4 a use.

5 MR. TWAIT: The Three Rivers Manufacturing  
6 Association expressed those same concerns.

7 MR. ANDES: In stakeholder meetings?

8 MR. TWAIT: I think it was via letter.

9 MR. ANDES: If we could get a copy of that, that  
10 would be helpful.

11 MS. WILLIAMS: Those letters should be in the  
12 record as appendices to Attachment A.

13 MR. SAFLEY: I'm sorry. Could you speak up?

14 MS. WILLIAMS: I believe the letters that I was  
15 referring to, I believe, are in appendices to  
16 Attachment A. There's some stakeholder comments that  
17 we agreed to make addendums to the report. I think  
18 that may include what Scott's referring to. There  
19 are a couple letters from them.

20 MR. ANDES: Was that as to the Lower  
21 Des Plaines?

22 MS. WILLIAMS: Yes.

23 MR. SULSKI: We're looking for that.

24 MR. ANDES: Okay.

1           MR. TWAIT: Yes. In Attachment A of --  
2 Appendix A of Attachment A we have three letters from  
3 the Three Rivers Manufacturing Association, June 11,  
4 2002, June 6, 2003, and July 18, 2002.

5           MR. ANDES: Has there been any consultation with  
6 that group or others regarding this particular issue  
7 since 2003?

8           MR. TWAIT: I don't believe so.

9           MR. SULSKI: Only in regards to their attendance  
10 at the stakeholder meetings for the CAWS.

11          HEARING OFFICER TIPSORD: Mr. Safley has a  
12 follow-up.

13          MR. SAFLEY: I was just going to point out that  
14 the letter that I introduced earlier today may have  
15 been one of those letters that's already attached.

16          MS. WILLIAMS: I don't think so.

17          MR. SAFLEY: If it was, I was going to  
18 apologize. I'm not familiar enough with the  
19 attachments to Attachment A to realize that. I  
20 didn't mean to create confusion. If it wasn't, then  
21 we will supplement it.

22          MS. WILLIAMS: But I haven't seen it, so I'm not  
23 sure because we haven't gotten a copy of it. But I  
24 don't think so.

1 MR. SAFLEY: Understood.

2 HEARING OFFICER TIPSORD: Go ahead.

3 MR. ANDES: Question 13. Currently, the US  
4 Coast Guard can issue a reckless behavior ticket for  
5 non-motorized voting in the Chicago Sanitary and Ship  
6 Canal because of the dangers associated with barge  
7 traffic and lack of points for exit. See IEPA  
8 Attachment JJ. The proposed standards designate the  
9 CSSC as limited contact with recreational waters from  
10 its easternmost point of origination to its junction  
11 with the Cal-Sag Channel and then designate it as  
12 non-recreational water to its confluence with the  
13 Des Plaines River.

14 What properties of the canal upstream of  
15 the confluence are going to change previous to the  
16 promulgation of these use designations to ensure the  
17 safety of non-motorized boaters in this reach?

18 MR. SULSKI: None of properties are going to  
19 change that I know of.

20 MR. ANDES: Question 14. On page 12 of your  
21 testimony, you state IEPA is recommending two  
22 different recreational water uses for the Calumet  
23 River. It's recommending the segment from Torrence  
24 Avenue to the O'Brien Lock and Dam be designated as

1 incidental contact recreation because smaller craft  
2 recreational boating occurs and that the segment in  
3 the Calumet River from Torrence Avenue to Lake  
4 Michigan be designated as non-contact recreation.  
5 I'll skip the definition of non-contact recreation.

6 Please explain why the Agency decided to  
7 recommend those two different recreational uses for  
8 the Calumet River.

9 MR. SULSKI: Okay. It was based on the existing  
10 uses that occur there. We already got into the use  
11 of the end of Stony Island to get into that reach of  
12 the Calumet River between O'Brien and Torrence. We  
13 spoke of that earlier. And that's an access point  
14 where people can go into Lake Calumet and do their  
15 field trips or whatever they do. In addition, that  
16 is an area that incorporates a turning basin and a  
17 SEPA station where you see people fishing and  
18 lingering along the shoreline.

19 MR. ANDES: And where are those?

20 MR. SULSKI: Those are in the reach between  
21 Torrence Avenue and O'Brien Lock. So the south side  
22 of that has got a sandy shoreline area. There's a  
23 SEPA station there. People visit that area. People  
24 fish along that area. They visit the shoreline. In

1 addition to that --

2 MR. ANDES: Does that include going into the  
3 water?

4 MR. SULSKI: I did not observe wading in that  
5 area that I can recall. However, I do know that they  
6 had a canoe trip there.

7 MR. ANDES: When?

8 MR. SULSKI: That's going to be provided to you  
9 in what Attachment JJ refers to, the other  
10 recreational activities gained during the UAA  
11 process.

12 MR. ANDES: Okay.

13 MR. SULSKI: Additionally, the O'Brien Lock  
14 separates the Calumet River from the Upper Little  
15 Calumet River, which is just lined with public and  
16 private boat docks and facilities where people can  
17 launch their boats. There's taverns, restaurants.

18 MR. ANDES: Along the Little Calumet?

19 MR. SULSKI: Along the Little Calumet just south  
20 of the O'Brien Lock and Dam.

21 They utilize those facilities for launching  
22 boats, going through O'Brien Lock, and going out to  
23 Lake Michigan. The lock doesn't operate all the  
24 time. You have to wait your turn. On the weekend it

1 gets very busy. So you have a lot of small motorized  
2 craft lingering in those areas in the Little Calumet  
3 and then on the other side in the Calumet River  
4 between Torrence Avenue and the O'Brien Lock.  
5 There's lots of boats that linger there and move  
6 around slowly. And they wait so that they get their  
7 turn to lock through. So that's more than just  
8 passage of a power boat.

9 MR. ANDES: Is it motorized boating, or is  
10 that --

11 MR. SULSKI: It's motorized boating.

12 MS. WILLIAMS: At this time I guess I'd just  
13 like to let the Board know that if at any point you  
14 would like Rob to point on the map -- Personally I  
15 can't visualize these types of things. So we've  
16 provided the map. If you want him to get up, just  
17 let us know.

18 HEARING OFFICER TIPSORD: Thank you.

19 MR. SULSKI: I guess the short answer is in the  
20 Lower Little Calumet between Torrence Avenue and  
21 O'Brien Lock we found existing incidental contact  
22 recreation had occurred whereas in -- from Torrence  
23 Avenue to the lake we did not find any incidental  
24 contact recreation and found it to be quite dangerous

1 with all the power boats going through that area.

2 MR. ANDES: And is the main recreational use  
3 you're talking about the boats waiting to go through  
4 the lock?

5 MR. SULSKI: That is the main recreation  
6 activity, yes. But we also had a canoe trip, and we  
7 also know that that's -- that southern part -- Stony  
8 Island on the north shore of that area right there is  
9 the only hand-powered boat access point to get to the  
10 whole Lake Calumet area because the Port District has  
11 everything fenced off.

12 MR. ANDES: In terms of the area between  
13 Torrence Avenue and the lock, are the physical  
14 conditions similar to the conditions in the other  
15 part of the Calumet River?

16 MR. SULSKI: They are -- No, they are different  
17 as well.

18 MR. ANDES: And --

19 MR. SULSKI: They are similar on the south bank,  
20 but they are dissimilar on the north bank. The north  
21 bank has a more gradual sandy shoreline.

22 MR. ANDES: And you have the fishing there, you  
23 indicated?

24 MR. SULSKI: Yes.

1 HEARING OFFICER TIPSORD: Ms. Dexter, did you  
2 have a follow-up?

3 MS. DEXTER: Is SEPA an acronym we should have  
4 on the record?

5 MR. SULSKI: Side-stream Elevated Pool Aeration  
6 is what SEPA means.

7 HEARING OFFICER TIPSORD: Mr. Welch, do you have  
8 a follow-up?

9 MR. WELCH: You mentioned the fishing use along  
10 the Calumet --

11 HEARING OFFICER TIPSORD: Mr. Welch, I'm having  
12 a hard time hearing you.

13 MR. WELCH: You mentioned the fishing use on the  
14 Calumet River. Can you explain how far that extends  
15 along the Calumet? Does that go all the way to the  
16 lake? Does that go -- Exactly where does the fishing  
17 occur?

18 MR. SULSKI: The fishing that we observed occurs  
19 near the exit of the SEPA station where the SEPA  
20 station puts water back into the waterway, and it  
21 occurs all the way westward to Stony Island Avenue  
22 where people park and fish there. Those are really  
23 the only public access points there besides fishing  
24 underneath bridges as well.

1 MR. WELCH: Okay. Thank you.

2 HEARING OFFICER TIPSORD: Mr. Andes?

3 MR. ANDES: I'm just reviewing a couple of  
4 questions here to see if we can cut them for now.

5 I believe that the issues -- Tell me if I'm  
6 wrong. The issues on question 15 concerning the two  
7 segments of the Sanitary and Ship Canal, I believe  
8 you've explained to us why those are separately  
9 designated?

10 MR. SULSKI: In terms of recreational use, yes.

11 MR. ANDES: Question 16. On page 13 of your  
12 testimony, you state in other reaches the existing  
13 aquatic life falls short of its attainable biological  
14 potential. In reaches where attainable uses are not  
15 being met, the Illinois EPA has concluded that low  
16 dissolved oxygen and high temperatures are major  
17 water quality constraints.

18 First, I'd like to know how the Agency  
19 determines the attainable biological potential of a  
20 waterway?

21 MR. SMOGOR: We examined the available  
22 information on the waterways that pertain to aquatic  
23 life use, indicators of the chemical, physical, and  
24 biological conditions of the waters. We primarily

1 focus on chemical and physical indicators because  
2 existing biological indicators do not necessarily  
3 represent potential. And so, for example, we  
4 examined QHEI scores and individual attributes, which  
5 is a measure of the physical habitat.

6 MR. ANDES: And how does that tell you -- If  
7 that tells you how the waterbody ranks with regard to  
8 its habitat, how does that tell you what its  
9 potential is?

10 MR. SMOGOR: There are -- For example, with the  
11 QHEI, there's document -- there's documentation in  
12 the attachments that talks about -- I think we talked  
13 about this yesterday -- that are scoring ranges of  
14 the QHEI that have been related to the potential for  
15 attainability of Clean Water Act aquatic life goals  
16 or inability to attain Clean Water Act aquatic life  
17 goals.

18 MR. ANDES: And how is that -- My understanding  
19 is that looking at attainable biological potential  
20 and looking at reference characteristics depends  
21 partly on the nature of the waterbody and can be very  
22 specific to the kind of waterbody we're talking  
23 about?

24 MR. SMOGOR: I don't think that -- At least our

1 interpretation of QHEI scores was not waterbody  
2 specific. That type of, if you will, tuning of the  
3 QHEI, if possible at all, wasn't part of the  
4 documentation that we relied on.

5 MR. ANDES: So comparing these waterbodies to  
6 waterbodies that would have a completely natural  
7 habitat?

8 MR. SMOGOR: Not necessarily. We're looking at  
9 attributes -- In a QHEI, for example, we're looking  
10 at attributes, and those attributes are scoring  
11 points based on -- a simple way to put it, based on  
12 what's good for aquatic life and what's not so good  
13 for aquatic life.

14 MR. ANDES: But in looking at what's the  
15 attainable potential for this waterbody, one would  
16 have to include an assessment of the fact that you're  
17 not going to take out concrete that's lining a  
18 channel to create habitat?

19 MR. SMOGOR: True. And the presence of  
20 concrete-lined walls would result in a lower QHEI  
21 score. That would affect the QHEI scoring.

22 MR. ANDES: But does that tell you what the  
23 attainable score is? Isn't the attainable score for  
24 a concrete-lined channel going to be inherently lower

1 than for a totally natural --

2 MR. SMOGOR: Yes. The attainable score  
3 relative -- that relative attainable score. But  
4 we're kind of looking at an absolute attainable  
5 score. There's an absolute level of QHEI score. In  
6 other words, there's an absolute level of physical  
7 habitat conditions that represent attainability of  
8 Clean Water Act goals -- aquatic life goals and less  
9 than attainability of Clean Water Act goals.

10 MR. ANDES: But that's attainability in a very  
11 abstract way, isn't it? It's not attainable for this  
12 waterbody necessarily?

13 MR. SMOGOR: Well, we have judged it that it's  
14 not attainable for the waterbody because we looked at  
15 physical habitat and made that judgment.

16 MR. ANDES: The question is, but you have  
17 defined in this process a level of QHEI that is  
18 attainable for this waterbody, right?

19 MR. SMOGOR: For all waterbodies actually.  
20 Those levels we used apply across the board, across  
21 all waterbodies.

22 MR. SULSKI: It's a fixed index.

23 MR. ANDES: The question is, where are you  
24 trying to get to with this waterbody? Are you trying

1 to get to a standard that this waterbody cannot get  
2 to because of its physical characteristics?

3 MR. SULSKI: We are engaging our criteria on  
4 what we think it can attain based, in part, on what  
5 its physical attributes are.

6 MS. WILLHITE. Marcia Willhite. I was sworn in  
7 yesterday.

8 This is, like, a measuring stick. It's,  
9 like, a ruler, and it has markings on it. No matter  
10 what you measure, the measurement is always the same.  
11 So you have an index, and you use it to see what the  
12 potential is for a particular waterbody.

13 MR. ANDES: But how do you figure out the  
14 attainable potential for a waterbody just by looking  
15 at this fixed ruler? Attainable potential for  
16 different waterbodies is going to be difference just  
17 because of their characteristics having nothing to do  
18 with -- One may be able to go up to a certain point,  
19 and that's as far as it can possibly go. Another can  
20 go to a higher point because of its characteristics.  
21 I'm asking, how do you decide how high --

22 MS. WILLHITE: Where it scores on the index.

23 MR. ANDES: But two can be at the same place on  
24 the index, and one of them can go higher and one of

1    them that's the highest it go.  How do you make that  
2    distinction?

3           MR. SULSKI:  It's reflected in its attributes  
4    that go into the value that's generated from that  
5    measurement.

6           MR. ANDES:  I didn't understand that.

7           MR. SMOGOR:  We're using the indicator of  
8    physical habitat not to represent what's attainable  
9    in terms of physical habitat.  Really we're using  
10   that to represent what's attainable in terms of  
11   aquatic life conditions.  Does that help?

12          MR. ANDES:  But the habitat relates to the  
13   aquatic --

14          MR. SMOGOR:  Sure.  Sure.  I'm trying to think  
15   of an analogy that might be helpful here, and  
16   nothing's coming to mind.

17          MR. ESSIG:  I think part of the problem is, yes,  
18   we've gotten a very low QHEI score and I suppose  
19   other habitat attributes for the Sanitary and Ship  
20   Canal.  We also know that a good part of what the  
21   problem is is irreversible due to the UAA factors.  
22   That goes into part of this.  So essentially the only  
23   thing -- We're not -- We are not making any  
24   comparison to a higher level of habitat as far as

1 biological potential goes.

2 MR. ANDES: But your QHEI scale is based on sort  
3 of obtaining a wonderful habitat?

4 MR. ESSIG: No, no, no. The Clean Water Act  
5 goals is the higher level. We know we're below the  
6 Clean Water Act goals, and we're not going to get  
7 above that. That's why we are coming up with a  
8 different use designation.

9 MR. ANDES: Marcia looks like she's trying to --

10 MS. WILLHITE: Well, I'm trying to see --  
11 There's a combination of factors that are scored to  
12 identify what the habitat index for a particular  
13 location is. They can be things like, you know,  
14 presence of little places for the fish to hide in  
15 order to breed or something like that. It doesn't  
16 make any difference if that's a natural system or an  
17 artificial system. If those factors are present, the  
18 fish are going to find what they need to live. So  
19 whatever factors those are that go into our  
20 measurement stick we use that the same way regardless  
21 of the system.

22 And what I heard testimony on yesterday was  
23 that there is a tie between those habitat scores and,  
24 you know, what we would consider as biological

1 potential, and that's what Roy was explaining about.  
2 You know, if the habitat score is 45 or below, we're  
3 just not going to get there. If it's 60 or above,  
4 that means a high attainable use. And in between you  
5 have to kind of look at some additional information  
6 to make that judgment. But it doesn't say that --

7           You know, the index scores for this system  
8 that we're looking at are what they are. And that is  
9 the indicator for us about whether or not -- or at  
10 what level the attainable biological potential is.

11           MR. ANDES: Okay. Let's move on to the next  
12 part of that question.

13           How is it determined that the limiting  
14 constraints on existing aquatic life -- or at least  
15 the major water quality constraints were DO and  
16 temperature? Particularly given what you just said  
17 about habitat being a constraint, how do we -- how  
18 did it lead to the Agency concluding that low DO and  
19 temperature were the major constraints? What's the  
20 connection there?

21           MR. SULSKI: I'll go.

22           Let's talk about low dissolved oxygen  
23 first. That's one of your questions. You said  
24 define what low dissolved oxygen is. Low dissolved

1 oxygen is something that is causing the aquatic life  
2 to not be able to attain a level that we believe  
3 corresponds to the available habitat there. Does  
4 that make sense?

5 MR. ANDES: Okay.

6 MR. SULSKI: The same goes with temperature.

7 MR. ANDES: So it depends partly on the habitat?

8 MR. SULSKI: It depends on habitat.

9 MR. ANDES: The level that's it's low or high  
10 depends partly on the reference to the particular  
11 habitat presence?

12 MR. SULSKI: Yes. So we -- What we do is we  
13 designate uses based on existing habitat and some  
14 other factors, and then we set criteria to protect  
15 those uses. We have an idea of what types of  
16 species, what types of structures of species, whether  
17 it's predominated by tolerant or moderately tolerant  
18 or whether it's good habitat and it can sustain  
19 intolerant species. We have an idea of where we are.  
20 And we know what the requirements of those organisms  
21 are in terms of oxygen and temperature. So if the  
22 oxygen is too low to sustain that type of  
23 structure --

24 MR. ANDES: Given the habitat?

1 MR. SULSKI: Given the habitat.

2 -- or the temperature is too high given  
3 that type of habitat --

4 MR. ANDES: And the habitat constraints affect  
5 what's possible?

6 MR. SULSKI: Yes.

7 MR. ANDES: Okay.

8 MR. SULSKI: Now, if we're not at what's  
9 possible, we start to look for why isn't it where  
10 it's suggested it should be? Why isn't it where it  
11 should be -- where we think it should be? And we  
12 look for the stressors, and dissolved oxygen and  
13 temperature were two stressors that we identified as  
14 being stressors.

15 MR. ANDES: And is there an analysis in the  
16 record that -- where the Agency could conclude that,  
17 given the existing habitat, that changing those  
18 stressors -- changing the low DO and high  
19 temperatures would have a definable effect in terms  
20 of the biological health of the waterbodies?

21 MR. SULSKI: Well, that was the subject of these  
22 two UAA studies -- one of the subjects of these two  
23 UAA studies.

24 MR. ANDES: Well, there's a lot of UAA studies.

1 I'm trying to figure out where it is.

2 MR. SULSKI: If there's no way you can attain,  
3 you know, that goal because of these six factors,  
4 then you can't attain it and you can rely on these  
5 six factors.

6 MR. ANDES: But I'm trying to figure out how you  
7 define -- not that you can't attain the desirable  
8 level, but how you define the level you can attain.

9 Given the limitations in habitat, how do  
10 you define -- if I take DO and temperature and I  
11 address those, how do I change the biological  
12 community?

13 MR. SULSKI: It centers around what the habitat  
14 suggests the system can support. That's where you  
15 start.

16 Then you look -- Then you go out fishing.  
17 If there's -- If there's a much better quality of  
18 fish life than the habitat suggests is there, then  
19 you have some other factors going. You have to dig  
20 deeper. Well, maybe your habitat alone isn't good  
21 enough for putting -- Maybe you can't invoke one of  
22 these factors. There's something else. We have good  
23 fisheries.

24 If you reach the fisheries goal, you're

1 done. Now, then what if the fishery says that its  
2 structure and its numbers and its species don't  
3 correspond with what this habitat suggests it can  
4 meet? Then you have problems that you try to  
5 identify.

6 MR. ANDES: So you're defining a level of  
7 fish or benthic population that you think the habitat  
8 would allow?

9 MR. SULSKI: The habitat suggests should exist.

10 MR. ANDES: And you're comparing everything to  
11 that?

12 MR. SULSKI: That's correct.

13 MR. SMOGOR: And, just for clarity, the  
14 irreversible aspects of the habitat.

15 MR. ANDES: Right, right.

16 MR. SULSKI: So then if the aquatic life doesn't  
17 meet what the habitat suggests, that's when you go  
18 out and look for why not. These are the stressors  
19 that we identify. You look at what these critters  
20 need in terms of oxygen or temperature or whatever.  
21 You look for stressors, and then you deal with those  
22 stressors. How can we get rid of these stressors?  
23 Can we get rid of them? Can we get rid of them?  
24 Let's get rid of them. If we can't get rid of them,

1 why can't we get rid of them? If we can't get rid of  
2 them because of one of the six factors, then we have  
3 grounds to back off. That's totally what a UAA is in  
4 nutshell. I'm struggling short of that to answer  
5 your question.

6 MR. ANDES: I think that answered the question.

7 Do we want to continue, or are we getting  
8 late?

9 HEARING OFFICER TIPSORD: I think we're reaching  
10 diminishing return. Let's call it a day.

11 We are in room 2025 tomorrow. Again, you  
12 do not have to go through security. You can use the  
13 escalators, or there is an elevator on the first  
14 floor concourse level that will take you up just to  
15 the second floor. We'll start at 9:00 a.m. See you  
16 then.

17 (WHICH WERE ALL THE PROCEEDINGS HAD  
18 IN THE FOLLOWING CAUSE ON THIS DATE.)

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1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF K A N E )

4 I, MARGARET R. BEDDARD, a Certified Shorthand  
5 Reporter of the State of Illinois, do hereby certify  
6 that I reported in shorthand the proceedings had at  
7 the hearing aforesaid and that the foregoing is a  
8 true, complete, and correct transcript of the  
9 proceedings of said hearing as appears from my  
10 stenographic notes so taken and transcribed by me.

11 IN WITNESS WHEREOF, I do hereunto set my hand at  
12 Chicago, Illinois, this \_\_\_\_\_ day of February, 2008.

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Certified Shorthand Reporter

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CSR Certificate No. 84-3565.

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